IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Appellant, vs. LAS VEGAS REVIEW-JOURNAL, Respondent.	Case No.: 74604 Appeal from the Eighth Judicial District Court, the Honorable Jim Crockett Presiding

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

1. The Clark County Office of the Coroner/Medical Examiner ("Coroner") is a governmental entity and has no corporate affiliation.

2. The Coroner is represented in the District Court and this Court by the Clark County District Attorney/Civil Division and Marquis Aurbach Coffing.

Dated this 4th day of June, 2018.

MARQUIS AURBACH COFFING

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I. JURISDICTIONAL STATEMENT

The Coroner appeals from the District Court's order granting the petition for writ of mandamus filed by Respondent, Las Vegas Review-Journal ("LVRJ"). 2 Joint Appendix ("JA") 428–442. The District Court's order granting LVRJ's petition for writ of mandamus is a final, appealable order according to NRAP 3A(b)(1), which allows for an appeal from a final order or judgment. *See Ashokan v. State, Dep't of Ins.*, 109 Nev. 662, 665–666, 856 P.2d 244, 246 (1993). The Coroner's notice of appeal was timely filed on November 28, 2017 from the District Court's order, which was noticed on November 9, 2017. 2 JA 428–444. Therefore, this Court has appellate jurisdiction over this appeal.

II. ROUTING STATEMENT

This appeal asks the Court to resolve several issues of first impression that are also of statewide public importance, including: (1) the confidentiality of juvenile autopsy reports in the context of NRS Chapter 239, the Nevada Public Records Act ("NPRA"); (2) a requester's inability to claim waiver of a governmental entity's clarified response to the requester's clarified public records request; and (3) a governmental entity's ability to charge a fee for redacting confidential portions of otherwise public records. Based upon NRAP 17(a)(10) and (11), the Supreme Court should retain this appeal since it involves issues of first impression that are also of statewide public importance.

III. ISSUES ON APPEAL

A. WHETHER THE DISTRICT COURT ERRED BY CONCLUDING THAT JUVENILE AUTOPSY REPORTS IN THE CORONER'S CUSTODY OR CONTROL ARE NOT CONFIDENTIAL FOR PURPOSES OF THE NPRA WHEN:

1. NRS 432B.407(6) MANDATES THE CONFIDENTIALITY OF INFORMATION ACQUIRED BY A CHILD DEATH REVIEW TEAM;

2. THE REQUESTED JUVENILE AUTOPSY REPORTS CONTAIN CONFIDENTIAL PERSONAL HEALTH INFORMATION;

3. THE DISTRICT COURT FAILED TO CONSIDER THE LEGAL UNDERPINNINGS OF ATTORNEY GENERAL OPINION 82-12; AND

4. ASSEMBLY BILL 57 (2017), WHICH CLARIFIED NRS 259.045, EITHER APPLIES TO THIS LITIGATION OR SHOULD APPLY RETROACTIVELY.

B. WHETHER THE DISTRICT COURT ERRED BY DETERMINING THAT THE CORONER WAIVED A PORTION OF ITS LEGAL POSITION TO WITHHOLD CONFIDENTIAL JUVENILE AUTOPSY REPORTS BECAUSE:

1. THE CORONER CLARIFIED ITS RESPONSE TO LVRJ'S CLARIFIED REQUEST FOR PUBLIC RECORDS; AND

2. WAIVER IS NOT A REMEDY EXPRESSLY STATED IN THE NPRA.

C. WHETHER THE DISTRICT COURT ERRED BY, ALTERNATIVELY, REFUSING TO ALLOW THE CORONER TO CHARGE A FEE TO LVRJ FOR REDACTING CONFIDENTIAL PORTIONS OF THE JUVENILE AUTOPSY REPORTS.

IV. STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

This is a case in which LVRJ has extracted an order from the District Court that requires the Coroner to "produce autopsy reports of autopsies conducted of anyone under the age of 18 conducted from 2012 through April 13, 2017 to the LVRJ in unredacted form." 2 JA 441, ¶ 59. To reach this order, the District Court ignored the plain language of NRS 432B.407(6)[1] and the confidential nature of the juvenile autopsy reports. The District Court also erroneously concluded that the Coroner waived portions of its clarified response after LVRJ clarified its public records request, even though the NPRA does not provide for such a waiver. 2 JA 436–437. Despite the Coroner's best efforts to cooperate with LVRJ through written responses, spread sheets of information, meetings, and sample redacted autopsy reports (1 JA 13–143), LVRJ filed a petition for writ of mandamus in the District Court to force the Coroner to turn over this confidential information. 1 JA 1–11.

In this appeal, the Coroner asks the Court to determine that the requested juvenile autopsy reports are, indeed, confidential, such that the District Court cannot compel the Coroner to produce any of these records. Alternatively, the

[1] **NRS 432B.407(6)**: "Except as otherwise provided in this section, information acquired by, and the records of, a multidisciplinary team to review the death of a child are confidential, must not be disclosed, and are not subject to subpoena, discovery or introduction into evidence in any civil or criminal proceeding."

Coroner asks this Court to conclude that the Coroner can redact confidential information from the requested juvenile autopsy reports, while charging a reasonable rate to LVRJ for the time spent redacting. The Coroner's requested relief is based upon the following arguments:

A. First, the District Court erred by concluding that juvenile autopsy reports in the Coroner's custody or control are not confidential for purposes of the NPRA. The plain language of NRS 432B.407(6) mandates the confidentiality of information acquired by a child death review ("CDR") team. Instead of abiding by the statutory language, the District Court ruled that the confidential information somehow expires after a CDR team has completed its investigation. 2 JA 438–439, ¶ 42. But, no such language is found within NRS 432B.407(6), and the District Court was not at liberty to ignore the strict language of this statute. *See S. Nev. Homebuilders Ass'n v. Clark Cnty.*, 121 Nev. 446, 451, 117 P.3d 171, 174 (2005) ("[I]t is not the business of this court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done."). Therefore, the juvenile autopsy reports that were reviewed by a CDR team should be deemed confidential and not subject to disclosure.[2]

[2] Based upon LVRJ's parameters dating back to January 2012, all but 49 child deaths were reviewed by the CDR team. 1 JA 229–230, ¶¶ 10–11.

Additionally, the requested juvenile autopsy reports contain confidential personal health information. This Court has previously articulated that "[b]oth the physicians and the courts are obligated to respect this privilege, unless there are overriding public policy considerations." *Hetter v. Dist. Ct.*, 110 Nev. 513, 516, 874 P.2d 762, 763 (1994). Certainly, LVRJ's desire to obtain private information does not override individual privacy rights. *See Reno Newspapers v. Sheriff*, 126 Nev. 211, 218, 234 P.3d 922, 927 (2010) ("[A]n individual's privacy is also an important interest, especially because private and personal information may be recorded in government files."). The Coroner also asserted that both the Health Insurance Portability and Accountability Act ("HIPAA"), 29 U.S.C. § 1181 et seq., and NRS 629.021 (defining "health care records") prohibit the disclosure of personal health information from the requested autopsy reports. 1 JA 208–210. On this issue, the District Court ruled that the Coroner is not a "covered entity" under HIPAA. 2 JA 439, ¶ 48. But, the District Court did not substantively address NRS 629.021 or the fact that the Coroner was performing his official duties. *Id.* On the additional basis of personal health information, the Court should determine that none of the juvenile autopsy records must be disclosed.

Further, the District Court failed to consider the legal underpinnings of Attorney General Opinion ("AGO") 82-12, which is titled "Autopsy Reports; Public Records—Strong public policy of confidentiality of medical information

requires that autopsy reports not be available for public inspection." 1 JA 36–39. From the outset of LVRJ's public records request, the Coroner raised the legal underpinnings of AGO 82-12. *Id.* However, the District Court refused to look at these legal underpinnings and, instead, concluded that AGOs are not legal precedent. 2 JA 437, ¶¶ 34–36. As such, the District Court erred by refusing to acknowledge or consider the merits of one the Coroner's reasons for withholding the confidential juvenile autopsy reports.

