IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL DISTRICT Appellant, vs. THE LAS VEGAS REVIEW-JOURNAL, Respondent.	CASE NO.: 75534

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RESPONDENT'S APPENDIX – VOLUME III

Appeal from Eighth Judicial District Court, Clark County
The Honorable Timothy C. Williams, District Judge
District Court Case No. A-17-750151-W

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I hereby certify that the foregoing RESPONDENT'S APPENDIX – VOLUME III was filed electronically with the Nevada Supreme Court on the 7th day of November, 2018. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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EXHIBIT LL

Education (https://www.reviewjournal.com/./news/education/) >>

Sex misconduct in CCSD is a system-wide crisis of broken trust

A high number of arrests of teachers accused of sexual misconduct is in part because of a concept known as "passing the trash," where teachers move from school to school, and district to district, because there is no documentation of any accusations of sexual misconduct on their record. (Rachel Aston/Las Vegas Review-Journal)

By Amelia Pak-Harvey and Meghin Delaney Las Vegas Review-Journal
May 23, 2017 - 5:59 am

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(mailto:?&subject=[Shared Post] Sex misconduct in CCSD is a system-wide crisis of broken trust&body=You may be interested in the following post: https://www.reviewjournal.com/post/1083246)

The Clark County School District didn't fire Dailey Elementary teacher John Stalmach (https://www.reviewjournal.com/crime/courts/old-case-left-loophole-for-teacher-sex/) when he was arrested in 2012 for having sex with a 16-year-old Basic High School student.

Instead, the district offered him a settlement: In exchange for his resignation, the incident wouldn't be documented in his personnel file.

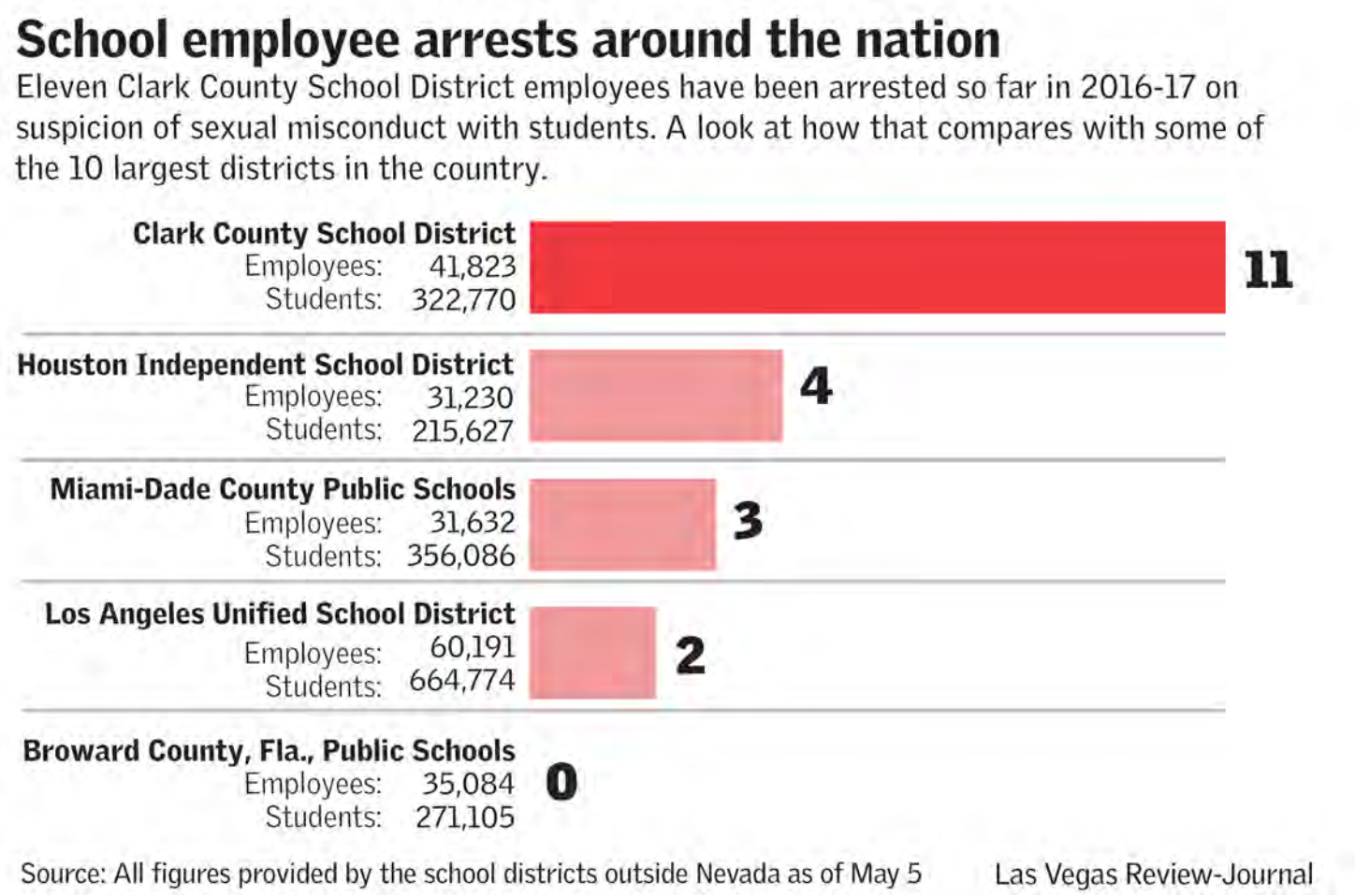
It wasn't the first time Stalmach had faced allegations of inappropriate behavior.

An untold number of Clark County staff members have had their personnel files scrubbed of sexual misconduct allegations, creating a culture that allows sexual behavior between students and teachers to fester.

It's just one part of a system-wide crisis of **broken trust** that, according to lawyers and experts, stems predominantly from three issues: **the district's contract with the teachers' union**, **loopholes in background checks** and **insufficient employee training**.

Over the past three years, 31 staff members have been arrested on suspicion of sexual misconduct or inappropriate behavior with a student. Since July, there have been 11 arrests.

That's higher than the number of such arrests for the 2016-17 school year in some of the nation's largest districts. The Los Angeles Unified School District, the second largest system in the country, reported just two.



Suspects in two of this school year's 11 arrests had a known history of inappropriate behavior, according to police records, but were allowed to remain in schools — a practice known as **"passing the trash."**

What's more, the district has faced at least five federal lawsuits over sexual misconduct between staff members and students in the past five years — three of which are ongoing. Two of those cases document clear instances of the system passing off problematic teachers from one school to another. All five initially claimed the district violated the rights of the victims under Title IX, although at least one has since dropped that claim.

