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 Oct 22 2018 11:25 a.m. Elizabeth A. Brown Clerk of Supreme Court SUPREME COURT CASE NO: 75095 DISTRICT COURT CASE NO.: A-17-758501-W

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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

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.

In district court, Margaret A. McLetchie of McLetchie Law, fka McLetchie Shell LLC, represented the Las Vegas Review-Journal. Ms. McLetchie represents Respondent on appeal.

DATED this 19th day of October, 2018.

/s/ Margaret A. McLetchie

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II. STATEMENT OF THE CASE

The Las Vegas Review-Journal (the "Review-Journal") prevailed in a public records dispute brought under the Nevada Public Records Act[1] ("NPRA") against the Clark County Office of the Coroner (the "Coroner"). Accordingly, under the plain language of Nev. Rev. Stat. § 239.011(2) (the "Fees Provision") the Review-Journal is entitled to its reasonable attorney's fees and costs.

The purpose of the NPRA is to foster democratic principles by ensuring government records are available to the public. Nev. Rev. Stat. § 239.001(1). The NPRA is clear: when a member of the public is forced to hire an attorney to go to court to obtain public records from a governmental entity, the governmental entity

[1] Nev. Rev. Stat. § 239.001 *et seq.*

should bear that member's legal expenses. This furthers the NPRA's overarching mandate of transparency by incentivizing governmental entities to comply with requests in a timely manner that does not necessitate the district court's intervention. Without this provision, intransigent government agencies could easily defeat the purpose of the NPRA by forcing members of the public to incur the costs associated with court actions.

The language of the NPRA is crystal clear, as is its mandate to interpret the NPRA liberally to further access. Nonetheless, the Coroner wants this Court to mutilate the NPRA's unambiguous Fees Provision by engrafting onto it a wholly separate provision of the NPRA. Although the NPRA immunizes public employees and officials (and their employers) from ***damages*** pursuant to Nev. Rev. Stat. § 239.012 (the "Immunity Provision") if they act in good faith in disclosing or refusing to disclose records, that does not obviate the Fees Provision, which separately and plainly provides for ***attorney's fees and costs***. The NPRA mandates that if the "requester prevails, 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." Nev. Rev. Stat. § 239.011(2) (emphasis added). The Fees Provision's entitlement is not premised on anything but prevailing in public records litigation, which the Review-Journal did. The district court agreed, and this Court should affirm its decision.

First, the district court properly interpreted the Fees Provision to have a distinct and separate purpose from the Immunity Provision. The Fees Provision allows for the recovery of attorney's fees from a government agency when the agency fails to produce public records, gets taken to court, and loses. The Immunity Provision, on the other hand, immunizes employees from liability for damages that arise out of disclosing or refusing to disclose public records when the employee acts in good faith. While multiple statutory provisions within a statutory scheme should be construed together, non-conflicting provisions with different purposes should not be haphazardly conflated. This Court, and several other courts, have held that attorney's fees are not the same as damages.[2]

There is no conflict or ambiguity: by their plain language, Nev. Rev. Stat. § 239.011(2) and Nev. Rev. Stat. § 239.012 concern completely different things. Therefore, this Court should affirm the district court's holding that the Fees

[2] *See*, e.g., *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 956, 35 P.3d 964, 968-69 (2001) (comparing procedure for seeking attorney's fees as a cost of litigation with fees sought as special damages pursuant to Nev. R. Civ. P. 9(g)); see *also Carolina Cas. Ins. Co. v. Merge Healthcare Sols. Inc*., 728 F.3d 615, 617 (7th Cir. 2013) (noting that "an award of attorneys' fees differs from 'damages'"); *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 437 S.E.2d 374 (1993) (noting that attorney fees may be awarded for unfair practice, while punitive damages are awarded for tort based on same conduct); *cf. City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (discussing whether the amount of damages recovered by a plaintiff in a civil rights matter affects the calculation of an award of attorney's fees under 42 U.S.C. § 1988).

Provision means exactly what it says—a prevailing requester is ***entitled*** to attorney's fees and costs.

Second, the district court properly concluded that the Immunity Provision does not provide immunity to the Coroner for attorney's fees because, as noted above, attorney's fees are different from damages. The Coroner's expansive interpretation of "damages" is not supported by any Nevada statute or case law. Furthermore, keeping attorney's fees and damages distinct would not make the Immunity Provision a "nullity," as the Coroner argues. (Appellant's Opening Brief ("OB"), p. 26.) That the Coroner cannot conceive of a situation where a requester (or a third party) could seek damages other than attorney's fees (OB, p. 25) does not mean that such a situation is impossible, or even improbable. Indeed, interpreting the "damages" discussed in Nev. Rev. Stat. § 239.012 to include attorney's fees would render Nev. Rev. Stat. § 239.011(2) a nullity by conditioning an entitlement to attorney's fees and costs on a finding of bad faith, which district courts are reluctant to make.

Third, the district court properly awarded attorney's fees and costs because the Review-Journal was the prevailing party and because counsel for the Review-Journal sufficiently accounted for its attorney's fees and costs. Contrary to the Coroner's unpreserved arguments (OB, pp. 33-34), the Review-Journal provided the

necessary memorandum of points and authorities that analyzed the *Brunzell* factors and included sufficient information to justify its fees and costs.

In sum, the district court properly awarded attorneys' fees and costs to the Review-Journal, and this Court should affirm the district court's order.

III. THE NPRA MANDATES LIBERAL CONSTRUCTION

The NPRA., is a comprehensive body of legislation intended to facilitate public access to governmental records. 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." Nev. Rev. Stat. § 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. Nev. Rev. Stat. § 239.001(2)-(3). As this Court has explained, "the provisions of the NPRA ***place an unmistakable emphasis on disclosure.***" *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 882, 266 P.3d 623, 629 (2011) (emphasis added).

Every provision of the NPRA "must be construed liberally" to facilitate access to public records,[3] and any privileges and limitations on disclosure must be construed

[3] *Gibbons*, 127 Nev. at 878, 266 P.3d at 626 (citing Nev. Rev. Stat. § 239.001(1)-(3)); *accord PERS v. Nevada Policy Research Institute*, 134 Nev. Adv. Op. 81 * 2 (Oct. 18, 2018) (citing *Gibbons*, 127 Nev. at 878, 266 P.3d at 626).

narrowly.[4] 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'rs. 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." Nev. Rev. Stat. § 239.001(2)-(3).

Finally, if any ambiguity in any provision of the NPRA 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…").

IV. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

The Coroner pads its Opening Brief's statement of facts with a lengthy discussion of its purposes and duties, facts about the content of autopsy reports, and facts about the Coroner's purported policy regarding the release of autopsy reports. (*See generally* OB, pp. 8-12.) These facts, however, are not relevant to the instant appeal. What *is* relevant is that the Review-Journal was forced to seek judicial intervention after the Coroner failed to disclose records that it acknowledged are public records, and that the Review-Journal prevailed in this litigation, thereby

[4] Nev. Rev. Stat. § 239.001(3).

entitling it to an award of attorney's fees and costs under Nev. Rev. Stat. § 239.011(2). Those relevant facts are summarized below.

A. The Review-Journal's Public Records Request and the Subsequent Litigation.

On April 13, 2017, Review-Journal 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[5].) 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 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 Review-Journal endeavored to resolve issues. (1JA041-044). The Coroner still refused access, instead suggesting that producing some records justified nondisclosure (1JA033-34) and that the

[5] Citations to the Joint Appendix ("JA") are to both volume and page number(s). Hence, "1JA019-020" refers to volume 1 of the Joint Appendix at pages 19 through 20.

Review-Journal 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 Child Death Report ("CDR") team (OB, pp. 16-17), it demanded that the Review-Journal 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 District Court Awards the Review-Journal Attorney's Fees and Costs.

After the district court granted its petition for a writ of mandamus, the Review-Journal filed a Motion for Attorney's Fees and Costs. (2JA448–486.) The Coroner filed its Opposition to the Motion for Attorney's Fees and Costs on December 14, 2017. (3JA487-592). The Review-Journal replied on January 4, 2018. (3JA593-731). On February 1, 2018, the district court granted the full relief that the Review-Journal's Motion for Attorney's Fees and Costs requested. (5JA750–765.) The Coroner's appeal followed.

V. STANDARDS OF REVIEW

A. Standard for Interpreting the NPRA.

Questions of law are reviewed de novo and it becomes the responsibility of the Court to discern the law when the legislature addresses a matter with "imperfect clarity." *See Baron v. Dist. Ct.*, 95 Nev. 646, 648, 600 P.2d 1192, 1193–1194 (1979).

