IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Appellant, vs. LAS VEGAS REVIEW-JOURNAL, INC., Respondent.	Electronically Filed Oct 03 2019 04:30 p.m. Elizabeth A. Brown Clerk of Supreme Court SUPREME COURT CASE NOS: 74604 / 75095 DISTRICT COURT CASE NO.: A-17-758501-W

RESPONDENT'S RESPONSE TO APPELLANT'S NOTICE OF SUPPLEMENTAL AUTHORITIES (CASE NO. 75095)

Respondent Las Vegas Review-Journal (the "Review-Journal"), by and through its counsel of record, hereby responds to the Clark County Office of the Coroner/Medical Examiner's Notice of Supplemental Authorities filed on September 23, 2019. This Response is supported by the following memorandum of points and authorities.

DATED this the 3rd day of October, 2019.

/s/ Margaret A. McLetchie

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

Docket 75095 Document 2019-41132

MEMORANDUM OF POINTS AND AUTHORITIES

In its September 23, 2019, Notice of Supplemental Authorities, the Coroner improperly asks this Court to read into the 2019 Nevada Legislature's inaction on a proposed amendment to the Nevada Public Records Act (the "NPRA"). The proposed amendment was merely designed to clarify existing law, which already plainly mandates that the government must pay reasonable fees and costs to a prevailing requester, without exception. *See* Nev. Rev. Stat. § 239.011. Specifically, the Coroner asks this Court to interpret the failure to adopt the clarification to Nev. Rev. Stat. § 239.012—a separate provision of the Nevada Public Records Act that provides immunity to individual public employees and officers from liability for damages in cases where those individuals acted in good faith in disclosing or refusing to disclose public records—as evidence that § 239.012 also immunizes government entities from any liability for a prevailing requester's attorney's fees and costs in a public records action. As the United States Supreme Court and this Court have recognized, however, the actions—or inactions—of a Legislature in amending a statute should be accorded little if any weight in divining the intent of the original legislative body which enacted the statute. Here, the Coroner's interpretation cannot stand due to language in Senate Bill 287 reflecting the recognition that existing law already mandates that fees and costs be paid to prevailing requesters.

/ / /

The United States Supreme Court has repeatedly cautioned that failed legislative proposals are "a particularly dangerous ground on which to rest an interpretation of a prior statute." *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States v. Price*, 361 U.S. 304 (1960)); *accord Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994); *see also United States v. United Mine Workers of America*, 330 U.S. 258, 281-82 (1947) (holding that opinions expressed during 1943 Senate debates on amendments to the Norris-LaGuardia Act of 1932 cannot be accepted as authoritative guides to the construction of the Act); *United States v. Wise*, 370 U.S. 405, 411 (1962) ("The interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance here.")

Indeed, citing the same line of precedent, this Court has recognized that "subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' [Legislature]." *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 197, n.8, 234 P.3d 912, 918 n.8 (2010) (quoting *Pension Benefit Guaranty Corporation*, 496 U.S. 633, 650) (other citation omitted; alteration in original). As the Court explained, "[d]eclarations of intent by a subsequent Legislature, especially those occurring after the commencement of this litigation, are 'entitled to little if any weight.'" *Great Basin Water Network*, 126 Nev. 187, 197, n.8, 234 P.3d 912, 918

n.8.

This Court's task is not to determine the intent of the 2019 Legislature in failing to adopt a particular amendment to Nev. Rev. Stat. § 239.012. Instead, this Court's task is to determine whether the plain language of Nev. Rev. Stat. § 239.011(2) provides that a prevailing requester in a public records action is entitled to recoup his or her reasonable attorney's fees and costs, a determination which does not require review of the legislative history of that provision. *See J.E. Dunn Nw., Inc. v. Corus Constr. Venture, LLC*, 127 Nev. 72, 79, 249 P.3d 501, 505 (2011) ("When the language of a statute is clear on its face, this court will not go beyond the statute's plain language.") (internal quotations and alterations omitted).