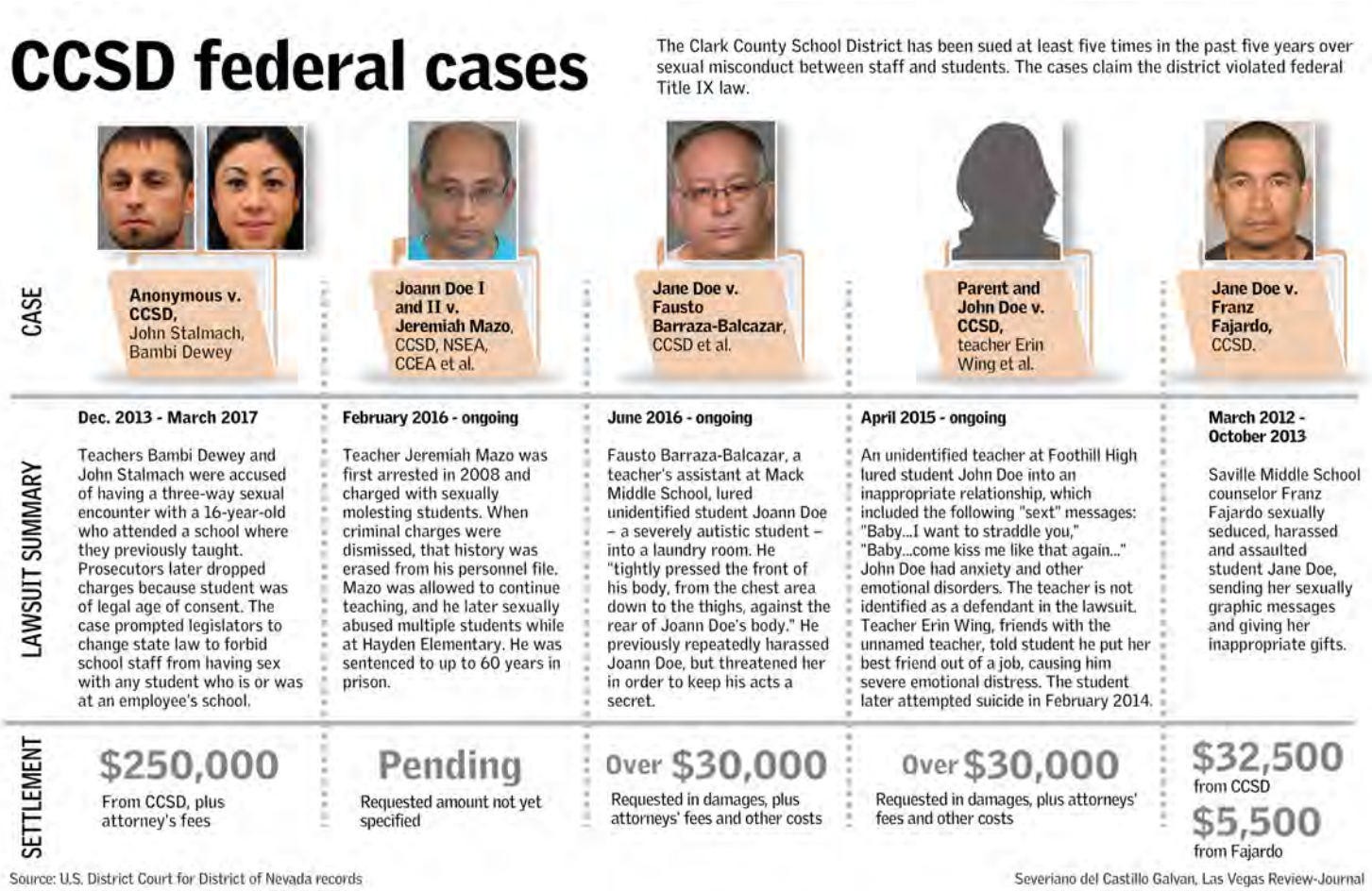
And all of those cases originally argued the district knew or should have known about staff misconduct, but did little — if anything at all — to stop it.

"You have students who've been molested at 8 or 9 years old that will never trust their teachers again," said Robert Eglet, an attorney for a number of families in a passing-the-trash case involving former teacher Jeremiah Mazo.

'Safe haven' for pedophiles

This year, teacher Jeffrey Schultz and custodian Jesus Acosta are the latest examples of the district's failure to keep staff with known histories of misconduct away from children.

But the breakdown of whatever safeguards exist to protect students started long ago, in part because of the power of the unions that protect employees no matter the allegations against them, according to attorneys involved in the federal lawsuits.



If a teacher is cleared of a criminal or civil charge, "all written reports, comments or reprimands concerning actions which the courts found not to have occurred, shall be removed from the teacher's personnel file," according to the Clark County Education Association contract.

It's that clause, Eglet says, that creates a "safe haven" for pedophile teachers in Clark County.

"You may as well put an ad … that says, 'Hey … pedophile teachers, come to Las Vegas to teach, because unless you're proven guilty beyond a reasonable doubt, your record will be sealed,'" Eglet said.

That's exactly what happened in the case of Mazo, according to Eglet's lawsuit. In 2008, Mazo was arrested on suspicion of sexually molesting students at Simmons Elementary.

But when the charges were dismissed, the allegations were removed from his personnel file and he continued teaching at other schools in Clark County, according to an amended complaint filed March 1.

Instead of firing Mazo or reassigning him to a job where he had no contact with children, the district transferred him to other schools, including Hayden Elementary, where he was again accused of sexually molesting students. Mazo pleaded guilty to three felony counts of attempted lewdness with a child in August 2015 and is serving up to 60 years in prison. (https://www.reviewjournal.com/local/local-las-vegas/music-teacher-to-serve-up-to-60-years-for-sex-abuse-of-children/)

The CCEA and the Nevada State Education Association are defendants in the lawsuit, which claims the unions assisted in the dismissal of Mazo's 2008 charges.

"To not realize the consequences of this was beyond negligent — it's gross negligence," Eglet said. "The school district and the union both share responsibility for this happening."

John Vellardita, the executive director of the Clark County Education Association, stands behind the clause in the contract.

"We represent 18,000 licensed professionals, and there's 320,000 kids and there's a lot of unfounded accusations that fly back and forth," he said. "And without a due process that tries to essentially determine what's fact from non-fact, anything that's placed in anybody's file that's not based on any kind of findings of evidence shouldn't be there."

Vellardita stressed that the union does not condone or protect, in any way, any educator engaged in any criminal act.

"We don't want folks that engage in criminal behavior in these classrooms or around kids, bottom line," he said.

Still, the contract also allows teachers to request the removal of reports or reprimands from their personnel file that are beyond three years and one day old.

John George, the attorney for Mazo, said he has seen allegations of impropriety with children in his family law experience, noting that in parenting disputes or divorce, somebody can make an allegation that is completely unfounded.

"Generally, if an investigation is taking place and they find that these allegations are unfounded, then why would you allow these allegations to negatively impact somebody's life?" he said. "Simply making an allegation like that can literally ruin somebody's life."

But he added that nothing is wrong with adding extra layers of protection in sexual misconduct cases.

He declined to comment on the Mazo case specifically.

Litigation fears

When it comes to firing a problematic staff member — whether teacher, support staff or administrator — district leaders' fears of costly arbitration proceedings and wrongful termination lawsuits play a role in the problem.

"My sense of it is, that's a principle component in the manner in which these cases are not aggressively pursued," said attorney Don Campbell, who represented the victim in the Stalmach case. "That they feel that the unions have too much power or they have too much money or they'll throw too much shade at them through litigation."

Clark County School District Superintendent Pat Skorkowsky acknowledged that arbitration and litigation costs quickly add up.

"We have to make sure that we are handling it appropriately so that we would always prevail in those situations," he said.

Stalmach and another teacher, Bambi Dewey, were accused of having sex with a 16-year-old student in 2012. Yet the district had previously investigated Stalmach for inappropriate text messaging with a female student at his prior school, Basic High, around 2009.

After that 2009 investigation, both the Basic High principal and the director of employee management relations recommended Stalmach's termination over concerns with his behavior, Campbell's lawsuit uncovered.

"He absolutely cannot come back to my school," Principal David Bechtel told the district, according to the lawsuit.

But the district's general counsel did not fire Stalmach to avoid the arbitration that would have occurred if Stalmach appealed the decision, according to the lawsuit. Stalmach stayed in the district, and he was arrested after the encounter with the 16-year-old about three years later.

When prosecutors dropped the charges in that (https://www.reviewjournal.com/news/teacherstudent-sex-allegations-lead-to-federal-lawsuit-against-ccsd/)case (https://www.reviewjournal.com/news/teacherstudent-sex-allegations-lead-to-federal-lawsuit-against-ccsd/), the district approved the settlement agreement with Stalmach to get rid of him. Stalmach, who now lives in Colorado, still has a valid teaching license in Nevada that expires in July 2018, according to the state Department of Education. Dewey's license expired in 2013.

Skorkowsky said it's important to look at the union contract to see what can be done to strengthen the district's policies.

If there are situations that don't warrant any legal or disciplinary action, he said, then the district doesn't necessarily have control over what goes in that personnel file.

"We might have the best teacher in the world who has somebody who comes out and says that this happened, and there is nothing ever found in the investigation," he said. "So it is very difficult. It's a thin line trying to protect the teacher as well as to protect the students."

Present-day problems

It took one upset father and a phone call to the police to bring the prior history of Brown Academy teacher Jeffrey Schultz to light.

Chad Jensen said he wasn't happy with the answers he got from a school official after being told that his 13-year-old daughter reported an uncomfortable conversation with Schultz.

"She told me that she couldn't reveal any information, that they're going to be looking into it, that nothing's going to be done today about it," he said. "I said, 'Well, if you guys aren't going to do nothing about it, I am.'"

So he went outside and called police.

Jensen subsequently found out that Schultz had faced previous allegations of misconduct at Brown Academy and another school. Schultz now faces three counts of annoyance, molestation of, or indecency toward a minor younger than 18. He's on paid suspension from the district pending the superintendent's letter of dismissal.

About three months later, Jensen said he received another phone call from the school: His 11-year-old daughter reported that a substitute teacher touched her thigh. Henderson police confirmed the matter was being investigated, but no arrest had been made in the case as of Monday.

Jensen's older daughter, Kendra, said she and two friends felt uncomfortable after Schultz asked them what kind of underwear they wear beneath their leggings.

They filed a report in the front office later that day, she said, in part because they remembered that their friend previously switched out of Schultz's class. That friend felt uncomfortable when Schultz touched her shoulder.

