IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Appellant, vs. LAS VEGAS REVIEW-JOURNAL, Respondent.	Electronically Filed Sep 06 2018 10:14 a.m. Elizabeth A. Brown Clerk of Supreme Court SUPREME COURT CASE NO: 74604 DISTRICT COURT CASE NO.: A-17-758501-W

RESPONDENT'S ANSWERING BRIEF

Margaret A. McLetchie, Nevada Bar No. 10931
Alina M. Shell, Nevada Bar No. 11711
MCLETCHIE SHELL LLC
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
Telephone: (702) 728-5300
Fax: (702) 425-8220
Email: maggie@nvlitugation.com
Counsel for Respondent, Las Vegas Review-Journal

NRAP 26.1 DISCLOSURE

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

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

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

DATED this 5th day of September, 2018.

/s/ Margaret A. McLetchie
Margaret A. McLetchie, Nevada Bar No. 10931
Alina M. Shell, Nevada Bar No. 11711
MCLETCHIE SHELL LLC
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
Counsel for Respondent, Las Vegas Review-Journal

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

/ / /

Other Authorities

I. STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

The district court properly granted the Las Vegas Review-Journal ("LVRJ") access to child autopsy reports sought by the LVRJ investigative team. Pursuant to the Nevada Public Records Act ("NPRA," NRS 239.001 *et seq.*), a court must order disclosure of records unless the governmental entity resisting disclosure provides evidence to satisfy its burden. NRS 239.0113. Pursuant to the NPRA's express mandates regarding statutory construction and precedent, a court cannot read exceptions to disclosure broadly, bootstrap confidentiality from inapplicable provisions, or entertain exceptions to access that only exist in the imagination of the resisting party. Yet this is exactly what the Coroner's Office (the "Coroner") requests this Court do in this case: it engages in interpretive gymnastics to support its claims. Its arguments fail.

NRS 432B.407(6) does not explicitly render all autopsy records confidential just because the work of Child Death Review teams ("CDR" or "CDRs") analyzing child deaths is protected. Recognizing that courts must give statutes their plain meaning and read exceptions to access narrowly, this Court has twice rejected exactly the type of argument the Coroner makes—that a statute rendering information confidential in one iteration makes the information confidential even if stored elsewhere—in *PERS v. Reno Newspapers Inc.*, 129 Nev. 833, 838, 313 P.3d 221, 224 (2013) and *Reno Newspapers v. Sheriff (Haley)*, 126 Nev. 211, 217, 234

P.3d 922, 926 (2010). Governmental records are presumed public unless otherwise declared by law to be confidential. NRS 239.010(1). NRS 432B.407's text is not the type of express, unequivocal exemption that makes a record confidential. *Haley*, 126 Nev. at 241, 234 P.3d at 924; *see also City of Sparks v. Reno Newspapers*, Inc., 399 P.3d 352, 356-57 (2017). Likewise, the Coroner's argument that the legislative history of NRS 432B.407 indicates an "express or unequivocal effort" to take autopsy reports outside the reach of the NPRA fails.

As for the other claims, the Coroner has admitted that the records are not covered by HIPAA; they also do not fall within Nevada's definition of medical records. This Court cannot infer from other statutes that autopsy records are confidential and would flip the clearly-articulated burden the government bears on its head.

The LVRJ recognizes that, even if the autopsy records are not expressly declared confidential by law, a governmental entity can still meet its burden—but only if it establishes by a preponderance of the evidence that: (1) the records are subject to some other claim of confidentiality; and (2) the interest clearly outweighs the presumed interest in favor of access. *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011).[1] Not only is an attorney general opinion

[1] The Coroner necessarily failed to satisfy the balancing test because it never recognized the interest in access, let alone bothered to explain how the purported interest outweighs the heavy presumption in favor of access.

("AGO") not considered law, the 1982 AGO's balancing test is inapplicable in light of NPRA amendments modifying the balancing test and this Court's subsequent decisions. Vague reliance on the AGO's "underpinnings" does not meet the Coroner's burden—and the district court did consider (but rejected) the policy arguments. (2 JA436, ¶ 30; 2 JA437-439.)

Even sensitive records must be produced if the countervailing interest urged by the government is not established or does not clearly outweigh the presumption in favor of access. A requester need not justify a request. The balancing test weighs heavily in favor of access; indeed, the principle that governmental transparency is of the utmost importance is written into the text of the NPRA itself. (NRS 239.001(1) "[t]he 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"); NRS 239.001(2)-(3)) (the NPRA must be interpreted in a manner that furthers this purpose and access).

Even if access was not favored, here access is important and outweighs secrecy. The autopsy records in this case pertain to potentially vulnerable children. Access will help the public evaluate the effectiveness of agencies charged with the protection of children. While CDRs exist to address policy issues pertaining to child deaths, their work is cloaked in secrecy. The public should not depend on secret government committees to determine if there are child deaths that could have been

avoided or prevented. Moreover, CDRs look at policy issues but do not address individual cases—and not every child has a parent or a family member to act in his or her interest. Society should have access to information to prevent child deaths—and vulnerable children should be given a voice.

While the district court considered the Coroner's claims, it also properly held that the Coroner could not raise untimely claims. The Coroner's argument to the contrary would render NRS 239.0107(1)(d)(2)—which mandates that a governmental entity resisting disclosure specifically explain why within five business days—meaningless. It would also make it harder to get access to records and put requesters in the untenable position of having to go to court just to get clear answers about why records are being withheld. Thus, the Coroner's interpretation must also be rejected because it hinders access. NRS 239.001(2)-(3).

Likewise, the Coroner's positions that it can charge an hourly fee to redact records and charge a per-page copying cost even if records are provided electronically are not supported by the text of the NPRA, let alone a liberal construction of the statute. Allowing a governmental entity to charge fees to keep information away from a requester is antithetical to the NPRA, especially when the governmental entity's proposed redactions are not supported by law. Again, "the provisions of [the NPRA] must be construed liberally to carry out [its] important purpose [of fostering democratic principles]" and, conversely, "[a]ny 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." NRS 239.001(2)-(3). These mandates extend to the provisions pertaining to fees. Allowing governmental entities unfettered discretion to ignore NRS 239.0107(1)(d) or charge exorbitant fees would deter access—and thus hinder operation of democracy in Nevada. NRS 239.001(1).

II. STANDARDS OF REVIEW

The district court found the Coroner had not "established by a preponderance of the evidence that any interest in nondisclosure outweighs the strong presumption in favor of access." (2 JA436.) While this case's legal issues are reviewed *de novo*, factual determinations are subject to abuse of discretion review. *PERS v. Reno Newspapers Inc.*, 129 Nev. 833, 836, 313 P.3d 221, 223 (2013).

The Coroner ignores the plain text of the NPRA and reads imaginary exceptions into it. In its Standards of Review (OB, pp. 9-10), the Coroner lays the groundwork for this tact by asserting that where "a matter is addressed with 'imperfect clarity,'" this Court can discern the law. This ignores that the Coroner must first establish an actual ambiguity,[2] and that any ambiguity must be resolved in

[2] *See, e.g., State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) ("To interpret an ***ambiguous statute***, we look to the legislative history and construe the statute in a manner that is consistent with reason and public policy.") (emphasis added; citations omitted).

a manner that furthers the NPRA's goal—access to public records. While the Coroner relies on matters such as inferences regarding the intent behind a statute separate from the NPRA, the allowance of a balancing test into NPRA analysis does not open to the door to such arguments.

Instead, this case must be resolved pursuant to the NPRA's mandates set forth below. Even if any ambiguity exists, it must be resolved in a manner that favors access, the unambiguous purpose of the NPRA. *Cf. McKay v. Bd. of Sup'rs of Carson City*, 102 Nev. 644, 651, 730 P.2d 438, 443 (1986) ("…a strict reading of the statute is more in keeping with the policy favoring open meetings expressed in NRS chapter 241 and the spirit of the Open Meeting Law…").

III. THE NPRA's MANDATES

The overarching purpose of the NPRA is to "foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law." NRS 239.001(1). To facilitate that fundamental purpose, the NPRA must be construed liberally, government records are presumed public records subject to the act, and any limitation on the public's access to public records must be construed narrowly. NRS 239.001(2)-(3). As this Court has explained, "the provisions of the NPRA ***place an unmistakable emphasis on disclosure.***" *Gibbons*, 127 Nev. at 882, 266 P.3d at 629 (emphasis added).

/ / /

Regarding claims of confidentiality, there are two steps in the process where claims come into play. When the government initially responds to a request, it must articulate claims of confidentiality with specificity: "[i]f the governmental entity must deny the person's request because the public book or record, or a part thereof, is confidential," it must "provide to the person, in writing: (1) Notice of that fact; and (2) A citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential." NRS 239.0107(1)(d)(1)-(2). Furthermore, it must do so within five business days. NRS 239.0107(1).[3] There are no exceptions to this mandate to provide specific and timely notice of the bases on which a governmental entity withholds records. This mandate allows a requester to evaluate the grounds on which a denial is made and determine whether to seek court intervention pursuant to NRS 239.011.

Then, if public records litigation ensues against a governmental entity withholding records, the governmental entity has a heavy burden in establishing its confidentiality claim. Pursuant to NRS 239.0113(2), if "[t]he governmental entity that has legal custody or control of the public book or record asserts that the public book or record, or a part thereof, is confidential, the governmental entity has the

[3] NRS 239.0107(1) mandates that a governmental entity "shall" act within five business days of a request. If the option the governmental entity chooses to pursue in response to a request is to withhold records (NRS 239.0107(1)(d)), it must do so within five business days.

burden of proving by a preponderance of the evidence that the public book or record, or a part thereof, is confidential."

