IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF HENDERSON, Appellant/Cross-Respondent, vs. LAS VEGAS REVIEW-JOURNAL, Respondent/Cross-Appellant.	CASE NO.: 75407

RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

Appeal from Eighth Judicial District Court, Clark County
The Honorable Mark Bailus, District Judge
District Court Case No. A-16-747289-W

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I. INTRODUCTION

In this case, the Las Vegas Review-Journal (the "Review-Journal") was forced to file a petition with the district court pursuant to the Nevada Public Records Act to obtain access to public records that the City of Henderson ("Henderson") refused to disclose unless the Review-Journal paid a nearly $6,000.00 ransom, purportedly for the city's staff to conduct a privilege review. As a result of its court action, the Review-Journal got access to the records. Because the Review-Journal prevailed in getting access to the records, it moved the district court pursuant to Nev. Rev. Stat. § 239.011(2) (the "Fees Provision") for an order directing Henderson to pay its attorney's fees and costs. (IV JA455-526.)

Following briefing and argument from the parties, the district court properly found that the Review-Journal prevailed, and entered an order awarding the Review-Journal fees and costs. This decision was consistent with the plain language of the Fees Provision, which provides that 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 should bear that member's legal expenses.

In a combined Reply Brief on Appeal/Answering Brief on Cross-Appeal ("RB/AB") that is long on conjecture but short on law, Henderson asks a lot of this Court. It asks the Court to find that the Review-Journal did not prevail because it did not achieve every objective of its litigation. (RB/AB, pp. 7-25.) In doing so,

Henderson invites the Court to ignore the plain language of the Fees Provision, the explicit intent of the NPRA, and case law demonstrating that a party can prevail in a public records matter even if it does not obtain "judicially sanctioned" relief.

Henderson also asks the Court to conflate the Fees Provision with Nev. Rev. Stat. § 239.012 (the "Immunity Provision"), a separate provision of the NPRA that immunizes public officers, employees, and their employers from civil liability for the disclosure (or non-disclosure) of public records, so long as they act in good faith. (RB/AB, pp. 25-31.) It also asks the Court to accept a distorted version of the legislative history of those two provisions to reach this result (*Id*., pp. 31-35) and ignore that the Fees Provision incentivizes governmental entities—even those acting in good faith—to maintain and produce public records in a manner that promotes access and transparency without the district court's intervention. (*Id*., pp. 35-37.)

Finally, in asking the Court to affirm the district court's decision to reduce the award of attorney's fees to the Review-Journal from $30,931.50 to $9,010.00 (*Id*., pp. 37-46), Henderson asks this Court to ignore that, despite direct inquiry from counsel for the Review-Journal, the district court did not articulate how the *Brunzell* factors influenced that decision.

Henderson asks too much. For the reasons set forth below, and for the reasons presented in the Review-Journal's Answering Brief/Opening Brief, the Court should (1) affirm the district court's determination that the Review-Journal prevailed, (2)

affirm the district court's determination that Nev. Rev. Stat. § 239.012 does not immunize Henderson from paying the Review-Journal's reasonable attorney's fees and costs; and (3) remand this matter to the district court for reconsideration of its decision to reduce the fees award.

II. ARGUMENT

A. The District Court Properly Found That the Review-Journal Prevailed Because It Achieved a Significant Goal of the Litigation: Access to Records.

1. Henderson's Decision to Provide Access to the Records After the Review-Journal Filed Suit Did Not Need to be "Judicially Sanctioned" for the Review-Journal to Prevail.

A central premise of Henderson's argument that the Review-Journal did a prevail in this litigation is that its decision to provide the Review-Journal access to the requested records (via in-person inspection and its in-court agreement to provide the records on a USB drive) was not "judicially sanctioned." (RB/AB p. 8; *id.* at pp. 15-18.) This position, however, elides case law from states with public records acts similar to Nevada's that indicates a requester "prevails" for the purposes of an award of fees and costs if the inception of litigation induced a withholding agency to release records.