"It was just going through our heads … how he did that to her," she said, "that we didn't want anything further to happen to us."

Jesus Acosta, a custodian at Tarkanian Middle School, was warned to correct his behavior with students before he was arrested.

District police had previously investigated email and text conversations Acosta had with students in June 2016, according to police records. He was told to refrain from sharing personal contact information with students and keep his interactions with them professional. He kept his job at the school.

This year, three sixth-grade girls at the school reported that Acosta had hugged or kissed them and made inappropriate comments that left them uncomfortable. Acosta was arrested and charged with three counts of unlawful contact with a minor under 14 years of age.

At a School Board meeting in May, Kendra's grandmother, Rhoda Jensen, issued a plea to trustees.

"It's got to stop. These are 11-, 12- and 13-year-old students that now do not trust their teachers, their principals, their counselors," she said. "They're not sure who to trust."

Violation of federal Title IX law

The Clark County School District's acquiescence to an escape clause in its contract with the teachers' union has put the system in direct violation of Title IX, according to an attorney with expertise in the federal law.

"All the attention is around campus rape at the university level, but really K-12 is a much worse landscape than what we see in college campuses," said John Clune, a Colorado attorney who has litigated a number of high-profile Title IX cases across the country.

Passed in 1972, Title IX prohibits discrimination on the basis of sex in education programs that receive federal funding. The law also covers acts of sexual harassment and prohibited sexual conduct.

But the school district's contract with the Clark County Education Association stipulates that "all written reports, comments or reprimands concerning actions which the courts found not to have occurred, shall be removed from the teacher's personnel file."

Clune said the clause in the contract clearly puts the district in violation of federal law.

"Schools have a contract with the federal government. … Clauses in union contracts, none of that alleviates the school's responsibility under Title IX," Clune said.

Still, Superintendent Pat Skorkowsky believes the district must follow the language in the union contract. He said the clause doesn't conflict with Title IX.

"If there was not enough information for us to be able to see charges filed in a jurisdiction, then it's difficult for us to fire a teacher if no charges were filed," he said. "It makes it very difficult."

But Skorkowsky acknowledged that "it is time for us to revisit that and look at special circumstances, and that's something that'll have to be done through negotiations."

Clune called such scenarios a campus safety issue and suggested that public school systems ignore such clauses or stop negotiating them in the first place.

"The school has an obligation to do their own investigation," Clune said. "The Department of Education is very clear. Investigations have to be done independently. This has nothing to do with whether the case ends up going to court or not."

Title IX cases, Clune said, require "preponderance of evidence" as a burden of proof — lower than the "beyond a reasonable doubt" standard in the teachers' union contract. Each of the five federal lawsuits against the district in the past five years have claimed violations of Title IX; two have been settled, three remain ongoing.

"What happens in so many situations is that schools do not take the time and they don't want to spend the money to develop strong policies," Clune said. "And then they end up spending tenfold that on civil liability (for) lawsuits and their own kids getting hurt."

Schools found in violation of Title IX risk losing federal funding. But no K-12 school has ever had funding pulled due to violations, according to the U.S. Department of Education.

The district was previously found in violation of Title IX in December for its mishandling of a special education student's harassment complaints. The U.S. Department of Education's Office for Civil Rights ordered employees at the child's school to undergo Title IX training, among other corrective actions.

The law also requires that a qualified, full-time Title IX compliance officer clearly be designated. But the district's coordinator isn't easily identified.

Susan Smith, listed as an assistant superintendent in the district's administrative telephone directory, was designated the Title IX coordinator in December. Yet a district spokeswoman previously identified Interim Chief Instructional Services Officer Billie Rayford as the Title IX officer.

Online, the district's website still says the "chief educational opportunity officer" is the acting Title IX coordinator.

The district has had a Title IX coordinator since 2015, a spokeswoman said recently, and a staff member has been selected as the next coordinator. That employee is currently in training.

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By Amelia Pak-Harvey / RJ

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Flawed Nevada, CCSD checks expose students to sexual predators

A second part of the problem of sexual misconduct involving teachers in Clark County School District is that background checks are limited in what they'll show state and district officials in the hiring process. (Rachel Aston/Las Vegas Review-Journal)

By Meghin Delaney and Amelia Pak-Harvey Las Vegas Review-Journal
May 24, 2017 - 6:00 am

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(mailto:?&subject=[Shared Post] Flawed Nevada, CCSD checks expose students to sexual predators&body=You may be interested in the following post: https://www.reviewjournal.com/post/1084392)

People who work in Nevada's public schools are supposed to have clean records. They're fingerprinted and screened at the local, state and national levels for criminal histories.

But the process isn't foolproof.

In fact, the checks are largely repetitive: the state Department of Education and the Clark County School District each vet candidates using three different databases that generate essentially the same background reports, an investigation by the Las Vegas Review-Journal shows.

Background checks are limited in what they show state and district officials in the hiring process. Experts say predators can exploit loopholes in the process and continue working in schools even if they've previously been accused of sexual misconduct with (https://www.reviewjournal.com/news/education/sex-misconduct-in-ccsd-is-a-system-wide-crisis-of-broken-trust/)minors (https://www.reviewjournal.com/news/education/sex-misconduct-in-ccsd-is-a-system-wide-crisis-of-broken-trust/).

Anything below the level of an arrest — including police interrogations, school district investigations and previous complaints of sexual misconduct involving students — isn't captured in any of the criminal background checks performed by the Clark County School District or the state Department of Education.

The flawed background check process is a major contributor to an ongoing crisis in the school district, as employees with histories of sexual misconduct allegations can be hired because they don't have a criminal history.

Since July, 11 district employees have been arrested on charges relating to sexual misconduct with students. It's unclear whether expanded background checks would have prevented any of these 11 individuals from working in schools, but experts say school districts should be looking beyond arrests.

"It's a false sense of security because so many of these predatory teachers have been passed from jurisdiction to jurisdiction, school to school, district to district, state to state," said Terri Miller, president of Las Vegas-based Stop Educator Sexual Abuse Misconduct & Exploitation, which formed in 1996. "And because of that, they don't have a criminal history."

It's the kind of loophole that allows abusers to game the system, stay under the radar and preserve access to potential victims, according to experts who want reforms and additional protections before employees set foot in schools.

Take, for example, Melvyn (https://www.reviewjournal.com/crime/courts/ex-las-vegas-teacher-found-guilty-of-kidnapping-child-porn/)Sprowson (https://www.reviewjournal.com/crime/courts/ex-las-vegas-teacher-found-guilty-of-kidnapping-child-porn/), a former Clark County kindergarten teacher charged in 2013 with kidnapping a 16-year-old girl. Sprowson came to Nevada in 2012 from the Los Angeles Unified School District, where he faced a number of accusations of student sexual abuse.

In March, Sprowson was found guilty on four counts of unlawful use of a minor in the production of pornography, as well as one count each of first-degree kidnapping and child abuse or neglect. Sprowson appeared in court Wednesday to face sentencing, but errors in a pre-sentence investigation report prompted the judge to postpone until June 26.

Sprowson wound up in a Clark County classroom partially because none of the accusations in Los Angeles resulted in an arrest. The information about the accusations never made it into the hands of Clark County hiring officials, although Los Angeles school officials told the Review-Journal at the time that all Clark County had to do was ask.

Superintendent Pat Skorkowsky said that case prompted change in the district.

"It was when our school district police arrested Sprowson that we realized that we had to put in more stringent policies. We do have new procedures and practices in place where we contact the district directly."

Skorkowsky said the system's human resources department calls all references and former employers of applicants, but he blames a lack of transparency from districts nationwide in disclosing investigations involving sexual misconduct.

"Until there is a national policy on this, it limits what we can find out because we are not always going to get the truth from other districts and other employees," he said.

Skorkowsky said he did not know of any district policy that requires the screening of social media activity or Internet vetting of potential employees.

"We get so many applicants that would be a challenge," he said.

The Nevada Legislature is considering reforms to help prevent predators from getting into schools in the first place.

Assembly Bill 362, also called the "SESAME Law," after Miller's national nonprofit that advocates on the issue, would add a new layer to background checks, and Senate Bill 287 expands the mandated reporting requirements, by requiring districts to share and check all past employment records of applicants.

The bills are sponsored by Assemblywoman Jill Tolles, R-Reno, and Sen. Heidi Gansert, R-Reno, respectively.

Creating a 'new layer'

State Superintendent of Public Instruction Steve Canavero cautioned that the vetting process for licensed employees shouldn't end just because the state has issued a license. "Soft vetting," done by district human resources departments, can often help find information an application or background check may not show.