A governmental entity has two avenues by which it might meet this heavy burden. First, it can establish by a preponderance of the evidence that the record is explicitly and unequivocally declared confidential by law. "This court will presume that all public records are open to disclosure unless . . . the Legislature has expressly and unequivocally created an exemption or exception by statute." *Haley*, 126 Nev. at 214, 234 P.3d at 924; *see also City of Sparks*, 399 P.3d at 356-57 (personal identifying information of persons associated with medical marijuana is exempt from disclosure because a statute authorizing the State to make the information confidential, and a Nevada Administrative Code "expressly and unequivocally prohibits disclosure").

Second, a governmental entity can establish by a "preponderance of the evidence" (NRS 239.0113) that some other claim of confidentiality applies and that asserted interest in nondisclosure clearly outweighs the strong presumption in favor of public access. *See, e.g., Gibbons*, 127 Nev. at 880, 266 P.3d at 628. This Court's "case law stresses that the state entity cannot meet this burden with a non-particularized showing, [] or by expressing hypothetical concerns. []" *Id.* (citations omitted).

/ / /

At every step of the analysis, the provisions of the NPRA "must be construed liberally" to facilitate access to public records,[4] and any privileges and limitations on disclosure must be construed narrowly.[5] Moreover, "[i]t is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly." *DR Partners v. Bd. of Cty. Comm. of Clark Cty.*, 116 Nev. 616, 6 P.3d 465, 468 (2000). This is especially so in the public records context: as noted above, any restriction on disclosure "must be construed narrowly." NRS 239.001(2)-(3).

IV. RESPONSE TO FACTUAL AND PROCEDURAL BACKGROUND

A. The Coroner Refused to Provide Records; the LVRJ Sued.

On April 13, 2017, LVRJ investigative reporter Arthur Kane submitted a records request (the "Request") to the Coroner seeking all autopsy reports of all autopsies conducted on anyone under the age of 18 from 2012 through the date of the Request. (1JA019-020.) The Coroner responded—without any statutory or legal justification—that it was "not able to provide autopsy reports." (1JA017.) Mr. Kane then requested "whatever law prevents their release." (1JA017.)

The Coroner still failed to provide authority. Instead, the Coroner relied solely on a nonbinding Attorney General Opinion, AGO 82-12. (1JA016.) Mr. Kane also

[4] *Gibbons*, 127 Nev. at 880, 266 P.3d at 628 (quoting NRS 239.001(2)).
[5] NRS 239.001(3).

reached out to the Coroner's counsel to get authority for the failure to disclose. (1JA029-030.) On April 14, 2017, the District Attorney's Office responded by referring to AGO 82-12 and Assembly Bill 57 ("AB57"), a bill considered during the Legislature's 2017 session. (1JA033-34.) The LVRJ endeavored to resolve issues. (1JA041-044). The Coroner still refused access, instead suggesting that producing some records justified nondisclosure (1JA032-33) and the LVRJ bore the burden of obtaining releases (1JA050.) While the Coroner decided it was willing to disclose autopsy records related to deaths not investigated by a CDR team (OB, pp. 19-20), it demanded that the LVRJ pay for the "extraordinary use of personnel" associated with reviewing the reports and redacting information before it would release them. (OB, pp. 20-21.) The sample redacted reports the Coroner provided were stripped of content. (1JA116-122.) Litigation ensued. (1JA001).

B. The Coroner Presented No Evidence and Relies On Hearsay.

The Coroner relies on a declaration by Clark County Coroner John Fudenberg (the "Declaration," 1JA226-231) to assert that the requested autopsy reports are confidential. (*See* OB, p. 4, n.2; p. 9; p. 25.)

The Declaration is replete with unsupported hearsay and inadmissible legal conclusions and should be disregarded. The Declaration's summary of a meeting with LVRJ reporters is hearsay within hearsay that does not fall within any of the statutory exceptions to the hearsay rule. *See* NRS 51.035; NRS 51.067; NRS 51.075-

51.305 Fudenberg also alleges, *inter alia* that his office reviewed reports and determined they had been sent to CDRs. (1JA229, ¶ 10).

The Declaration does not identify who reviewed the cases and determined which had been sent to CDRs. Additionally, the Coroner offered no evidence to support the assertions. There is no way to assess the statements' accuracy. Thus, the Coroner has not established that the CDR privilege it asserts even applies.

The Declaration also includes hearsay regarding the alleged difficulty of the redaction process. (1JA230, ¶¶ 11-12.) Despite ample opportunity—the Coroner has never presented any evidence to support these allegations, and the statements are inadmissible as hearsay.

Further, the Declaration also contains legal conclusions regarding: (1) AGO 82-12 (1JA227-28, ¶¶ 4-6); (2) state law regarding the confidentiality of information reviewed by a CDR team (1JA229, ¶ 9); (3) what information in the autopsy reports "could not be considered private by a family of a decedent" (1JA230, ¶ 11); and (4) the applicability of NRS 239.055 to the LVRJ's request. (*Id.* at ¶ 13.) These legal conclusions are inadmissible. *Washington v. Maricopa County*, 143 F.2d 871, 872 (9th Cir. 1944); *Cornish v. King County*, ___ F.3d ___, 2018 WL 3673151, *13 (9th Cir. Aug. 3, 2018) (declaration of a private consultant was inadmissible because it offered only legal interpretations).

/ / /

C. Other Coroners' Policies Are Irrelevant.

The Declaration asserts that the Coroner's policy of "limiting dissemination of Autopsy Reports to the next of kin is consistent with that of other coroners in Nevada." (1JA231 (citing Washoe County Code 35.160(f).) This is irrelevant for three reasons. First, a policy is not a cognizable basis for withholding records. *See* NRS 239.0107(1)(d)(2) (outlining bases a governmental entity may cite). Second, other coroners' practices are not a cognizable basis for withholding public records. That "everybody else is doing it" is not a cognizable defense to its noncompliance. *See In re Catfish Antitrust Litig.*, 908 F. Supp. 400, 417 (N.D. Miss. 1995).

Third, the assertion is undercut by the record. While this matter was in the district court, the LVRJ received juvenile autopsy from the White Pine County Coroner (2 JA325-69), and a juvenile autopsy report from the Lander County Sheriff's Office. (2 JA371-97.)

D. The Deadline to Respond Was Not Reset

The Coroner asserts that correspondence with the LVRJ provided the Coroner an opportunity to "clarify" its basis for withholding. (OB, p. 37.) The correspondence did not alter the Request's terms, or reset the five-day clock for responding under NRS 239.0107. The Coroner notes it was first alerted to the alleged nature of the LVRJ's investigation on May 8, 2017. (OB, p. 17.) Yet the Coroner did not supplement its response then. Instead, it waited eighteen days to provide its new

and untimely basis for withholding the autopsy reports. (1JA048-050; *see also* OB, p. 18.) No matter how the Coroner spins the facts, it never responded to the Request in the manner required.

V. LEGAL ARGUMENT

A. COMPLIANCE WITH NRS 239.0107 IS MANDATORY.

While the district court considered each of the Coroner's arguments, it did not need to; the district court properly recognized that the Coroner could not rely on privileges it failed to timely raise in the manner prescribed. (2JA437.) The Coroner's arguments ignore that NRS 239.0107 requires obedience and there must be some consequence for a failure to comply.

1. NRS 239.0107 Requires Strict Compliance.

NRS 239.0107(1)(d)(2) requires that a governmental entity provide a requester with timely,[6] specific notice regarding its bases for withholding records. It does not provide for any exception to this mandate.[7] This Court has made clear that when a statute prescribes a specific time and manner for performance, that statute "is mandatory and requires strict compliance." *Markowitz v. Saxon Special*

[6] Within five business days. NRS 239.0107(1).

[7] *Compare* NRS 281A.720(4) (in an ethics investigation response, "…no objection or defense, in law or fact, is waived, abandoned or barred by the failure to assert, claim or raise it in the response or in any proceedings before the review panel."). As this reflects, if the Legislature wanted to allow a governmental entity to preserve the right to make confidentiality claims of confidentiality despite disobeying the mandate of NRS 239.0107(1)(d), it could have done so.

Servicing, 129 Nev. 660, 664, 310 P.3d 569, 572 (2013) (quoting *Leven v. Frey*, 123 Nev. 399, 408, 168 P.3d 712, 717 n. 27, 718 (2007)); *see also Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 696, 290 P.3d 249, 254 (2012) ("In general, 'time and manner' requirements are strictly construed") (quotation omitted).

In determining whether a statute requires strict compliance, this Court must "look[] at the language used and policy and equity considerations." *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 255 P.3d 1275, 1278 (2011) (citing *Leven*, 123 Nev. at 406-07, 168 P.3d at 717). "In so doing, [the Court] examine(s) whether the purpose of the statute or rule can be adequately served in a manner other than by technical compliance with the statutory or rule language." *Id.* (citations omitted).

NRS 239.0107(1)(d)(2)'s language unequivocally mandates that a government entity asserting that a record (or even just part thereof) is confidential "shall" provide the bases for doing so—and specific authority—within five business days. This Court has repeatedly held that the use of "shall" "is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature." *See, e.g., State of Nev. Employees Ass'n, Inc. v. Daines*, 108 Nev. 15, 19, 824 P.2d 276, 278 (1992) (citation omitted). The Coroner, relying instead on inapplicable arguments about waiver (discussed below), ignores statute's mandatory language. The clear intent of the legislature is to facilitate access to records. This intent cannot be adequately served if compliance with NRS 239.0107(1)(d)(2) is

deemed optional because a requester would be left confused about whether records are properly withheld.