However, when the statute is plain and unambiguous, "this court should not construe that statute otherwise." *MGM Mirage v. Nevada Ins. Guar. Ass'n*, 125 Nev. 223, 228–29, 209 P.3d 766, 769 (2009). *See also Public Employees' Benefits Prog. v. LVMPD*, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008) ("It is well established that, when interpreting a statute, the language of the statute should be given its plain meaning unless doing so violates the act's spirit.") (citation omitted).

It is beyond cavil that when one statute conflicts with another, the controlling statute should "be construed in light of the policy and the spirit of the law, and the interpretation should avoid absurd results." *Hunt v. Warden*, 111 Nev. 1284, 1285, 903 P.2d 826, 827 (1995) (citation omitted). However, no conflicting statutes or even conflicting provisions within the same statute exist here. Nev. Rev. Stat. § 239.011(2) is clear, explicit, and refers only to "attorney fees." Nev. Rev. Stat. § 239.012 is clear, explicit, and refers only to "damages." This Court need not read further and construe the statute otherwise. If the legislature intended to conflate attorney fees and damages, it would have done so in the plain language of the NPRA.

Furthermore, immunizing governmental entities and employees from paying a prevailing requester's attorney's fees and costs would violate the expressed spirit of the NPRA, which mandates that its provisions be construed liberally in favor of access to public records, and that any exceptions limiting or restricting access to public records be construed narrowly. Nev. Rev. Stat. § 239.001(2)-(3). Thus, under

de novo review, this Court should interpret the NPRA according to its unambiguous language and affirm the district court's ruling.

B. Standards for Reviewing an Award of Attorney's Fees and Costs

As discussed above, questions of law are reviewed de novo, and when an attorney fee matter implicates a question of law, the proper review is de novo. *See In re Estate and Trust of Rose Miller*, 125 Nev. 550, 553, 216 P.3d 239, 241 (2009). But when *facts* regarding attorney fees are in dispute, this Court reviews for an abuse of discretion. *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) ("An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason.") A district court's award of fees is not disturbed on appeal absent an abuse of discretion. *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1353–54, 971 P.2d 383, 386 (1998).[6]

The Coroner raises an unpreserved argument that the Review-Journal did not file the proper memorandum of costs or provide the proper supporting documentation for an award of attorney's fees. (OB, pp. 33-34.) Because the Coroner did not raise this issue below, this Court should decline to consider it in this appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). To

[6] *See also*, *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993); *Nelson v. Peckham Plaza Partnerships*, 110 Nev. 23, 26, 866 P.2d 1138, 1139–40 (1994).

the extent, however, this Court choses to consider this argument, it must be reviewed for an abuse of discretion. *Bobby Berosini, Ltd.*, 114 Nev. at 1353–54, 971 P.2d at 386.

VI. LEGAL ARGUMENT

A. The Plain Language of Nev. Rev. Stat. § 239.011(2) Dictates That a Prevailing Requester is Entitled to Its Fees and Costs.

This case must be resolved based on the plain language of the NRPA and the specific mandates the legislature provided with regards to interpreting its terms. As this Court has repeatedly held, the starting point in evaluating the Fees Provision is the plain language of Nev. Rev. Stat. § 239.011 itself. *See Williams v. State Dep't of Corr.*, 402 P.3d 1260, 1262 (Nev. 2017) ("To ascertain the Legislature's intent, we look to the statute's plain language.") (citing *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011)). "[W]hen a statute's language is clear and unambiguous, the apparent intent must be given effect, as there is no room for construction." *Edgington v. Edgington*, 119 Nev. 577, 582–83, 80 P.3d 1282, 1286 (2003). In interpreting the plain language of the statute, the Court "must give [a statute's] terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory." *Southern Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (quotation omitted).

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The NPRA states that "[i]f the requester prevails, 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." Nev. Rev. Stat. § 239.011(2). Thus, under a reading of the plain language of the NPRA, awarding fees and costs to a prevailing requester is mandatory, not optional—and there are no exceptions.

Indeed, this Court has already held that the NPRA entitles prevailing requesters to fees and costs. In *LVMPD v. Blackjack Bonding*, this Court explained:

> Blackjack was a prevailing party and is entitled to recover attorney fees and costs associated with its efforts to secure access to the telephone records, despite the fact that it was to pay the costs of production. *See* NRS 239.011 (2011). Accordingly, we reverse the district court's order denying Blackjack's motion for attorney fees and costs and remand the matter for the district court to enter an award for reasonable attorney fees and costs consistent with this opinion.

131 Nev. Adv. Op. 10, 343 P.3d 608, 615 (2015) (citing *DR Partners*, 116 Nev. 616, 629, 6 P.3d 465, 473 (2000)). The Court further noted that "[t]o the extent that the parties raise policy arguments that conflict with NRS 239.011's plain meaning, they are without merit and do not alter our analysis." *Id.*, 343 P.3d at 615, n.6 (citing *Williams v. United Parcel Servs*., 129 Nev. 386, 391-92, 302 P.3d 1144, 1147 (2013) ("Our duty is to interpret the statute's language; this duty does not include expanding upon or modifying the statutory language because such acts are the Legislature's function.")). Thus, despite the Coroner's lengthy protestations to the contrary, this

Court has already found the plain terms of the NPRA's Fees Provision unconditionally entitle a prevailing requester to its reasonable attorney's fees and costs.

B. Even if the Meaning of Nev. Rev. Stat. § 239.011 Was Not Plain, The Mandates of the NPRA Dictate that the Fees Provision Be Interpreted to Further Access to Public Records.

As this Court has recognized, the unambiguous purpose of the NPRA "is to promote government transparency and accountability by facilitating public access to information regarding government activities." *PERS v. Reno Newspapers Inc.*, 129 Nev. 833, 836–37, 313 P.3d 221, 223 (2013). The Legislature has mandated the provisions of the NPRA must be construed liberally in favor of access, a fact that this Court has repeatedly recognized. *See* Nev. Rev. Stat. § 239.001(2)-(3); *Gibbons*, 127 Nev. at 878, 266 P.3d at 626; *accord PERS v. Reno Newspapers Inc.*, 129 Nev. 833, 837, 313 P.3d 221, 223 (2013); *see also Comstock Residents Assoc. v. Comm'r*, 134 Nev. Adv. Op. 19, 414 P.3d 318, 320 (2018).

Thus, any ambiguity must be resolved in a manner that favors access and 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 Nev. Rev. Stat. chapter 241 and the spirit of the Open Meeting Law…"). The Coroner's interpretation would not further the NPRA's central purpose (transparency) or access

to records. Indeed, it would discourage actions to enforce the NPRA. Instead, even if an ambiguity existed, the Fees Provision would have to be interpreted to allow a requester to get fees for having to go to court to get access to records.

C. The Legislature Intended to Allow for Requesters to Recoup Attorney's Fees and Costs When a Governmental Entity Refuses to Produce Public Records.

As discussed above, because the meaning of the Fees Provision is plain, this Court need not look to the legislative history to discern the legislature's intent. However, if the Court does choose to consider the legislative history of the Fees Provision, that history demonstrates that the legislature intended to create a mechanism for prevailing requesters to recoup reasonable attorney's fees and costs.

During the 1993 legislative session, the legislature considered Assembly Bill 365, which it passed into law as Nev. Rev. Stat. § 239.011. (3JA609-674 (legislative history of Assembly Bill 365).) Prior to the passage of AB 365, the NPRA provided for criminal penalties for the denial of access to public records. (3JA609.) AB 365 proposed replacing the criminal penalties with civil enforcement mechanisms. (*Id.*; *see also* 3JA612-13 (AB 365 as introduced).) Section 2 of AB 365 specifically contemplated that a prevailing requester "is entitled to recover his costs and attorney's fees in [a public records] proceeding from the agency whose officer has custody of the book or records." (3JA612.)

During a May 7, 1993 meeting of the Assembly Subcommittee on Government Affairs, there was discussion making clear that, as initially written, Section 2 mandated that, if the requester prevails, "he was entitled to recover his costs and fees and attorney's fees in the proceeding, from the agency whose officer had custody of the record." (3JA652-653.) During the Subcommittee hearing, there was some discussion about whether a resisting governmental agency should be entitled to fees if it prevailed—an idea which was rejected because it would discourage the public from going to court to fight for access to public records. (3JA653.) The Subcommittee recommended only one limitation on the fees and costs provision: it added the word "reasonable" before the words "attorney's fees." (*Id*.) Thus, the legislature always contemplated that a prevailing requester should be compensated for the fees and costs incurred in taking a public records case to court.