That includes an Internet search, he said, and thorough reference checks.

"Google is a wonderful way for us, and I hope for districts, to do some quick scanning of candidates, their references as well as previous jobs that are not listed that may raise some red flags," Canavero said.

Even then, there may be some individuals who are still under the radar, Canavero said.

Gansert and Tolles' legislative proposals are aimed at catching those who won't show up on criminal background checks.

"These address a different layer where you have investigations or individuals who have been investigated but that investigation did not lead to a criminal conviction," Canavero said.

Gansert's SB287 expands on the existing mandatory reporting laws, which right now only require school employees to report to law enforcement potential child abuse or neglect suspected to have been caused by a parent or guardian. Gansert wants to expand that and require employees to report on other employees, she said.

Telling law enforcement triggers the welfare agency, and if the report ends up being substantiated, it'd be added to the central registry.

BROKEN TRUST
SEXUAL MISCONDUCT IN OUR SCHOOLS

1 **Passing the Trash**

Scrubbed personnel files and an escape clause in teacher contracts allow staff with sexual misconduct complaints to simply switch schools.

2 **Flawed background checks**

School employees are fingerprinted and screened for criminal histories, but the Clark County School District does little beyond those limited background checks to uncover past sexual misconduct.

3 **Training failures**

CCSD relies on a 9-minute video to train employees on sexual misconduct and lacks policies on appropriate employee behavior.

Legal solutions

AB362 — Sponsored by Assemblywoman Jill Tolles and referred to as the "SESAME Law," after a nonprofit that advocates on the issue.

- As of May 22, the bill was still being discussed by Assembly committees. It is exempt from passage deadlines.
- Requires applicants to allow the district to access any information on alleged sexual misconduct at previous employer.
- Requires districts to contact an applicant's former employers for information.
- Requires Nevada Department of Education to keep a list of names of people who have had their application for licensure denied because of a sexual offense with a minor.

SB287 — The bill is sponsored by Sen. Heidi Gansert and expands the state's mandatory reporting law.

- As of May 22, the bill had cleared the Senate and was being considered by the Assembly.
- Authorizes districts to access the state child welfare database to see if applicants have been investigated by the agency.
- Requires districts to perform background checks on employees at least once every five years.
- Requires all school district employees, not just licensed teachers, to call the state hotline to report suspected child abuse.

Las Vegas Review-Journal

Gregory Beasley
White Middle School Teacher
Arrested March 27
Preliminary hearing scheduled May 25

Jesus Acosta
Tarkanian Middle School Custodian
Arrested April 15
Preliminary hearing scheduled June 13

"One of my concerns was when you keep reports in house and it's handled as a personnel issue, that's a huge issue. The offender can be allowed to resign without any consequences," Gansert said. "Screening up front will help us not to inherit these individuals."

The SESAME Law

Tolles' AB362 requires applicants to disclose past allegations, if they left their job while there were pending allegations, and if they had a license suspended or revoked while there were pending allegations.

"We know that the vast majority of abusers would not show up [on a background check] because there hadn't been a conviction, but there could be a scenario where there's an accusation, an investigation and even awaiting trial and they might be dismissed from one school but they could go to another school even within the same district," Tolles said. "What this seeks to do is close that reporting and communication loophole."

RA492
LVRJ226

Ryan Davis
Legacy High School
Substitute teacher/coach
Arrested January 4
Calendar call scheduled July 6

Willie Bell
Eldorado High School
Substitute teacher
Arrested February 2
Calendar call scheduled June 19

Roger Brown
Arbor View High School
Athletic director/teacher
Arrested February 7
Preliminary hearing scheduled June 16

Under the bill, applicants would be required to disclose all past employment where they had direct contact with children, contact information for those districts and a written statement describing whether the person had been investigated for alleged sexual misconduct.

Districts would be required to share information about sexual misconduct investigations. The bill prohibits districts from signing agreements to keep investigations under wraps.

Finally, her bill requires the state Department of Education to keep and distribute to districts a list of people who have been denied licenses because of sexual misconduct charges.

Both bills are still working through the legislative process. Assembly Bill 362 was heard by the Assembly Committee on Ways and Means but has not yet received a vote. Senate Bill 287 has passed the Senate and is awaiting a vote by the Assembly.

The state teacher's union, Nevada State Education Association, did not take a position on either bill. The local teacher's union, Clark County Education Association, supports both bills.

Beyond Nevada

Even with the potential new protections from lawmakers, there's only so much in Nevada's control. There are no mandated federal tracking or reporting requirements for teachers under investigation for sexual misconduct.

Randall Minyard
Sandy Miller Elementary Magnet School
Substitute teacher
Arrested March 10
Preliminary hearing scheduled June 23

Michael Barnson
Cimmaron-Memorial High School
Volunteer coach
Arrested March 18
Status check July 18

Jeffrey Schultz
Brown Junior High School
Teacher
Arrested March 21
Trial set for July 11

The National Association of State Directors of Teacher Education and Certification clearinghouse, called NASDTEC, is pointed to by experts as a resource, but it's an incomplete one. The database notes whether states have taken action against someone's license, such as a suspension or revocation.

Agencies can report action taken against employees and can run potential employees' names through the database. But reporting is voluntary and can often lag behind, Nevada licensing officials said. Nevada reports suspended or revoked licenses and also runs applicants from other states through the system.

"It's very manual," said Jason Deitrich, the director of educator licensure for the state Department of Education.

But it's not always updated in real time. An employee who flees one state to start over in Nevada may not show up in the database immediately, because officials in the previous state might be slow to upload their report.

NASDTEC said all 50 states now use the tool, but Phil Rogers, the executive director called it "simply an alert system."

"It's not meant to be used for research or anything like that," he said. "It's simply meant to allow that state to know that they need to contact the state where the person came from if they need more information."

Gansert said new protections are about restoring trust and safety.

"We all have the expectation when we send out children to school that it's a safe place. We trust the individuals who are there and when you think about children, they have a very high level of trust and respect, and that's what we teach our children," Gansert said. "They should be in an environment that is safe."

How current background checks work

The state Department of Education and the Clark County School District check job applicants against multiple databases. None of the databases will show misconduct below the level of an arrest, a loophole experts say allows predators to move from school to school. Here's how the current process works.

Brian Theophil
Silverado High School
Junior varsity assistant girls volleyball coach
Arrested October 4
Arraignment scheduled May 26

Jordan Turner
Silverado High School
Volunteer football coach
Arrested October 14
Calendar call scheduled July 26

Ati Poni
Del Sol High School
Campus security monitor/coach
Arrested November 7
Sentencing scheduled May 30

— For most applicants, the background check begins with the Nevada Department of Education, which grants licenses to certain school applicants, including teachers, administrators, psychologists, nurses, speech pathologists and others.

— As part of the licensing process, those individuals undergo both a state and federal criminal background check. The background checks are repeated when the individual applies to renew the license. Licensed are renewed on a three-, five- or eight-year rotation.

— Fingerprints are sent to the state Department of Safety and the FBI, a process that can take between four and six weeks — sometimes longer.

— The report generated by the background check will indicate no record for the individual or it will indicate arrests and convictions.

— In the past two years, the Department of Education has denied 120 people licenses because of background check issues. The state approved 25,000 new or renewed licenses in that same time frame.

— The Clark County School District also checks the background of every applicant, include those who already have completed and passed background checks from the state. Clark County conducts background checks on nonlicensed employees, too, including bus drivers, janitors and food service employees.

— The district again sends fingerprints to the FBI, which returns the same report generated by the state.

— For local checks, the district uses the Shared Computer Operations for Protection and Enforcement database. All local law enforcement entities, including the Metropolitan Police Department, feed information into the system.

— "SCOPE" reports again show arrests and convictions, but again won't show investigations.

— The district's human resources department reviews the reports to determine whether any charges would bar the applicant from being employed.

— All new teachers who started working in the district for the 2016-17 year had cleared the SCOPE report prior to being employed in the district, according to figures provided by the Clark County Schools District.

— Even so, 249 of the 1,509 — or 16.5 percent — new teachers began working before the federal background report was returned to the district, allowing applicants who possibly had criminal charges or convictions in other states to work with students. The district said all of the federal checks were approved when they were returned. Information about checks for other employees was not readily available.