2. The Coroner's Interpretation Would Render NRS 239.0107 Meaningless.

Allowing a governmental entity to delay asserting claims of confidentiality would render the requirements of NRS 239.0107 meaningless, something this Court must avoid. *Pellegrini v. State*, 117 Nev. 860, 874, 34 P.3d 519, 528–29 (2001) (". . . if possible, we will avoid any interpretation that renders nugatory part of a statute") (citation omitted).[8] "As with most issues pertaining to statutory construction, our goal is to determine and implement the Legislature's intent." *Vill. League to Save Incline Assets, Inc. v. State ex rel. Bd. of Equalization*, 124 Nev. 1079, 1087, 194 P.3d 1254, 1260 (2008). The Legislature's intent is explicitly stated it in the NPRA: furthering democratic principles by ensuring access to records. NRS 239.001(1). Reading NRS 239.0107(1)(d)(2) in a manner that requires compliance is necessary to further this purpose. Otherwise, governmental entities would be free to ignore their legislatively-mandated obligation to respond to a request. Requesters would be in the dark about why records are being withheld and in the untenable

[8] Interpreting a statute, must "construe statutes to give meaning to all of their parts and language, and … will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation." *Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) (quotation omitted).

position of having to go to court to just find out why records are withheld.[9]

Moreover, because Nevada case law allows for the assertion of non-statutory confidentiality claims through the application of a balancing test it is even more important that the governmental entity explain its withholding with specificity. Otherwise, a requester is subject to the whims of governmental entities who often just cite "*Donrey*" or otherwise respond vaguely to requests, as the Coroner did here.

3. The Coroner's Statutory Arguments Fail.

The Coroner asserts a governmental entity can ignore NRS 239.0107 with impunity, contending that the only remedy available to a requester after a governmental entity shirks its response obligations is to file suit. (OB, p. 39.)[10] The Coroner relies on irrelevant authority regarding "waiver." *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007) (cited at OB, p. 38) addressed an attorney-client issue: whether a party "waived any conflict by waiting over two years into the litigation before filing its motion to disqualify counsel." The question here is whether the NPRA requires compliance.

---

[9] While government attorneys work closely with public information officers, most requesters do not have counsel.

[10] In fact, there is nothing restricting a requester from pursuing other claims or declaratory relief. *See* NRS 30.030; *see also* NRS 239.012 (contemplating that a party can seek damages for disclosure of records or a failure to disclose records unless the public officer or employee was acting in good faith).

Even assuming that the proper question at hand is whether the Coroner intentionally relinquished a known right,[11] the NPRA specifically instructs governmental entities to assert claims of confidentiality within five days. Thus, the Coroner intentionally relinquished a known right when it failed to do so. Whether the necessary consequence of a failure to comply with NRS 239.0107(1)(d)(2) should be labeled a "waiver" or "remedy" is irrelevant. The Coroner must obey the NPRA's mandates. Nowhere does the Coroner explain how its interpretation can be reconciled with the need to give meaning to NRS 239.0107(1)(d)(2), let alone the mandate to liberally construe the NPRA.

Relying on a misrepresentation of *PERS v. Reno Newspapers Inc*., 129 Nev. 833, 838, 313 P.3d 221, 224, n.2 (2013), the Coroner also contends that "[i]n the context of the NPRA, once information is deemed confidential, the Court does not need to reach waiver arguments." (OB, p. 37.) The Coroner has it backwards. Because this Court found that NRS 286.117 did ***not*** deem the records confidential, it did not address waiver.

Id. (emphasis added). NRS 239.0107(1)(d) must be interpreted to mean what it says: a governmental entity ***must provide notice of claims of confidentiality within five business days***.

/ / /

[11] NRS 239.0107 imposes obligations on the government; it does not grant rights.

4. Citing Non-Authority and Later "Clarifying" Does Not Satisfy NRS 239.01017.

The Coroner argues that citing AGO-82 and subsequently "clarifying" its position satisfies NRS 239.0107. This is irreconcilable with the NPRA's plain requirement to cite to specific authority within five business days. NRS 239.0107(1)(d)(2). The Coroner did not do so. Instead, it referenced an old AGO based on a now-obsolete version of the NPRA.[12]

a) AGOs Are Not Authority.

The Coroner failed to meet its obligation to provide specific legal ***authority*** because AGOs are not binding legal authority. *Redl v. Sec'y of State*, 120 Nev. 75, 80, 85 P.3d 797, 800 (2004) (citing *Univ. & Cmty. Coll. Sys. of Nevada v. DR Partners*, 117 Nev. 195, 203, 18 P.3d 1042, 1048 (2001)); *see also Goldman v. Bryan*, 106 Nev. 30, 42, 787 P.2d 372, 380 (1990); *Cannon v. Taylor*, 88 Nev. 89, 493 P.2d 1313 (1972).

b) The Opinion Is Obsolete.

The NPRA has been significantly amended since 1982. In 1993, the NPRA was amended to strengthen its provisions. The 1993 Amendments were intended to make access easier, and to correct governmental over-reliance on *Donrey*. (1

[12] Further, the contention that a non-attorney should have to root around to figure out what "AGO 82-12 (6-15-82)" means is not tenable. The Coroner has the responsibility to provide specific authority; a requester should not be forced to divine authority from cryptic citations.

RA001-066.) The amendments arose "because some years ago the Nevada Supreme Court decided a case called Bradshaw…I have yet to hear of a situation where somebody has asked for governmental records … and the AG's office or District Attorney has said, 'We balanced it and you won, you get these records.'' (1 RA008.) The bill was designed "so a signal is sent to the public employees who hold public records that it is their job to ensure the public has easy access to those documents which indeed are open to review by taxpayers." (*Id*.)

In 2007, the Legislature amended the NPRA again to facilitate access. State Senator Terry Care explained that he brought the bill to address "problems [that] persist" with governmental entities' responses to public records requests (1 RA073) by providing a framework for response obligations. (1 RA077 (SB 123 "codifies [that the] burden is on the government to demonstrate that confidentiality exists").) As this Court explained:

> In 2007, in order to better effectuate these purposes, the Legislature amended the NPRA to provide that its provisions must be liberally construed to maximize the public's right of access.

Gibbons, 127 Nev. at 878, 266 P.3d at 626. This Court has spelled out exactly how the 2007 Amendments changed the burden:

> Prior to the amendment of the Act, this court routinely employed a balancing test when a statute failed to unambiguously declare certain documents to be confidential…. This balancing test equally weighed the general policy in favor of open government against privacy or law enforcement policy justifications for nondisclosure… However, in light of the Legislature's declaration of the rules of construction of the Act—

> requiring the purpose of the Act to be construed liberally and any restriction to government documents to be construed narrowly—the balancing test under Bradshaw now requires a narrower interpretation of private or government interests promoting confidentiality or nondisclosure to be weighed against the liberal policy for an open and accessible government. . .

Haley, 126 Nev. at 217–18, 234 P.3d at 926. These Amendments strengthened the NPRA and changed its framework. Despite this, the Coroner asserts "[t]he legal analysis in AGO 82-12 is the best logical way to address autopsy reports in the context of the NPRA." (OB, p. 31.) Yet AGO 82-12's framework is obsolete.[13]

Rather than the applicable framework, the AGO is based on the personal, conclusory opinion that "disclosure would be contrary to a strong public policy" and "we can ascertain no public interest in disclosure sufficient to outweigh the public policy of confidentiality of medical records." Thus, AGO 82-12 is inapplicable here for two reasons. First, the NPRA now explicitly recognizes that a presumption in favor of access attaches to all public records and includes a legislative determination that public access into the workings of all government agencies and officials is inherently valuable because it is necessary to promote democracy. NRS 239.001(1). Second, as described above, in this case there is a great public interest in shining a light on the deaths of vulnerable children.

AGO 82-12 is inapplicable.

[13] The Coroner's reliance on the 1982 Attorney General opinion reflects bad faith and a willful disobedience to the current terms of the NPRA.

c) "Clarification" Does Not Satisfy NRS 239.0107(1)(d)(2).

The Coroner failed to cite specific authority within five business days and cannot rely on post hoc justifications for withholding. The Coroner's contention that it provided "clarification" of the five-day response satisfies its obligations fails for numerous reasons. First, as detailed above, NRS 239.0107 has no exceptions and does not allow for supplementation. A denial of a public records request is analogous to an adverse agency decision. In the administrative law context, courts may not accept post hoc rationalizations of an agency's decision. *Manin v. Nat'l Transp. Safety Bd*., 627 F.3d 1239, 1243 (D.C. Cir. 2011) (holding that "the law does not allow [a court] to affirm an agency decision on a ground other than that relied upon by the agency"). Second, the Coroner did not supplement within five days of learning the purported purpose.[14] Third, AGO 82-12 asserts that records are confidential based on an obsolete version of the balancing test and does not sufficiently provide notice of the bases for confidentiality.

Fourth, the Coroner argues that once it "figured out" the purpose it presumes is behind the request at issue, it cited to new authority. (OB, p. 38; pp. 17-18.) However, a record is either confidential or it isn't—its protected nature has nothing to do with the purpose for which it is sought. The Coroner knew when it initially

[14] *See* OB, p. 17; 2JA 228 (citing 5/8/18 email stating purpose); 1JA 48-50 (5/26/18 letter).

responded that the request sought information about juvenile autopsies; it is not possible that a request for all such autopsies over a five-year period (1 JA019) would not include autopsies the CDR team also reviewed.