As discussed in the Review-Journal's Answering Brief in this matter (Ans. Br., pp. 14-15), to the extent that the Court does determine that review of the legislative history of Nev. Rev. Stat. § 239.011 is required, the only legislative history that can provide any authoritative guidance as to the Legislature's intent is the 1993 legislative session during which the Legislature adopted the provision. (*See generally* 3 JA507-3 JA674.) That legislative history demonstrates that the Legislature did indeed intend to allow prevailing requesters to recover reasonable attorney's fees and costs from a governmental entity. For example, during the 1993 legislative session, Assistant Attorney General Brooke Nielsen submitted testimony to the Assembly Committee on Government Affairs noting that Assembly Bill 365

("AB 365")—the legislation which eventually became Nev. Rev. Stat. §§ 239.011 and 239.012—"entitles the prevailing requester . . . to recover attorneys fees and costs" from an agency that denied access to public records. (3 JA639) (emphasis in original). As another example, during a May 3, 1993, hearing of the Assembly Subcommittee on Government Affairs on AB 365, Subcommittee Chairman Rick C. Bennett "said he hoped the court would penalize" governmental agencies that refuses to disclose a public record "in some way by making them pay the costs" associated with litigation. (3 JA649) (emphasis in original). Thus, the intent of the 1993 Legislature was to make sure that requesters who prevailed in a public records action could recover reasonable attorney's fees and costs from a governmental agency that denied access to public records.

Even if the Court were to consider the legislative history of Senate Bill 287 ("SB 287"), the Coroner's argument is nevertheless misplaced because, the version of SB 287 that was enrolled by the Legislature and became effective on October 1, 2019 makes plain that Nev. Rev. Stat. § 239.011 entitles a prevailing requester to recover his or her reasonable attorney's fees and costs from the governmental entity that resisted production. Specifically, in the enrolled version of SB 287 included as Exhibit 2 to the Coroner's Notice, the Legislative Counsel's Digest explicitly states as follows:

> If a request for inspection, copying or copies of a public book or record is denied, existing law authorizes a requester to apply to a district court

> for an order permitting the requester to inspect or copy the record or requiring the person who has legal custody or control of the public record to provide a copy to the requester. ***Existing law provides that if the requester prevails in such a proceeding, the requester is entitled to recover his or her costs and reasonable attorney's fees in the proceeding from the governmental entity whose officer has custody of the book or record***. (NRS 239.011)

(Exh. 2 to Notice, p. 2) (emphasis added). Thus, it is apparent that when the Legislature considered SB 287, it already understood that Nev. Rev. Stat. § 239.011 provides that a governmental entity is liable for all reasonable attorney's fees and costs incurred by a prevailing requester in a public records action, without limitation.

Moreover, if the Court were to use legislative inaction as a guide to intent, the Court must consider that during the 2019 legislative session, the Clark County District Attorney's Office—the governmental entity representing the Coroner in this matter—proposed a conceptual amendment to SB 287 which would have amended the Nevada Public Records Act to declare that autopsy files confidential. (*See* Addendum A, p. 7.) Thus, if the Coroner wants to live by the sword, it must die by the sword as well, and this Court should find that autopsy reports are public records.

DATED this the 3rd day of October, 2019.

/s/ Margaret A. McLetchie

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONDENT'S RESPONSE TO APPELLANT'S NOTICE OF SUPPLEMENTAL AUTHORITIES (CASE NO. 75095) was filed electronically with the Nevada Supreme Court on the 3rd day of October, 2019. 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 and Jackie Nichols
Marquis Aurbach Coffing

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

/s/ Pharan Burchfield
Employee of McLetchie Law

ADDENDUM A

Committee Action:
Do Pass_____
Amend & Do Pass_____
Other_____

Senate Committee on Government Affairs

This measure may be considered for action during today's work session.