D. The District Court Thus Did Not Err In Refusing to Read a Good Faith Limitation into the Fees Provision.

The Fees Provision **entitles** prevailing parties in a specific type of action—an action to enforce the NPRA—to fees "from the governmental entity whose officer has custody of the book or record." Stat. § 239.011(2). There is no limitation on this entitlement to fees whatsoever. In contrast, the Immunity Provision provides that, if a public officer or employee "acts in good faith" in disclosing or failing to disclose a public record in good faith, such officer or employee (and, vicariously, his or her employer) is entitled to immunity from damages—"either to the requester or the

person to whom the information concerns." Nev. Rev. Stat. § 239.012. Thus, the Immunity Provision only provides for immunity from **damages** under such circumstances—not immunity from attorney's fees and costs in an action to enforce the NPRA and access records.

In sum, that the NPRA contains an entirely separate provision providing for immunity from damages does not alter the fact that the NPRA expressly and unequivocally mandates that a district court award a prevailing requester fees. Contrary to the Coroner's argument (OB, p. 22 (citing *Cleghorn v. Hess*, 109 Nev. 544, 548, 853 P.2d 1260, 1262 (1993))) the NPRA is not an ambiguous statute. Therefore, the courts need not "determine the meaning of the words used in a statute by examining the content and spirit of the law or the causes which induced the legislature to enact it." (OB, p. 22 (citing *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007)).) Even if this Court were to perform such an inquiry, it would determine that the Legislature's intent, as memorialized in the NPRA's very first section, is to further access to public records. Nev. Rev. Stat. § 239.001(1). Interpreting the Fees and Immunity Provisions into the NPRA separately, as the district court did, does exactly that. Its decision should be affirmed.

1. There Are Significant Structural Differences Between the Fees and Immunity Provisions.

The Fees and Immunity Provisions have different purposes and address entirely unrelated scenarios. As noted above, the Fees Provision addresses a specific,

narrow issue: whether a prevailing party can get fees and costs in an action to get access to records. The answer is yes, *absolutely*. *See* Nev. Rev. Stat. § 239.011(2) (providing that a prevailing requester is "entitled" to fees, without restriction). In contrast, the Immunity Provision addresses whether a public official or employee (and his or her employer) can be liable for damages in connection with that public official or employee's disclosure or non-disclosure of records. The answer is yes, *sometimes*. *See* Nev. Rev. Stat. § 239.012 (conditioning immunity on good faith). The fact that the Fees and Immunity Provisions address different questions shows the folly in relying on the Immunity Provision to qualify the express, unqualified entitlement to fees in the NPRA.

Indeed, interpreting the Immunity Provision as creating a restriction on the Fees Provision is incompatible with the fact that the Fees Provision only addresses a very narrow circumstance (attorney's fees and costs for requesters in actions to obtain access to records) whereas the Immunity Provision deals with a separate topic (damages) in a much broader fashion. The Immunity Provision does not just address liability for damages for non-disclosure of records but also liability for *disclosing* records, and liability not just to a requester but also to "the person whom the information concerns." Nev. Rev. Stat. § 239.012. This demonstrates that the Immunity Provision should not be read to obviate the unrelated Fees Provision.

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2. The Immunity Provision Provides Immunity for the Acts of Individuals and Is Irrelevant to Whether An Entity Is Required to Pay Fees.

As noted above, the Immunity Provision only addresses when immunity from damages attaches ***for the acts of government employees or officials.*** Unrelatedly, the Fees Provision in the NPRA requires that whenever a requesting party prevails in an action to obtain access to public records, it is entitled to attorney's fees and costs ***from the governmental entity*** whose officer has custody of the book or record. Nev. Rev. Stat. § 239.011(2) (emphasis added).

Nev. Rev. Stat. § 239.005(5) defines "governmental entity" as follows:

> (a) An elected or appointed officer of this State or of a political subdivision of this State;
> (b) An institution, board, commission, bureau, council, department, division, authority or other unit of government of this State, including, without limitation, an agency of the Executive Department, or of a political subdivision of this State;
> (c) A university foundation, as defined in Nev. Rev. Stat. § 396.405; or
> (d) An educational foundation, as defined in Nev. Rev. Stat. § 388.750, to the extent that the foundation is dedicated to the assistance of public schools.

The Coroner is a "governmental entity" within the meaning of Nev. Rev. Stat. § 239.005(5)(b) and is therefore responsible for attorney's fees under Nev. Rev. Stat. § 239.011(2). By contrast, the officers and employees whose "good faith" actions are immunized under the Immunity Provision are not the "governmental entities" subject to fees in the Attorneys' Fees Provision. This militates heavily against

bootstrapping a "good faith" requirement onto Nev. Rev. Stat. § 239.011(2), and further illustrates that the Immunity Provision has no bearing on the Fees Provision.

3. Attorney's Fees Are Not Damages In the NPRA.

To support its effort to nonetheless engraft the language from the Immunity Provision onto (and therefore devastate) the Fees Provision, the Coroner opines that the term "damages" in Nev. Rev. Stat. § 239.012 encompasses the terms "attorneys' fees" and "costs." (OB, pp. 25-28.) The Coroner's argument must be rejected because attorney's fees are not damages in this context.

a. Case Law Does Not Support Conflating Fees and Damages In The Context of the NPRA.

The Coroner's argument ignores a broad a body of case law holding that damages and attorney's fees are different. For example, in *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 35 P.3d 964 (2001), a case which the Coroner cites (OB, p. 26), this Court dedicated several paragraphs to discussing the procedural differences between "attorney fees as a cost of litigation" and "attorney fees as foreseeable damages arising from tortious conduct or a breach of contract." *Sandy Valley*, 117 Nev. at 956, 35 P.3d at 969. This Court explained:

> Procedurally, when parties seek attorney fees as a cost of litigation, documentary evidence of the fees is presented to the trial court, generally in a post-trial motion. . . If the fees are authorized, the trial court examines the reasonableness of the fees requested and the amount of any award. Thus, when a court is requested to award attorney fees as a cost of litigation, the matter is decided based upon pleadings, affidavits and exhibits. . . In contrast, when a party claims it has incurred attorney fees

> as foreseeable damages arising from tortious conduct or a breach of contract, such fees are considered special damages. They must be pleaded as special damages in the complaint pursuant to NRCP 9(g) and proved by competent evidence just as any other element of damages. . .

Id. Here, Nev. Rev. Stat. § 239.011 provides that a requester is entitled to recover his or her costs and reasonable attorney's fees to compensate the requester for the costs of having to file a petition to obtain public records. There is no provision indicating a prevailing petitioner must request the fees as special damages, nor is there any requirement that the requester demonstrate the governmental entity acted tortuously, unlawfully, or in bad faith. Instead, as discussed above, the language of the Fees Provision is plain: when a requester prevails, "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." Nev. Rev. Stat. § 239.011(2).

Other courts have held that attorney's fees and damages are distinct from eachother. *See, e.g., Carolina Cas. Ins. Co. v. Merge Healthcare Sols. Inc*., 728 F.3d 615, 617 (7th Cir. 2013) (noting that "an award of attorneys' fees differs from 'damages'"); *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 437 S.E.2d 374 (1993) (noting that attorney fees may be awarded for unfair practice, while punitive damages are awarded for tort based on same conduct); *cf. City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (discussing whether the amount of damages recovered by

a plaintiff in a civil rights matter affects the calculation of an award of attorney's fees under 42 U.S.C. § 1988).

To support its position, the Coroner relies on inapplicable case law from Utah and Montana to assert that the term "damages" could only mean "fees" within the context of the NPRA. (OB, pp. 25-26.) Neither case, however, support the Coroner's broad assertion. In *Swaner v. Union Mortg. Co*., the Utah court stated that "attorney's fees, ***in the absence of statute*** or agreement between the parties, are not ordinarily recoverable as damages." 99 Utah 298, 305, 105 P.2d 342, 346 (1940) (emphasis added). The *Swaner* Court then noted that the statute at issue did not have a provision for attorneys' fees, but it did have a peculiar construction in its Immunity Provision. *Id*. The statute stated that the party who fails to release a mortgage must pay "***all*** damages ***resulting from*** such a failure." *Id*. (emphasis added). The Utah court then concluded "all damages resulting from" means the damage one incurs by hiring an attorney to bring a legal action to secure the release of a mortgage. *Id*. The Utah court conducted an analysis of the meaning of "all damages" due to an ***absence*** of a statute for attorney's fees. Here, however, there is a statute which explicitly awards attorney's fees: the NPRA's Fees Provision which intentionally excludes a good faith requirement. Nev. Rev. Stat. § 239.011(2).

Similarly, the Coroner cites *State ex rel. O'Sullivan v. Dist. Ct*., to assert "damages" are synonymous with attorneys' fees. (OB, pp. 25-26.) The Coroner

misrepresents the case. The statute at issue in *Sullivan* specifically provided for the recovery of "costs" in addition to damages. *State ex rel. O'Sullivan v. Dist. Court of Tenth Judicial Dist. In & For Fergus Cty*., 127 Mont. 32, 36, 256 P.2d 1076, 1078 (1953) ("R.C.M.1947, § 93–9112, provides in part: 'If judgment be given for the applicant, he may recover the damages which he has sustained… , *together with costs*; and for such damages and costs an execution may issue; and a peremptory mandate must also be awarded without delay.") (emphasis added). Therefore, it is of no effect here.