Assembly Bill ("AB") 57, 79th Leg. Session (Nev. 2017), which clarified NRS 259.045, either applies to this litigation or should apply retroactively. In AB 57, the Legislature limited the class of individuals to whom the Coroner can release an autopsy report. 1 JA 236–237. This amendment became effective on July 1, 2017. *Id.* at 237. However, LVRJ did not file its District Court petition for writ of mandamus until July 17, 2017. 1 JA 1–11. Thus, the clarifications of AB 57 should have applied to this litigation based upon the effective date. 2 JA 437–438, ¶¶ 44–46. Even if the effective date standing alone does not warrant the application of AB 57 to this litigation, the Legislature's clarifications regarding the scope of the Coroner's duties, nevertheless, apply retroactively. *See In re Estate of Thomas*, 116 Nev. 492, 495, 998 P.2d 560, 562 (2000) (clarifications to a statute apply retroactively). Therefore, the Court should declare that the requested juvenile autopsy reports are confidential.

B. Second, the District Court erred by determining that the Coroner waived a portion of its legal position to withhold confidential juvenile autopsy reports. The Coroner explained to the District Court that once LVRJ clarified its public records request, the Coroner, likewise, clarified its response. 1 JA 218–221. The District Court, nevertheless, read an additional remedy into the NPRA regarding waiver, even though there is no supporting statutory text. 2 JA 436–437, ¶¶ 32–33. As a matter of law, LVRJ's remedy for its refusal to accept the Coroner's position was to petition the District Court for relief, as outlined in NRS 239.011. Notably, nothing within NRS 239.0107 or NRS 239.011 suggests that waiver is a remedy. As such, the District Court was without authority to read an additional remedy of waiver into the NPRA. *See Builders Ass'n of Northern Nevada v. City of Reno*, 105 Nev. 368, 370, 776 P.2d 1234, 1235 (1989) ("If a statute expressly provides a remedy, courts should be cautious in reading other remedies into the statute."). Therefore, the Court should reject the District Court's conclusion on waiver, particularly because the District Court actually addressed the merits of the Coroner's arguments that were allegedly waived. 2 JA 428–442.

C. Third, the District Court erred by, alternatively, refusing to allow the Coroner to charge a fee to LVRJ for redacting confidential portions of the juvenile autopsy reports. The District Court's order currently requires the Coroner to produce "unredacted" juvenile autopsy reports. 2 JA 441, ¶ 59. However, the

District Court alternatively ruled that if the Coroner is permitted to redact confidential information from the autopsy reports, the Coroner would not be able to charge a fee for its time spent redacting. 2 JA 440–441. Despite the authorizing provisions in NRS 239.055 regarding the "extraordinary use of personnel," the District Court's order requires the Coroner to sift through documents and potentially redact confidential information, all for LVRJ's benefit, without being able to charge a fee. 2 JA 440–441. LVRJ suggests that a fee authorized by NRS 239.055 only relates to "a copy of a public record," but such a reading would impermissibly render superfluous the remaining provisions of this statute. *See D.R. Horton, Inc. v. Dist. Ct.*, 123 Nev. 468, 477, 168 P.3d 731, 738 (2007) ("[N]o part of a statute [may] be rendered meaningless and its language should not be read to produce absurd or unreasonable results."). Therefore, if the Court rules that the Coroner is permitted to redact confidential information from the juvenile autopsy reports, the Court should also rule that the Coroner is entitled to charge a reasonable fee for time spent redacting confidential information.

In summary, this Court should vacate the District Court's order requiring the Coroner to produce unredacted child autopsy reports since: (1) these reports are confidential according to NRS 432B.407(6); (2) these reports contain confidential personal health information; (3) these reports cannot be legally disclosed according to the legal underpinnings of AGO 82-12; and (4) AB 57 amended NRS 259.045 to

clarify that autopsy reports are confidential and can only be disclosed to a certain class of individuals. Additionally, this Court should determine that the Coroner did not waive any portion of its legal position to withhold confidential juvenile autopsy reports because the Coroner clarified its response to LVRJ's clarified request for public records. And, waiver is not a remedy expressly stated in the NPRA.

Alternatively, if the Court requires the Coroner to produce redacted juvenile autopsy reports, the Court should allow the Coroner to charge a reasonable fee to LVRJ for time spent redacting based upon NRS 239.055. Upon these grounds, the Coroner urges this Court for relief.

V. STANDARDS OF REVIEW

This Court reviews a district court's decision to grant or deny a petition for a writ of mandamus under an abuse of discretion standard. *See City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003). Questions of statutory construction, however, including the meaning and scope of a statute, are questions of law, which this Court reviews de novo. *Id.* This Court also reviews the District Court's interpretation of case law de novo. *See LVMPD v. Blackjack Bonding*, 343 P.3d 608, 612 (Nev. 2015).

When the Legislature has addressed a matter with "imperfect clarity," it becomes the responsibility of this Court to discern the law. *See Baron v. Dist. Ct.*,

95 Nev. 646, 648, 600 P.2d 1192, 1193–1194 (1979). Given an ambiguous statute, this Court must interpret the statute "in light of the policy and the spirit of the law, and the interpretation should avoid absurd results." *Hunt v. Warden*, 111 Nev. 1284, 1285, 903 P.2d 826, 827 (1995).

VI. BACKGROUND ON THE NPRA

The NPRA provides that all public books and public records of governmental entities must remain open to the public, unless "otherwise declared by law to be confidential." NRS 239.010(1). The Legislature has declared that the purpose of the NPRA is to further the democratic ideal of an accountable government by ensuring that public records are broadly accessible. NRS 239.001(1). Thus, the provisions of the NPRA are designed to promote government transparency and accountability. Any limitations or restrictions on the public's right of access must be narrowly construed. NRS 239.001(3).

If a governmental entity withholds records, it bears the burden of proving, by a preponderance of the evidence, that the records are confidential. NRS 239.0113. *See Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 877–878, 266 P.3d 623, 626 (2011). The balancing-of-competing-interests test is employed "when the requested record is not explicitly made confidential by a statute" and the governmental entity nonetheless resists disclosure of the information. *Id.*, 127 Nev. at 878–879, 266 P.3d at 627. This test weighs "the fundamental right of

a citizen to have access to the public records" against "the incidental right of the agency to be free from unreasonable interference." *DR Partners v. Bd. of Cnty. Comm'rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000). "[A]n individual's privacy is also an important interest, especially because private and personal information may be recorded in government files." *Reno Newspapers v. Sheriff*, 126 Nev. 211, 218, 234 P.3d 922, 927 (2010).

VII. FACTUAL AND PROCEDURAL BACKGROUND

A. BACKGROUND ON THE DUTIES AND PURPOSE OF THE CLARK COUNTY CORONER/MEDICAL EXAMINER (NRS CHAPTER 259 AND CLARK COUNTY CODE CHAPTER 2.12).

The purpose of the Coroner is to investigate deaths within Clark County that are violent, suspicious, unexpected, or unnatural to identify and report on the cause and manner of death. This may include those reported as unattended by a physician, suicide, poisoning or overdose, occasioned by criminal means, resulting or related to an accident. *See* Clark County Code ("CCC") § 2.12.060; 1 JA 225–234. When the Coroner is notified of a death, a Coroner investigator responds to the scene and conducts a medico-legal investigation. Information is gathered from the scene and persons (such as witnesses, law enforcement officers, and family members), the decedent is identified, the next of kin is notified, and property found on or about the decedent is secured. The investigation often entails obtaining medical records or health information of the decedent. Most often, the body is

transported to the Coroner's Office for a physical examination known as an autopsy, which is conducted by a medical examiner who is a forensic pathologist. *See* CCC §§ 2.12.060, 2.12.280; 1 JA 226–227.

In conducting the autopsy, the medical examiners perform an external and internal exam of the body of the decedent. They review investigative findings, medical records, and health history prior to commencing the exam. The organs are examined, and histology samples along with blood are submitted to a laboratory for analysis. It is the responsibility of the medical examiners to determine the cause and manner of death. *See* CCC §§ 2.12.040, 2.12.060; 1 JA 226–227. The manner of death is the method by which someone died. The five manners of death are homicide, suicide, natural, accident, and undetermined. The cause of death is the circumstance that triggers a death, such as a gunshot wound, heart attack, or drug overdose. The medical examiner documents findings, including the cause and manner of death in an autopsy report. *See* CCC §§ 2.12.060, 2.12.040, 2.12.250; 1 JA 226–227. After completion of the autopsy, the body is released to a mortuary, and the person with rights to the body takes over the handling of the body. *See* CCC §§ 2.12.270, 2.12.280; NRS 451.024. The death of the decedent, including the cause and manner, is documented in a death certificate, which is generated and maintained by the Department of Vital Statistics. *See* CCC § 2.12.250, ¶ 2(e).