April 12, 2019

SENATE BILL 287
Revises provisions governing public records. (BDR 19-648)

Sponsored by:	**Senators Parks, Hansen, Spearman, et al.**
Date Heard:	**April 3, 2019**
Fiscal Impact:	**Effect on Local Government: May Have Fiscal Impact**
	Effect on the State: Yes

Senate Bill 287 revises provisions relating to public records, including public inspection, request for copies, and receipt of copies. The measure provides that the legislative intent is for public access to records to be prompt. The measure:

- Provides for a civil penalty relating to public records. (Section 1)
- Defines public record. (Section 3)
- Clarifies that the actual costs to a governmental entity of making copies does not include overhead and labor costs incurred. (Section 3)
- Authorizes the electronic redaction of public records and requires an entity to provide a copy of a public record in an electronic format unless the copy was requested in a different medium. (Section 5)
- Clarifies when a request for a public record will take longer than five business days, the entity must provide written notice of the earliest date and time the record will be available. If the record is not provided by that date, the entity must provide a written explanation of the reason for the delay. In addition, the measure requires the entity to work with the requester to focus the request in a manner as to maximize the likelihood that the requester will be able to inspect, copy or receive a copy of the record expeditiously. (Section 6)
- Provides that if a request for inspection, copying or copies is found by a court to be unreasonably delayed or the fee appears to be excessive or improper, the requester will recover attorney's fees and $100 per day for each day the requester was denied the right to the records. The requester would also be entitled to recover any civil penalty. (Section 7)
- Provides that when a public record matter is considered by a court, the burden of proof is on the public officer or employee or employer. In addition, the measure clarifies that public officers and employees are not immune from liability for paying the costs and reasonable attorney's fees and other monetary relief to a prevailing requester. (Section 10)
- The measure also eliminates the authority of an entity to charge an additional fee for providing a copy of a public record when extraordinary use of personnel or resources is required. (Section 13)

Amendments:

1. Warren Hardy, Nevada League of Cities and Municipalities, on behalf of multiple organizations.

   A. Delete all sections of the bill (Sections 1 through 13).

   B. The amendment:

   - Clarifies what a public record does not include. (Section 3)
   - Clarifies categories of books and records that are confidential. (Section 3)
   - Clarifies when a request for a public record will take longer than five business days, the entity must provide a written explanation of the delay and a new date when the public record will be available. (Section 6)
   - If the entity does not provide a written response, the entity must pay a fee in the amount of $100 per day for each day the response is not provided. The fee is payable to the Nevada State Library and Archives and must be used for the modernization of the public records storage and production. (Section 6)

2. Tod Story representing American Civil Liberties Union.

   The amendment:

   - Provides for an administrative fine for not complying with the release of public records to be $500 for a first offense, $1,000 for a second office, and $2,500 for a third offense. If the person acted in good faith concerning the release of public records, a civil fine is not required to be paid. (Section 1)
   - Revises the definition of a public record to not include a database, data processing software, or metadata. (Section 3)
   - Clarifies that nothing in the measure requires the State Library and Archives to provide access to public records that could be obtained from a different state agency. (Section 5)
   - Clarifies that the electronic submission of a records request must only be transferred in that medium if feasible. If not feasible, it must be submitted using the means it was created, prepared, or otherwise retained. (Section 5)
   - Repeals Section 10 relating to court review and the burden of proof. Instead, the amendment:
     - Provides that the governmental entity may petition the district court for relief from a request that is clearly vexatious and frivolous. Before doing so, the public agency must in good faith work with the requester to focus a request and give the requester the opportunity to withdraw the request or pay the costs the government will actually incur in connection with fulfilling the request.

- In any such action, the governmental entity has the initial burden of establishing by a preponderance of the evidence that the request is clearly vexatious and frivolous, that it worked in good faith with the requester to narrow the request but was unable to reach agreement, and the requester refused to pay the costs or withdraw the request.
- If the governmental entity meets that burden, the burden shifts to the requester to show that the request was made in good faith and the records request is in the public interest. If the public agency does not prevail in such an action, it must pay the requester's fees and costs and must pay $100 per day for any delay in providing records.