For example, Cal. Gov't Code § 6259, the provision of California's Public Records Act pertaining to attorney's fees, provides in pertinent part, like the Fees Provision, that a court "shall award court costs and reasonable attorney fees to the

plaintiff should the plaintiff prevail in litigation filed pursuant to this section." California courts interpreting this provision have held that "[a] plaintiff prevails in litigation under the Public Records Act ***if the litigation motivated the defendant to release the requested documents***." *Motorola Communication & Electronics, Inc. v. Department of General Services*, 55 Cal.App.4th 1340, 1344 (Cal. Ct. App. 1997) (emphasis added) (citing *Rogers v. Superior Court*, 19 Cal.App.4th 469, 482 (Cal. Ct. App. 1993)); *see also Belth v. Garamendi*, 232 Cal.App.3d 896, 902 (Cal. Ct. App. 1991) ("A plaintiff is considered the prevailing party if his lawsuit motivated defendants to provide the primary relief sought or activated them to modify their behavior, or if the litigation substantially contributed to or was demonstrably influential in setting in motion the process which eventually achieved the desired result.") (internal citations omitted).

New Jersey has likewise adopted a similar approach in determining whether a litigant has "prevailed" for the purposes of its Open Public Records Act, which, like the NPRA's Fees Provision, provides that a "requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." *Mason v. City of Hoboken*, 196 N.J. 51, 72, 951 A.2d 1017, 1031 (2008). Interpreting the broad language of that provision, the New Jersey Supreme Court held that a litigant prevails "if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id*. at 72, 1029.

The District of Columbia has likewise held that a party "prevails" under the District of Columbia's Freedom of Information Act if he or she can demonstrate a "causal nexus ... between the action [brought in court] and the agency's surrender of the information." *Frankel v. D.C. Office for Planning & Econ. Dev*., 110 A.3d 553, 558 (D.C. 2015), *as amended* (Mar. 5, 2015) (quotation omitted). Similarly, the Illinois Court of Appeals held that a requester did not need to obtain a judgment on the merits to prevail under the Illinois Freedom of Information Act. *Uptown People's Law Ctr. v. Dep't of Corr.*, 7 N.E.3d 102, 108, 110 (Ill. Ct. App. 2014).

The record here shows a plain causal nexus between the Review-Journal's petition to the district court and Henderson's agreement to allow the Review-Journal access to the records. As discussed in the Answering Brief/Opening Brief (AB/OB pp. 12-13), after the Review-Journal filed suit, counsel for the Review-Journal met and conferred with Henderson City Attorneys and obtained an interim agreement to allow a Review-Journal reporter to inspect the records while litigation was pending.[1] (II JA240.) Then, during the March 30, 2017 hearing on the Review-Journal's Amended Petition, counsel for Henderson finally agreed to provide the Review-Journal a USB drive with copies of the requested documents. (III JA427.)

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[1] And as also noted in the AB/OB, even during the in-person inspection, the Review-Journal reiterated its request for copies of the records. (III JA364.)

Had the Review-Journal not filed suit, Henderson would not have agreed to permit the newspaper to conduct a free, in-person inspection of the records; instead, it would have simply refused to provide the Review-Journal access to the records unless the Review-Journal agreed to pay thousands of dollars for Henderson's staff to conduct a privilege review. Thus, because the Review-Journal's lawsuit caused Henderson to abandon its constructive denial of access to public records and resulted in Henderson releasing the public records, the Review-Journal prevailed for the purposes of the NPRA.

2. The Plain Language of The Fees Provision Demonstrates the Review-Journal Prevailed.

The NPRA does not define "prevails" and, as such, the Court must interpret the plain language of the statute. *See, e.g., Savage v. Pierson*, 123 Nev. 86, 89, 157 P.3d 697, 699 (2007) ("When examining a statute, a purely legal inquiry, this court should ascribe to its words their plain meaning, unless this meaning was clearly not intended."); *see also S. Nevada Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) ("When interpreting a statute, this court must give its terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render the words or phrases superfluous or a make a provision nugatory.").

Here, the Legislature used the term "prevails" in the NPRA's Fees Provision rather than the legal term of art "prevailing party," which has a well-defined meaning

in Nevada. *C.f., Smith v. Crown Fin. Servs. of Am.*, 111 Nev. 277, 284, 890 P.2d 769, 773-74 (1995) ("Where the legislature uses words which have received judicial interpretation, they are presumed to be used in that sense unless the contrary intent can be gathered from the statute. The legislature's employment of the same measuring language suggests that the legislature did not intend to eliminate the requirement of a money judgment."); *Savage*, 123 Nev. at 94, 157 P.3d at 703 ("When the same word is used in different statutes that are similar with respect to purpose and content, the word will be used in the same sense unless the statutes' context indicates otherwise."). The legal term of art "prevailing party" has "consistently been interpreted as requiring a money judgment [*i.e.* an order on the merits] prior to an award of attorney fees." *Id.* (interpreting the use of "prevailing party" in Nev. Rev. Stat. § 18.010).