1. Content of Autopsy Reports.

Autopsy reports consist of the findings from the autopsy, including those related to the cause and manner of death of the decedent. Additionally, the name, age, sex, and date of death are identified. 1 JA 226–227. The external examination is described in the autopsy report and includes an analysis as to the medical/health status or condition of the exterior parts of the body. These findings could range from observations about the genitalia to recent medical treatment to a hidden tattoo. *Id.* The findings related to the internal examination are also included in the autopsy report. Such findings may include radiographic findings, detailed descriptions of medical evaluations as to the condition of organs and functions, which may include the neck (i.e., thyroid, cricoids, prevertebral tissue, and muscles); cardiovascular system (i.e., aorta, coronary arteries, heart); respiratory system (i.e., trachea, major bronchi, pulmonary vessels, lungs); hepatobiliary system (i.e., liver); hemolymphatic system (i.e., spleen); gastrointestinal system (i.e., esophagus, stomach, appendix, intestines); genitourinary system (i.e., renal and genitalia); endocrine system (i.e., thyroid and adrenal glands); and central nervous system (i.e., brain). *Id.* The fluids, tissue, and organ samples retained and submitted for testing are included in the autopsy report, along with the types of tests ordered. The test results and any microscopic examinations are also included. *Id.*

References to specific medical records, specific medical or health information, and personal characteristics about the decedent may also be included in an autopsy report. Such references could include sexual orientation of the decedent and types of diseases, such as venereal, HIV, liver, cancer, mental illness, or drug/alcohol addiction or overdoses. This information may not be publicly known, and its dissemination may result in unwanted social stigmas or embarrassment to a family. 1 JA 226–227.

2. The Coroner's Policy With Respect to the Release of Autopsy Reports.

The Coroner's policy with respect to the release of autopsy reports is to release them, upon request, to the legal next of kin, an administrator or executor of an estate, law enforcement officers in performing their official duties, and pursuant to a subpoena. *Cf.* NRS 259.045; AB 57 (1 JA 236–237). The Coroner's policy not to release autopsy reports to the general public is based on the underlying legal analysis in AGO 82-12. 1 JA 227. This AGO concludes that an autopsy report is a public record but not for public dissemination based on public policy and the law treating the subject matter in an autopsy report as confidential. 1 JA 36–39. However, the Coroner does make public the information related to the fulfillment of its statutory duties, such as the identification of a decedent, location and date of death, cause and manner of death, which is consistent with AGO 82-12. 1 JA 227.

B. LVRJ'S REQUEST FOR JUVENILE AUTOPSY REPORTS.

On April 13, 2017, Arthur Kane ("Kane") and Brian Joseph ("Joseph"), investigative reporters for LVRJ, emailed a public records request to the Coroner for:

> . . . all autopsy reports, notes and other documentation of all autopsies performed by the Clark County Coroner's office from Jan. 1 2012 to present on anyone who was younger than the age of 18 when he or she died.

1 JA 19. On the same day, Nicole Charlton ("Charlton"), administrative secretary of the Coroner, responded by stating that there were hundreds of these cases and asked if LVRJ wanted all manners of death (suicide, homicide, accidents, etc.) or just certain types. 1 JA 18. LVRJ was informed that the Coroner could not provide autopsy reports, notes, or other documents, but could provide a spreadsheet of data, consisting of the Coroner case number, name of decedent, date of death, gender, age, race, location of death, and cause and manner of death. 1 JA 17–18, 228.[3] Kane verified the desire for spreadsheets in addition to the actual autopsy reports and asked for confirmation as to whether the cases went to full autopsy. 1 JA 17. Charlton explained that autopsies are not conducted on all decedents involved in the Coroner's Office and that she could not separate cases

[3] A few months earlier, LVRJ had asked for a listing of all homicides dating back to 2006. The Coroner provided a spreadsheet of public information, pursuant to CCC § 2.12.060, consisting of name, Coroner case number, date of death, age, gender, race, cause and manner of death going back to January 2012. 1 JA 228.

that were not autopsied from ones that were. 1 JA 16. She also provided an explanation as to why the Coroner does not release autopsy reports. *Id.*

> Autopsy reports are public records but not open to any member of the public for inspection, copying, and dissemination. ***The reasoning is that the reports contain medical information and confidential information about the deceased's body***. There may be a situation when a particular report would be available for a particular party who has sufficient interest to justify access. AGO 82-12 (6-15-82). This decision may preclude the dissemination of an autopsy report to members of the decedent's immediate family without following the correct procedures of law, i.e., a court order. In that situation, it may be appropriate to require the decedent's family to sign a release form in exchange for the autopsy report.

1 JA 16 (emphasis added). Kane was emailed detailed spreadsheets listing all Clark County juvenile deaths dating back to January 2012 that involved the Coroner. 1 JA 22–27, 35–63. Later that day, April 13, 2017, Kane emailed the Civil Division, District Attorney's ("D.A.") Office stating:

> I requested all autopsies for any deaths between 2012 and present of people younger than 18 years old from the Clark County Coroner's office this morning. The response is below. I do not see any legal citation to deny these records, the Coroner admits they're public just not available and they cite a privacy right which does not exist for deceased people.
>
> Can you consult with them and let them know these are public documents that they are required to produce[?] Conversely, if you believe they are not, please cite a statute that exempts them from release.

1 JA 29. The D.A.'s Office responded to Kane on April 14, 2017, stating that the basis for nondisclosure of the juvenile autopsy reports is the legal underpinnings of

AGO 82-12, as previously expressed by the Coroner. Specifically, the D.A.'s Office stated:

> As I believe you are aware, the Nevada Attorney General, in Opinion No. 82-12, has opined that the autopsy report is a public record but not open to public inspection. The opinion setting forth the legal analysis of the attorney general is attached.
>
> It is the practice of the Clark County Coroner to release the autopsy reports to the next of kin, if desired. It is my belief that the Nevada Supreme Court would agree with the practice of the Coroner.
>
> Notably, there is legislation pending, AB 57, which, if enacted, will specifically state to whom the Coroner may provide a report (parents, guardians, adult children or custodians of a decedent). The analysis behind this bill is also compatible with the current practice.

1 JA 18–19.

On Sunday, May 7, 2017, Coroner John Fudenberg ("Fudenberg") met in person with Kane and Joseph at the Coroner's Office. 1 JA 228, ¶ 7. Fudenberg explained the office policy on the release of autopsy reports to them. *Id.* He tried to determine the information they wanted and to understand their request. *Id.* Joseph emailed Fudenberg after that meeting with an additional request for public records. 1 JA 233–234. Based on that email, it became apparent that Joseph was interested in deaths of children who were involved in the Clark County Department of Child and Family Services ("DFS"), as he was trying to match up DFS cases with Coroner cases. *Id.*; 1 JA 228. After the meeting and email from Joseph, Fudenberg compiled a second spreadsheet consisting of the same data as the spreadsheet sent on April 13, 2017, but listed only the cases in which autopsies

were conducted. 1 JA 65–88. This updated spreadsheet was sent to LVRJ on May 9, 2017. 1 JA 228, ¶ 7.

LVRJ did not contact the Coroner until about May 23, 2017, when counsel for LVRJ, Maggie McLetchie ("McLetchie"), wrote to the Coroner and the D.A.'s Office. In that letter, LVRJ alleged that the Coroner failed to establish the existence of a privilege protecting the documents, or that any interest in nondisclosure outweighed the public interest to access. 1 JA 41–44. Additionally, from the letter, LVRJ revealed that it was investigating the handling of child deaths, "which of course implicates important child welfare and public policy interests." 1 JA 43, 228–229, ¶ 8. The D.A.'s Office responded to McLetchie on May 26, 2017, setting forth the Coroner's legal position with respect to the release of the autopsy reports. This letter essentially repeated the analysis of the policy and law stated within AGO 82-12. 1 JA 48–50. Additionally, due to LVRJ's specific expressed interest in DFS cases, the Coroner's response cited to the statutory privilege, NRS 432B.407, with respect to the autopsy reports accessed by the CDR team, of which the Coroner is a representative. *Id.* The D.A.'s Office, on behalf of the Coroner, offered to consider redacting autopsy reports not reviewed by the CDR team, pursuant to NRS 239.010(3), provided that LVRJ identify particular cases. *Id.*

Later in the day on May 26, 2017, Kane requested redacted autopsy reports of approximately 126 specific deaths. 1 JA 91, 229. On May 31, 2017, the D.A.'s Office responded:

> We are in receipt of your records request. Due to the magnitude of the request and the review involved, we will be unable to have the records available by the end of the fifth business day. Each record has to be reviewed individually by experienced personnel, and, of course, those subject to privilege will not be disclosed. Additionally, it will take time to redact content of the records that are not subject to privilege. Because of the detail involved in this request, we are unable to determine at this time when they will be ready. As we progress, we will have a better idea of the timeframe. We will keep you updated as to the timeframe and the charges.