What the Coroner casts as "clarification" really constitutes viewpoint discrimination. LVRJ reporters never sought records the CDR team created or tried to even discern which cases the CDR team considered.[15] While the reporter here discussed it to try to resolve logistical issues, the NPRA does not require a requester to disclose its purpose. Nothing in the NPRA allows a governmental entity to discriminate based on who a requester is or the requester's purpose. Instead, the interest in access is presumed. NRS 239.001(1); c*f. Bozeman v. Mack*, 744 So. 2d 34, 39 (La. Ct. App. 1998), *writ denied*, 99-0149 (La. March 19, 1999).

Allowing the government to restrict access based on the purpose of a request does not further the NPRA's express intent to foster democratic principles. Governmental entities and requesters are incentivized to avoid scrutiny; allowing governmental entities to deny public records requests based on the requester's purpose all but ensures that anyone who wishes to scrutinize the government will be denied the records. That the Coroner considered the purpose is antithetical to the First Amendment. *Cf. Citizens for a Better Lawnside, et al. v. Bryant, et al.* 2008 WL 2246491 (D. N.J. May 22, 2008) (verdict against a local government entity for

[15] Indeed, it is the Coroner that revealed this information. (1 JA049.)

violations of New Jersey's Open Public Records Act ***and the First Amendment*** where local government refused to provide meeting recordings in an effort to limit free speech).

B. THE DISTRICT COURT PROPERLY ORDERED RELEASE OF THE RECORDS.

1. The Coroner Did Not Establish That NRS 432B.407 Applies, Let Alone Deems Autopsies Confidential.

As discussed above, despite the requirements set forth in NRS 239.0113, the Coroner never presented any actual evidence the records at issue were in fact provided to any CDR. Thus, with regard to its contention that NRS 432B.407 applies, the Coroner necessarily failed to meet its burden set forth in NRS 239.0113 because it failed to demonstrate by a preponderance of the evidence that the records are subject to the statutory claims of confidentiality it asserts render the records secret.

Even assuming facts that the Coroner never established, its legal argument with regard to NRS 432B.407 fails. In an effort to flip the applicable burden on its head, the Coroner asserts that because a statute provides confidentiality for "information acquired by" and "the records of" a CDR (OB, pp. 23-24), that makes autopsy records confidential in all iterations and from all sources. Even assuming "information" means "records," the interpretation is an effort to read a blanket exception from a narrow statute governing the CDR. The interpretation does not

square with the plain meaning of NRS 432B.407, let alone the NPRA's mandate to apply restrictions on access narrowly.

The Coroner asserts NRS 432B.407 expressly and unequivocally renders child autopsy reports confidential and exempts them from the reach of the NPRA. (OB, pp. 22-26.) In fact, NRS 432B.407 is a narrow statute that: (1) provides the CDRs with access to record (NRS 432B.407(1)); and (2) provides that the work of the CDRs—both information they obtain and records they create—are confidential. NRS 432B.407(6).

While the Coroner is correct that the members of a CDR team must share records (NRS 432B.407(1)), there is no provision that grants CDRs exclusive control of the records received or render the records confidential in all forms. NRS 432B.407(6) just 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." In short, the work of, and information possessed by CDRs is secret. However, NRS 432B.407 does not state that any records provided to CDRs become confidential because they were provided to CDRs.

The Coroner's contorted interpretation of the statute and effort to read into it an exception to the NPRA would have absurd results. For example, in addition to

the fact that members of CDRs are required to share records, NRS 432B.407(4)) grants CDRs the ability to obtain subpoenas to access records. The Coroner's interpretation would mean that the records are confidential in the custody of the subpoena target. The Coroner's interpretation would also have the absurd result that, just because the CDRs obtain a copy of the record, it could never thereafter be admitted into evidence in a criminal or civil case. It would also somehow mean that records would be vested with confidentiality—even though NRS 432B.407 does not provide for any mechanism pursuant to which the custodians would even have notice that the record is confidential. As these examples illustrate, the Coroner's interpretation is not tenable. *Houtz v. State*, 111 Nev. 457, 461, 893 P.2d 355, 358 (1995) ("The interpretation of a statute should be reasonable and should avoid absurd results.") (citation omitted).

Case law regarding whether the attorney-client privilege applies to documents that were routed through an attorney is instructive. As the United States Court of Appeals for the Eighth Circuit has explained, "[i]f an unprivileged document exists before there exists an attorney-client relationship the mere delivery of the document to an attorney does not create a privilege." *Bouschor v. United States*, 316 F.2d 451, 457 (8th Cir. 1963) (quoting 8 Wigmore, Evidence, § 2292 (McNaughton Rev. 1961)); *see also SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 478 (E.D. Pa. 2005) ("[A]ttorney-client 'privilege does not shield documents merely

because they were transferred to or routed through an attorney'") (quoting *Resolution Trust Corp. v. Diamond*, 773 F.Supp. 597, 600 (S.D.N.Y.1991)). "What would otherwise be routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is 'copied in' on correspondence or memoranda." *Andritz Sprout–Bauer, Inc. v. Beazer E., Inc.*, 174 F.R.D. 609, 633 (M.D.Pa.1997) (citing *U.S. Postal Serv. v. Phelps Dodge Refining Corp*., 852 F.Supp. 156, 163–64 (E.D.N.Y.1994)).

Even if this were not an NPRA case, NRS 432B.407 must be read consistently with its plain terms. Under those terms, *a CDR's records*—the records it creates and the information it acquires—are confidential. This is an NPRA case. In evaluating whether NRS 432B.407 creates a wholesale carve-out to access, this Court must read the statute (any exception to access) narrowly. As the Coroner recognizes (OB, pp. 22-23), to establish that a record is confidential by law, there must be an express, unequivocal expression of that intent. No such expression is in NRS 432B.407.

That NRS 432B.407 should not be read as a carve-out to the NPRA for child death autopsies is especially clear because NRS 432B.407 was enacted after the NPRA. A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change. *See Green v. Bock Laundry Mach. Co*., 490 U.S. 504, 521 (1989); *Anderson v. Pacific Coast S.S. Co.*, 225 U.S.

187, 199 (1912); *cf., State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 295, 995 P.2d 482, 486 (2000) ("[W]hen the legislature enacts a statute, this court presumes that it does so with full knowledge of existing statutes relating to the same subject") (quotation omitted). The Coroner bears the burden of demonstrating the Legislature, in enacting § 432B.407, intended the confidentiality of "information obtained" provision in subsection (6) to supersede the presumption of access in the NPRA. It cannot do so.

Moreover, the Coroner's interpretation is not consistent with the mandate to "interpret a rule or statute in harmony with other rules or statutes." *State Farm Mut. Auto. Ins. Co.*, 116 Nev. at 295, 995 P.2d at 486 (citations omitted); *see also City Council of City of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 892, 784 P.2d 974, 978 (1989). Interpreting NRS 432B.407 as mandating that public records such as autopsy reports must permanently confidential does not harmonize with the purpose or plain language of the NPRA. All public records are presumptively open to public review and inspection; 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." NRS 239.001(3).

Even assuming a record is confidential while the CDR team is evaluating it, as the district court properly recognized (2 JA438-39, ¶ 42), such a claim is not permanent. *Cf. State ex rel. Cincinnati Enquirer v. Pike County Coroner's Office*,

153 Ohio St. 3d 63, 78 (2017) ("certain information contained in autopsy reports falls under one of the narrow exceptions to public disclosure for a temporary period"). Even if the reports may also have been obtained and used by CDRs, the confidentiality provision in NRS 432B.407(6) should not apply to the records in other iterations—especially once the CDR team is done with its work.

Further, nothing in NRS 432B.407's plain text indicates its confidentiality provision is intended to apply to autopsy records in perpetuity. The purpose of organizing CDRs is to review and assess selected cases of deaths of children to analyze those cases, "[m]ake recommendations for improvements to laws, policies, and practice; [s]upport the safety of children; and [p]revent future deaths of children." NRS 432B.403(1)-(6). A CDR can access law enforcement investigative information, autopsy records, medical or mental health records pertaining to the child, and records pertaining to social and rehabilitative services provided to the child or the child's family. NRS 432B.407(1)(a)-(d). The CDRs may then use the information they obtain to prepare a report and recommendations. NRS 432B.408(1). If the Legislature had intended for records obtained by CDRs to remain permanently confidential, it would have explicitly stated so in NRS 432B.407(6).

In *PERS*, this Court explicitly rejected the very type of argument the Coroner is making in this case to resist disclosure. There, the Reno Gazette-Journal sent a request to the Public Employees' Retirement System of Nevada ("PERS") "seeking

the following pension information: the names of all individuals who are collecting pensions, the names of their government employers, their salaries, their hire and retirement dates, and the amounts of their pension payments." *PERS*, 129 Nev. at 824, 313 P.3d at 222. "The RGJ's request originated as part of an investigation concerning government expenditures and the public cost of retired government employee pensions." *Id.*

To avoid production under the NPRA, PERS argued that "all information contained in an individual's file" was protected by confidentiality pursuant to a statute which declared employee and retired employee files confidential. 129 Nev. at 837, 313 P.3d at 224. This Court held the applicable statute's "scope of confidentiality does not extend to all information by virtue of it being contained in individuals' files." 129 Nev. at 838, 313 P.3d at 224. Therefore, "[w]here information is contained in a medium separate from individuals' files, including administrative reports generated from data contained in individuals' files, information in such reports or other media is not confidential merely because the same information is also contained in individuals' files." *Id.* (footnote omitted).