The Coroner pontificates on the "American Rule," arguing that this rule requires each party to pay their own fees unless a statute, rule, or agreement provides otherwise. (OB, p. 26; *see also id.*, p. 28.) The Coroner cites several cases for this proposition. (OB, p. 26 (citing *Sandy Valley Assocs. v. Sky Ranch Estate Owners Ass'n*, 117 Nev. 48, 35 P.3d 964 (2001) and *Von Ehrensmann v. Lee*, 98 Nev. 335, 647 P.2d 377 (1982)). Given the Coroner's acknowledgement of this Court's precedent—that attorney's fees are permitted only where specifically permitted by statute (emphasis added)—it is puzzling that the Coroner then choses to ignore that the NPRA ***specifically provides that a prevailing requester is entitled to attorney's fees***, *see* Nev. Rev. Stat. § 239.011(2), arguing instead that this case deals with "equitable relief." (OB, p. 26 (citing *Von Ehrensmann*, 98 Nev. at 337-38, 647 P.2d at 378).) The Coroner's "ostrich-like tactic of pretending that potentially dispositive

authority against [its] contention does not exist is as unprofessional as it is pointless." *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011) (quotation omitted).

The Coroner further asserts that because awarding attorney's fees is "in derogation of the common law [] under the American Rule," "any statutory scheme allowing for an award of attorney fees must be construed narrowly." (OB, p. 27-28 (citing *Bobby Berosini, Ltd. v. PETA*, 114 Nev. at 1352, 971 P.2d at 385); *see also* OB, p. 8 (citing *Gibellini v. Klindt*, 110 Nev. 1201, 1205, 885 P.2d 540, 543 (1994)).) Of course, a truly narrow interpretation of the Fees Provision would militate for the award of fees and costs in this case, as the Fees Provision's plain language places no conditions on the prevailing requester's entitlement to fees and costs. The Coroner's idea of construing the Fees Provision "narrowly" has no basis in law or common sense, as it consists of transplanting an entirely different provision of the NPRA into the Fees Provision.

To further support its nonsensical position, the Coroner cites *Hardisty v. Astrue*, 592 F.3d 1072 (9th Cir. 2010). (OB, p. 28.) The Coroner's broad citation to *Hardisty* is misleading. In that case, the Ninth Circuit affirmed a district court's decision to deny attorney's fees to a plaintiff in an Equal Access to Justice Act case with respect to issues not reached by a district court in reversing a federal agency's decision. *Hardisty*, 592 F.3d at 1077 (noting that the Equal Access to Justice Act

"provides no indication that attorneys' fees should be awarded with respect to positions of the United States challenged by the claimant but unaddressed by the reviewing court"). This holding is of no moment here, where the district court considered each of the claims raised in the Review-Journal's petition and ruled in the newspaper's favor on each one.

b. Unlike Other Nevada Statutes, the NPRA Does Not Define Fees and Costs as an Element of Damages.

The NPRA can be contrasted with Nevada statutory provisions such as Nev. Rev. Stat. § 40.655, which expressly defines attorney's fees as an element of damages. *See also Albios v. Horizon Communities, Inc*., 122 Nev. 409, 414, 132 P.3d 1022, 1025 (2006) ("… although Nev. Rev. Stat. § 40.655 allows constructional defect claimants to recover attorney fees and costs as an element of damages, Nev. Rev. Stat. § 40.655 does not preclude application of the penalty provisions of Nev. R. Civ. P. 68(f) and Nev. Rev. Stat. §17.115(4)"); *Liu v. Christopher Homes, LLC*, 130 Nev. Adv. Op. 17, 321 P.3d 875, 878 (2014) (attorney fees may be awarded as "special damages," but only in "limited circumstances"). This evidences the Legislature's capability to include attorney's fees and costs as an element of damages in certain contexts. That the Legislature chose not to do so in the context of NPRA records litigation demonstrates that it intended the Fees Provision and the Immunity Provision to be read separately.

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4. The Coroner's Argument Relies on the False Assumption That No Liability Other than Attorney's Fees and Costs Could Ever Exist with Regard to Public Records.

The Coroner argues that the Immunity Provision must limit the Fees Provision because no other liability can attach with regard to public records. (OB, p. 25 ("That is, what other damages could a requester, such as LVRJ, possibly seek under NRS Chapter 239?").) This argument is misguided because the NPRA clearly contemplates that liability—separate and apart from being required to produce public records and pay attorney's fees and costs—could stem from both disclosure and non-disclosure of records. Common sense and basic legal analysis also make plain that, absent the Immunity Provision, it would be possible to obtain damages from a governmental entity and/or its employees in connection with the (non-) disclosure of public records, without regard to attorney's fees and costs incurred by a requester.

For example, if a person claimed that disclosure of a record violated his or her privacy rights and sued the governmental entity for invasion of privacy, the governmental entity could assert immunity under the Immunity Provision. Indeed, this nearly became an issue when the family of a 1 October shooting victim sued the Coroner and the Review-Journal to claw back disclosure of his redacted autopsy report to media outlets who had requested it pursuant to the NPRA. *See Las Vegas Review-Journal v. Eighth Judicial District Court*, 134 Nev. Adv. Op. 7, 412 P.3d 23

(2018). While the Coroner never acted to protect taxpayers' interests in the matter,[7] if it had (and if the plaintiff in that case had pleaded a cognizable cause of action), the Coroner could have asserted the Immunity Provision as a defense against plaintiff's claims.

Additionally, disclosing a public record could also entitle a requester to damages under other circumstances. For example, if a public officer withheld public records from a newspaper but provided it to a competing media outlet that asked for the records, such action could constitute impermissible viewpoint discrimination under the First Amendment and the Equal Protection Clause, which also protects against discriminatory denial of access to public forums or information. *See*, *e.g.*, *McCoy v. Providence Journal Co.*, 190 F.2d 760, 766 (1st Cir. 1951) ("the refusal of the defendants to accord the plaintiffs their right of inspection [under state public records law] while granting such right to a competitor, the Pawtucket Times, constitutes a denial of equal protection of the laws which gives rise to a case or controversy within federal jurisdiction …"); *American Broadcasting Companies v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) (holding that ABC could not be

[7]*See* February 7, 2018 Response in Non-Opposition to Plaintiffs' Ex Parte Application for Temporary Restraining Order and Motion for Preliminary Injunction (filed in Case No. A-18-768781-C). This Court may take judicial notice of this document, as it is "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute." *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009) (citing Nev. Rev. Stat. § 47.130(2)(b)).

excluded from post-election activities at campaign headquarters where other members of the press were granted access because "once there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable"); *Telemundo of Los Angeles v. City of Los Angeles*, 283 F. Supp. 2d 1095, 1102–04 (C.D. Cal. 2003) (granting Telemundo's "request for a preliminary injunction granting equal camera positioning, equal number of cameras, equal truck positioning, equal access to stage audio, equal 'access' credentials, equal access to production meetings, and equal access to rehearsal meetings.").

A party whose First Amendment and/or Equal Protection rights are violated in such a fashion could seek damages under several theories, including 42 U.S.C. § 1983. While a state governmental entity would not be entitled to immunity under such circumstances, these examples illustrate that it is false to argue that the only possible liability that can attach in connection with (non-) disclosure of public records is an award of attorney's fees and costs under the NPRA.

An example from Hawaii is instructive in demonstrating that damages independent of attorney's fees and costs could stem from a governmental entity's (non-) disclosure and negligent retention of public records. In *Molfino v. Yuen*, 134 Haw. 181, 399 P.3d 679 (2014), the plaintiff requested a "pre-existing lot determination"—a public record—from the Planning Department—a governmental

entity—concerning a piece of property he had purchased. *Id*. at 182, 680. The defendant, the Planning Director, responded that the piece of property consisted of two pre-existing lots. *Id*. The defendant was unaware that four years earlier, a former Planning Director had determined—in letters that were public records—that the piece of property consisted of six lots. *Id*. The plaintiff sold the property, discovered the defendants' error regarding the number of lots in his former property, and sued for negligence. *Id*.