1 JA 90. On June 12, 2017, as the Coroner suggested, Kane provided a list of prioritized cases. 1 JA 75–76. At this time, the Coroner was ascertaining which autopsy reports involved cases not reviewed by the CDR team and, therefore, could be disclosed in redacted form. 1 JA 229–230, ¶¶ 10–11. On July 7, 2017, Kane inquired as to an update on the redacted records. 1 JA 103. On July 9, 2017 Kane was informed of the progress:

> We have researched the cases going back to January 1, 2012 and identified those that are not child death review committee cases and subject to privilege under NRS 432B.407. The cases listed below are not child death review committee cases. We are commencing the redaction process with respect to these cases. I will check with the Coroner tomorrow with respect to a time frame, but I would think the

> redaction process and delivery to you could occur within the next 30 days. Again, I will verify tomorrow.

1 JA 100–102. All of the cases involving the Coroner listed on LVRJ's May 26, 2017 and June 12, 2017 lists had been reviewed by the CDR team and were, therefore, privileged. Additionally, researching back to January 2012, per LVRJ's overall request, it was determined that all but 49 deaths were reviewed by the CDR team. 1 JA 229–230, ¶¶ 10–11.

The D.A.'s Office followed up with Kane on July 11, 2017, informing him that it was expected to take 30 days to redact the autopsy reports involving deaths that were not reviewed by the CDR team. Kane was also advised as to the significant work and time involved in compiling spreadsheets, setting redaction parameters, and testing the redaction. Kane was provided with three samples of redacted autopsy reports so that LVRJ could review them and determine if it wanted the Coroner to proceed with redaction of the remaining reports that were not privileged. 1 JA 108–109. While the Coroner did not intend to seek costs for this preliminary work already completed, the Coroner would charge LVRJ for the extraordinary use of personnel in redacting the remaining reports in the 49 cases not reviewed by the CDR team. *Id.* This charge was due to the time, level of detail, and necessity for experienced personnel. It was determined that it would take 10–12 hours to redact the remaining reports and cost $45.00 per hour for the extraordinary use of personnel. *Id.* The Coroner advised LVRJ of this cost and

asked for a commitment before proceeding. *Id.*; 1 JA 229–230, ¶¶ 10–14. With respect to the three sample redacted autopsy reports, LVRJ was advised as to the basis for the redactions as follows:

> Attached please find samples of redacted autopsy reports. The language that is redacted consists of information that is medical, relates to the status of the decedent's health (or the mother of a baby), could be marked with stigmata or considered an invasion of privacy by the family. With respect to the autopsy reports of children decedents, most of the redacted information is related to medical or health related. Statements of diagnosis or opinion that are medical or health related that go to the cause of death are not redacted. Note that there is not much more information in the redacted documents than in the spreadsheets the Coroner's Office provided you.

1 JA 108–109. LVRJ subsequently filed its petition for writ of mandamus in the District Court. 1 JA 1–11.

C. LVRJ'S PETITION FOR WRIT OF MANDAMUS AND THE DISTRICT COURT PROCEEDINGS.

In its petition for writ of mandamus, LVRJ alleged that the requested autopsy reports are not privileged or confidential, and that the Coroner violated NRS 239.0107. 1 JA 1–11, 144–161. The Coroner filed a detailed response to LVRJ's petition for writ of mandamus and related filings. 1 JA 196–237. LVRJ filed a reply, and without leave of the District Court, also filed a supplement. 2 JA 238–397. The District Court held a hearing on LVRJ's writ petition and ordered the requested autopsy reports to be produced, starting within five days in an unredacted form. 2 JA 398, 441. The District Court also limited the Coroner's

costs to $15.00 per compact disc for a production of electronic files, and did not allow any fee for the Coroner's extraordinary use of personnel. *Id.* Upon the Coroner's motion, the District Court stayed the Coroner's compliance with the District Court's own production order pending the resolution of this appeal. 2 JA 448–452.

VIII. LEGAL ARGUMENT

A. THE DISTRICT COURT ERRED BY CONCLUDING THAT JUVENILE AUTOPSY REPORTS IN THE CORONER'S CUSTODY OR CONTROL ARE NOT CONFIDENTIAL FOR PURPOSES OF THE NPRA.

1. NRS 432B.407(6) Mandates the Confidentiality of Information Acquired by a CDR Team.

The plain language of NRS 432B.407(6) mandates the confidentiality of information acquired by a CDR team. Instead of abiding by the statutory language, the District Court ruled that the confidential information somehow expires after a CDR team has completed its investigation. 2 JA 438–439, ¶ 42. But, no such language is found within NRS 432B.407(6), and the District Court was not at liberty to ignore the strict language of this statute. *See S. Nev. Homebuilders Ass'n v. Clark Cnty.*, 121 Nev. 446, 451, 117 P.3d 171, 174 (2005) ("[I]t is not the business of this court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done.").

When a statute or regulation expressly and unequivocally deems certain information confidential, this information is exempt from disclosure under the

NPRA. *See City of Sparks v. Reno Newspapers, Inc.*, 399 P.3d 352, 357 (Nev. 2017) (exempting from disclosure under the NPRA the identifying information for medical marijuana businesses based upon NRS 453A.370(5) and NAC 453A.714(1)); NRS 239.010(1). NRS 432B.405 provides for a multidisciplinary team to review the death of a child, and assess and analyze the circumstances surrounding the death. NRS 432B.406 provides for the composition of CDR teams and lists the representatives of such a team, which includes a representative from the Coroner's Office. Additionally, the members of the team include other County representatives from the D.A.'s Office, the Department of Family Services, the Department of Juvenile Justice Services, and University Medical Center. *Id.* The purpose of this team is to make recommendations for improving laws, policy and practice, supporting the safety of children, and preventing future deaths of children. *See* NRS 432B.403.

NRS 432B.407(1) states that the documents to which the CDR team has access include autopsy reports relating to death, as well as and medical or mental health records. NRS 432B.407(2) states that each organization represented on the CDR team shall share with the team information in its possession concerning the child that is the subject of the review, any siblings of the child, any person responsible for the welfare of the child, and other pertinent information. NRS 432B.407(6) strictly prohibits the disclosure of information acquired by and

the records of the CDR team, which includes information acquired from autopsy reports. Additionally, NRS 432B.407 is specifically identified as an exception to the disclosure of public records in NRS 239.010(1). NRS 432B.407(6) states:

> Except as otherwise provided in this section, information acquired by, and the records of, a multidisciplinary team to review the death of a child are confidential, must not be disclosed and are not subject to subpoena, discovery or introduction into evidence in any civil or criminal proceeding.

This statute is related to the federal Child Abuse and Prevention Treatment Act of 1996 ("CAPTA") disclosure requirements. CAPTA requires states to preserve the confidentiality of records to protect the rights of the child and of the child's parents or guardians. To this end, CAPTA enumerates limited exceptions to this confidentiality requirement, of which the media is not included.[4] *See* 42 U.S.C. § 5106a(a)(2)(A) and (b)(2)(B)(viii, ix, x). NRS Chapter 432B is consistent with CAPTA. In fact, the Coroner's failure to comply with the confidentiality requirements could impact the County's federal grant eligibility requirements. *See* 42 U.S.C. § 5106a(b); NRS 432B.290(1).