Likewise, here, autopsy reports do not become confidential forever and in all forms because they are also acquired and reviewed by a CDR team. They are maintained separately from CDR files, and the mere fact that a CDR team reviewed

an autopsy does not render it confidential.[16]

2. AB57 Does Not Support the Coroner's Position.

a) AB 57 Does Not Render the Records Confidential.

AB57 modified NRS 259.054 to: (1) require a coroner to make reasonable effort to locate the next-of-kin responsible for authorizing burial or cremation, and (2) to provide that a coroner may provide certain other next of kin notification regarding of the fact of death and provide a copy of a report at the same time. (1 JA236-237.) Nowhere in the statute does it state that autopsy reports held by a coroner are confidential.

Although the Coroner belabors statutory construction (OB, pp. 34-35), it ignores that the NPRA starts from the presumption that all governmental records are open to the public unless otherwise declared to be confidential. NRS 239.010(1). Here, nothing in NRS 259.045 "expressly and unequivocally" prohibits disclosure of autopsy reports. Thus, it does not provide a basis for the Coroner's Office to withhold the requested reports. *See Reno Newspapers v. Sheriff* (*Haley)*, 126 Nev.

[16] The Coroner's reliance on a "related" federal statute to justify withholding is even more contorted. It asserts that disclosure would jeopardize federal grant eligibility requirements under the Child Abuse and Prevention Treatment Act of 1996 ("CAPTA"), 42 U.S.C. § 5106a. (OB, p. 24.) Nothing in CAPTA makes autopsy records confidential. Moreover, 42 U.S.C. § 5106a(c)(4)(B)(i)(I) specifically provides that members of child death panels may make public information related to the investigation of a child death when "authorized by State statute." The NPRA not only authorizes disclosure of public records such as autopsy reports, it *requires* disclosure.

211, 214–15, 234 P.3d 922, 924–25 (2010).

Rather than pointing to any explicit declaration of confidentiality, the Coroner tries to flip the NPRA on its head and argues that autopsy reports are confidential because the Legislature "could have stated that Autopsy Reports were open to the public and not confidential, but did not do that." (OB, pp. 35-36.) The Coroner also relies on the idea that, where a statute "specifically includes or enumerates particular things, they must be interpreted to mean that all other things were intended to be excluded." (OB, p.34 (citing, *e.g., Ramsey v. City of N. Las Vegas*, 392 P.3d 614, 619 (Nev. 2017).) This argument is inapplicable in an NPRA case, which instead requires an express and unequivocal expression of an intent to make a record confidential.[17] Moreover, the provision is not a complete enumeration of whom a coroner may (or must) provide copies of reports to. For example, it does not mention CDRs or law enforcement. NRS 259.045(2) instead simply states:

> The coroner may notify the parents, guardians, adult children or custodians of a decedent of the fact of the decedent's death and provide a copy of the report of the coroner to the parents, guardians, adult children or custodians regardless of whether they are the next of kin authorized to order the burial or cremation of the human remains of the decedent pursuant to NRS 451.024.

Thus, the mention of providing a copy of the report is incidental to, and tied to, the expanded statutory authority to notify additional next-of-kin. NRS 259.045 is not an

[17] The Coroner recognizes this binding precedent in its statement regarding the NPRA but doesn't apply it.

exhaustive list of whom the Coroner may provide reports to, let alone a clear expression of intent to make autopsy reports confidential.

b) AB57's Irrelevant Legislative History Does Not Support the Coroner's Position.

Where a statute is clear, its legislative history is not even relevant to interpreting that statute—let alone other statutes. *J.E. Dunn Nw., Inc. v. Corus Constr. Venture, LLC*, 127 Nev. 72, 79, 249 P.3d 501, 505 (2011).

The legislative testimony surrounding the eventual passage of AB57 does not evidence any intent to restrict public access to autopsy reports. It demonstrates that the intent motivating AB57 was to "require[] . . . coroners to make reasonable efforts to notify the next of kin of the decedent's death and [expand] who is authorized to order the burial or cremation of the decedent" and "authorize[] a coroner to notify a decedent's loved ones of the death of the decedent and provide a copy of the coroner's report to those individuals." (JA 259.) The statements in support of AB57 largely focused on next-of-kin notifications in "situations in which the death [of a person] is the result of family violence." (2 JA259-260; *see also generally* 2 JA293-309).

The Legislature never considered whether autopsy reports should be public records. Just because AB57 allows for the Coroner to notify certain next-of-kin of the fact of a death—and provide a copy of the autopsy report at the same time—that

has no bearing on whether autopsy reports are subject to the NPRA.[18] Thus, not only is the legislative history of AB57 not properly before this Court, the Coroner's efforts to read any intent to restrict access to records reflects a reliance on a conjecture about legislative intent, which can never be used to support a finding that a public record is a secret.

The Declaration undercuts one of the Coroner's key legal contentions in this appeal—that the amendments to NRS 259.045 made by AB57 were intended to "limit the class of individuals to whom the Coroner can release an autopsy report (OB, p. 32) :

> I am very familiar with AB57 … AB57 made changes to NRS Chapter 259 that require a coroner to notify the next of kin with the right to the body of the decedent under NRS 451.024 in that it ***provided that a coroner may also notify certain other next of kin*** consisting of parents, guardians, adult children or custodians as defined in NRS 432B.060. Additionally, that bill provided that ***a copy of the coroner's report may be released to certain individuals*** (parents, adult children, guardian or custodian as defined in NRS 43213.060) ***regardless of whether they have the right to the body under NRS 451.024***.

(1JA230-31 (emphasis added).) As this reflects and as further discussed below, AB57 was intended to ***expand*** a coroner's ability to disseminate notice and

[18] In its contortions, the Coroner even suggests the lack of testimony from the Nevada Press Association and the LVRJ supports its position. (OB, p. 33.) Similarly, without any evidentiary support, the Coroner contends that the intent was to make the "policy" of the coroner law, and that this somehow supports is position with regard to public records (OB p. 34; *see also* p. 45 (suggesting, without any support that the intent of AB 57 was to protect privacy interests).

information about a person's death, not to make any records confidential.

c) Language from Other States Cannot be Grafted Into AB57.

The Coroner improperly attempts to buttress its statutory arguments regarding AB57 with other states' statutes. In fact, that other states' statutes explicitly provide for confidentiality undermines the Coroner's argument that AB57, devoid of such language, should be read as also doing so.

The other statutes the Coroner relies on (OB p. 36) expressly render autopsy reports "confidential" or "not public records." Iowa Code Ann. § 22.7(41.5) (expressly define "autopsy reports" as confidential) (West 2018) (cited in OB, p. 36).Mass. Gen. Laws Ann. ch. 38, § 2 (West 2018) ("…autopsy reports,… shall not be deemed to be public records…"); N.H. Rev. Stat. Ann. § 611-B:21 (West 2018) ("…autopsy reports, investigative reports, and supporting documentation are confidential and, as such, are exempt from the provisions of [New Hampshire's public records / "right to know" law."); N.D. Cent. Code Ann. § 23-01-05.5 (2) (West 2018) ("[an autopsy report" is "confidential .." [and listing exceptions]); Or. Rev. Stat. Ann. § 192.345(36) (West 2018) (defining "autopsy report " as exempt from disclosure."); Utah Code Ann. § 26-4-17(7) (West 2018) ("the medical examiner may not disclose any part of a medical examiner record"); Wash. Rev.

Code Ann. § 68.50.105(1) (West 2018) ("Reports and records of autopsies or postmortems shall be confidential…").[19]

The Nevada Legislature could have expressly stated that autopsy reports are confidential and exempt. It did not do so, and thus the Coroner has not established that the records are confidential by law. Moreover, that some states' legislatures have made a decision to make autopsies secret (for unknown reasons), does not make that the policy of Nevada. It is noteworthy that, just as some states have decided to explicitly exempt public records from disclosure, others have taken the opposite approach. *See, e.g.,* Ala. Code § 36-18-2; La. Rev. Stat. Ann. § 44:19(A)(3); N.C. Gen. Stat. Ann. § 132-1.8; Ohio Rev. Code § 313.10; Tenn. Code. Ann. § 38-7-110; Tex. Code Crim. Pro. Ann. § 49.25(11)(a).

d) Other States' Case Law Does Not Support the Coroner's Interpretation.

The Coroner's reliance on case law from states with different public records laws to make its case is misguided. *Reid v. Pierce County*, 136 Wash. 2d 195 (Wash. 1998) did not address release of autopsy reports but "whether Plaintiffs may maintain a cause of action . . . for appropriating and displaying to others photographs

[19] While the Coroner cited Okla. Stat. Ann. tit. 63, § 949 to support its interpretation of AB 57, Oklahoma's statute does not in fact render autopsy reports confidential, although a recent change in the law does *delay* public access. *See* https://newsok.com/article/5578392/public-autopsy-records-delayed-under-new-oklahoma-law (last accessed 8/13/18).

of corpses." *Id.* at 198. *Galvin v. Freedom of Info. Com'n*, 201 Conn. 448, 460 (Conn. 1986), relied on an express statute limiting disclosure of autopsy reports. [20] *Larry S. Baker, P.C. v. City of Westland*, 627 N.W.2d 27, 29 (Mich. 2001), applied an explicit privacy exemption. The Michigan Court also predicated its decision on the fact that, in that specific case, what it deemed to be a small privacy interest outweighed a "nonexistent public interest in disclosure in this case." *Id.* at 33. Thus, the case is distinguishable for two reasons—the general presumption in favor of access in Nevada and the specific reasons why disclosure is in the public interest here.

e) AB57 Should Not Be Applied Retroactively.