The Hawaii Supreme Court held that the immunity provision of Hawaii's Freedom of Information Statute—which is similar to that of the NPRA[8]—immunized government entity employees from liability stemming from "participating in good faith in the disclosure or nondisclosure of a government record[.]" *Id*. at 685, 187 (quoting HRS § 92F-16). Therefore, the defendants in *Molfino* could not be held liable for damages—such as the loss in value plaintiff may have suffered selling his property based on inaccurate public records—stemming from defendants' potentially negligent retention and production of inaccurate public records. *Id*. Notably, the *Molfino* court did not once mention attorney's fees and costs; this wholly undermines the Coroner's contention that the only damages potentially stemming from (non-) disclosure of public records are attorney's fees and

[8] *Compare* HRS § 92F-16 *to* Nev. Rev. Stat. § 239.012.

costs.[9]

As the above real-life example indicates, damages—not merely attorney's fees and costs—can result from (non-) production of public records. Moreover, it is not difficult to imagine hypothetical situations in which (non-) production of public records would result in damages. For instance, what if a school district act in good faith but fails to produce documents revealing that one of its employees had been fired for sexual misconduct, and that employee is subsequently hired by another school district where he commits sexual misconduct again? The Immunity Provision would ensure that employees acting in good faith would not be held liable for damages suffered by the second school district and the victim. Those damages would, of course, be entirely independent of attorney's fees and costs.

For another hypothetical example, what if a police department negligently discloses the identity of one of its confidential informants, who then sues the department after criminals exact physical revenge? The damages in this hypothetical stem, in part, from a governmental entity's production of a public record; however, would then be able to entirely unrelated to attorney's fees and costs. The Immunity Provision would immunize the police department from liability in this instance,

[9] *See also Dalessio v. Univ. of Wash.*, No. C17-642 MJP, 2018 WL 4538900, at *1 (W.D. Wash. Sept. 21, 2018) (noting, without mention of attorney's fees and costs, that the Washington Public Records Act's "good faith immunity defense has been applied in many cases against a number of causes of action.") (citations omitted).

without any bearing on whether a public records requester is entitled to attorney's fees and costs. Indeed, in these hypothetical examples of negligent (non-) disclosure there would not even ***be*** a prevailing requester entitled to attorney's fees and costs under the Fees Provision. These examples demonstrate that attorney's fees and costs are far from the only damages a requester (or third party) could suffer from (non-) production of public records. That the legislature contemplated this fact is reflected in the separation of the Immunity Provision and the Fees Provision in the NPRA.

Because damages stemming from (non-) disclosure of public records unrelated to a requester's attorney's fees and costs are possible, interpreting the Immunity Provision separately from the Fees Provision does not create conflict, ambiguity or render either of these provisions a "nullity," as the Coroner argues. (*See generally* OB, pp. 23-24 (citing *Nuleaf CLV Dispensary, LLC v. State, Dep't of Health and Human Serv.*, 134 Nev. Adv. Op. 17, at *8 (Mar. 29, 2018); *Southern Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005); *Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 1168, 14 P.3d 511, 514 (2000); *In re Candelaria*, 126 Nev. 408, 411, 245 P.3d 518, 520 (2010); *Herrera-Castillo v. Holder*, 573 F.3d 1004, 1007 (10th Cir. 2009); *Mora v. Mukasey*, 550 F.3d 231, 237-239 (2d Cir. 2008); *United States v. Heckenliable*, 446 F.3d 1048, 1051 (10th Cir. 2006)).) Therefore, in the absence of such an ambiguity, courts have no reason to, as the Coroner argues, "look to the legislative history to determine the intent for

guidance in interpreting the multiple statutory provisions." (OB, p. 24 (citing *United States v. Manning*, 526 F.3d 611, 617 (10th Cir. 2008); *United States v. Craig*, 181 F.3d 1124, 1127 (9th Cir. 1999)).)

5. Different Nevada Attorney Fee Statutes Are Irrelevant.

To convince this Court to ignore the plain meaning of the very specific Fees Provision, the Coroner relies on irrelevant statutes governing attorney's fees in *other types of matters*. (OB, p. 32) Specifically, the Coroner cites Nev. Rev. Stat. § 7.085 and Nev. Rev. Stat. § 18.010(2)(b) as examples where attorney's fees are contingent upon a showing of bad faith. (*Id*.)

Unlike the NPRA's Fees Provision, these statutes set explicit conditions for the award of attorney's fees and costs in their plain language. *See* Nev. Rev. Stat. § 7.085(1)(a) (authorizing fees when "such action or defense is not well-grounded in fact or is not warranted by existing law or by an argument for changing the existing law that is made in ***good faith***.") (emphasis added); Nev. Rev. Stat. § 18.010(2)(b) (authorizing fees for a "claim, counterclaim, cross-claim or third-party complaint or defense … brought or maintained ***without reasonable ground or to harass the prevailing party***") (emphasis added). This further proves the Review-Journal's contention that the Legislature knew how to condition an award of fees on bad faith or unlawful behavior by making those conditions part of the plain language of the statute. That the Legislature chose not to include any such limitations in the NPRA's

Fees Provision, indicates the Legislature intended the Fees Provision to provide a prevailing requester an unconditional entitlement to attorney's fees and costs.

The Coroner's argument that because the district court "balances the relative good faith of the parties" to determine an award of attorney's fees to a settlement offeror from a settlement offeree who fails to obtain a more favorable judgment (OB, p. 32, citing Nev. R. Civ. P. 68 and *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983)) has no bearing on whether the district must award attorney's fees pursuant to the Fees Provision of the NPRA. The purpose of Nev. R. Civ. P. 68 is "to encourage settlement[,] not to force plaintiffs unfairly to forego legitimate claims." *Beattie*, 99 Nev. at 588, 668 P.2d at 274. In the context of balancing the interest in the speedy resolution of cases against the rights of plaintiffs to pursue claims, it makes sense to inquire into the good-or-bad faith of the respective parties during settlement negotiations.

Unrelatedly, the purpose of the NPRA is to foster democratic principles by ensuring government records are available to the public. Nev. Rev. Stat. § 239.001(1). Conditioning the award of attorney's fees to a prevailing requester restricts the public's access to public records, which flies in the face of the NPRA's mandate that such exemptions, exceptions or balancing of interests must be construed narrowly. Nev. Rev. Stat. § 239.001(3). Thus, unlike awarding fees pursuant Nev. R. Civ. P. 68, it would be improper for the district court to inquire

about the governmental entity's good faith (or lack thereof) when awarding attorney's fees under the NPRA's Fees Provision.

Furthermore, Nev. R. Civ. P. 68 state that "the offeree shall pay the offeror's … reasonable attorney's fees, ***if any be allowed*** […]." Nev. R. Civ. P. 68(f)(2) (emphasis added). This, unlike the unambiguous entitlement of the NPRA's Fees Provision, Nev. R. Civ. P. 68 implies that attorney's fees granted as a penalty for rejecting a favorable settlement offer must be allowed, presumably by either the court's inherent authority or by another statute. Therefore, the district court did not err by awarding attorney's fees and costs without finding that the Coroner acted in bad faith.

6. Case Law Interpreting Different States' Public Records Acts Does Not Support the Coroner's Position.

Although this Court has previously rejected arguments that conflict with the plain meaning of the Fees Provision[10] and arguments based on other jurisdictions' public records caselaw,[11] the Coroner mistakenly relies on such arguments and

[10] *Blackjack Bonding*, 343 P.3d at 615, n.6 ("To the extent that the parties raise policy arguments that conflict with NRS 239.011's plain meaning, they are without merit and do not alter our analysis.").

[11] *Blackjack Bonding*, 343 P.3d at 615, at n.7. ("We have considered the parties' remaining arguments, including those based on other jurisdictions' public records caselaw and the NPRA's legislative history, and conclude that they are without merit.").

caselaw to support its unavailing arguments about the NPRA's unambiguous language.

Specifically, the Coroner cites several Florida state court cases interpreting Florida's Sunshine Law, Fla. Stat. § 119.01 et seq., for the proposition that a governmental entity is not liable for a requester's attorney's fees if it acted in good faith in refusing to disclose public records. (*See* OB, p. 27 (citing, *inter alia, B&S Utilities, Inc. v. Bakerville-Donovan, Inc.*, 988 So.2d 17, 23 (Fla. 1st DCA 2008); *Putnam Cnty. Human Soc'y, Inc. v. Woodward*, 740 So.2d 1238 (Fla. 5th DCA 1999)).) However, unlike the NPRA's Fees Provision, the fees provision in Florida's Sunshine Law explicitly premises an award of attorney's fees on a judicial finding that the governmental entity acted unlawfully:

> (1) If a civil action is filed against an agency to enforce the provisions of this chapter, the court shall assess and award the reasonable costs of enforcement, including reasonable attorney fees, against the responsible agency if the court determines that:
>
> (a) The agency ***unlawfully refused*** to permit a public record to be inspected or copied; and
>
> (b) The complainant provided written notice identifying the public record request to the agency's custodian of public records at least 5 business days before filing the civil action, except as provided under subsection (2).

Fla. Stat. § 119.12 (emphasis added). In any case, even if we were in Florida instead of Nevada, the district court in this instance did find that records were unlawfully withheld—it ordered that they must be produced.