[4] Specifically, CAPTA allows disclosure to individuals who are the subject of the report, governmental agencies, child abuse panels, child fatality review panels, a grand jury or a court, and other entities or individuals authorized by state law to receive such information. *See* 42 U.S.C. § 5105a(a)(2)(A) and (b)(2)(B)(viii, ix, x).

Information relating to children is one of the most, if not the most, protected types of information in terms of confidentiality under the NPRA.[5] Since LVRJ expressed its interest in autopsy reports connected to children in the DFS system, the Coroner was required to apply the privilege under NRS 432B.407. All of the autopsy reports that LVRJ specifically requested on May 26, 2017 and June 12, 2017 involved child deaths reviewed by the CDR team. 1 JA 229–230, ¶¶ 10–11. With respect to the child deaths going back to January 2012, the vast majority were cases reviewed by the CDR team with the exception of 49 cases. *Id.* When LVRJ expressed specific interest in confidential DFS matters, the Coroner, as a representative of the CDR team, invoked the CDR privilege and would not consider redaction. LVRJ cannot use the Coroner to obtain autopsy reports, consisting of confidential information accessible and acquired by the CDR team. Otherwise, the statutory protections provided to shield information concerning children from public dissemination would be completely undermined by LVRJ's

[5] NRS Chapter 432B, titled "Protection of Children From Abuse and Neglect," strictly protects the privacy interests in such information and specifically provides what type of information and to whom it can be disseminated. *See* NRS 432B.290(2) (limiting disclosure of DFS records to specified individuals, including parents or legal guardian of the child, law enforcement and the CDR team, but not the media); NRS 432B.175 (specifying certain data that can be made available to the public relating to a child that is the subject of reported abuse or neglect and suffers a fatality); NRS 432B.280 (criminal liability for releasing confidential DFS information); NRS 432B.290(2) (limiting disclosure of information to specified individuals).

back-door approach. Therefore, all of the juvenile autopsy reports that were reviewed by a CDR team should be deemed confidential and not subject to disclosure.

2. The Requested Juvenile Autopsy Reports Contain Confidential Personal Health Information.

The requested juvenile autopsy reports contain confidential personal health information. This Court has previously articulated that "[b]oth the physicians and the courts are obligated to respect this privilege, unless there are overriding public policy considerations." *Hetter v. Dist. Ct.*, 110 Nev. 513, 516, 874 P.2d 762, 763 (1994). Certainly, LVRJ's desire to publish private information does not override individual privacy rights. *See Reno Newspapers v. Sheriff*, 126 Nev. 211, 218, 234 P.3d 922, 927 (2010) ("[A]n individual's privacy is also an important interest, especially because private and personal information may be recorded in government files."). The Coroner also asserted that both HIPAA and NRS 629.021 (defining "health care records") prohibit the disclosure of personal health information from the requested autopsy reports. 1 JA 208–210. On this issue, the District Court ruled that the Coroner is not a "covered entity" under HIPAA, even though the Coroner was performing his official duties. 2 JA 439, ¶ 48. But, the District Court did not substantively address NRS 629.021. *Id.*

As outlined, the vast majority of the information contained in an autopsy report consists of medical and health information. Confidentiality, protection, and limited disclosure of medical and personal health information are addressed in HIPAA. With respect to personal health information of decedents, HIPAA generally prohibits health care providers and other covered entities from disclosing a decedent's personal health information to anyone other than the decedent's personal representative. *See* 45 C.F.R. § 164.502(f)–(g). Further, HIPAA requires that covered entities protect this information for 50 years. *Id.*

There are certain exceptions to HIPAA, and one of them allows for disclosure to a coroner for purposes of exercising its duties, including identifying a decedent and determining the cause and manner of death. *See* 45 C.F.R. § 164.512(g). By analogy, the fact that federal law stringently protects personal health information demonstrates the overwhelming public policy to protect this private information contained in autopsy reports. Since the Coroner was undertaking his official duties, and in compliance with § 164.512(g), the confidential nature of the personal health information was not lost. *Cf. Cotter v. Dist. Ct.*, 416 P.3d 228, 232 (Nev. 2018) (allowing attorneys with a common interest to share confidential information without waiving the privilege).

As discussed in AGO 82-12, Nevada state law also protects medical and health information. 1 JA 36–39. NRS 49.225 provides that communications

between a patient and a physician are privileged. NRS Chapter 629 restricts inspection of health care records to certain circumstances. *See* AGO 82-12, at *3 (opining that in Nevada there is strong public policy that the secrets of a person's body are very private and confidential and any intrusion in the interest of public health or adjudication is narrowly circumscribed). Other jurisdictions have also extended this protection to autopsy reports. *See Globe Newspaper Co. v. Chief Medical Exam'r*, 404 Mass. 132, 135, 533 N.E.2d 1356, 1358 (1989) (addressing the public policy favoring confidentiality as to medical data about a person's body); *Perry v. Bullock*, 409 S.C. 137, 142, 761 S.E.2d 251, 253 (2014) ("[T]he medical information gained from the autopsy and indicated in the report . . . reveals extensive medical information, such as the presence of any diseases or medications and any evidence of treatments received, regardless of whether that information pertained to the cause of death."). *See* NRS 62H.020 (limitation on the publication of name or race of child and nature of charges); NRS 62H.025 (confidentiality and limited release of juvenile justice information); NRS 62H.100–170 (procedure for sealing criminal records of a child); NRS 62H.210–220 (juvenile justice information collected by DFS has restricted public access).

Further, NRS 440.170 restricts the disclosure of data contained in vital statistics, except as authorized by statute or the State Board of Health. In other words, the public does not have a right of access to this information. As discussed

in AGO 82-12, details about vital statistics are consistent with information in autopsy reports. Similarly, the public's access to death certificates is limited. NRS 440.650(2) restricts the issuance of a certified copy of a death certificate unless the applicant has a direct and tangible interest in the manner recorded. Additionally, NAC 440.021(1)(b) states that the State Registrar may allow examination of a certificate if it is determined not to contain confidential information, or the disclosure would not constitute an unwarranted invasion of privacy which would result in irreparable harm to the person named on the certificate or members of the immediate family. Logically, since certain information in a death certificate is not open to the public, neither should an autopsy report, which contains similar confidential information. *See* CCC § 2.12.060. Therefore, on the additional basis of personal health information, the Court should determine that none of the juvenile autopsy records must be disclosed.

3. The District Court Failed to Consider the Legal Underpinnings of Attorney General Opinion 82-12.

Further, the District Court failed to consider the legal underpinnings of AGO 82-12, which is titled "Autopsy reports; Public Records—Strong public policy of confidentiality of medical information requires that autopsy reports not be available for public inspection." 1 JA 36–39. From the outset of LVRJ's public records request, the Coroner raised the legal underpinnings of AGO 82-12. *Id.*

However, the District Court refused to look at these legal underpinnings and, instead, concluded that AGOs are not legal precedent. 2 JA 437, ¶¶ 34–36. As such, the District Court erred by refusing to acknowledge or consider the merits of one of the Coroner's reasons for withholding the confidential juvenile autopsy reports.

NRS 239.0107(1)(d) states that if a governmental entity must deny a request for a record on grounds of confidentiality, it must state in writing notice of that fact and a citation to a specific statute or legal authority that makes the record confidential. LVRJ convinced the District Court that the legal underpinnings of AGO 82-12 are not "legal authority" to justify nondisclosure of the juvenile autopsy reports. 2 JA 437–438. Yet, the District Court never actually analyzed AGO 82-12. *Id.* AGO 82-12 reaches the conclusion that Nevada statutory law and laws of other jurisdictions adopt policies to protect the disclosure of autopsy reports. *Id.* at *3. Importantly, AGO 82-12 also explains what information should be public:

> The official register, labeled 'Coroner Register,' sets forth the fulfillment of the coroner's statutory duties including identification of the dead person, inventory of any personal property of the deceased, disposal of the remains, notification of the next of kin and the date and cause of death. . . . Thus, the apparent intent is to have a register, open

> to public inspection, and a file containing detailed medical information maintained away from the public eye.

Id. at *2–3. The Coroner's preparation and release of the spreadsheets on April 13, 2017 and May 9, 2017 are consistent with this analysis. The legal analysis in AGO 82-12 is the best logical way to address autopsy reports in the context of the NPRA: that autopsy reports are public records, but not open to public inspection for reasons of confidentiality. Specifically, AGO 82-12 states:

> While cognizant that public inspection is the rule and secrecy the exception, we can ascertain no public interest in disclosure sufficient to outweigh the public policy of confidentiality of personal medical information. The fact that a person dies in an accident, is no justification for enabling public knowledge of that which was closely guarded throughout his lifetime.