The Nevada Legislature's choice not to use the legal term of art "prevailing party" in the Fees Provision demonstrates that the Legislature intended the Fees Provision to be broader in scope than a "prevailing party" provision and not tied to the technical form by which a requestor prevailed in achieving its goals after being forced to file a petition for relief. Other courts that have reviewed similar legislative decisions to use "prevails" instead of the common "prevailing party" have concluded the legislature intended for the authorization of fees to encompass a broader array of circumstances than those applicable to "prevailing party" clauses. *See Frankel*, 110

A.3d at 557 (finding that the D.C. Council's use of the term "'prevails' [ ] suggests that the D.C. Council intended to authorize attorney's fees in [D.C.] FOIA cases more often than in other types of cases.")

In the present case, as a result of filing a legal action for access to Henderson's hidden records, the Review-Journal's public records litigation ended with the Review-Journal getting access to the records it requested, both through in-person inspection, and later, Henderson's in-court agreement to provide the Review-Journal with electronic copies of the records. Thus, the Review-Journal "prevailed" for the purposes of the Fees Provision and is entitled to an award of attorney's fees and costs.

B. Obtaining Copies of the Records Was a Significant Goal of the Litigation.

Henderson asserts that obtaining copies of the records the Review-Journal had inspected was not a "significant issue" in this case. (RB/AB pp. 10-15.) In making this argument, Henderson raises a new legal theory which this Court should disregard. (RB/AB pp. 11-13.) Then, it attempts (as it did in its Opening Brief) to discount its in-court agreement to provide electronic copies of the inspected records as a "token issue." (RB/AB, p. 14.) Both arguments fail.

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1. Henderson Cannot Raise A New Argument on Appeal Against Affirming the District Court's Fees Award.

For the first time in this case (either at the district court or on appeal), Henderson asserts that the Review-Journal's request in its original petition for the immediate production of "complete copies of all records requested" was superseded by the request in its amended petition for access to "all records requested but previously withheld and/or redacted."[2] (*See* RB/AB pp. 12-13.)

The Court should disregard this argument, as it is the first time Henderson has raised it at either the trial or appellate level. At the district court, Henderson pointed to the change in the Review-Journal's requested relief as a basis for a *reduction* in any award of fees. (*See, e.g.*, IV JA0545-47.) But it did not argue that amended petition "superseded" the original petition and therefore barred any award of fees as it does now.

This Court has repeatedly held that "[p]arties 'may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below.'" *Dermody v. City of Re*no, 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997) (quoting *Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989)); *accord Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 437, 245 P.3d 542, 544 (2010). The "requirement that parties may raise on appeal only issues which

[2] (I JA40.)

have been presented to the district court maintains the efficiency, fairness, and integrity of the judicial system for all parties." *Schuck*, 126 Nev. at 437, 245 P.3d at 544.

Here, as noted above, Henderson never argued that the change in the Review-Journal's request for relief "superseded" the original requested relief, and thereby precluded *any* award of fees. Accordingly, Henderson has waived its ability to raise this new theory for reversal of the district court's fees award.

Even if the Court were to consider this argument, it nevertheless fails because the case law Henderson cites is inapposite. Each of the cases cited by Henderson dealt with the superseding effect of an amended *complaint*. *See Randono v. Ballow*, 100 Nev. 142, 143, 676 P.2d 807, 808 (1984)[3] (holding that an amended complaint supersedes the original complaint); *Ramirez v. Cty. of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015)[4] (same); *Associated Aviation Underwriters, Inc. v. Vegas Jet, L.L.C.*, 106 F. Supp. 2d 1051, 1054 (D. Nev. 2000)[5] (same). This is not a matter which arose from a civil complaint; this is a mandamus proceeding. While it may be "well-settled that an amended pleading is a distinct pleading that supersedes the original," (RB/AB, p. 12) mandamus petitions are not pleadings: "[i]n

[3] (cited in AB/RB, p. 12.)

[4] (*Id.*)

[5] (cited in AB/RB, p. 13.)