3. Lewis Trout, Private Citizen from Winnemucca.

   The amendment

   - Provides for an administrative fine for not complying with the release of public records. If the person acted in good faith concerning the release of public records, a civil fine is not required to be paid. (Section 1)
   - Clarifies indirect overhead costs by providing a fee schedule. (Section 3)
   - Revised the definition of public record. (Section 3)
   - Clarifies confidential by adding "subject to the family authorization, court approved subpoena, and court order requirements . . . ." (Section 5)
   - Clarifies provisions relating to release of a record in an electronic medium. (Section 5)
   - When a request for a public record will take longer than five business days, the amendment adds that the entity must provide written notice of a "good faith estimate" earliest date and time the record will be available. (Section 6)
   - When a request for inspection, copying, or copies is found by a court to be unreasonably delayed or the fee appears to be excessive or improper, the requester will recover attorney's fees and $100 per day for each day the requester was denied the right to the records. The amendment provides that the court may determine a different reasonable compensation. (Section 7)

Submitted by The Nevada League of Cities and Municipalities

List of organizations participating in the working group regarding Senate Bill 287

Contact: Warren Hardy
Phone: 702-408-6666
Email: warren@hardycounsultinggroup.com

Nevada League of Cities
Nevada Association of Counties
The Las Vegas Metropolitan Police Department
Washoe County Sheriff's Office
Las Vegas Valley Water District
Clark County District Attorney's Office
Nevada District Attorney's Association
Washoe County District Attorney's Office
City of North Las Vegas
Nevada System of Higher Education
Clark County School District
Washoe County School District
Regional Transportation Commission of Southern Nevada
Regional Transportation Commission of Washoe County
Nevada PERS
Clark County Regional Flood Control District

Memorandum

SB287 Amendment

TO: The Honorable Members of the Senate Committee on Government Affairs

SUBJECT: Conceptual Amendment for SB287

DATE: April 10, 2019

Dear Chairman Parks and Members of the Senate Committee on Government Affairs:

The attached conceptual amendment for Senate Bill 287 is jointly submitted for your consideration by the following organizations.

Nevada League of Cities and Municipalities
Nevada Association of Counties
Las Vegas Metropolitan Police Department
Washoe County Sheriff's Office
Las Vegas Valley Water District
Clark County District Attorney's Office
Nevada District Attorney's Association
Washoe County District Attorney's Office
Nevada Sheriffs and Chiefs Association
City of North Las Vegas
Nevada PERS

CONCEPTUAL AMENDMENT SB287

EXPLANATION: Matter in (1) ***blue bold italics*** is new language in the original bill; (2) ***green bold italic underlining*** is new language proposed in this amendment; (3) ~~red strikethrough~~ is deleted language in the original bill; (4) ~~purple double strikethrough~~ is language proposed to be deleted in this amendment; (5) orange double underlining is deleted language in the original bill that is proposed to be retained in this amendment; and (6) **green bold underlining** is newly added transitory language.

PURPOSE: To clarify the responsibilities of all governmental entities in responding to requests for public records.

AMENDMENT: Replace existing language in SB287 with language below.

Delete Sections 1 through 13 of the bill. Add new sections 14 and 15 to read as follows:

Section 14. NRS 239.0105 is hereby amended by adding a new subsection to read as follows:

NRS 239.0105 Confidentiality of certain records of local governmental entities.

1. Records of a local governmental entity are confidential and not public books or records within the meaning of NRS 239.010 if:

(a) The records contain the name, address, telephone number or other identifying information of a natural person; and

(b) The natural person whose name, address, telephone number or other identifying information is contained in the records provided such information to the local governmental entity for the purpose of:

(1) Registering with or applying to the local governmental entity for the use of any recreational facility or portion thereof that the local governmental entity offers for use through the acceptance of reservations; or

(2) On his or her own behalf or on behalf of a minor child, registering or enrolling with or applying to the local governmental entity for participation in an instructional or recreational activity or event conducted, operated or sponsored by the local governmental entity.