Id. at *3. In fact, this Court referenced an Attorney General Opinion in *Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630, 636, 798 P.2d 144, 148 (1990) in weighing the public policies relevant to the disclosure of public records. As such, this Court should weigh the important public policies outlined in AGO 82-12 in evaluating the issues before this Court related to juvenile autopsy reports. *See Baron v. Dist. Ct.*, 95 Nev. 646, 648, 600 P.2d 1192, 1193–1194 (1979) (explaining that when the Legislature has addressed a matter with "imperfect clarity," it becomes the responsibility of this Court to discern the law). Therefore, the Coroner asks this Court to vacate the District Court's order on the additional

basis of the legal underpinnings of AGO 82-12, which the District Court refused to consider.

4. Assembly Bill 57 (2017), Which Clarified NRS 259.045, Either Applies to This Litigation or Should Apply Retroactively.

AB 57, which clarified NRS 259.045, either applies to this litigation or should apply retroactively. In AB 57, the Legislature limited the class of individuals to whom the Coroner can release an autopsy report. 1 JA 236–237. This amendment became effective on July 1, 2017. *Id.* at 237. However, LVRJ did not file its District Court petition for writ of mandamus until July 17, 2017. 1 JA 1–11. Thus, the clarifications of AB 57 should have applied to the instant case based upon the effective date—contrary to the District Court's holding. 2 JA 437–438, ¶¶ 44–46. Even if the effective date standing alone does not warrant the application of AB 57 to this litigation, the Legislature's clarifications, nevertheless, apply retroactively regarding the scope of the Coroner's duties. *See In re Estate of Thomas*, 116 Nev. 492, 495, 998 P.2d 560, 562 (2000) (clarifications to a statute apply retroactively); *see also Pub. Emps. Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 157, 179 P.3d 542, 554–555 (2008) (stating that "when a statute's doubtful interpretation is made clear through subsequent legislation, we may consider the subsequent legislation persuasive evidence of what the Legislature originally intended"); *Metz v. Metz*,

120 Nev. 786, 792, 101 P.3d 779, 783–784 (2004) (noting that the Legislature's change to a statute demonstrates legislative intent).

The Legislature clarified two important points in AB 57. 1 JA 236–237. First, AB 57 clarified provisions relating to the notification of a death consistent with NRS 451.024, which provides a hierarchy as to who has the right to a body after death, and lists certain other persons who may be notified to include parents, adult children, guardian, or custodian. Second, AB 57 also clarified that this very group of persons may be provided a copy of the report of the Coroner, regardless of whether they had the right to the body under NRS 451.024. *Id.* It is this second clarification that is relevant to this case, for it is further evidence that autopsy reports are confidential but may be released to specific persons consisting of the person with the right to the body, parents, adult children, guardians, and custodians. AB 57 was discussed at the Meeting of the Assembly Committee on Government Affairs on February 16, 2017. *See* Hearing on AB 57 Before the Assembly Committee on Government Affairs, 2017 Leg., 79th Sess. (Nev. Mar. 8, 2017). Fudenberg was present, as were representatives of other public entities, private citizens, and the Nevada Press Association. *Id.* LVRJ was not present, and the Nevada Press Association did not present testimony or documentation. *Id.* The language in AB 57 that references the release of a report to the parents, adult children, guardians or custodians, whether or not they have the right to the body

under NRS 451.024, is based on the principle that the reports of coroners in Nevada are not for public access, and, as a matter of practice, are generally released only to next of kin. In other words, the ongoing practice of the Coroner with respect to the limited release of autopsy reports to next of kin was clarified, accepted, and incorporated into AB 57, which then expanded this practice to include a specific enumerated group of individuals. 1 JA 230–231.

AB 57 was not expanded to allow the release of a coroner report to just anybody (unless pursuant to NRS 451.024), not the press and not the general public. This limitation is consistent with the well-settled rules of statutory interpretation in Nevada. When the Legislature specifically includes or enumerates particular things, they must be interpreted to mean that all other things were intended to be excluded. *See Ramsey v. City of N. Las Vegas*, 392 P.3d 614, 619 (Nev. 2017) (the maxim *expressio unius est exclusio alterius* the expression of one thing is the exclusion of another, long adhered to in this State, instructs that the failure to acknowledge or include one thing demonstrates the intent to exclude, or allow no other); *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.3d 237, 246 (1967) (the principle has been repeatedly confirmed in Nevada): *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (under traditional principles of statutory interpretation, the doctrine creates the presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be

understood as exclusions). The Legislature could have stated that autopsy reports are open to the public and not confidential, but it did not do that. Instead, AB 57 furthered the policy of coroners in Nevada by accepting the limited release of the coroner reports to the immediate next of kin or other specific persons associated with the decedent. By enumerating such a small number of individuals entitled to notification and a report, AB 57 recognizes and respects the privacy interests in personal health information pertaining to decedents and their families. Thus, AB 57 is consistent with the Coroner's policy regarding the release of autopsy reports and clearly demonstrates that these reports are not for public disclosure.

Similarly to AB 57, many other jurisdictions respect the privacy interests of decedents, as contained within autopsy reports, which are classified as confidential but subject to release to certain specified individuals, such as the next of kin, which does not include the media or the general public. In *Reid v. Pierce County*, 136 Wash.2d 195, 198, 961 P.2d 333, 335 (1998), relatives of deceased persons sued a county for common law invasion of privacy with respect to allegations of appropriation and display of photographs of deceased relatives. In that case, the court discussed the privacy interest in autopsy records and held that "the immediate relatives of a decedent have a protectable privacy interest in the autopsy records of the decedent. That protectable privacy interest is grounded in maintaining the dignity of the deceased." *See also Galvin v. Freedom of Info.*

Comm'n, 201 Conn. 448, 461, 518 A.2d 64, 71 (1986) (autopsy reports are not accessible to the general public as information in autopsy reports could cause embarrassment or unwanted attention to the family of the deceased); *Larry S. Baker, P.C. v. City of Westland*, 627 N.W.2d 27, 15 (Mich. App. 2001) (notions of privacy in state law applied to deceased individuals and their families and outweighed public interest in accidents and injuries information).

Statutes in other jurisdictions also exempt autopsy reports from public disclosure, except to certain specified persons, such as next of kin. *See* IOWA CODE, § 22.7(41) (Iowa) (expressly exempts autopsy reports from disclosure, except to the decedent's immediate next of kin); MASS. ANN. LAWS, ch. 38, § 2 (Massachusetts) (the chief medical examiner is required to promulgate rules for the disclosure of autopsy reports, which are deemed not to be public records, to those who are legally entitled to receive them); N.H. REV. STAT. ANN., § 611-B:21, III (New Hampshire) (autopsy reports are confidential, but available to the next of kin, law enforcement, decedent's physician, and organizations for education or research); N.D. CENT. CODE, § 23-01-05.5 (North Dakota) (autopsy reports are confidential but may be disclosed to certain specified persons such as next of kin); OKLA. STAT., title 63, § 949(D) (Oklahoma) (reports of medical examiner may be furnished to next of kin or others having need upon written statement); OR. REV. STAT. ANN., § 146.035(5)(a) (Oregon) (autopsy reports are generally exempt from

public disclosure except next of kin or person liable for the death may examine copies of the autopsy report); UTAH CODE ANN., § 26-4-17(3) (Utah) (despite being confidential, medical examiner shall deliver copies of reports to next of kin or decedent's physicians upon request); WASH. REV. CODE ANN., § 68.50.105 (Washington) (autopsy reports are confidential but available to certain specified persons such as family members, decedent's physicians, or law enforcement). Consistent with AB 57, these statutes demonstrate that privacy interests clearly outweigh public access. Therefore, the Court should declare that the requested juvenile autopsy reports are confidential and cannot be disclosed.

B. THE DISTRICT COURT ERRED BY DETERMINING THAT THE CORONER WAIVED A PORTION OF ITS LEGAL POSITION TO WITHHOLD CONFIDENTIAL JUVENILE AUTOPSY REPORTS.