Nevada, pleadings allowed in civil actions are limited to 'complaints, answers and replies.'" *Johanson v. Eighth Judicial Dist. Court of State of Nev. ex rel. Cty. of Clark*, 124 Nev. 245, 250, 182 P.3d 94, 97, n.16 (2008) (quoting *Smith v. District Court*, 113 Nev. 1343, 1346, 950 P.2d 280, 282 (1997)). Thus, the Review-Journal's amended petition did not supersede the Review-Journal's original petition.

2. Obtaining the Requested Records Was Not a Token Issue.

Once again, Henderson asks this Court to treat the fact that it agreed to provide the Review-Journal with access to the records it had requested regarding Henderson's dealings with Trosper Communications and Elizabeth Trosper as a "token issue." (RB/AB, p. 14.) To accept this argument, the Court would have to ignore its NPRA precedent and the facts of this case.

The specific 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); *see also Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 878, 266 P.3d 623, 626 (2011) (noting that "the provisions of the NPRA are designed to promote government transparency and accountability"). Given this specific purpose, the fact that Henderson agreed to allow the Review-Journal access to the records without payment *only after* the Review-Journal filed its petition means that this was not a "token issue."

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As discussed in the Review-Journal's Answering Brief/Opening Brief, Henderson indicated it would not provide the requested records unless the Review-Journal agreed to pay thousands of dollars for Henderson's staff to conduct a privilege review. (I JA16.) In order to obtain the records and obtain clarity from the district court about the permissible fees Henderson could charge for producing public records, the Review-Journal filed its petition with the district court. (I JA1-22.) Although Henderson did allow the Review-Journal to inspect the records after the Review-Journal filed suit, it refused to provide copies of those records until the day of the hearing on the Review-Journal's petition. (III JA427.) Thus, the Review-Journal succeeded in a significant goal of its litigation and vindicated the overarching goal of the NPRA: access to public records without paying exorbitant fees.

C. The Review-Journal's Decision to Petition the District Court for Access to Records Was Not "Premature."

As it did in its Opening Brief, Henderson argues that the Review-Journal's decision to petition the district court for access to the requested records was "premature." (AB/RB, p. 20.) According to Henderson, the Review-Journal's petition was "premature" because Henderson never denied the paper access to the requested records; it just demanded the Review-Journal pay it thousands of dollars for the "extraordinary use of its personnel" before it would provide responsive

records. (RB/AB, pp. 21-22.)[6] Henderson further asserts this exorbitant demand "cannot be deemed a denial of records." (RB/AB, p. 23.)[7]

As an initial matter, buried in Henderson's argument regarding the alleged prematurity of the Review-Journal's petition is an argument that "informing a requestor about a fee associated with preparing a request" does not "trigger[] the right to initiate an NPRA petition" under Nev. Rev. Stat. § 239.011. (RB/AB, p. 23; *see also id.* at p. 27, n. 10.) This is a new legal argument from Henderson that was not presented to the district court, and as such, this Court should decline to 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).

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[6] Henderson also insinuates that the Review-Journal "rebuffed" its efforts to resolve the dispute regarding the appropriate fees Henderson could demand for the records prior to petitioning the district court. (RB/AB, p. 9.) However, the NPRA does not mandate that a requester meet and confer with a governmental entity before petitioning the court. Notwithstanding the lack of any meet-and-confer requirement, counsel for the Review-Journal had several phone calls with attorneys for Henderson. (III JA324.) Once it became apparent the parties could not reach an agreement, the Review-Journal properly petitioned the district court.

[7] Henderson also asserts that its demand that the Review-Journal pay $5,787.94 just for Henderson to determine whether it would even disclose the requested records was proper under Nev. Rev. Stat. § 239.055. (RB/AB pp. 21-22.) This position is incorrect, as has been thoroughly discussed in the other, related appeal arising out of this litigation, *Las Vegas Review-Journal v. City of Henderson*, Case No. 73287.

In any event, Henderson's argument that its demand for $5,787.94 for time spent by City staff or any City contractor "to locate the requested public records, to review the records in order to determine whether any requested records are exempt from disclosure, to segregate exempt records, to supervise the requester's inspection of original documents, to copy records, to certify records as true copies, and to send records by special or overnight methods such as express mail or overnight delivery" (I JA020) and its demand for a deposit of $2.893.94 *just to continue its search* for responsive records did not act as a denial of the Review-Journal's request does not withstand scrutiny.