2. The records described in subsection 1 must be disclosed by a local governmental entity only pursuant to:

(a) A subpoena or court order, lawfully issued, requiring the disclosure of such records;

(b) An affidavit of an attorney setting forth that the disclosure of such records is relevant to an investigation in anticipation of litigation;

(c) A request by a reporter or editorial employee for the disclosure of such records, if the reporter or editorial employee is employed by or affiliated with a newspaper, press association or commercially operated, federally licensed radio or television station; or

(d) The provisions of NRS 239.0115.

3. Except as otherwise provided by specific statute or federal law, a natural person shall not provide, and a local governmental entity shall not require, the social security number of any natural person for the purposes described in subparagraphs (1) and (2) of paragraph (b) of subsection 1.

4. As used in this section, unless the context otherwise requires, "local governmental entity" has the meaning ascribed to it in NRS 239.121.

5. A public record does not include drafts, notes, preliminary computations, and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; materials that are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent, or bequest; and published materials in the possession of an authority other than a public library that are available for sale, or that are available for inspection at a public library.

6. The following categories of books and records are confidential:

(a) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

(b) personnel, medical and autopsy files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; and

(c) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual].

Section 15. NRS 239.0107 is hereby amended to read as follows:

NRS 239.0107 Requests for inspection or copying of public books or records: Actions by governmental entities.

1. Not later than the end of the fifth business day after the date on which the person who has legal custody or control of a public book or record of a governmental entity receives a

written ~~or oral~~ request from a person to inspect, copy or receive a copy of the public book or record, a governmental entity shall do one of the following, as applicable:

(a) Except as otherwise provided in subsection 2, allow the person to inspect or copy the public book or record or, if the request is for the person to receive a copy of the public book or record, provide such a copy to the person.

(b) If the governmental entity does not have legal custody or control of the public book or record, provide to the person, in writing:

(1) Notice of that fact; and

(2) The name and address of the governmental entity that has legal custody or control of the public book or record, if known.

(c) Except as otherwise provided in paragraph (d), if the governmental entity is unable to make the public book or record available by the end of the fifth business day after the date on which the person who has legal custody or control of the public book or record received the request, provide to the person, in writing:

(1) Notice of that fact; and

(2) A date and time after which the public book or record will be available for the person to inspect or copy or after which a copy of the public book or record will be available to the person. If the public book or record or the copy of the public book or record is not available to the person by that date and time, ~~**the person may inquire regarding the status of the request**~~ ***the governmental entity shall provide the requester in writing:***

i. An explanation of why the public record is not available; and

ii. A new date that the public record will be available..

(d) If the governmental entity must deny the person's request because the public book or record, or a part thereof, is confidential, 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.

2. If a public book or record of a governmental entity is readily available for inspection or copying, the person who has legal custody or control of the public book or record shall allow a person who has submitted a request to inspect, copy or receive a copy of a public book or record.

3. In the event the governmental entity does not provide a response to a written request as required under subsection 1 of this section, the governmental entity shall pay a fee in in the amount of $100 for each day the response is not provided. The fee is payable to the Nevada State Library and Archives and must be used for the modernization of public record storage and production.

Contact Info:
Warren Hardy
wbhardy2@gmail.com
702 408-6666

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN

SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Included are the sections we have proposed amendments to– possible amendments are in purple, underlined, italicized font ~~***and deletions to language in SB 287 are in blue strike-thru.]***~~

Section 1. Chapter 239 of NRS is hereby amended by adding thereto a new section to read as follows

1. In addition to any relief awarded pursuant to NRS 239.011, if a court determines that a governmental entity or the person identified pursuant to subsection 3 of NRS 239.0107 as responsible for making the decision on behalf of the governmental entity concerning the request to inspect, copy or receive a copy of a public record failed to comply with the provisions of this chapter, the court shall require ~~***the requestor of the public record is entitled to :***~~

~~***(a) Recover from***~~ ***the governmental entity and or the person identified pursuant to subsection 3 of NRS 239.0107***~~***, or both, a civil penalty***~~ ***to pay an administrative fine as follows:***

(a) ~~***of not less than $1,000 or more than $250,000 per offense.***~~ ***For a first offense, $500;***

(b) ~~***Any such additional relief as the court deems proper to punish and deter violations of the provisions of this chapter.***~~ ***For a second offense, $1,000; and***

(c) For a third or subsequent offense, $2,500.