1. The Coroner Clarified Its Response to LVRJ's Clarified Request for Public Records.

The District Court erred by determining that the Coroner waived a portion of its legal position to withhold confidential juvenile autopsy reports. The Coroner explained to the District Court that once LVRJ clarified its public records request, the Coroner, likewise, clarified its response. 1 JA 218–221. In the context of the NPRA, once information is deemed confidential, the Court does not need to reach waiver arguments. *See PERS v. Reno Newspapers Inc.*, 129 Nev. 833, 838 n.3, 313 P.3d 221, 224 n.3 (2013). Regardless, the Coroner did not intentionally

relinquish a known right, which is the definition of "waiver." *See Nevada Yellow Cab Corp. v. Dist. Ct.*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007).

In the District Court, LVRJ argued that the Coroner did not timely cite to NRS 432B.407 when it first responded to LVRJ's request on April 13, 2017. However, it was not apparent that LVRJ was trying to use the Coroner to obtain confidential information acquired by the CDR team until LVRJ's May 8, 2017 email from Joseph to Fudenberg (1 JA 228, 233–234) and the May 23, 2017 correspondence from LVRJ's attorney. 1 JA 40–44. Once the "red flag" was raised, the Coroner asserted the privilege, as it did in its response dated May 26, 2017 (1 JA 45–88—NRS 432B.407 privilege applies to Coroner participation on the CDR team), and thereafter on May 31, 2017 (1 JA 89–92—reports subject to the privilege would not be redacted), and on July 9, 2017 (1 JA 99–106—non-CDR cases are not subject to privilege).

After LVRJ had asked for redacted autopsy reports on May 26, 2017, and due to LVRJ's attempt to use the Coroner as a way to obtain privileged information, the Coroner determined which juvenile death cases were not reviewed by the CDR. This process took several weeks since LVRJ's request on April 13, 2017 entailed hundreds of cases going back to January 2012. 1 JA 18. The Coroner determined that all of the cases listed in LVRJ's emails on May 31, 2017 and June 13, 2017 that involved the Coroner were reviewed by the CDR team.

1 JA 229–230, ¶¶ 10–11. The 49 cases that did not go to the CDR team were provided to LVRJ on July 9, 2017 when the information was available. 1 JA 99–106. Therefore, because LVRJ clarified its public records request several times, the Coroner cooperated with LVRJ throughout the pre-litigation process and, likewise, clarified its response each time LVRJ clarified its requests. As such, the Court should determine that the Coroner did not waive any of its legal arguments to protect the confidential information sought by LVRJ.

2. Waiver Is Not a Remedy Expressly Stated in the NPRA.

The District Court impermissibly read an additional remedy into the NPRA regarding waiver, even though there is no supporting statutory text. 2 JA 436–437, ¶¶ 32–33. As a matter of law, LVRJ's remedy for its refusal to accept the Coroner's position was to apply to the District Court for relief, as outlined in NRS 239.011. Notably, nothing within NRS 239.0107 or NRS 239.011 suggests that waiver is a remedy. As such, the District Court was without authority to read an additional remedy of waiver into the NPRA. *See Builders Ass'n of Northern Nevada v. City of Reno*, 105 Nev. 368, 370, 776 P.2d 1234, 1235 (1989) ("If a statute expressly provides a remedy, courts should be cautious in reading other remedies into the statute."). Because NRS 239.011 expressly provides for a certain remedy, the Court should "decline to engraft any additional remedies therein." *Stockmeier v. Nev. Dep't of Corrections Psychological Review Panel*,

124 Nev. 313, 317, 183 P.3d 133, 136 (2008). This Court has previously established that "[w]here a statute gives a new right and prescribes a particular remedy, such remedy must be strictly pursued, and is exclusive of any other." *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220, 225 (1879).

In the NPRA, there is no provision for "waiver," except in NRS 239.052 where it states that the public entity may waive a fee, and NRS 239.170 involving lost or destroyed records. Notably, LVRJ relied upon orders of other district courts to support its waiver argument, even though such orders are not precedential. 1 JA 164–195; SCR 123. Despite the District Court's conclusion that the Coroner had waived some of its arguments, the District Court, nevertheless, addressed the merits of these allegedly waived arguments. 2 JA 428–442. Therefore, the Court should reject the District Court's conclusion on waiver, particularly because the District Court actually addressed the merits of the Coroner's arguments that were allegedly waived.

C. ALTERNATIVELY, THE DISTRICT COURT ERRED BY REFUSING TO ALLOW THE CORONER TO CHARGE A FEE TO LVRJ FOR REDACTING CONFIDENTIAL PORTIONS OF THE JUVENILE AUTOPSY REPORTS.

Alternatively, the District Court erred by refusing to allow the Coroner to charge a fee to LVRJ for redacting confidential portions of the juvenile autopsy reports. The District Court's order currently requires the Coroner to produce "unredacted" juvenile autopsy reports. 2 JA 441, ¶ 59. However, the District

Court alternatively ruled that if the Coroner is permitted to redact confidential information from the autopsy reports, the Coroner would not be able to charge a fee. 2 JA 440–441. The Coroner urges this Court to deem confidential both the CDR team cases and the 49 non-CDR team cases because LVRJ can decipher confidential information. *See* 1 JA 233–234. Despite the authorizing provisions in NRS 239.055 regarding the "extraordinary use of personnel," the District Court's order requires the Coroner to sift through documents and redact confidential information, all for LVRJ's benefit, without being able to charge a fee. 2 JA 440–441. LVRJ suggests that a fee authorized by NRS 239.055 only relates to "a copy of a public record," but such a reading would impermissibly render superfluous the remaining provisions of this statute. *See D.R. Horton, Inc. v. Dist. Ct.*, 123 Nev. 468, 477, 168 P.3d 731, 738 (2007) ("[N]o part of a statute [may] be rendered meaningless and its language should not be read to produce absurd or unreasonable results.").

NRS 239.055 entitled, "Additional fee when extraordinary use of personnel or resources is required; limitation" provides as follows:

> 1. Except as otherwise provided in NRS 239.054 regarding information provided from a geographic information system, ***if a request for a copy of a public record would require a governmental entity to make extraordinary use of its personnel or technological resources, the governmental entity may, in addition to any other fee authorized pursuant to this chapter, charge a fee not to exceed 50 cents per page for such extraordinary use***. Such a request must be made in writing, and upon receiving such a request, ***the governmental***

> ***entity shall inform the requester, in writing, of the amount of the fee before preparing the requested information***. ***The fee charged by the governmental entity must be reasonable and must be based on the cost that the governmental entity actually incurs for the extraordinary use of its personnel or technological resources***. The governmental entity shall not charge such a fee if the governmental entity is not required to make extraordinary use of its personnel or technological resources to fulfill additional requests for the same information.
>
> 2. As used in this section, "technological resources" means any information, information system or information service acquired, developed, operated, maintained or otherwise used by a governmental entity.

(emphases added).

In prior case law this Court has recognized the difference between the extraordinary use of personnel and the maximum copy charge of 50 cents. For example, in *LVMPD v. Blackjack Bonding*, 343 P.3d 608, 615 (Nev. 2015), this Court did not disturb the District Court's order requiring the requester to "bear the costs of production." Similarly, in *PERS v. Reno Newspapers Inc.*, 129 Nev. 833, 840, 313 P.3d 221, 225 (2013), this Court commented that NRS 239.055 "permit[s] a government entity to charge an additional fee for extraordinary resources necessary to comply with 'a request for a copy of a public record.'" (emphasis omitted). The Court should now clarify that the fees for copying public records are distinct from the fees charged for the extraordinary use of personnel.

NRS 239.052 allows a governmental entity to charge a fee for copying public records. In contrast, NRS 239.055(1) allows an additional fee to be charged

when "extraordinary use of personnel . . . is required by the public entity." The term "extraordinary use of personnel" is not defined in the statute. When statutory terms are undefined, this Court looks to the legislative history for clarification. *See State, Dep't Mtr. Vehicles v. Vezeris*, 102 Nev. 232, 236, 720 P.2d 1208, 1211 (1986); *see also Cleghorn v. Hess*, 109 Nev. 544, 548, 853 P.2d 1260, 1262 (1993). Additionally, conflicts within the statutory language itself are resolved by a resort to legislative history. *See Orion Portfolio Services 2, LLC v. County of Clark, ex rel. Univ. Medical Cntr. of S. Nev.*, 126 Nev. 397, 402, 245 P.3d 527, 531 (2010). As a guideline, AGO 2002-32 opines that that expending staff time of more than 30 minutes may constitute extraordinary use.