Although it failed to raise this argument below, the Coroner asserts that AB57 "should apply retroactively" to this case. (OB, p.32-31.) This Court should decline to consider this argument. *See, e.g.*, *Dermody v. City of Ren*o, 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997) (citation omitted); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 50, (1983) (holding that "courts may not accept appellate counsel's post hoc rationalizations for agency action") (citation omitted). At the time the Coroner cited AB57, it was *pending legislation*—not law. (*See* 1JA034.) Allowing pending legislation to justify

[20] Conn. Gen. Stat. Ann. § 1-200 (West 2018), is devoid of the legislative mandates contained in the NPRA.

withholding would create a perverse incentive for governmental entities to delay compliance with requests until they can come up with new bases for withholding post-hoc. Further, a pending bill is not authority within the meaning of NRS 239.0107(1)(d).[21]

3. The Records Are Not Protected Medical Records.

The Coroner assumes, without establishing (let alone by a preponderance of the evidence), that "[t]he requested juvenile autopsy reports contain confidential personal health information" and that "disclosure of the autopsy reports violates individuals' privacy rights." (OB, p. 26.)

However, the Coroner is not covered by provisions governing medical care to live patients. Based on the Coroner's own description of the duties and purposes of the Clark County Coroner (OB, pp. 11-12), the Coroner is not a medical provider. Rather, the Coroner exists to "investigate deaths within Clark County that are violent, suspicious, unexpected, or unnatural to identify and report on the cause and

[21] The cases the Coroner cites are distinguishable. *In re Estate of Thomas*, 116 Nev. 492, 495-496, 998 P.2d 560, 562 (2000) (cited at OB, p. 32) noted that a statute would not apply retroactively without evidence that the legislature intended it to apply retrospectively. The Coroner never presented evidence that the legislature intended the changes to NRS 259.045 to apply retroactively. *Compare Emps. Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 157-58,179 P.3d 542, 555 (2008) (cited at OB, p. 32). Finally, the language the Coroner's Office cites to in *Metz v. Metz*, 120 Nev. 786, 792, 101 P.3d 779, 783-84 (2004) (*see* OB, p. 32-33), is dicta; the Court addressed federal preemption, not retroactivity.

manner of death." (OB, p.11; *see also* OB p.12 (describing the role of medical examiners).) The intent of conducting an autopsy is to determine if a person's death was "homicide, suicide, natural, accident, [or] undetermined." (OB, p. 12.) The dead cannot receive health care and the Coroner is not a "provider of health care." For the same reason, autopsy records are not "medical records." While determining a cause of death involves considering health information, an autopsy does not constitute providing health care or treating a patient.

The Coroner admitted it "is not a covered entity under HIPAA or a provider of health care." (1JA208.)[22] While the Coroner now argues the district court erred in making this finding "even though the Coroner was performing his official duties" (OB, p. 26), it is estopped from doing so. *See In re Harrison Living Trust*, 121 Nev. 217, 223, 112 P.3d 1058, 1061-62 (2005). That the Coroner was performing his official duties makes the records public, not exempt. *Las Vegas Metropolitan Police Department v. Blackjack Bonding, Inc.*, 131 Nev. Adv. Op. 80, 343 P.3d 608, 613

[22] It also now admits that providing medical records to a coroner divests them of their protection under HIPAA (OB, p. 27). The Coroner instead argues that because he was fulfilling his duties, the "confidential nature of the personal health information was not lost." (*Id*.) To support this argument, the Coroner cites an inapposite case regarding the common interest privilege. However, unlike the common interest privilege pursuant to which each attorney's work is already privileged, the Coroner is arguing that because medical records it receives are privileged, its reports are privileged. Such a leap of logic is the opposite of construing exceptions to access narrowly and construing any privilege narrowly, as is required. NRS 239.001(2)-(3).

(2015) (records pertaining to "the provision of a public service" are public records).

Nor are autopsy records protected under Nevada law:[23]

> "Health care record" means any reports, notes orders photographs X-rays or other recorded data or information whether maintained in written, electronic or other form which is received or produced ***by a provider of health care***, or any person employed by a provider of health care, and ***contains information relating to the medical history examination, diagnosis or treatment of the patient***.

NRS 629.021 (emphasis added); *see also* NRS 629.031 (listing who qualifies as a "provider of health care"). The reports are not protected.

4. Other Statutes Do Not Make Autopsies Confidential.

Consistent with its other efforts to bootstrap and imagine exceptions to access, the Coroner contends that because some juvenile records are protected from disclosure, juvenile autopsy reports must also be. (*See, e.g.,* OB p. 25.) This is entirely inconsistent with the mandate to read restrictions on access narrowly. NRS 239.001(3). It is irrelevant if DFS records (*id.*, n.5) and portions of juvenile justice records (OB, p. 28) are protected.[24]

---

[23] Although the district court did not explicitly reference NRS 629.021 in the hearing or its order, it found that autopsy reports were not medical records (2 JA407 (HIPAA "has no application to the coroner's office or the coroner's records because they are not medical records").

[24] The statute cited supports disclosure here, as it provides that "[d]ata or information concerning reports and investigations thereof made pursuant to this chapter ***must be made available pursuant to this section to any member of the general public upon request*** if the child who is the subject of a report of abuse or neglect suffered a fatality or near fatality. Any such data and information which is known must be made available not later than 48 hours after a fatality and not later than 5 business days

Likewise, NRS 440.170, NAC 440.021(1)(b), and CC 2.120 (OB, pp. 28-29) do not deem autopsy reports confidential. Even accepting its description of them, the Coroner's attempt to rely on these unrelated provisions "exceeds the plain meaning of [those statutes], which must be narrowly construed…." *PERS*, 129 Nev. at 838, 313 P.3d at 224. For example, while the Coroner argues that "[l]ogically, since certain information in a death certificate is not open to the public, neither should an autopsy report, which contains similar confidential information" (OB, p. 29), such leaps are not permissible under the NPRA. *PERS v. Reno Newspapers Inc.*, 129 Nev. 833, 838, 313 P.3d 221, 224 (2013) (rejecting an interpretation of the privacy provision of a statute which exceeded its plain meaning).

5. Other Jurisdictions' Case Law Overwhelmingly Supports Disclosure.

To support its contention that autopsy reports are exempt from disclosure, the Coroner relies on two cases holding that autopsy reports are private. (OB, p. 28 (citing *Globe Newspaper Co. v. Chief Medical Exam'r*, 404 Mass 132 (Mass. 1989)[25] and *Perry v. Bullock*, 409 S.C. 137 (S.C. 2014).) These cases stand in opposition to a large body of case law holding that autopsy reports are public. In *Charles v. Office*

after a near fatality." NRS 432B.175(1) (emphasis added).

[25] As discussed above, unlike Nevada, Massachusetts deems autopsy reports confidential. Mass. Gen. Laws Ann. ch. 38, § 2 (West 2018) ("…autopsy reports, which shall not be deemed to be public records…").

of the Armed Forces Med. Exam'r, 935 F. Supp. 2d 86, 99–100 (D.D.C. 2013), the court found that final autopsy reports other records showing whether any service member's death may have resulted from bullet wounds in torso areas that were usually covered by armor s are not exempt from disclosure under the federal Freedom of Information Act (FOIA). This finding was made despite FOIA's express exception (Exemption 6) for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.*

In *Bozeman v. Mack*, 744 So. 2d 34, 37 97-2152 (La. App. 1 Cir. 1998), the court held that an "autopsy report is a public record when it is prepared by a coroner in his public capacity as coroner." *See also Everett v. S. Transplant Serv., Inc.*, 709 So.2d 764, 97–2992 (Feb. 20, 1998) (coroner's records were public records); *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 "public records"); *Schoeneweis v. Hamner*, 223 Ariz. 169, 174, 221 P.3d 48, 53 (Ct. App. 2009) (autopsy report is a public record).

Likewise, in *State ex rel. Findlay Publishing Co. v. Schroeder*, 76 Ohio. St. 3d 580, 583, 669 N.E.2d 835, 839 (1996), the court held that a county coroner's records in which the cause of death was suicide were "unquestionably public records." The Colorado Supreme Court has also held 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." *Denver Pub. Co. v. Dreyfus*, 184 Colo. 288, 295, 520 P.2d 104, 108 (Colo. 1974) (en banc); *accord Freedom Newspapers, Inc. v. Bowerman*, 739 P.2d 881, 883 (Colo. App. 1987).

In *Star Pub. Co. v. Parks*, 875 P.2d 837 (Az. Ct. App. 1993), the court held that autopsy records are public records and a county could not delay producing copies to allow time to notify relatives of the request so they could object to disclosure. *See also Hearst Television, Inc. v. Norris*, 617 Pa. 602, 619, 54 A.3d 23, 33–34 (Pa. 2012) (manner of death records prepared by county coroner were 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 (N.J. App. Div. 1990) (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 (Wisc. Ct. App. 1988) (autopsy reports are public records subject to public inspection unless they are implicated in a "crime detection effort".) *cf. People v. Leach*, 2012 IL 111534 (Ill. 2013), ¶ 71, 980 N.E.2d 570, 582 (autopsy record is an admissible business record and noting that "the deceased person brought to the medical examiner's office for determination of cause of death is not a patient and the medical examiner, although she is trained as a physician, is not the deceased

person's doctor"); *Sandles v. State*, 857 S.W.2d 932, 936 (Tex. App. 1993) ("autopsy report was admissible both as a business record and a public record").