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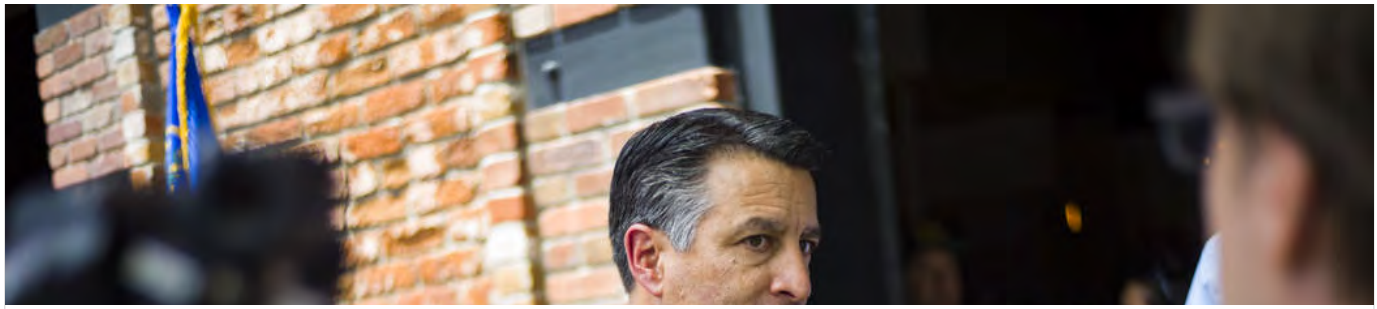

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Training failures major cause of CCSD sexual misconduct crisis

A lack of proper employee training is another way experts say a culture of sexual misconduct permeates in schools across the nation and here in Clark County. (Rachel Aston/Las Vegas Review-Journal)

By Meghin Delaney and Amelia Pak-Harvey Las Vegas Review-Journal
May 25, 2017 - 6:00 am

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Updated May 25, 2017 - 6:08 am

The Clark County School District has no social media or text-messaging policies for employee-student communications and heavily relies on a vague, outdated video to educate employees about sexual misconduct, a Review-Journal investigation has found.

Training failures are a major reason why the nation's fifth-largest school district is mired in a years-long sexual misconduct crisis that has seen 11 employees arrested since July, experts told the Review-Journal. And the district has not acted on a recommendation to expand its sexual misconduct training and create an Office of Educator Sexual Abuse Prevention.

Experts say juvenile victims of sexual abuse often are "groomed" through social media or text messaging by predators. Digital communication is used to gain a child's trust.

RA499
LVRJ233

In Clark County, six of the 11 staff arrested since July fostered their inappropriate relationships with students through texting or social media, including Facebook and Snapchat, according to police records.

"Our school employees are not being trained properly," said Terri Miller, president of the Las Vegas nonprofit Stop Educator Sexual Abuse Misconduct and Exploitation. "I believe it should be a curriculum that they should have to complete before they get that degree to become a teacher. And that kind of curriculum is nonexistent."

Yet other large districts, including the New York City Department of Education and the Los Angeles Unified School District, have such policies that date back as far as 2012.

Neither New York nor Los Angeles prohibit employees from communicating with students through social media communication, but the policies strongly urge educators to keep personal and professional accounts separate.

New York's 14-page document includes a script employees can use if students engage with them on social media sites.

'Vague,' outdated video

Every year the district's roughly 40,000 employees are required to watch a video that begins with a message from Superintendent Pat Skorkowsky.

It's not the stern statement on sexual misconduct that might be expected.

"We love when our employees make media headlines," Skorkowsky says. "Please make sure you're on the right side of those headlines."

Skorkowsky appears with district lawyers and law enforcement officials in the roughly nine-minute video, used by the system since 2015 to train employees how to act appropriately around children. The video continues to prove prescient — 31 staff members have been arrested on suspicion of sexual misconduct in the past three years.

"It doesn't give examples, it names a couple of things, but it doesn't give the see, scent, feel of it. The criteria they're giving about reporting an inappropriate relationship, it could start what people call a witch hunt because it's so vague," Mary Jo McGrath, a California-based lawyer who founded a company to help school districts train employees, said after reviewing the video at the request of the Review-Journal.

In addition to the video on inappropriate relationships with students, school district employees also must watch videos on sexual harassment, child abuse and neglect, and bullying.

But staff can watch it on their own time. They may be quizzed on some videos through an online system that verifies the completion of training, but there's no guarantee they watched them in their entirety.

Substitutes also watch the same videos, according to the district, and receive a substitute teacher's handbook that details prohibited sexual harassment against students or other staff.

The video reviews "red flags" and urges employees to immediately report any inappropriate behavior, but it doesn't clearly define what that looks like, McGrath said.

"I think the overarching concern is the use of the word 'inappropriate.' They keep using the word inappropriate without it being actually defined," McGrath said. "Doing this kind of shotgun approach, if you will, is just going to stir up more worry."

The video also cites outdated statutes.

It tells staff that school personnel older than 21 are prohibited from engaging in sexual conduct with students age 17 or younger who attend the same school. Yet current statute prohibits employees from having sexual relationships with any students they come in contact with through their jobs, regardless of which school a student attends and regardless of a student's age.

Two school district employees who were arrested this school year claimed they didn't know they were breaking the law.

When Silverado High School assistant junior varsity girls volleyball coach Brian Theophil was arrested in October on suspicion of having sex with a 12th-grader, he told police, "It's not technically illegal," according to the police report. "But I shouldn't do it." He also said he hadn't had any training.

Ryan Davis, a Legacy High School substitute teacher and football coach, was arrested in January on suspicion of having sex with a 12th-grader. "Davis said he thought, 'She's not going back to school, she's an 18 year old, can't get into trouble for that,'" the arrest report said.

"My own feeling is that the school district could probably do more, so there should be more education and more training," said Clark County District Attorney Steve Wolfson.

Wolfson's office began working with the district to update the video after a news conference in April, he told the Review-Journal. Skorkowsky confirmed the collaboration but said he wanted to wait until the legislative session ends June 6 in case new laws are passed.

"The training video is a good start," Wolfson said. "I know there are other people that are interested in providing education to the teachers and students."

A proposal ignored

For the past seven years, John Pacult has been trying to get the district to expand its sexual misconduct training.

Pacult, a Las Vegas licensed clinical social worker who has worked for state and county agencies, has spent years conducting risk assessments in sexual misconduct cases and is an expert witness on those matters in court.

"I knew this was happening, and it just continues to happen," he said. "I saw an opportunity to really help the district fix this problem."

Pacult's plan calls for a separate Office of Educator Sexual Abuse Prevention to handle claims of sexual misconduct.

That would take the burden off administrators, who aren't trained to handle sexual misconduct cases, and put inquiries in the hands of licensed professionals, he said.

Know the signs

★★★★★

Stop Educator Sexual Abuse, Misconduct & Exploitation provides guidelines for parents to help protect their students from sexual abuse.

Tips for parents include:

— Educate your child. Children should know which body parts are "private" and to tell a parent if someone touches a private part.

— Never let your child be alone with school employees. Experts suggest telling the school verbally and in writing the parent never wants the child to be alone.

— Educate yourself on the "grooming process." Predators may pay extra attention to potential victims, including giving them small gifts or special opportunities.

— Communicate with your child on a daily basis. Ask specifically about the child's interaction with employees.

— Visit the child's school and class room.

— Physical signs of abuse include trouble sitting, torn clothing, stained or bloody underwear and pain or itching in the genital area.

Source: sesamenet.org

LAS VEGAS REVIEW-JOURNAL

RA500
LVRJ234

"At the end of the day, there's a file created — a proper file created," he said. "There's a proper tracking method. Then ultimately we determine whether there was or wasn't anything going on."

The Clark County School District did not explain why it hasn't accepted Pacult's suggestions. A spokeswoman said vendors and consultants regularly reach out to offer services, and a request for proposals process and a vetting of expertise must be done.

Pacult had a meeting with Trustee Kevin Child on Monday to discuss his proposal.

27-member working group

In the wake of public outcry over arrests (https://www.reviewjournal.com/news/education/henderson-parents-demand-ccsd-action-to-protect-students/) in April, the district created a 27-member internal working group to craft a policy on sexual misconduct, including a social media plan.

The group consists of school police, teachers, administrators, one student, one representative from the Las Vegas Metropolitan Police Department and a representative from the Clark County district attorney's office.

The working group does not include parents or representation from victims.

Chad Jensen, whose daughters have alleged inappropriate behavior by two Brown Academy teachers — leading to the arrest of teacher Jeffrey Schultz — wants parents on the panel.

"We should have some type of say-so and be involved in it."

"I'm glad they're doing something," he said. "They should have done it a long time ago."

The group plans to present a draft proposal to a public community roundtable in (https://www.reviewjournal.com/news/education/ccsd-plans-discussion-to-address-concerns-of-sexual-misconduct-toward-students/)June (https://www.reviewjournal.com/news/education/ccsd-plans-discussion-to-address-concerns-of-sexual-misconduct-toward-students/), then accept public input, after which it's expected to reach the School Board in July.