Notably, the phrase in NRS 239.055 "preparing the requested information" suggests a broader activity than just copying documents. As outlined in NRS 239.010(3), where possible, governmental entities must "redact, delete, conceal or separate the confidential information from the information included in the public book or record that is not otherwise confidential." The legislative history for the NPRA supports the Coroner's position that requesters, such as LVRJ, cannot employ—without payment—governmental entities for public records requests, involving hundreds of pages with confidential information that requires redaction. In 2007, Senate Bill 123 ("SB 123") proposed to add several amendments to the NPRA, including the intent to foster democratic principles and

the timeframe in responding to requests. Dan Musgrove ("Musgrove"), representing University Medical Center of Southern Nevada, shared his concern of low fees and payment for personnel time in responding to requests:

> DAN MUSGROVE (University Medical Center of Southern Nevada): A letter was sent to us from the Las Vegas Review-Journal (Exhibit K) asking for documents. University Medical Center has been under the lights lately due to issues taking place in southern Nevada, and the press has been active in asking for documents. While we tried to respond to the voluminous request in Exhibit K, this information is not easily produced in the manner they asked. Even though the request was in writing and specific, ***it takes staff time and resources, a week to ten days, to determine how to bring the information together and produce it in a manner the newspaper would like to see***. We are willing to do so, but ***it displaces job functions at the hospital*** that need to take place. We responded to the Las Vegas Review-Journal with a letter seeking payment for staff time to produce this information. Senator Care felt taxpayers pay our salaries and we should set aside normal duties to produce the documents. That is not in the best interest of our hospital to set aside important duties such as financial collections and invoices to work on public requests. How quickly we turn the request around and at what cost to the hospital staff resources becomes a logistical matter. We would like to work with the subcommittee on addressing those matters.
>
> SENATOR CARE: If an office gets a request for documents and there is time for staff to retrieve and copy the documents, it would not be the most important function the office serves, but those people would work for taxpayers at that time by satisfying a taxpayer's request for public records. Overhead costs would have to be eaten as a matter of public policy. ***Whatever happened with the request for a check for staff time***?

> MR. MUSGROVE: ***I have not seen an answer to that. We were looking at staff time of at least two weeks to garner this information. That is a lot of time to take away from normal duties***.

Hearing on SB 123 Before the Senate Committee Minutes on Government Affairs, 74 Leg. (Nev. Feb. 26, 2007) (emphases added). As the dialogue demonstrates, the concept of paying staff time for governmental entities in extraordinary circumstances was not foreclosed.

In 2013, Assembly Bill 31 ("AB 31") was introduced to amend the NPRA to include a record official for government agencies, require regulations regarding forms to be used with public records requests, and identify the existing statutory exceptions to the NPRA. The legislative history for AB 31 reflects the discussions regarding the meaning of "actual costs":

> Senator Goicoechea: I am concerned because it says actual cost can only be the direct cost of the reproduction and not include the research involved in finding a document. I realize this only pertains to State government and not local government; however, I am concerned about where this will go. There is inherent cost with searching records.
>
> Mr. Munro: That is not part of the bill. We have left the actual cost to your staff to determine; ***however, many agencies add personnel costs***.

Hearing on AB 31 Before the Senate Committee on Government Affairs, 77th Leg. (Nev. May 27, 2013) (emphasis added).

In addition to AB 31, Senate Bill 74 ("SB 74") was also introduced during the 77th Legislature regarding amendments to certain provisions of the NPRA. The main concern regarding this amendment was the inconsistency across the

agencies for the fees charged for copying records. In support of the amendment, Barry Smith ("Smith"), Executive Director, Nevada Press Association, testified that many agencies charge $1.00 per page to supply a stream of revenue for the agencies. Hearing on SB 74 Before the Senate Committee on Government Affairs, 77th Leg. (Nev. Feb. 20, 2013). While Smith agreed that "[i]t was not the intent of the public records law to charge a person that is the responsibility of the agency in the first place," he, nonetheless, acknowledged that there is a provision that allows agencies to be compensated for extraordinary use of personnel. *Id.*

On April 10, 2013, another hearing was held before the Senate Committee on Government Affairs. Hearing on SB 74 Before the Senate Committee on Government Affairs, 77th Leg. (Nev. Apr. 27, 2013). At this hearing, the Committee passed SB 74 with an amendment to reflect an adjustment for the copy rate of 50 cents per page, rather than the initial proposed 10 cents per page. *Id.* Once SB 74 passed the Senate Committee, it moved to the Assembly Committee on Government Affairs to be heard on May 3, 2013. Hearing on SB 74 Before the Senate Committee on Government Affairs, 77th Leg. (Nev. May 3, 2013). Interestingly, the entire May 3 hearing for SB 74 stands for the proposition that the additional language of 50 cents per page, now codified in NRS 239.055, was strictly limited to copying costs and did not apply to staff time:

> Senator Segerblom: [T]hey can charge a reasonable fee of 50 cents. Under extraordinary circumstances, they can charge additional fees.

* * * *

> Assemblyman Stewart: I appreciate you bringing this bill in order to save the public money and give them more access. If someone from out of state or out of country requested information, would this preclude the agencies from charging the requester postage.
>
> Senator Segerblom: This is actually a question I never thought of. We do not have anything in the bill regarding postage, so I do not think it would. ***This is basically only the copying charge, so I would assume it would not***.

Id. (emphasis added). Thus, the legislative history distinguishes the 50-cent copy charge from the extraordinary use of personnel.

In the instant case, the Coroner's review of the 49 non-CDR team cases for the redaction of personal health information requires expertise and knowledge of the subject matter, public policy, and the law. It is not suitable for inexperienced employees or those not involved in the autopsy investigation to perform such redactions. The Coroner estimated that by using the appropriately qualified personnel, 4 to 5 non-CDR team reports could be redacted in one hour, and it would take about 8 to 10 hours to redact the requested reports on cases not reviewed by the CDR team, thus constituting extraordinary use of personnel. 1 JA 108–109. The Coroner informed LVRJ of the estimated time for the redactions and the $45.00 per hour charge for the extraordinary use of personnel for these non-CDR team cases. *Id.* Yet, the District Court's order does not allow the Coroner to recover any amount for the extraordinary use of its personnel. 2 JA 440–441. And, the Coroner cannot even recover the copying charge of

50 cents per page because the District Court's order requires the production of electronic copies. *Id.* If the Court allows the Coroner to redact the confidential information from the requested juvenile autopsy reports, the Court should, at a minimum, allow the Coroner to recover the 50 cents charge per page. Therefore, if the Court rules that the Coroner is permitted to redact confidential information from the juvenile autopsy reports, the Court should also rule that the Coroner is entitled to charge a reasonable fee for time spent redacting confidential information.

IX. CONCLUSION

In summary, this Court should vacate the District Court's order requiring the Coroner to produce unredacted juvenile autopsy reports since: (1) these reports (except 49 non-CDR cases) are confidential according to NRS 432B.407(6); (2) these reports contain confidential personal health information; (3) these reports cannot be legally disclosed according to the legal underpinnings of AGO 82-12; and (4) AB 57 amended NRS 259.045 to clarify that autopsy reports are confidential and can only be disclosed to a certain class of individuals. Additionally, this Court should determine that the Coroner did not waive any portion of its legal position to withhold confidential juvenile autopsy reports because the Coroner clarified its response to LVRJ's clarified request for public records. And, waiver is not a remedy expressly stated in the NPRA.

Alternatively, if the Court requires the Coroner to produce redacted juvenile autopsy reports, the Court should allow the Coroner to charge a reasonable fee to LVRJ for time spent redacting based upon NRS 239.055. Upon these grounds, the Coroner urges this Court for relief.

Dated this 4th day of June, 2018.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

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

☒ proportionally spaced, has a typeface of 14 points or more and contains 12,071 words; or

☐ does not exceed _____ pages.

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

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 4th day of June, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S OPENING BRIEF** was filed electronically with the Nevada Supreme Court on the 4th day of June, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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