In its desperation, the Coroner even goes so far as to rely on a case that has been overruled, without mentioning that fact. The Coroner cites *Althouse v. Palm Beach Cnty. Sheriff's Office*, 92 So.3d 899, 901 (Fla. 4th DCA 2012) for the proposition that there is "a good faith exception to attorney fees provision in [Florida] public records law." (OB, p. 27.) However, the Coroner failed to note that the Florida Supreme Court explicitly held that "[t]here is no additional requirement, before awarding attorney's fees under the Public Records Act, that the trial court find that the public agency did not act in good faith, acted in bad faith, or acted unreasonably" and disapproved of *Althouse* and similar cases "to the extent that [*Althouse* and similar cases] require a showing that the public agency acted unreasonably or in bad faith before allowing recovery of attorney's fees under the Public Records Act." *Bd. of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, 189 So. 3d 120, 122 (Fla. 2016).[12] The Coroner's attempt to mislead the Court regarding the validity of other courts' precedents should not be countenanced.

The Coroner's reliance on cases interpreting Kentucky's open records law[13]

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[12] This is another example of the Coroner engaging in an "ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist." *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011) (citing *Mannheim Video, Inc. v. County of Cook*, 884 F.2d 1043, 1047 (7th Cir.1989), quoting *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1198 (7th Cir.1987)).

[13] (OB, p. 27 (citing *Com., Cabinet for Health & Family Servs. v. Lexington H-L Servs., Inc.*, 382 S.W.3d 875 (Ky. Ct. App. 2012).))

is also misplaced because, unlike the Fees Provision, the provision of Kentucky's open records law pertaining to attorney's fees explicitly premises an award of fees "upon a finding that the records were willfully withheld in violation of [Kentucky's open records law]." Ky. Rev. Stat. Ann. § 61.882. The Coroner also attempts to mislead this Court with its citation to *KPNX-TV v. Superior Court In & For Cty. of Yuma*, 183 Ariz. 589, 593, 905 P.2d 598, 602 (Ct. App. 1995).[14] This case is also inapposite because—unlike the Fees Provisions—Arizona's open records law explicitly premises the award of attorney's fees on a judicial finding of bad faith. *See* Ariz. Rev. Stat. Ann. § 39-121.02(B).[15] The final out-of-state case cited by the Coroner, *Friedmann v. Corr. Corp. of Am.*, 310 S.W.3d 366 (Tenn. Ct. App. 2009)[16], is inapplicable here because Tennessee's Public Records Act similarly premises an award of attorney's fees on a finding "that the governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and willfully refused to disclose it." Tenn. Code Ann. § 10-7-505(g). In any case, even if we were in

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[14] (OB, p. 27.)

[15] Providing that "[i]f the court determines that a person was wrongfully denied access to or the right to copy a public record ***and if the court finds that the custodian of such public record acted in bad faith***, or in an arbitrary or capricious manner, the superior court may award to the petitioner legal costs, including reasonable attorney fees, as determined by the court."(emphasis added).

[16] (OB, p. 27.)

Tennessee, not Nevada, the Coroner did withhold records it concedes are public records and did so willfully.

Again, by its plain language, the NPRA's Fees Provision does not premise a requester's entitlement to attorney's fees and costs on the withholding entity's subjective intent. It simply requires that the requester prevail in a civil action to access public records, nothing more. In this case, through its failure to respond to the Review-Journal's records requests in a manner consistent with the NPRA, the Coroner forced the Review-Journal to bring the instant action. The Review-Journal prevailed in this action. Thus, under the plain language of the Fees Provision, the Review-Journal is entitled to compensation for the attorney's fees and costs it expended in this matter.

7. The Coroner's Reliance on the Legislative History to Support its Position is Misplaced.

Even though the statute is clear on its face, and even though the legislative intent favoring access to public records is spelled out in the NPRA itself, the Coroner asks this Court to look at the legislative history to interpret the statute. (OB, pp. 28-33.) This runs afoul of basic canons of statutory interpretation which mandate that "when a statute is clear on its face, a court cannot go beyond the statute in determining legislative intent." *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) (citation and internal quotation marks omitted); *see also Robert E. v. Justice Court*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983) (same); *Coast Hotels &*

Casinos, Inc. v. Nevada State Labor Comm'n, 117 Nev. 835, 840, 34 P.3d 546, 550 (2001) ("When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it.")[17]

Here, the language of the Fees Provision is plain: if a requester prevails in an action to obtain public records, "the requester is entitled to recover his or her reasonable costs and attorney's fees in the proceeding from the governmental entity whose officer has custody of the book or record." Nev. Rev. Stat. § 239.011(2). The statute does not require a requester to demonstrate a governmental entity acted in bad faith; it only requires that the requester prevail. Despite all this, the Coroner is asking this Court to rely on outside "legislative history" to negate a foundational provision of the NPRA. This Court should not do so.

Even if the Court considers the legislative history, the Coroner's argument still fails. The Coroner starts with a misleading discussion of Legislative Counsel Bureau ("LCB") Bulletin No. 93, a bulletin which explained recommended changes to the NPRA. (*See* OB, pp. 29-30; *see also* 3JA508-44 (Bulletin No. 93).) In arguing

[17] The Coroner also ignores another canon of statutory construction: *expressio unius est exclusio alterius*, which means that "the expression of one thing is the exclusion of another." *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967). Had the Nevada Legislature intended Nev. Rev. Stat. § 239.012 to immunize governmental entities that act in good faith from damages *and* attorney's fees, it would have done so. Instead, it addressed a prevailing requester's entitlement to attorney fees and costs separately in Nev. Rev. Stat. § 239.011(2), and a governmental officer or entity's potential immunity from damages in Nev. Rev. Stat. § 239.012.

that the Legislature intended the Fees Provision and the Immunity Provisions to be considered together, the Coroner cites only to the final two pages of the Bulletin, which summarizes the LCB's recommendations regarding enforcement of public records laws and cross-references the Fees Provision. (OB, pp. 29-30.) This conveniently ignores the several sections of the Bulletin which in fact demonstrate that the LCB considered the Fees Provision and the Immunity Provisions to be conceptually distinct.

Specifically, in the "Summary of Recommendations" section, the recommended adoption of what would become the Fees Provision appears in a subsection entitled "Procedures for Access to Public Records." (3JA515-16.) The recommendation for what would become the Immunity Provision, on the other hand, was included in a subsection entitled "Enforcement of Public Records Laws." (3JA518.) Similarly, in the more detailed sections of the Bulletin, the LCB discussed the recommended Fees Provision in a section of the Bulletin entitled "Procedures Upon Denial of Access to Records," (3JA535-36), while discussing the eventual Immunity Provision in a section dealing with enforcement of public records laws. (3JA543-44.)

The Coroner also argues that because the Fees Provision and the Immunity Provisions of AB 365 appear back-to-back, they must be read together. (OB, pp. 30-31 (citing 3JA549).) In addition to not citing any case law to support this absurd

argument, the Coroner ignores textual clues in AB 365 which demonstrate that the legislature intended these two provisions to have separate meaning and effect.

Significantly, the Coroner's argument ignores the different language of the two sections of AB 365. Section 2—which eventually became the Fees Provision—provides that a prevailing requester is entitled to recover attorney's fees and costs "from the ***agency*** whose officer has custody of the book or record." (3JA549) (emphasis added). Section 3—which eventually became the Immunity Provision—uses different language, providing that a "***public officer or employee*** who acts in good faith in disclosing or refusing to disclose information is immune from liability from damages, either to the requester or to the person whom the information concerns." (*Id.*) (emphasis added).

This Court has stated that it will "construe statutes to give meaning to all of their parts and language, and this court 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) (citation omitted). The uses of the term "agency" in Section 2 and the terms "public officer or employee" in Section 3 demonstrate that the legislature intended the two sections to be distinct provisions. Had the legislature intended to carve out some sort of immunity from attorney's fees and costs for a governmental ***agency***, it could have easily done so. But it did not, and neither should this Court. Thus, conflating the two

provisions of AB 365 simply because they appear "back-to-back" would run afoul of this Court's precedent and would render the legislature's specifically chosen language nugatory, a result the Coroner consistently reminds this Court that it must avoid.

Also telling is the absence of any bad faith requirement in Section 2. All that AB 365 required for a requester to recoup attorney's fees and costs is that he or she prevails in the litigation in district court. (3JA549.) Unlike Section 3, there is no requirement that a requester demonstrate an agency acted in bad faith.

Moreover, reading these two separate sections of AB 365 together as the Coroner argues would be inconsistent with the purpose of AB 365 and the overall purpose of the NPRA. As the Society for Professional Journalists explained during public testimony on the bill, AB 365 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." (3JA624.) Rendering the Fees Provision meaningless would be inconsistent with this purpose, which, as detailed above, is now enshrined in the NPRA's plain language.