"We know the majority of our employees are doing things the right way. But we still have a responsibility to protect students and also protect our employees," said Tammy Malich, assistant superintendent of educational opportunities. "Hopefully that is the message that we will communicate loud and clear, and that is the message that will be heard."

Senate Minority Leader Michael Roberson, R-Henderson, wants the policy to be clear and rigid.

"CCSD must immediately take all necessary steps to put an end to this outrageous sexual misconduct by district employees," Roberson said in an email response to questions from the Review-Journal on Wednesday night. "To the extent social media and texting are being used as tools by sexual predators — and we know they are — CCSD should adopt a zero-tolerance policy on communication between staff and students via social media and texting."

Regardless of how that policy takes shape, Skorkowsy believes a culture exists in which students do not want to "rat on" each other in coming forward with alleged incidents of sexual misconduct.

"If we don't know that these rumors and rumblings are going on, we can't step in," Skorkowsky said. "And so we have to figure out a way to encourage students to come forward with this information to protect their friends as opposed to have it considered ratting them out."

Recognizing patterns

Good training isn't just about how individuals should behave with students, but also about creating a culture where others can spot and report potential grooming behaviors, according to experts.

"So, what do you do with all that information?" said Billie-Jo Grant, a board member at Stop Educator Sexual Abuse Misconduct and Exploitation. "That's where you do the reporting to the compliance officer, and it's a central recording keeping."

Under federal Title IX law, the training should identify who the school or district-level Title IX coordinator is and how to make a report, Grant said. That's missing from the video for employees.

The Title IX officer can monitor individual employees. If there are complaints about an educator behaving inappropriately or having a strange relationship with students, it may prompt further investigation.

But for complaints to happen, other teachers need to know what to look for and what to report, McGrath said. Often the line between what's appropriate and what's inappropriate is hard to tell.

"Typically what's on the surface is these behaviors that are boundary violations, they're too much," she said. "Too much attention, too much favoritism, too many gifts."

But time and attention can also be a mark of a passionate teacher, McGrath conceded.

"You have to put the same protections in place all the time. That gets to seem like it's a little sad, but it's not. It can work if people are conscious," she said.

Another glaring hole for experts? Excluding students and parents from training efforts.

A shifting Nevada law

A shifting Nevada law

Nevada's law governing student-staff sexual relationships in K-12 schools, NRS 201.540, has been amended three times since its enactment 20 years ago.

1997 New Nevada law prohibits "a person employed in a position of authority by a public school or private school from engaging in sexual conduct with a pupil who is 16 or 17 years of age."

2001 Amended to include both employees and those "volunteering in a position of authority at a public or private school." Also protects 14- and 15-year-old pupils, making sexual conduct with them a category B felony.

2013 After Dewey-Stalmach case, amended to forbid sexual conduct with an employee or volunteer's current or former students, or any pupil "with whom the person has had contact in the care of performing his or her duties."

2015 Amended to forbid sexual conduct with all current or former students 16 years or older who have not received a high school diploma. Also eliminates vague "position of authority" term.

Source: NRS 201.540

Las Vegas Review-Journal

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SEXUAL MISCONDUCT IN OUR SCHOOLS

1 Passing the Trash

Scrubbed personnel files and an escape clause in teacher contracts allow staff with sexual misconduct complaints to simply switch schools.

2 Flawed background checks

School employees are fingerprinted and screened for criminal histories, but the Clark County School District does little beyond those limited background checks to uncover past sexual misconduct.

3 Training failures

CCSD relies on a 9-minute video to train employees on sexual misconduct and lacks policies on appropriate employee behavior.

RA501
LVRJ235

It wasn't until 1997 that the state banned sexual relationships between school employees and 16- and 17-year-old students.

Before then, the law was unclear on whether employees could engage in sex with students who were older than 16, the state's age of consent.

Nevada law now forbids relationships with current or former students who have not yet graduated from high school, regardless of their age.

Yet the law still holds a potential loophole, applying only to current or former students or those the employee has had contact with "in the course of performing his or her duties."

If a teacher in Boulder City strikes up a relationship with a 17-year-old student in Summerlin who has never been in that teacher's class — or never interacted with the educator on a professional basis in any way — are there grounds for prosecution?

State Superintendent of Instruction Steve Canavero said it would never be appropriate for school employees to have sexual relationships with students, calling it "professional malpractice."

"That just seems too intuitive to have to actually explicate," he said. "But I think districts would agree with that."

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RA506
LVRJ240

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RA507
LVRJ241

EXHIBIT MM

REVIEW-JOURNAL SEQUENTIAL INDEX (OF ALL DOCUMENTS) AND ASSESSMENT OF CCSD REDACTIONS

Bates Range	Description/ Review-Journal Position	Comments
0001A	Produced With Redactions No Objection	0001A-0033A replaced document previously produced by CCSD with Bates Numbers 0001-0033.
0002A-0028A	Produced Without Redactions	
0029A	Produced With Redactions No Objection	
0030A-0033A	Produced Without Redactions	
0034-060	***Withheld Records Should Be Produced (with only redactions consistent with 2/222017 Order). (Each listed below.)***	***Documents submitted to Court for in camera review***
0034-0041	*Withheld: Draft of Cole Memo.* ***CCSD Has Not Met Burden; Produce.***	
0042-0048	*Withheld: Cole Investigation Notes.* ***CCSD Has Not Met Burden; Produce.***	
0049-0053	*Withheld: Cole Investigation Notes.* ***CCSD Has Not Met Burden; Produce.***	
0054-0057	*Withheld: Cole Memo.* ***CCSD Has Not Met Burden; Produce.***	
0058-0060	*Withheld: Cole Investigation Notes.* ***CCSD Has Not Met Burden; Produce.***	
0061-0062	n/a	Pages intentionally left blank

Bates Range	Description/ Review-Journal Position	Comments
0063	Produced With Redactions. **Objection:** Name of reporting teacher/staff person should not be redacted.	Per the Court's 2/22/2017 Order at ¶ 37, only the names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff may be redacted. This email was sent by a complainant who is not a direct victim.
0064	Produced Without Redactions	
0065-0068	Produced With Redactions. **Objection:** name of complainant redacted on pages 0065, 0067 without explanation.	Per the Court's 2/22/2017 Order at ¶ 37, only the names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff may be redacted. It does appear that the complainant was a direct victim and CCSD has provided no explanation for this redaction.
0069	Produced With Redactions. No Objection; *see comments.*	The complainant reported an incident that occurred in 2014 where Trustee Child visited the complainant's second grade class and made inappropriate comments, including "snitches get stitches." The complainant's identity is not protected pursuant to the Court's 2/22/2017 Order. However, because the complainant requested the complaint be handled anonymously, the Review-Journal has no objection to the redaction.
0070-0071	Produced With Redactions.	
0072-0075	Produced With Redactions. No Objection.	
0076-0078	Produced With Redactions. No Objection; *see comments*	Pages 0077-78 were subsequently produced two additional times by CCSD with no redactions at 130-131 and 151-152. Page 0076 was also reproduced without redaction at 150.

Bates Range	Description/ Review-Journal Position	Comments
0079-0089	Produced With Redactions. **Objection:** name, position, and school of complainant improperly redacted	Per the Court's 2/22/2017 Order at ¶ 37, only the names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff may be redacted. The name of the elementary school is improperly redacted. The complainant appears to be an assistant principal at the redacted school. (*See* 0088.) The complainant is not a victim of sexual harassment, and is reporting inappropriate/allegedly intimidating behavior.
0090-0108	Produced With Redactions. **Objection:** name of complainant improperly redacted	Per the Court's 2/22/2017 Order at ¶ 37, only the names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff may be redacted. The complainant is not a victim of sexual harassment.
0109-0110	Produced With Redactions. **Objection**; *see comments*	Bates 109-110 is an email chain between Trustee Child and Superintendent Skorkowsky in which Trustee Child's phone number is redacted. The Court's 2/22/2017 does not specifically permit redaction of phone numbers. CCSD has not provided an explanation for why the phone number of a public official must be redacted.
0111-0133	Produced Without Redactions.	
0134	Produced With Redactions. No Objection.	Similar version of email produced at 0029A.
0135	Produced Without Redactions.	