2. A person identified pursuant to subsection 3 of NRS 239.0107 is not required to pay a civil fine pursuant to this section if he or she acted in good faith.

~~2.~~ ***3. The rights and remedies recognized by this section are in addition to any other rights or remedies that may exist in law or in equity.***

Sec. 2. NRS 239.001 is hereby amended to read as follows:

239.001 The Legislature hereby finds and declares that:

1. The purpose of this chapter is to foster democratic principles by providing members of the public with ***prompt*** access to inspect ***,*** ~~[and]~~ copy ***or receive a copy of,*** ~~***including, without limitation, in an electronic format by means of an electronic medium,***~~ public ~~[books and]~~ records to the extent permitted by law;

2. The provisions of this chapter must be construed liberally to carry out this important purpose;

3. Any exemption, exception or balancing of interests which limits or restricts access to public ~~[books and]~~ records by members of the public must be construed narrowly;

4. The use of private entities in the provision of public services must not deprive members of the public access to inspect ***,*** ~~[and]~~ copy ~~[books and]~~ ***or receive a copy of*** records relating to the provision of those services; and

5. If a public ~~[book or]~~ record is declared by law to be open to the public, such a declaration does not imply, and must not be construed to mean, that a public ~~[book or]~~ record is confidential if it is not declared by law to be open to the public and is not otherwise

declared by law to be confidential.

Sec. 3

…….

8. "Public record" means any record, document, paper, letter, map, notes, calendar, spreadsheet, ~~database,~~ book, tape, photograph, film, sound recording, video recording, ~~data processing software~~, computer and other electronic data, ~~metadata,~~ electronic mail or any other material or means of recording information, regardless of the physical form, characteristics or means of transmission, which is prepared, created, used, owned, retained or received in connection with the transaction of official business or the provision of a public service.

Sec. 5

…….

3. A governmental entity that has **[**~~legal~~] ***possession,*** custody or control of a public ~~[book or]~~ record shall not deny a request made pursuant to subsection 1 to inspect or copy or receive a copy of a public ~~[book or]~~ record on the basis that the requested public ~~[book or]~~ record contains information that is confidential if the governmental entity can redact, delete, conceal or separate ***, including, without limitation, electronically,*** the confidential information from the information included in the public ~~[book or]~~ record that is not otherwise confidential. ***Nothing in this provision shall be interpreted as requiring the State Library and Archives to provide access to public records that a requester can obtain from a different state agency.***

4. A ~~[person may request]~~ ***governmental entity shall transmit a copy of a public record electronically if feasible and, if not feasible shall provide*** a copy of a public record ~~***in***~~**[**~~any~~**]** ~~***an electronic format***~~ ***by means of an electronic*** medium ~~[in which the public record is readily available.]~~ ***unless the public record was requested in a different medium. If requested, a copy of a public record must be proided in the electronic format in which the public record was created or prepared, or is otherwise retained.***

(a) Nothing in this section shall be construed to require the governmental entity to provide a record in an electronic format if the record was not created and is not stored or otherwise available in an electronic format.
(b) If the request is for information in a format other than electronic format, and the information also is in electronic format, the governmental entity may inform the requester that the information is available in electronic format.
(c) Nothing in this section shall be construed to permit a governmental entity to make information available only in an electronic format.
(d) Nothing in this section shall be construed to require the governmental entity to release an electronic record in the electronic form in which it is held by the agency if its release would require production of confidential material that cannot be redacted or otherwise removed or require production of proprietary software.

(e) Nothing in this subsection shall be construed to modify any confidentiality provision or provisions in NRS 239.010(1).

Sec. 6.

…..