First, at least one other state court with a public records act similar to the NPRA has specifically held that excessive copying charges can operate as a *de facto* denial of access. In several cases, New Jersey's appellate courts have held that "excessive copying charges can, in practice, thwart a citizen's right to access records" under New Jersey's Open Public Records Act. *Smith v. Hudson Cty. Register*, 422 N.J. Super. 387, 397, 29 A.3d 313, 319 (App. Div. 2011); *see also Libertarian Party of Central New Jersey v. Murphy*, 384 N.J. Super. 136, 139, 894 A.2d 72 (App. Div. 2006) (holding that an inordinately high copying fee can illegally burden the right of access guaranteed by the state's public records act); *Higg-A-Rella, Inc. v. County of Essex*, 141 N.J. 35, 53, 660 A.2d 1163 (1995) (holding that a fee for records "must be reasonable, and cannot be used as a tool to discourage

access").

Second, if the Court were to accept Henderson's argument, it would create a perverse incentive for governmental entities to maintain public records in a disorganized manner that necessitates costly procedures for providing access. Following Henderson's argument to its logical end, a governmental entity could use a byzantine system for record retention, demand outrageous sums to retrieve the records from said system, and force a requester to incur legal fees to get the district court to provide records that the public is entitled to access in the first place. This practice would obviously discourage requesters from vindicating their rights, either directly from the governmental entity or through the court process specifically provided for in the NPRA. Erecting hurdles between requesters and public records cuts against the explicit purpose of the NPRA—"providing members of the with access to inspect and copy public books and records" Nev. Rev. Stat. § 239.001(1)—and therefore this Court must reject Henderson's attempts to do so.

D. The Fees Provision Plainly Mandates An Award of Reasonable Attorney's Fees and Costs to a Prevailing Requester.

As this Court has already explained, "…by its plain meaning, [the Fees Provision] grants a requester who prevails in NPRA litigation the right to recover attorney fees and costs, without regard to whether the requester is to bear the costs of production." *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 615 (2015), *reh'g denied* (May 29, 2015), *reconsideration en banc denied* (July 6,

2015). Henderson, however, asks this Court to ignore both the plain meaning of the Fees Provision and the Court's own precedent to find that Henderson is immunized from paying the Review-Journal's attorney's fees and costs by a separate, unrelated provision of the NPRA. This position is untenable because—despite Henderson's protestations to the contrary—it ignores the plain language and intent of the Fees Provision.

1. The Language of the Fees Provision is Plain and Unambiguous.

When interpreting a statutory provision, this Court "looks first to the plain language of the statute." *Clay v. Eight Jud. Dist. Ct.*, 129 Nev. 445, 451, 305 P.3d 898, 902 (2013) (citing *Bigpond v. State*, 128 Nev. 108, 114, 270 P.3d 1244, 1248 (2012)). The Court must give the 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.'" *S. Nevada Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (quoting *Charlie Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 502, 797 P.2d 946, 949 (1990)).

The Fees Provision 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, and not predicated

upon a finding that a governmental entity acted in bad faith in refusing to disclose public records.

Additionally, Henderson relies on a definition of "entitle" that does not reflect the legal definition of that term. Black's Law Dictionary defines "entitle" as "[t]o grant a legal right to or qualify for." Black's Law Dictionary (10th ed. 2014). Relatedly, Black's Law Dictionary defines "entitlement" as "[a]n *absolute right* to a (usu. monetary) benefit, such as social security, granted immediately upon meeting a legal requirement." Thus, the use of the word "entitle" in the Fees Provision means that a prevailing requester has an absolute right to an award of fees and costs.

Moreover, as noted above, this Court found in *Blackjack Bonding* that the terms of Nev. Rev. Stat. § 239.011 are plain. *See, e.g. Blackjack Bonding*, 343 P.3d at 615.[8] Indeed, in *Blackjack Bonding*, this Court reversed the district court's denial of Blackjack Bonding's motion for attorney's fees and costs and remanded the matter to the district court to enter an award for reasonable attorney's fees and costs. *Blackjack Bonding*, 343 P.3d at 615. Thus, this Court has already found the plain terms of the NPRA's Fees Provision entitle a requester that prevails to its attorney's fees and costs. Henderson's arguments therefore fail.