Bates Range	Description/ Review-Journal Position	Comments
0136-0138	Produced With Redactions. No Objection.	
0139-0146	Produced Without Redactions.	
0147-0149	Produced With Redactions. **Qualified Objection**; *see comments*	Bates 147 is another version of the email produced at 0029A and 134. Bates 148 is redacted in its entirety, but CCSD's privilege log does not specify reason for redaction. CCSD did provide explanation for redaction in 6/05/2017 email to Margaret McLetchie. Log should be updated to reflect that explanation.
0150-0158	Produced Without Redactions.	
0159-0233	***Withheld Records Should Be Produced (with only redactions consistent with 2/222017 Order).*** ***(Each listed below.)***	***Documents submitted to Court for in camera review***
00159-0177	*Withheld: "Confidential Case Notes."* ***CCSD Has Not Met Burden; Produce.***	
00178	*Withheld: "ID of Employees."* ***CCSD Has Not Met Burden; Produce.***	*What does this mean?*
00179-0183	*Withheld: Draft of Cole Memo.* ***CCSD Has Not Met Burden; Produce.***	
0184-0188	*Withheld: Investigation Notes.* ***CCSD Has Not Met Burden; Produce.***	

Bates Range	Description/ Review-Journal Position	Comments
0189-0195	*Withheld: Draft of Cole Memo.* ***CCSD Has Not Met Burden; Produce.***	
0190-0203	*Withheld: Investigation Notes.* ***CCSD Has Not Met Burden; Produce.***	
0204-0223	*Complaint.* ***CCSD Has Not Met Burden; Produce.***	
0224-0225	*Complaint (Addendum).* ***CCSD Has Not Met Burden; Produce.***	
0226-0228	*Withheld: Draft of Cole Memo.* ***CCSD Has Not Met Burden; Produce.***	
0229-0230	*Cole Memo.* ***CCSD Has Not Met Burden; Produce.***	
0231-0233	*Withheld: "Personal notes regarding K. Child site visit interactions."* ***CCSD Has Not Met Burden; Produce.***	

EXHIBIT NN

maggie

From: Adam Honey <ahoney@interact.ccsd.net>
Sent: Friday, May 19, 2017 1:17 PM
To: maggie
Subject: Re: LVRJ - CCSD - Order DRAFT 05.19.17 2

Maggie,

I will read the edits and get back to you.

We will provide you with a log and it will have the categories consistent with our previous privilege log and the asserting of privileges/identifying documents as the judge has ordered. . I agree with your position on the NV law regarding the same. Nonetheless, the Court did not Order it so it is not appropriately in the Order. I don't think either side should be reading between the lines and taking it upon themself as to what the court intended. Additionally, the Court is allowing you to file a response to our privilege log, which by any reasonable interpretation requires you to have a copy of the log, which we will provide.

Do you have the transcript? If not would you like me to provide you the transcript?
As to hard copy searches, we have previously conducted hard copy searches. As indicated on our privilege log dated 3/21, we have withheld hard copies from the Ofice of Diversity. There were no other hard copy records. Please indicate where in the transcript we were directed to conduct any additional hard copy searches. Regardless, I am not aware as to any previously unsearched location for hard copies, unlike the emails where we had not previously searched principals outside of District D or emails from within the Office of Diversity and Affirmative Action. If you have somewhere in mind for hard copy searches, please let me know and I will tell you if we searched there or not.

Sincerely,

Adam

maggie <maggie@nvlitigation.com> writes:
Adam:

Please see attached. I redlined additional edits and made comments about what I otherwise accepted or rejected. Some of your proposed edits regarding relief confused me. Is it CCSD's position that it shouldn't have to give a copy of the log it provides the Court to the Review-Journal? That would of course be inconsistent with Supreme Court case law.

Also, please note the Court required the hard copy searches as well. Finally, any additional responsive but non-privileged records of course need to be produced to the Review-Journal.

If you would like to discuss further, please give me a call as soon as you get some time. We plan to submit a cleaned-up version of the attached to the Court by around 3 p.m. (without your signature), unless we are able to resolve additional issues by then so please let me know if you are willing to speak.

Maggie

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DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Mandamus | **COURT MINUTES** | **June 27, 2017**

A-17-750151-W Las Vegas Review-Journal, Plaintiff(s)
vs.
Clark County School District, Defendant(s)

June 27, 2017 **10:30 AM** **Hearing: Search Parameters**

HEARD BY: Williams, Timothy C. **COURTROOM:** RJC Courtroom 12D

COURT CLERK: April Watkins

REPORTER: Peggy Isom

PARTIES PRESENT:
Honey, Adam — Attorney for Deft.
McLetchie, Margaret A. — Attorney for Pltf.

JOURNAL ENTRIES

- Following arguments by counsel, Court stated it's important to point out that when you take a look at the statute, under Nevada law, The Court focused, more specifically on NRS 239.010, and that would be the public books, public records are open to inspection. It appears to the Court to be fairly clear that what the Nevada legislature wanted to do was to make sure public records of our governments are open to inspection. And there's a very simple reason for that when it comes to public records, public decision, decisions made by those in government elected officials, the public has a right to know when it's all said and done. And so that's the first consideration. Secondly, the Court has taken a look at Nevada Chapter 233. That is the NERC or Nevada Equal Rights Commission, and EEOC from the federal side. And it's the decision by the Court that Chapter 233 has no application to the diversity to the school district, a diversity department. Because that's not a governmental agency. It's not a state agency. It's not the federal government. So that doesn't apply. The Court took a look at the derivative process privilege being applied here. And for the record, once again, it's not an absolute privilege. And so, ultimately, and this is one of the reasons why the Court is going to make the decision the Court is going to make regarding what should happen. And, specifically, we have competing interests regarding the statutory interest of disclosure versus the interest of secrecy regarding the acts of the Clark County School District. The Court stated it's important to point out we can't overlook this one fact that the focus of the interests of disclosure is not really focusing on the conduct of an employee, but the conduct of an elected official. And the

Court feels that is significant. And that's on for a couple of reasons. Number one, not only does the public have a right to know, but anyone that wants to participate in the election process has a right to know because they're an elected official. Then we have an interest of secrecy. The Court understands that. But it appears to the Court that the actions of an elected official are very compelling to know exactly what happened, and the public has a right to know that. Regarding the regulation, the Court thinks that is 4110. And for the record I did have a chance to look at that, and I think that's Roman Numeral X, which provides as follows: All information gathered by the district in the course of its investigation of an alleged unlawful discriminatory practice will remain confidential except to the extent necessary to conduct an investigation, resolve the complaint, serve other significant needs, or comply with the law. It is the Court's decision that the information gathered by the district in this case serves a significant need because it focuses on the acts of an elected official. And, consequently, this will serve as an exception to the confidentiality requirement under the regulation. And also, if the Court was to make a decision that there's a conflict between the regulation and Chapter 239.010, the next provision "or to comply with the law" would take care of that too. So because at the end of the day there's an overwhelming mandate from the Nevada legislature regarding the public's right to access governmental records. COURT ORDERED, regarding the documents, the Court is going to require them to be disclosed but redacted in accordance with my prior decision where applicable. Before those are turned over, counsel can submit them to the Court with the redactions, and then the Court will review them, and then the Court will submit them to counsel. FURTHER ORDERED, documents to be provided to the Court by Friday, June 30, 2017.

Ms. McLetchie to prepare the order.

CASE NO. A-17-750151-W

DOCKET U

DEPT. 16

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

LAS VEGAS REVIEW JOURNAL,)
)
Plaintiff,)
)
vs.)
)
CLARK COUNTY SCHOOL DISTRICT,)
)
Defendant.)
_____)

REPORTER'S TRANSCRIPT
OF
HEARING: SEARCH PARAMETERS

BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

DISTRICT COURT JUDGE

DATED TUESDAY, JUNE 27, 2017

REPORTED BY: PEGGY ISOM, RMR, NV CCR #541,

APPEARANCES:

FOR THE PLAINTIFF:

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OFFICE OF THE GENERAL COUNSEL
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* * * * *

Pursuant to NRS 239.053, illegal to copy without payment.

LAS VEGAS, NEVADA; TUESDAY, JUNE 27, 2017

10:33 A.M.

P R O C E E D I N G S

* * * * * * *

THE COURT: All right. So I see this was a continuation. And tell me where are we at right now.

MS. MCLETCHIE: Where we are at is the CCSD has submitted the documents to your Honor in camera
10:33:28 along with a privilege log and certifications. We now have received a copy of the privilege log and the certifications. And we submitted a memorandum addressing our positions.

Last hearing, we got continued. We both
10:33:44 appreciate your accommodating our schedules in light of the length of the last hearing. And other than that, the only updates for the Court are that there were a few documents that were produced to the Court and to the LVRJ. On June 16, CCSD provided a document to the
10:34:05 Court. They subsequently decided that that document was not -- was not privileged, and so we now have that. And that was the May 31st letter from the superintendent to Mr. Child.