3. In addition to performing the actions required by subsections 1 and 2, the person who has possession, custody or control of a public record of a governmental entity shall provide in writing to a person who makes a request for the public record:
(a) The name and title or position of the person responsible for making the decision on behalf of the governmental entity concerning the action the governmental entity will take pursuant to this section concerning the request or any other decision in connection with the request; and

(b) Contact information for the person described in paragraph (a), including, without limitation, his or her business address, telephone number and electronic mail address. This information shall be updated as appropriate, including if a different person makes a subsequent decision in connection with the request.

~~**Sec. 10.** NRS 239.012 is hereby amended to read as follows:~~
~~239.012 ***1.*** A public officer or employee who acts in good faith in disclosing or refusing to disclose information and the employer of the public officer or employee are immune from liability for damages, either to the requester or to the person whom the information concerns.~~
~~***Such damages do not include any costs and reasonable attorney's fees or other monetary amount awarded to the requester pursuant to NRS 239.011 or section 1 of this act.***~~
~~***2. For the purposes of subsection 1, the public officer or employee or his or her employer, as applicable, has the burden of proving by a preponderance of the evidence that the public officer or employee acted in good faith in refusing to disclose information.***~~

New section:

A governmental entity may petition the district court in the county in which the book or record for relief from a request that the public agency alleges is clearly vexatious and clearly frivolous. Before doing so, the public agency must in good faith work with the requester to focus a request pursuant to Section 6, subsection 2 and must give the requester the opportunity to withdraw the request or pay the costs the government will actually incur in connection with fulfilling the request. In any such action, the governmental entity has the initial burden of establishing by a preponderance of the evidence that the request is clearly vexatious and clearly frivolous that it worked in good faith with the requester to narrow the request but was unable to reach agreement and that the requester refused to pay the costs or withdraw the request. If the governmental entity meets that burden, the burden shifts to the requester to show that the request was made in good faith and is in the public interest. If the public agency does not prevail in such an action, it must pay the requester's fees and costs and must pay $100 per day for any delay in providing records.

Possible Amendments to SB 287 Submitted for Your Consideration

By Lewis W. Trout, Winnemucca resident

Upon Consultation with Tami Rae Spiro, Humboldt County Clerk

Section 1: Delete lines 9 – 11 on page 1 and lines 1 – 2 on page 2. Replace with:

(a) In addition to any other penalties provided by law, the court may impose the following penalties on the governmental entity and the person or persons identified in Section 3 of NRS 239.0107, whether or not such person is a current or former public officer or employee or contract legal counsel:
   (1) a fine not to exceed $5,000 for a first willful violation of this chapter;
   (2) a fine not to exceed $10,000 for a separate act or event that constitutes a second willful violation of this chapter;
   (3) a fine not to exceed $25,000 for a separate act or event that constitutes a third violation of this chapter;
   (4) a fine not to exceed $50,000 and imprisonment or probation for a Class E felony for a separate act or event that constitutes a fourth violation of this chapter; and

(b) In addition to any other penalties provided by law, the court, at it's discretion, may impose an additional civil penalty not to exceed $5,000 and assess an amount equal to the amount of the attorney's fees and costs actually incurred by the person bringing action before the court against the governmental entity or person who prevents, interferes with or attempts to prevent or interfere with the discovery or investigation of a violation of this chapter.

(c) If the court finds that a violation of a provision of his chapter by a public officer, employee or legal counsel or former public officer, employee, or legal counsel has resulted in the realization of a financial benefit by the current or former public officer, employee, legal counsel or another person, the court may, in additional to any other penalties provided by law, require the current or former public officer, employee, or legal counsel to pay a civil penalty of not more than three times the amount realized.

(d) Any fines imposed on an individual person or persons may not be paid from public funds of the governmental entity.