[8] Henderson asserts that the Review-Journal's reliance on *Blackjack Bonding* is misplaced because the Court in that matter "does not address the Immunity Provision." (RB/AB, p. 28 n.11.) However, because the Court found that the meaning of the Fees Provision was plain, it was not necessary for the Court to consider the Immunity Provision.

2. The NPRA Mandates that the Fees Provision Be Interpreted to Further Access to Public Records.

The express 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) ("*Reno Newspapers*"). 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 Reno Newspapers*, 129 Nev. 833, 837, 313 P.3d 221, 223 (2013); *Comstock Residents Assoc. v. Comm'r*, 134 Nev. Adv. Op. 19, 414 P.3d 318, 320 (2018); *Clark Cty. Sch. Dist. v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 84, 429 P.3d 313, 317 (2018).

Given this express purpose, even if there were any ambiguity regarding the plain meaning of the Fees Provision[9], that 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…"); *accord Harris Assocs. v. Clark Cty. Sch. Dist.* 119 Nev. 638, 642, 81 P.3d

[9] Which, as discussed above, there is not under this Court's holding in *Blackjack Bonding*.

532, 534 (2003) ("An ambiguous statutory provision should also be interpreted in accordance 'with what reason and public policy would indicate the legislature intended.'") (quoting *McKay*, 102 Nev. at 649, 730 P.2d at 442).

Thus, the express mandates of the NPRA and this Court's precedent require that the ambiguity be resolved to allow a requester to recoup his or her fees for having to go to court to get access to records.

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

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.

Henderson 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.

4. Henderson's Case Law Does Not Support Conflating Fees and Damages in the Context of the NPRA.

In its Answering Brief/Opening Brief, the Review-Journal cited a broad body of case law from courts across the country holding that damages and attorney's fees are different and identified specific Nevada statutory provisions that expressly provide for situations in which attorney's fees can be awarded as an addition to damages. (*See* AB/OB, pp. 46-50; *see also id.* at pp. 56-58.) Henderson does not attempt to distinguish those cases or statutes in its Reply Brief/Answering Brief; instead, it again relies on this Court's inapposite decision in *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 35 P.3d 964 (2001), and a later clarifying decision in *Horgan v. Felton*, 123 Nev. 577, 170 P.3d at 982 (2007). (RB/AB, p. 30.) The *Sandy Valley* and *Hogan* decisions are limited to a determination that in slander of title actions attorney fees are only available as

special damages, and that attorney's fees as damages must be specially pleaded under Nev. R. Civ. P. 9(g). *See Sandy Valley*, 117 Nev. at 956, 170 P.3d at 969; *Horgan*, 123 Nev. at 586, 170 P.3d at 988 and n.26. They do not apply to attorney's fees specifically and unambiguously authorized by a statute such as the Fees Provision. Thus, they are of no precedential or persuasive value in this case.

E. The Legislative History of the Fees Provision and the Immunity Provision Does Not Support Henderson's Improper Conflation of the Provisions.

Because the Fees Provision is plain on its face, this Court should not look beyond the provision's plain language to interpret its meaning. *See 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."). Nevertheless, should the Court determine it is necessary to consider the legislative history of the Fees Provision, that history does not support Henderson's position.

1. Henderson's Presentation of the Legislative History is Incomplete and Misleading.

As it did in its Opening Brief, Henderson relies on a slim portion of a Legislative Counsel Bureau ("LCB") Bulletin No. 93 to support its assertion that courts must consider the Immunity Provision when deciding a prevailing requester's motion for attorney's fees and costs. (RB/AB, pp. 31-32.) In reiterating this argument, Henderson declined to address the Review-Journal's explanation that

LCB considered the Fees Provision and the Immunity Provision to be conceptually distinct. (AB/OB, p. 60.)

Specifically, as noted in the Review-Journal's Answering Brief/Opening Brief, in the "Summary of Recommendations" section of Bulletin No. 93, the recommended adoption of what would become the Fees Provision appears in a subsection entitled "Procedures for Access to Public Records." (IV JA631.) The recommendation for what would become the Immunity Provision, on the other hand, was included in a subsection entitled "Enforcement of Public Records Laws." (IV JA633.) 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," (I RA31-32), while discussing the eventual Immunity Provision in a section dealing with enforcement of public records laws. (I RA39-40.)