Thus, the bill was designed to revamp and strengthen access to public records. It set forth a mechanism by which a requester could go to court—and recoup fees and costs upon prevailing. It also separately replaced a prior provision that imposed criminal liability with one limiting civil liability to those cases in which the

governmental officer or employee did not act in good faith. Nothing in the record shows that Section 3 was intended as a limitation on Section 2.

The Coroner cites to an isolated portion of testimony by Ande Engleman of the Nevada Press Association for the proposition that an award of attorney's fees must be predicated upon a showing of bad faith. (OB, pp. 31-32.) While Ms. Engleman may have testified that costs and fees would be "granted only when it was a denial of what was clearly a public record" (3JA649), that sentence was sandwiched in a discussion of frivolous lawsuits. (*Id.*) Ms. Engleman was not urging a limitation on the fees and costs provision—she was assuring legislators that public agencies would not be on the hook for fees and costs if a lawsuit was frivolous. In any case, such "legislative history" certainly cannot be used to dodge the plain text of the NPRA.

Moreover, at the same hearing where Ms. Engleman testified, Assembly Subcommittee on Government Affairs Chairman Rick Bennett explained that "[a]s currently written, if the requester prevailed, he was entitled to recover his costs and attorneys' fees in the proceeding, from the agency whose officer had custody of the record." (3JA652-53.)

When interpreting a statute, this court resolves any doubt as to legislative intent in favor of what is reasonable, and against what is unreasonable. *Hunt v. Warden, Nevada State Prison*, 111 Nev. 1284, 1285, 903 P.2d 826, 827 (1995)

(citing *Oakley v. State*, 105 Nev. 700, 702, 782 P.2d 1321, 1322 (1989)). Further, even if any ambiguity results in interpreting the Fees Provision, it must be resolved in a manner that favors access and 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…"); *see also 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). As discussed above, the purpose of the NPRA is to further public access to government records. Using a contorted interpretation of legislative history to cancel out a provision of the NPRA which entitles requesters to recoup their attorney's fees for having to drag a governmental entity to court to obtain public records is both unreasonable and contrary to that important purpose.[18]

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[18] The Coroner also asserts that the district court committed reversible error by "interpret[ing] NRS 239.011(2) in isolation." (OB, p. 22.) This necessarily ignores that in declining the Coroner's request to conflate Nev. Rev. Stat. §§ 239.011 and 239.012, the district court found that such an interpretation would be inconsistent with the purposes and policies animating the entire NPRA. (*See* 5JA761-62.)

E. Even if the Immunity Provision Applied to the Fees Provision, the Coroner Would Not Be Entitled to Rely On it.

In its Petition, the Review-Journal made clear that it intended to seek fees in this matter. (1JA145; 1JA160.) In response, the Coroner quoted the Immunity Provision and asserted that it "acted in good faith … responded timely, maintained open and professional communication, provided spreadsheets consisting of public data relating to these deaths, and provided continuous discussion regarding the legal basis for non-disclosure" and therefore "is immune from liability for damages, even if that damage is in the form of attorney's fees and costs for which there is no specific statutory entitlement."[19] (1JA223.) However, even if the Immunity Provision applied as the Coroner imagines it does, the Coroner has not sufficiently demonstrated that it acted in good faith in this matter, and would thus still be liable.

1. The Immunity Provision is an Affirmative Defense, Which Must Be Proved by the Coroner.

If the Immunity Provision even applied to attorney's fees and costs—which it does not—it would be an affirmative defense to liability, all elements of which must be proven by the defendant. *See Nevada Ass'n Servs., Inc. v. Eighth Jud. Dist. Ct.*, 130 Nev. 949, 955, 338 P.3d 1250, 1254 (2014) (citing *Schwartz v. Schwartz*, 95 Nev. 202, 206 n.2, 591 P.2d 1137, 1140 n.2 (1979)) ("because the voluntary payment

[19] The contention that there is no specific statutory entitlement to attorney's fees and costs in this instance is meritless. *See* Nev. Rev. Stat. § 239.011(2).

doctrine is an affirmative defense, the defendant bears the burden of proving its applicability"); *see also Childress v. Darby Lumber, Inc*., 357 F.3d 1000, 1007 (9th Cir. 2004) ("good faith is an affirmative defense as to which defendants have the burden of proof" regarding violations of Worker Adjustment and Retraining Notification Act). The requirement that a defendant bear the burden of proving the affirmative defense of good faith is especially pertinent when the defendant is the government. *See Benigni v. City of Hemut*, 879 F.2d 473, 479 (9th Cir. 1988) ("We have expressly held that good faith is an affirmative defense that a police officer must prove."); *McDonald v. United States*, 102 F.3d 1009, 1010 (9th Cir. 1996) (In a case dealing with an alleged improper tax disclosure, "[g]ood faith is an affirmative defense which the government must prove"); *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992) (In § 1983 civil rights action, "qualified immunity is an affirmative defense, and the burden of proving the defense lies with the official asserting it") (*citing Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982)).

Aside from its naked assertions (1JA223) the Coroner never provided evidence to support its defense of good faith. Indeed, the history of this case shows that the Coroner did not act in good faith—and failed to comply with both the spirit and the letter of the NPRA.

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2. The Coroner's Actions Demonstrating Lack of Good Faith.

Most centrally, the Coroner relied on flimsy "authority" to skirt compliance with important procedural requirements contained in the NPRA. In its mandatory five-day response, all the Coroner cited to support its claims of privilege was Attorney General Opinion ("AGO") No. 82-12, in which the attorney general opined that an "autopsy report is a public record but not open to public inspection." (1JA33) and Assembly Bill 57, "legislation pending." (1JA34.)

While it is axiomatic that unenacted statutes have no legal weight, an AGO is not a binding legal authority either. *Univ. & Cmty. Coll. Sys. of Nevada v. DR Partners*, 117 Nev. 195, 203, 18 P.3d 1042, 1048 (2001). Therefore, the Coroner failed to cite to specific authority for withholding records, in violation of Nev. Rev. Stat. § 239.0107(1)(d). That provision requires the Coroner provide the Review-Journal with a "citation to the specific statute or other legal authority" that it believed made the requested records confidential within five (5) days of the request at issue. This provision is important: public records are presumed public and § 239.0107(1)(d) gives a requester notice of why a record is being withheld. The requester is then able to determine whether it should seek court action to get access to records.

The Review-Journal was then forced to petition the district court for a writ of mandamus to obtain public records from the Clark County Coroner. Then, as it did

pre-litigation, the Coroner continued to rely on inapplicable authority to justify withholding public records, which is not good faith. At a September 28, 2017 hearing, the Court orally granted the Review-Journal's Petition and entered a written order on November 8, 2017. (2JA398.) In its subsequent written order, the district court found that the Coroner failed to comply with Nev. Rev. Stat. §239.0107(1)(d). (*See* Order, 2JA436-437, ¶¶ 32-33.) The Court found that the Coroner could not "rely on privileges, statutes, or other authorities that it failed to assert," but nonetheless considered the arguments made by the Coroner. The Court then rejected each of the authorities cited by the Coroner as bases for withholding the requested autopsy records *because the Coroner did not rely on any valid statute or legal authority*. (*Id*., 2JA436-439, ¶¶ 34-48.)

Despite the Coroner's attempts to redact the reports and charge for the redaction, the district court ruled that nothing within NPRA permitted the Coroner to do so. (*Id*., at 2JA 440, ¶ 52.) The district court found that permitting a public entity to charge for a privilege review or redaction was contrary to the plain language of the NPRA and was also impermissible because "[t]he public official or agency bears the burden of establishing the existence of privilege based upon confidentiality," and the Coroner did not meet its burden. (*Id.* at ¶ 53 (quoting *DR Partners v. Bd. of Cty. Comm'rs of Clark Cty*., 116 Nev. 616, 621, 6 P.3d 465, 468

(2000)). The myriad ways in which the Coroner flouted the requirements of the NPRA are simply incompatible with good faith.

Indeed, the facts of the case are not unlike cases relied on by the Coroner from other jurisdictions where governmental entities have been found to act unlawfully and/or in bad faith. For example, in *Com., Cabinet for Health & Family Services v. Lexington H-L Services, Inc.* (cited in OB, p. 27), the Court found that a blanket policy of nondisclosure "constituted a 'willful' violation of the Open Records Act." 382 S.W.3d 875, 883–84 (Ky. Ct. App. 2012) Here, as in that case, the Coroner has a nearly blanket policy against providing releasing Autopsy Reports to the general public. (1JA227 (Declaration of John Fudenberg).) Here, as in the Kentucky case, the Coroner's "all-encompassing policy of nondisclosure" exists "despite the purpose of the [Open Records Act]." *Com., Cabinet for Health & Family Services,* 382 S.W.3d at 883. The Kentucky court found the blanket policy and refusal to follow the applicable public record to be "willful" and thus upheld the lower court's conclusion that the "denials were made in 'bad faith'." *Id.* at 883-884. Here, as in the Kentucky case, the Coroner acted in bad faith.[20]

[20] In contrast, in *Friedmann v. Corr. Corp. of Am*., 310 S.W.3d 366, 381 (Tenn. Ct. App. 2009) (cited in OB, p. 27), the reviewing court refused to disturb a district court's determination not to grant fees because "the record fully support[ed] the Trial Court's conclusion that CCA was acting in good faith."