(e) Notwithstanding any other provision of this chapter, any act or failure to act by a public officer or employee or former public officer or employee, is not a willful violation of the chapter if the current or former public officer or employee establishes by sufficient evidence that:

(1) the current or former public officer or employee relied in good faith upon the advice of the legal counsel retained by his or her public body, agency or employer; and

(2) The advice of the legal counsel was:

(a) Provided to the public officer or employee before the public officer or employee acted or failed to act; and

(b) Based on the reasonable legal determination by the legal counsel under the circumstances when the advice was given that the act or failure to act by the public officer or employee would not be contrary to prior published opinion(s) issued by an appellate or Supreme Court of the State of Nevada or circuit or Supreme Court of the United States of America.

(c) If the court determines that the advice given by the legal counsel was known to be in violation of this Chapter, a willful violation of this Chapter by the legal counsel shall have occurred for which the legal counsel shall be liable for the penalties set forth in subsection (a)(1)(2)(3)(4) above.

(f) In addition to any other penalties provided by law, the public officer, employee or legal counsel who commits a willful violation of this chapter is subject to disciplinary proceedings by the employer and/or licensing body of the public officer, employee or legal counsel and must be referred for action in accordance with the applicable provisions governing the employment of the public officer or employee, or the contract terms of a contracted legal counsel.

(g) The imposition of a civil penalty pursuant to subsection (a)(1)(2)(3)(4) above is a final decision for the purposes of judicial review.

(h) A finding by the court that a current or former public officer, employee or legal counsel has violated any provision of this chapter must be supported by a preponderance of evidence unless a greater burden is otherwise prescribed by law.

(i) All fines imposed pursuant to provisions of this section shall be collected by the court and transferred to a fund administered by the Nevada State Archivist to make grants to requesting counties, cities and special districts to help pay for the conversion of public records to electronic formats and electronic media.

AMENDMENTS TO SB287 (continued)

Page 4, Line 40, add the following new sentences:

"Since determination of such indirect overhead costs is difficult, the following fee schedule is to be used for charges for public records available at the offices of a governmental entity:

(a) $0.05 per page of a record in and electronic format;
(b) $0.50 per page for paper copies of a public record;
(c) $2.00 per CD or similar medium; and
(d) $5.00 per DVD or similar medium.

If the total cost of the public records request is not greater than $5.00, based on the fee schedule above, all fees shall automatically be waived. If the estimate of total fees exceed $5.00, the fees shall be paid in advance with a prompt refund of fees paid is less that the good faith estimate. The governmental entity reserves the right to waive all fees, regardless of total amount, if the governmental entity determines it appropriate to do so.

Page 5, line 45, change the period after the word "service" to a comma and add:

"but excludes all images from security cameras located in public and leased governmental offices; and all images from law enforcement and first responder body camera, dashboard and other cameras or visual recording devices in use for official purposes, unless release of such images has been authorized by persons (or surviving family members of persons) whose images are recorded on such camera or photographic devices; by court authorized subpoenas; or by court order. Also excluded are all coroner's autopsy records and recorded images of deceased persons and human remains, unless release of such records and/or images has been authorized by surviving family members of deceased persons who are the subject of autopsies or whose images are recorded on camera or photographic devices used to visually record the autopsy; by court authorized subpoenas; or by court order. "

Page 8, line 35, change the period after the word "confidential" to a comma and add:

"Subject to the family authorization, court approved subpoena, and court order requirements of Section 3, subsection 8 of this bill."

Page 8, line 40, change the period to a comma after the word "medium" and insert:

"Provided such record exists in an electronic medium."

Page 8, line 43, change the period after the word “prepared” and add:

“or if not available in such electronic format, in paper, photographic or such other format to which the public record must be converted to respond to the requestor in a software format that is not proprietarily restricted and available for use by the public.”

Page 9, line 6, change the period to a comma after the word “medium” and add:

“ except when the public record exists in a proprietary format using software not available to the public and must be converted to respond to the requestor in a software format that is not proprietarily restricted and available for use by the public.”

Page 9, line 38, change the word “the” to “a” and preceding the word “earliest” insert:

“good faith estimate of the”

Page 11, lines 29 and 38, after the word “record” change the period to a comma and add:

Or, such additional, reasonable compensation as determined by the court.