Henderson also revisits it reliance on a select excerpt of the testimony of Ande Engleman at a May 7, 1993 Assembly Subcommittee on Government Affairs hearing to support its position that the Legislature intended an award of attorney's fees under the Fees Provision be conditioned upon a showing of bad faith. (*compare* OB, p. 40 and RB/AB, pp. 33-34.) However, this position ignores that during that same hearing, there was a discussion making clear that, as initially written, the Fees Provision mandated that, if the requester prevails, "he was entitled to recover his

costs and attorney's fees in the proceeding, from the agency whose officer had custody of the record." (I RA84-85.) Although there was some discussion about whether a resisting governmental agency should be entitled to fees if it prevailed, the Subcommittee rejected that idea because it would discourage the public from going to court to fight for access to public records. (I RA85 (noting that "[t]he primary argument against the agency recovery, was this would restrict people from going to court to try to gain access to certain closed records").) 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 requester that prevailed should be compensated for the fees and costs incurred in taking a public records case to court.

Henderson asserts that the Review-Journal "cannot point to a single Nevada case . . . where a government was sued for damages not related to attorney's fees in connection with its disclosure or withholding of a public record." (RB/AB, p. 33.) In fact, the Review-Journal can, and it did so in its Opening Brief/Answering Brief[10]: this nearly became an issue when the family of a 1 October shooting victim sued the Clark County Office of the Coroner/Medical Examiner, the Review-Journal, and The Associated Press 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*

[10] (*See* OB/AB, p. 62.)

v. Eighth Judicial District Court, 134 Nev. Adv. Op. 7, 412 P.3d 23 (2018). While, as noted in the Opening Brief/Answering Brief, the Coroner did not act to protect taxpayers' interests in the matter, if it had, the Coroner could have asserted the Immunity Provision as a defense against plaintiff's claims. Thus, this is not a matter of conjecture. Moreover, as discussed in the Review-Journal's Opening Brief/Answering Brief, at least one other state court of appeal has faced the precise scenario Henderson claims is too unlikely to have merited legislative consideration. (*See* OB/AB pp. 53-54 (discussing *Molfino v. Yuen*, 134 Haw. 181, 399 P.3d 679 (2014).) Thus, it is clear that the legislature intended the Fees Provision to be applied without regard to the Immunity Provision.

2. Henderson's Interpretation and Application of the Legislative History is Inconsistent with the Animating Principles of the NPRA.

The animating principle of the NPRA is that the transparency of governmental actions fosters democracy. *See* Nev. Rev. Stat. § 239.001(1) (stating that the 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").) To further the goal of fostering democracy, the NPRA explicitly provides that if a governmental entity denies a request for records, a requester may petition the court for relief. Nev. Rev. Stat. § 239.011(1). Also, to further the right to speedy access, the NPRA provides that a prevailing requester is entitled to fees and costs.

Nev. Rev. Stat. § 239.011(2).

Henderson ignores that putting any roadblock between requesters and recovery of attorney's fees flies in the face of the NPRA's legislative mandate of encouraging transparency. In effect, a "good faith" requirement allows governmental entities to deny records and dare requesters to sue them, knowing that they will only face consequences if the requester can make an unlikely showing of "bad faith." Faced with the prospect of incurring massive attorney's fees, many requesters would undoubtedly forego their right to fight for these records in court, allowing intransigent governmental entities to have their denial of access go wholly unchallenged, which in turn would preclude any determination of "good faith" or "bad faith." Requesters should not be forced to "call the government's bluff" to get access to public records, and access to public records should not be limited to those wealthy enough to hire attorneys to fight governmental entities in court.

Contrary to Henderson's assertions (RB/AB, pp. 36-37) awarding attorney's fees to prevailing requesters incentivizes governmental entities to comply with the NPRA and speedily produce records regardless of whether those entities act in good faith or bad faith. An entity can act in "good faith" while simultaneously maintaining records in a haphazard, disorganized or negligent way that—despite its employees' best efforts—prevents it from producing public records in a timely manner. Forcing governmental entities to foot the bill for requesters to go to court encourages the

governmental entity to maintain and produce its records in an organized, streamlined, adequately-staffed fashion that grants requesters their desired access without the district court's intervention.