6. AGO 82-12's "Underpinnings" Do Not Justify Nondisclosure.

As detailed above, not only did the district court properly hold that AGO 82-12 was not authority, it is obsolete. The Coroner appears to suggest that even though it failed to establish by a preponderance of the evidence that any claim discussed in AGO 82-12 clearly outweighed access pursuant to NRS 239.0113 in litigation, the district court should have done the Coroner's work for it.[26] This is not so, and the arguments in AGO 82-12 fail.

The Coroner first points to AGO 82-12's unsupported factual and legal "conclusion" (based on hearsay, and no evidence) that "Nevada statutory law and laws of other jurisdictions adopt policies to protect the disclosure of autopsy reports." AGO 82-12 does extrapolate from the fact that coroners themselves "have consistently held that the medical information in their files, including autopsy reports, to be of a confidential nature with restricted release." (OB, p. 30.) AGO 82-

[26] While the district court found that the Coroner had waived to raise issues not timely raised and that AGOs are not legal authority, it addressed the Coroner's arguments. *see* 2 JA404-07 (court's discussion of coroner's arguments); 2 JA407 (HIPAA "has no application to the coroner's office or the coroner's records because they are not medical records").

12, 1982 WL 181273 at *3 (June 15, 1982). However, a governmental entity saying the records are confidential does not make it so; they must meet their burden.

Second, the Coroner points to AGO 82-12's extrapolation from the existence of a "Coroner Register" that "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." (OB, pp. 30-31 (quoting and citing AGO 82-12).) Not only is there no support for "the apparent intent," we cannot presume that, because some records are open to the public, there is any intent to make other records secret. Instead, as detailed above, *all* records are presumed to be open to the public.[27] A governmental entity cannot meet its burden under the modern NPRA with such conclusory inferences.[28]

Third, the Coroner points to the conclusion in AGO 82-12. As discussed above, particularly in light of the current state of the law, the Coroner cannot blithely argue that "the legal analysis in AGO 82-12 is the best logical way to address autopsy reports" (OB p. 31) and expect this Court to simply presume that autopsy reports are "not open to public inspection." The Coroner was required to prove that the records should be withheld by a preponderance of the evidence in district court.

---

[27] Indeed, allowing the government to foreclose access to primary source material and only provide access to official reports would not promote transparency and democratic principles. NRS 239.001(1).

[28] Moreover, it is the current NPRA burden that applies not the vague, conclusory sort of "balancing" reflected in AGO 82-12.

Fourth, the Coroner makes much of this Court's discussion of an AGO in *Donrey*. However, the *Donrey* Court rejected the AGO, finding that policy arguments did not outweigh disclosure. *Donrey*, 106 Nev. at 634, 798.

7. The Coroner Did Not Overcome the Heavy Presumption In Favor of Access.

None of the statutes the Coroner relies on expressly renders autopsy reports confidential.[29] Accordingly, even assuming it is entitled to rely on untimely claims of confidentiality, the Coroner was required to establish in litigation that some claim of confidentiality applies and that the asserted interest in nondisclosure clearly outweighs the strong presumption in favor of public access— by a preponderance of the evidence. *See, e.g.*, *Gibbons*, 127 Nev. at 880, 266 P.3d at 628.

The Coroner's generalized arguments fail to establish by a preponderance of the evidence that any countervailing interest is at stake. The Coroner failed to present any evidence that privacy interests are implicated, instead relying on its own self-serving conclusion. The district court thus properly found that that the Coroner had not "established by a preponderance of the evidence that any interest in nondisclosure outweighs the strong presumption in favor of access." (2 JA436). In

[29] Its argument that AB 57 or NRS 432B.407 exempt the records from disclosure notwithstanding, the Coroner concedes that autopsy records are public records. (OB, p. 31 (opining that the Attorney General's legal analysis applies and "autopsy records are public records, but not open to inspection").)

Star Pub. Co. v. Parks, 875 P.2d at 838 (discussed above), an Arizona court rejected a parallel contention regarding privacy interests due to a failure to support it in the record. The court found that the government "cannot keep all autopsy reports secret for up to an extra month on the proposition that some few reports might be legitimately kept secret" because the argument was too speculative. *Id.* It explained:

> If disclosure is to be avoided, the public entity must point to specific risks with respect to a specific disclosure; it is insufficient to hypothesize cases where secrecy might prevail and then contend that the hypothetical controls all cases. There being no record why privacy considerations mandated retention of the records in this case, the trial court properly ordered production.

Id. Just like Arizona disclosure law, the NPRA law does not permit speculation and non-particularized hypothetical concerns to support non-disclosure. *See, e.g*, *Gibbons*, 127 Nev. at 880, 266 P.3d at 628 ("our case law stresses that the state entity cannot meet [its] burden with a non-particularized showing, or by expressing hypothetical concerns.") (citing *Reno Newspapers v. Sheriff*, 126 Nev. 121, 127-28, 234 P.3d 922, 927 (2010) and *DR Partners*, 116 Nev. at 627-28, 6 P.3d at 472-73).

Thus, even where sensitive information is at issue, this Court has repeatedly required disclosure. In *PERS*, this Court held:

> Because PERS failed to present evidence to support its position that disclosure of the requested information would actually cause harm to retired employees or even increase the risk of harm, the record indicates that their concerns were merely hypothetical and speculative. Therefore, because the government's interests in nondisclosure in this instance do not clearly outweigh the public's presumed right to access,

> we conclude that the district court did not err in balancing the interests involved in favor of disclosure.

PERS., 129 Nev. at 839, 313 P.3d at 225. Thus, this Court ordered protection of records related to retirees' pension files.

In *Reno Newspapers v. Sheriff (Haley)*, in considering whether records pertaining to individual concealed-carry permits should be presented, this Court found:

> … Haley has provided no evidence to support his argument that access to records relating to concealed firearms permits would increase crime or subject a permit holder or the public to an unreasonable risk of harm. Therefore, because Haley bases his argument on the supposition that access would increase the vulnerability of permit holders, we conclude that Haley has not met his burden of proof to show that the government interest clearly outweighs the public's right to access. And because Haley has not met his burden of proof, a narrow reading of NRS 202.3662 mandates that we favor public access over confidentiality.

Haley, 126 Nev. at 219, 234 P.3d at 927. Thus, while the *Haley* court considered privacy and safety arguments," it rejected them due to the resisting party's failure to present evidence. *Id.*

Here, just like in *PERS* and *Haley*, the Coroner presented no evidence to support its contention that autopsy records are private. It did not even endeavor to submit a sample report to the Court *in camera* to show private information was included. Nor did it present any information showing that any survivor of any decedent objected to production.

/ / /

Further, even ignoring the Coroner's abject failure to meet its evidentiary burden and assuming *arguendo* that the records implicate privacy rights, the Coroner never bothered to explain how such an interest outweighs the presumption in favor of access present in all cases, let alone the particular reasons transparency is so important in this case.[30] Just like AGO 82-12's conclusion, the Coroner's self-serving, conclusory arguments that the reports implicate privacy interests and that that they outweigh the presumption in favor of access, are not sufficient.

C. THE CORONER IS NOT ENTITLED TO FEES OR COSTS NOT EXPRESSLY PROVIDED FOR IN THE NPRA.

The plain language of the NPRA delineates the permissible fees an entity may charge for production of public records. Nonetheless, the Coroner contends that this Court should read the word "copy" out of the extraordinary use provision (OB, p. 41) and read into the NPRA an unwritten entitlement to charge an hourly fee for redacting. That interpretation is at odds with what the NPRA says, the express

[30] Even in the FOIA context, extremely sensitive records have been ordered produced when disclosure promotes the public interest. *See, e.g., Blethen Maine Newspapers, Inc. v. State*, 2005 ME 56, 33 Media L. Rep. 1616 (2005) (ordering production of investigatory records held by a government prosecutor regarding priest sex abuse). Moreover, even records documenting a death itself—such as police videos of officer-involved shooting—are routinely produced and help further accountability and transparency. *See, e.g.,*:
https://www.youtube.com/watch?v=iZ4khQyvpRs (video of a 7/11/18 officer involved shooting released by the LVMPD and published on its YouTube channel on 7/16/18) (last accessed 8/13/18).

purposes of the NPRA as stated in the NPRA itself, and the Legislature's express directives regarding interpretation.

1. The NPRA Does Not Allow for Hourly Fees and the Costs the Government Can Levy Are Limited.

NRS 239.052 allows the government to charge a fee for providing a copy, but that fee cannot exceed the "actual cost" of doing so. "Actual cost" is defined as follows:

> "Actual cost" means the direct cost related to the reproduction of a public record. The term does not include a cost that a governmental entity incurs regardless of whether or not a person requests a copy of a particular public record.

NRS 239.005(1). Thus, it is copying costs (i.e. the "Xeroxing" cost incurred) that are permitted. NRS 239.005(1) also reflects a basic truth: it is part of the government's job to facilitate access under the NPRA.

NRS 239.055 also allows for an additional fee when "a request for a copy of a public record would require a governmental entity to make extraordinary use of its personnel or technological resources." NRS 239.055(1). In such an event, to provide a copy, "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." *Id.* As a further limitation, the Legislature also provided:

> 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.

Id. Thus, the NPRA's fee provisions only allow a government to charge: (1) for copies; (2) for the actual costs of reproduction incurred to make a copy; and (3) *if* extraordinary use of technological or personnel resources is implicated, a fee that: (a) is reasonable; (b) based on the actual costs incurred; and (c) does not exceed 50 cents per page.