3. If the Immunity Provision Applies, the Review-Journal is Entitled to an Evidentiary Hearing to Determine Whether the Coroner Acted in Good Faith.

If this Court determines (despite all the above) that the Immunity Provision applies, the issue of whether the Coroner acted in good faith remains unresolved. Thus, this matter would need to be remanded for an evidentiary hearing. At such an evidentiary hearing, the Review-Journal would be entitled to examine John Fudenberg (the Coroner), the Coroner's counsel, and any other the other person(s) responsible for the decision to withhold the requested records. Even assuming the Coroner has asserted sufficient facts for the Court to consider the affirmative defense of good faith, such a defense is one that is resolved by the trier of fact. *See W. Indus., Inc. v. Gen. Ins. Co.*, 91 Nev. 222, 228, 533 P.2d 473, 476–77 (1975) (the question of whether a corporate officer has breached his duty of good faith, honesty and full disclosure is "a question the trier of fact must resolve after scrutinizing all the evidence"); *see also G. Golden Assocs. Of Oceanside, Inc. v. Arnold Foods Co*., 870 F. Supp. 472, 478 (E.D.N.Y. 1994) ("Whether a party has acted in good faith is typically a question to be answered by the trier of fact . . . Issues of motive simply are not easily determinable before trial on the basis of a limited record without the ability to assess the credibility of witnesses."); *Safeco Ins. Co. v. City of White House, Tenn*., 36 F.3d 540, 548 (6th Cir. 1994) (good faith is a question of fact).

F. The Coroner Has Waived Its Right to Object to the Sufficiency of the Review-Journal's Documentation of Costs.

In its Opening Brief, the Coroner asserts for the first time on appeal that the district court erred in awarding the Review-Journal $852.02 in costs because the Review-Journal did not file a memorandum of costs. (OB, p. 33.) The Coroner did not raise this argument in the district court. (*See generally* 3JA487-506 (Coroner's opposition).) Thus, the Coroner has waived its ability to raise it on appeal, and the Court should not consider it. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.") (citation omitted).

Even if the Coroner had preserved this argument for appeal, the district court did not abuse its discretion in awarding the Review-Journal its costs. This is because the NPRA provides a specific basis for the Review-Journal to recover fees and costs that is separate from the general provisions regarding recoupment of fees and costs in Chapter 18 of the Nevada Revised Statutes."[I]t is an accepted rule of statutory construction that a provision which specifically applies to a given situation will take precedence over one that applies only generally." *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999) (quoting *Sierra Life Ins. Co. v. Rottman*, 95 Nev. 654, 656, 601 P.2d 56, 57–58 (1979)); *accord In re Resort at Summerlin Litig.*, 122 Nev. 177, 185, 127 P.3d 1076, 1081 (2006) (holding that the

costs provision in the 2001 version of Nev. Rev. Stat. § 108.239(6) controlled over the general costs provisions of Chapter 18 of the Nevada Revised Statutes).

As this Court discussed in *In re Resorts at Summerlin Litig.*, the costs provisions in Chapter 18 are "general costs provisions." *In re Resorts at Summerlin Litig.*, 122 Nev. at 185, 127 P.3d at 1081. By contrast, the NPRA's Fees Provision, as discussed above, specifically provides that a prevailing requester is entitled to his or her costs and reasonable attorney's fees. Unlike the general costs provisions in Chapter 18, the Fees Provision does not require prevailing petitioners to submit a memorandum of costs. Thus, the Coroner's unpreserved argument is misplaced.

Should this Court find that the Fees Provision does not take precedence over Nev. Rev. Stat. § 18.110(1)'s memorandum of costs requirement, the fairest solution is to vacate the portion of the order that granted the Review-Journal its costs and remand this matter to the district court to allow the Review-Journal to submit a memorandum of costs.

G. The District Court Did Not Err in Awarding Fees to Administrative Support Staff.

In addition to its unpreserved argument regarding costs, the Coroner asserts that the district court erred in awarding the Review-Journal $165.00 for administrative support. (OB, p. 33 (citing 5JA757).) As with its argument regarding costs, the Coroner failed to raise this argument below, and this Court should therefore decline to consider it on appeal. *Old Aztec Mine, Inc.*, 97 Nev. at 52, 623

P.2d at 983. To support this unpreserved argument, the Coroner makes a bare citation to this Court's opinion in *LVMPD v. Yeghiazarian*, 129 Nev. 760, 312 P.3d 503 (2013). (OB, p. 33.) In that case, this Court vacated a fee award and remanded it to the district court for further analysis of the claims for attorney's fees because the district court had failed to assess the reasonableness of the requested fees under the *Brunzell* factors[21]. *Yeghiazarian*, 129 Nev. at 770, 312 P.3d at 510. In this case, by contrast, the district court appropriately considered the *Brunzell* factors when reviewing the work performed by the Review-Journal's attorneys, paralegal, and administrative support. (5JA762-64.) Thus, the district court did not abuse its discretion in awarding the Review-Journal $165.00 for the time its administrative support staff expended in this matter.

H. The Review-Journal is Entitled to Its Fees and Costs Regardless of the Outcome of the Coroner's Appeal of the District Court's Order Granting the Review-Journal's Petition.

The Coroner argues that if this Court rules in its favor in *Clark Cty. Office of the Coroner v. Las Vegas Review-Journal*, Nev. S. Ct. Case No. 74604—the Coroner's appeal of the district court's order granting the Review-Journal's petition—the Review-Journal will not be a "prevailing party" and thus will not be entitled to its fees and costs. (OB, pp. 20-21.) It is not disputed that there is no statute or other express authority rendering autopsy records confidential. *See generally*

[21] *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

Clark Cty. Office of the Coroner v. Las Vegas Review-Journal, Nev. S. Ct. Case No. 74604. Thus, pursuant to Nev. Rev. Stat. § 239.0113, the Coroner was required to establish by a "preponderance of the evidence" that some other claim of confidentiality applied and that the 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). Here, the district court found 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." (2JA436.) As detailed in the Review-Journal's Answering Brief in Case No. 74604 (Document No. 18-34735), this factual determination must be upheld.

If this Court nonetheless applies the balancing test and determines that the records should be withheld in part[22], the Review-Journal should still be entitled to fees for multiple reasons. First, until such a hypothetical ruling would be made, it cannot be said that there is any authority making the records confidential. Thus, the

[22] Even the Coroner conceded the autopsy reports should be produced in redacted form. (*See* OB, pp. 16-18 (discussing the Coroner's pre-litigation offer to redact and sample redacted reports); *see also* 1JA107-43 (email from Coroner with sample redacted reports).)

Review-Journal properly went to court to get access. Second, the matter would still need to be remanded to determine the proper scope of redactions, which would likely be far less than those desired by the Coroner. The Coroner had an obligation to make only those redactions that were supported by law and was required to support those redactions. Nev. Rev. Stat. § 239.010(3); Nev. Rev. Stat. § 239.0107(1)(d)(2). Third, if the documents are produced with fewer redactions, that outcome would still render the Review-Journal the prevailing party. *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 615 (2015) ("A party prevails 'if it succeeds on *any significant issue* in litigation which achieves some of the benefit it sought in bringing suit.'") (quotation omitted; emphasis in original).

Fourth, as the district court found, the Coroner did not comply with the mandates of the NPRA with regard to, *e.g.*, providing timely and specific notice. (2JA436-37.) A requester should not be required to ask for, or go to court, to get the specific information that the government has the duty to provide under the NPRA.

For all these reasons, even if this Court were to overrule the district court in whole or in part, the Review-Journal should still be entitled to its attorney's fees and costs.

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VII. CONCLUSION

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

DATED this 19th day of October, 2018.

/s/ Margaret A. McLetchie

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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 ANSWERING BRIEF has been prepared in a proportionally spaced typeface (14-point Times New Roman font).

I further certify that this ANSWERING BRIEF complies with the type-volume limitation of Nev. R. App. P. 28.1(e)(2)(B)(i) because it contains 13,618 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.

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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 19th day of October, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONDENT'S ANSWERING BRIEF was filed electronically with the Nevada Supreme Court on the 19th day of October, 2018. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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