Henderson argues that the Review-Journal's interpretation of the NPRA "encourages lawsuits and discourages collaboration" because requesters "will be less inclined to work with an agency to resolve disputes and will rush to file unnecessary lawsuits as a tactic to obtain attorney's fees." (RB/AB, p. 37.) Henderson appears to be under the mistaken impression that attorney's fees are a windfall rather than just compensation for being forced to retain the services of attorneys to gain access to the public records they are entitled to. Nevertheless, Henderson's position is at odds with reality—it is governmental entities, with their near-limitless resources, who must be cowed into resolving disputes with requesters. Without the prospect of having to pay attorney's fees, governmental entities will be less inclined to work with requesters to resolve disputes because most requesters cannot carry the financial burden of protracted litigation. The Legislature, correctly recognizing that this imbalance hinders access to public records, saw fit to place this burden on governmental entities by making the Fees Provision non-discretionary and independent from the Immunity Provision. Public policy thus demands that the Fees Provision be interpreted to award reasonable fees and costs to prevailing requesters—without exception.

F. The District Court Did Not Adequately Explain How the *Brunzell* Factors Influenced Its Decision to Reduce the Review-Journal's Fee Award From $30,931.50 to $9,010.00.

Pursuant to *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), the district court must consider several factors in determining the reasonableness of attorney fees. *See Brunzell*, 85 Nev. at 349, 455 P.2d at 33 (enumerating factors that must be considered). Although express findings on each factor are not required, a court must nevertheless demonstrate that it considered the required factors. *Logan v. Abe*, 131 Nev. Adv. Op. 31, 350 P.3d 1139, 1143 (2015).

Henderson asks that the Court piece together several facts to find that the district court properly considered the *Brunzell* factors in reducing the Review-Journal's fee award. (RB/AB, pp. 40-43.) Henderson's presentation of the facts does not withstand scrutiny. In particular, Henderson asserts that the district court's reduction in the requested fee award was the result of the court's conclusion "that [the Review-Journal] only prevailed on a very limited issue and did not succeed on any of its claims for relief in the Amended Petition." (RB/AB, p. 42 (citing to IV JA692 and JA693-94.) However, Henderson ignores that the district court apparently disclaimed this calculus. After the court made its oral pronouncement that it was reducing the Review-Journal's fee award to $9,010.00, counsel for the Review-Journal attempted to clarify whether the award was limited to counsel's work on the initial Petition:

> MS. SHELL: Your Honor, I just want to clarify. Your Honor's award of attorney fees was limited just to the work on the original petition?
>
> THE COURT: I just looked at your entire bill -- and I applied the Brunzell factors, and I determined that reasonable attorneys' fees were $9,010.
>
> MS. SHELL: . . . I just want to clarify. Looking – [the award is] not limited to work as to one specific issue. It's just all the issues at one time?
>
> THE COURT: Just applying the Brunzell factors, all the factors under Brunzell – I determined that was reasonable attorneys' fees.

(IV JA695-96.) Thus, when counsel for the Review-Journal *specifically asked* whether the fees award was limited to the work performed on the initial Petition, the district court did not provide a clear response, and in fact indicated that it had made an across-the-board reduction of fees.

Accordingly, while Henderson is correct that the district court commended the parties on their advocacy and considered the briefing submitted by the parties (RB/AB p. 41), and that the Review-Journal partially succeeded in the litigation (RB/AB, p. 42), the fact that the district court did not specifically articulate its rationale for reducing the Review-Journal's award—despite specific inquiry from Review-Journal counsel—indicates that the court did not adequately explain how the *Brunzell* factors influenced its decision. Accordingly, the district court abused its discretion in reducing the Review-Journal's fee award.

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III. CONCLUSION

For these reasons, the Review-Journal respectfully requests that this Court affirm the district court's determination that the Review-Journal was a prevailing party and its determination that Nev. Rev. Stat. § 239.012 does not immunize Henderson from paying the Review-Journal's reasonable attorney's fees and costs. The Review-Journal further requests that this Court remand this matter to the district court for reconsideration of its decision to reduce the fees award.

DATED this 12th day of March, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28.2:

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because the RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL has been prepared in a proportionally spaced typeface (14-point Times New Roman font).

I further certify that this RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL complies with the type-volume limitation of NRAP 28.1(e)(2)(C) because it contains 6,913 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 NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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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 12th day of March, 2019.

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CERTIFICATE OF SERVICE

I certify that I am an employee of McLetchie Law and that on this 12th day of March, 2019 the RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the Master Service List as follows:

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