These are the only fees provided for, other than fees specific to inapplicable matters *See* NRS 239.053 (transcripts of administrative proceedings); NRS 230.054 (geographic information systems). While these other fee provisions are inapplicable, their inclusion reflects that the Legislature intended to comprehensively address fees, and an entitlement to other fees and costs cannot be read into the NPRA. Moreover, a review of the fee provisions makes clear the costs that a governmental entity can recoup are costs associated with *providing information* to a requester—not withholding it.

Limiting the extraordinary use fee to 50 cents per page for copies would not render NRS 239.055 meaningless; it just places clear restrictions on when such a fee—which is only supposed to be applied in "extraordinary" circumstances—can be charged. In short, just because the NPRA does not provide for the fees the Coroner thinks is it entitled to, that does not mean that the NPRA is ambiguous. Thus, the legislative history is irrelevant. *State v. Lucero,* 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) ("The starting point for determining legislative intent is the

statute's plain meaning; when a statute "is clear on its face, a court cannot go beyond the statute in determining legislative intent.") (citation is omitted). It is especially inappropriate to read restrictions on access—which fees are—where the Legislature has seen fit to make the NPRA's purpose and mandates regarding statutory interpretation explicit in the text of the statute.

The Coroner cites to a single sentence from this Court's opinion in *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608 (2015) to support its assertion that it can charge an hourly rate for redactions. (OB, p. 42.) Its reliance is misguided. In *Blacjack*, the petitioners requested all call record details from telephones used by inmates at the Clark County Detention Center from the Las Vegas Metropolitan Police Department. *Id.* at 611. Those services were provided by CenturyLink, a private telecommunications provider. *Id.* at 610.

This Court found that "actual costs" (*see* NRS 239.055) were properly awarded as costs pursuant to NRS 239.052(1) (allowing for actual costs associated with copies):

> The district court's requirement that Blackjack pay LVMPD's costs of production is consistent with NRS 239.052(1) (2011), which provides that "a governmental entity may charge a fee for providing a copy of a public record ... [that shall] not exceed the actual cost to the governmental entity" of producing the record.

Id., at 614, fn. 5. The Nevada Supreme Court upheld the district court's decision in which it held: "Petitioners shall be responsible for all costs associated with the

production [of a report of the requsted telephone calls] charged by Century Link [sic] to Respondents, if any." (3 RA575.) Thus, the district court only ordered the petitioners to pay any costs incurred by the LVMPD in getting copies from CenturyLink, and there was evidence of the costs Century Link charged the LVMPD. Thus, *Blackjack* does not help the Coroner and cannot be relied on for matters that were not even before the Court.

2. Charging for a Privilege Review Is Inconsistent with the NPRA's Purpose and Mandates.

The Coroner complains the district court's order "requires the Coroner to sift through documents and redact confidential information." (OB, p. 41.) Not only does the Coroner impermissibly ask this Court to rewrite a statute to its liking, such arguments ignore the presumed interest in access (and the fact that reporting on public records assists in promoting transparency in furtherance of NRS 239.001(1)).

First, the NPRA mandates that a governmental entity must assert specific claims of privilege within five business days (NRS 239.0107(1)(d)), which negates any argument that Coroner can simply demand money for its employees go through records and conjure up reasons to withhold them.

Second, requiring a requester to pay for a privilege review is at odds with the NPRA. NRS 239.0113(2) plainly states that if "[t]he governmental entity that has legal custody or control of the public book or record asserts that the public book or record, or a part thereof, is confidential, the governmental entity has the burden of

proving by a preponderance of the evidence that the public book or record, or a part thereof, is confidential." Likewise, as detailed above, this Court's case law squarely places the burden on the governmental entity to establish that a record is confidential. *See, e.g.*, *Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628. It would be inconsistent with this burden and the nature of the NPRA to require the requester to pay for redaction.

Third, on a common-sense level, it would be unfair and run afoul of the letter and purpose of the NPRA to make a requester pay for a governmental entity to keep records secret. A requester should not be in the position of paying for personnel time spent on keeping public records from public view and delaying rightful access to information about the conduct of government and the expenditure of taxpayer funds. The NPRA and this Court's precedent explicitly mandate that the provisions of the NPRA be interpreted liberally to facilitate access to public records. NRS 239.001(2); *see also Gibbons*, 127 Nev. at 878, 266 P.3d at 626. "Conversely, any limitations or restrictions the public's right of access must be narrowly construed." *Id.* (citing NRS 239.001(3)).

In this case, it is notable that the Coroner wanted to over-redact; the district court subsequently ordered production of the records. Even if this Court finds the records are subject to some redaction, the history illustrates the difficult position requesters are placed in: pay for redactions of records that are not clearly permitted

by law or go to court to get access. In short, redacting is a mechanism for keeping information away from requesters and requesters should not have to pay for associated fees.[31]

3. This Case Does Not Involve Extraordinary Use.

Again, the Coroner did not provide any evidence regarding actual costs incurred—let alone why responding to the Request was extraordinary. "[W]ords will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United State*s, 444 U.S. 37, 42 (1979). Because, as the Coroner acknowledges (OB, p. 43), the NPRA does not define "extraordinary use," this Court must interpret the term based on its common meaning. "Extraordinary" means "[b]eyond what is usual, customary, regular, or common." Black's Law Dictionary (10th ed. 2014).

Responding to public records requests cannot be deemed "extraordinary use." Accordingly, the Coroner cannot force the LVRJ or any other requester to pay for the time its attorneys expend in doing their jobs, or to otherwise pay for the government to meet its burdens under the NPRA.

/ / /

/ / /

/ / /

[31] As one district court recognized (1JA 174-195), a rule barring the government from charging for redactions is necessary to incentivize the government to keep confidential and non-confidential records separate as much as possible.

4. The Legislative History Does Not Support the Coroner's Interpretation of the Costs Provisions of the NPRA.

Even if properly considered to rewrite the NPRA, the legislative history does not support the Coroner's position.

First, the Coroner's lengthy quotation of a dialogue between Dan Musgrove and Senator Terry Care during a 2007 Senate Government Affairs hearing on SB 123 (OB, pp. 44-45) is just that: a discussion. That discussion does not aid the Coroner's argument, as Senator Care's comments indicate a reluctance to charge requesters for staff time spent in fulfilling a records request because "those people work for the taxpayers at that time by satisfying a taxpayer's request for public records." (OB, p. 44.) This is consistent with NRS 239.005(1), which reflects a policy of only allowing the government to charge for its actual costs. Second, as the Coroner admits (OB, p. 45), 2013 AB 31 did not pertain to the costs provisions of the NPRA—a fact that is mentioned in the portion of the hearing the Coroner quotes. (*Id.*)[32]

The Coroner also relies on a 2002 Attorney General Opinion, AGO 2002-32, to support its position that it can charge requesters for time its employees spend reviewing and redacting autopsy reports. (OB, p. 43.) In addition to having no precedential value, AGO 2002-32 is of little persuasive value. Although the AGO

[32] Similarly, that Senator Segerblom, considering a "question [he] never thought of" noted that postage should be allowed (OB, p. 47) is irrelevant.

did opine that public records requests requiring more than thirty (30) minutes of staff time to retrieve and copy them are "more likely" to be of a "nuisance type" or to "hinder governmental operations," *see* AGO 2002-32, 2002 WL 2030953 at *7 (Aug. 27, 2002), that threshold is speculative, not absolute or definitive. Determining whether the time spent is an "extraordinary use" of personnel must be considered on a case-by-case basis. Indeed, finding thirty (30) minutes of staff time to be the defining line in every situation would create disincentives to provide public information, a consequence Senator William Raggio and the 1997 Nevada Legislative sought to avoid. *See id.* (quoting Senator Raggio as stating that "he did not agree with creating a disincentive to provide public information").)

That discussion is not evidence that taking more than 30 minutes to complete a request is extraordinary and allowing for governmental entities to charge for "extraordinary" use is not reconcilable with the text of the NPRA. Moreover, Senator Raggio was right: there should not be disincentives to provide records. The NPRA's text embodies this—restrictions on access must be read narrowly. NRS 239.001(3). Imagining a fee entitlement not expressly provided for in the NPRA is the opposite of the type of construction this Court must give the NPRA.

/ / /

/ / /

/ / /

VI. CONCLUSION

This Court must affirm the decision of the district court in its entirety.

DATED this 5th day of September, 2018.

/s/ Margaret A. McLetchie

Margaret A. McLetchie, Nevada Bar No. 10931
Alina M. Shell, Nevada Bar No. 11711
MCLETCHIE SHELL LLC
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
Counsel for Respondent, Las Vegas Review-Journal

CERTIFICATE OF COMPLIANCE

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

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

I further certify that this RESPONDENT'S ANSWERING BRIEF complies with the type-volume limitation of Nev. R. App. P. 32(a)(7)(A)(ii) because it contains 13,885 words.

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

/ / /

/ / /

/ / /

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 5th day of September, 2018.

/s/ Margaret A. McLetchie
Margaret A. McLetchie, Nevada Bar No. 10931
Alina M. Shell, Nevada Bar No. 11711
MCLETCHIE SHELL LLC
Counsel for Respondent, Las Vegas Review-Journal

CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONDENT'S ANSWERING BRIEF was filed electronically with the Nevada Supreme Court on the 5th day of September, 2018. 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

Micah S. Echols
Marquis Aurbach Coffing

Counsel for Appellant,
Clark County Office of the Coroner/Medical Examiner

/s/ Pharan Burchfield
Employee of McLetchie Shell LLC