Then just yesterday, we did receive -- we did
10:34:21 receive another document from CCSD. And this is a

10:34:27 document from November 30, 2016. And I don't think your chambers received a copy. So if I may approach, I do have a copy.

THE COURT: Yes, you may.

10:34:38 MR. HONEY: Is there a second letter on there as well with the April 24? It's two correspondences in one, right, Maggie? The last page is a separate letter.

MS. MCLETCHIE: November 30th. Yes, I'm

10:34:54 sorry. There's a November 30 letter and an April 24, 2017, letter, neither of which was previously produced. And I'm not clear why. And I -- when we discuss issues pertaining to the certification, I think this raises additional -- this -- the late production of these

10:35:17 documents raise additional issues.

After the last hearing, counsel for CCSD and myself were able to discuss some issues by phone. I did ask counsel for CCSD to provide a word or electronic version of their search parameters, their

10:35:35 search chart that was attached to a certification. I never heard back about his decision on that.

And the other issues that we discussed about the certification and production issues, Mr. Honey indicated that we should let the Court address these

10:35:51 issues today. So the issues before the Court today are

10:35:55 the in camera documents and the certification. And I'm not sure how your Honor wanted to handle those. Obviously, the Court has looked at those documents in camera, and I have not.

10:36:06 THE COURT: I understand. Let's talk. And so as far as the search parameters, I want to make sure I understand that. Is that based upon the certification that was signed on May 25th, 2017?

MS. MCLETCHIE: Yes. There was -- there was a

10:36:25 certification provided.

THE COURT: Yes.

MS. MCLETCHIE: There were two certifications provided. One from -- one from Mr. Wray, the IT person, and then one also from Ms. Smith-Johnson, a

10:36:39 public information officer.

And our concerns with -- our concerns with the certifications themselves were as follows: In my view, it doesn't certify any searches or productions completely. At best, it certifies the May 17th

10:36:59 production. And from my view, the certifications are not in compliance with the Court's ordered. And that's because Ms. Smith Johnson, for example, says she reviewed 11,907 emails, but she only documents in her certification the 43 pages that she initially handed

10:37:18 over to CCSD counsel for the May searches that this

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10:37:22 Court had previously ordered.

The other issues that the certification raised are that not only are we not detailed the information about the February and December searches, but there's

10:37:37 nothing in there whatsoever that addresses the hard copy searches that this Court ordered. In paragraph 5 of this -- 45 of this Court's last order, I believe it's paragraph 45, we -- it was detailed what this Court -- what -- I'm sorry, what CCSD was required to

10:37:57 further do and to certify. And the certification requirement said they needed to certify everything in paragraph 45 which included as well as in the December and February searches.

So I think the issue is that we -- we don't

10:38:13 have a full certification in short, your Honor. And we briefed this at length in our memorandum.

In addition, Exhibit HH to our memorandum included those certifications as well as the attached printout that explains what searches were conducted

10:38:33 when. And as this Court recalls, we ended up here because we were -- the Las Vegas Review Journal was delayed in receiving documents and was concerned that it never received full production, and that CCSD was not acting in good faith.

10:38:51 At the first page of their search records, it

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10:38:54 1 says that they searched only Mike Barton and Pat
2 Skorkowski on December 9, 2016. And so the Review
3 Journal's extensive efforts in this case to get
4 information about who was searched, what was searched,
10:39:08 5 and when, was well founded because, in fact, the
6 only -- the only two email boxes that CCSD had
7 voluntary searched itself back in December, although
8 they hadn't handed over the records, were those of
9 Mr. Barton and Superintendent Skorkowski.
10:39:28 10 Another issue that is raised by the list of
11 who is searched and when, is that -- and I would
12 probably have been able to do a better job of analyzing
13 it if I had received it in electronic form, but another
14 issue that is raised is that CCSD has taken the
10:39:46 15 position that the February searches were not
16 duplicative of the December searches. And this Court
17 has ordered CCSD to conduct full searches and to
18 certify those. But when you look at the list of
19 searches conducted, you see on there that the one and
10:40:05 20 only time that Mr. Skorkowski's email was searched was
21 December 9, 2016. I looked this over at length. This
22 is briefed in our memorandum, and I also discussed this
23 issue by phone with Mr. Honey. So that's a concern.
24 Another concern that we point out in our brief
10:40:28 25 is that while we certainly aren't looking to get

10:40:30 duplicative copies of emails, usually whenever you do email searches and productions, you see the emails produced slightly differently depending on who was the recipient or the custodian searched. And we pointed
10:40:42 out an example in our memorandum where the document -- we should have expected to see the document. If the full email search had been conducted, you should have expected to see it both with somebody as the "to" and as the "from". For example, your Honor, if we searched
10:40:57 your emails, your department's emails and my emails, my emails would show that I sent -- that I sent something to your department, copied Mr. Honey. Your department would also produce another version of that email.

In this case, only one of the emails that you
10:41:13 would have expected. And that was just an illustration. More globally, while I do greatly appreciate that Mr. Honey provided these documents to me yesterday, he only did so yesterday. The November 30, 2016, memorandum that I -- that I provided
10:41:32 to the Court just now. And that document further reflects, and I quote, it's a letter to Mr. Child from Superintendent Skorkowski. And I'm reading now from the letter. It states:

You were counseled on numerous occasions in
10:41:47 the last year that your interactions with

10:41:49 1 district employees made them feel
2 uncomfortable, especially women, and that your
3 habit of dropping in on their work environment
4 impeded their ability to perform their duties
10:42:00 5 of their assignment.
6 My concern is that we have received no
7 documentation whatsoever of any of those counseling
8 sessions or the fact that they occurred. And as I
9 imagine CCSD, and as they've indicated in their
10:42:17 10 briefing, they're establishing a Burlington Faragher
11 defense. And they're documenting that they've
12 appropriately responded to these complaints. And so
13 one would certainly have expected that these counseling
14 sessions between the superintendent and Trustee Child
10:42:41 15 would have been produced, or if not produced because
16 the district maintained they were confidential, they
17 would appear on the log.
18 But we didn't see anything. Anything. In
19 fact, we don't have anything predating that letter.
10:42:58 20 The letter is a little bit confusing. I think
21 it's in the last year. I think it means 2016. In any
22 case, we don't have anything predating that. We do
23 have some subsequent email exchanges, a few of them,
24 between Skorkowski and Child. But nothing that would
10:43:14 25 reflect these counseling sessions.

10:43:16 This brings me to another issue with the certifications too. While CCSD counsel has represented that it's not possible to search all of the emails, Mr. Wray did not indicate that in his certification. So we still have lack of information regarding how, how their search was really conducted and what was available to the district to search. And so we're still a little bit shooting in the dark.

To that end, your Honor, we also don't know exactly what -- what Ms. Smith-Johnson did in evaluating whether or not something was responsive. I'm cognizant of the fact that we did not need to receive 11,907 pages, documents that might indicate things that are totally irrelevant to this case, but it's not clear to me, and it's my view that she should have explained what her -- what her interpretation of responsive was.

Further, her certification indicates that she handed the documents over to CCSD counsel who made the final determination for production.

So I think in order to kind of fully close the loop on what was searched and the chain of custody, if you will, on these documents, I think that we would need -- we would have needed a CCSD counsel certification or declaration.

10:44:40 Finally, with regard to the production and the certification, your Honor, there's no emails or documentation regarding the interviews that Cole did other than his notes of interviews, the documents that
10:44:55 he put on, that Mr. Honey, that CCSD has put on the privilege log. And it just seems peculiar to me that nobody emailed to say we're going to a meeting with Cedric Cole today.

It's my understanding from Mr. Honey that
10:45:08 Mr. Cole doesn't really use email, that he does all of these interviews over the phone or in person, keeps notes, and then makes his report.

But it does seem that other people would have been discussing their meetings or what happened during
10:45:22 them. In addition, one would expect that there was some deliberation regarding the Cole report. They have claimed the deliberative process privilege. And as I'll get into later, I don't think it applies to documents that may have been reviewed in making a
10:45:40 decision, but it does -- the raising of the deliberative process privilege by the district raises the whole question to me, which is, where are the documents in which people were discussing the Cole report and what to do with this problematic trustee.

10:45:56 There are no -- there are no such documents on

10:45:58 the log or in the production. So, your Honor, those
are -- those are my issues with regard to the
certification and my related issues with regard to
production issues, and the apparent failure to produce
10:46:12 some documents.
My view is they were under a Court order to do
full certifications regarding the -- regarding not just
the most recent production but all of them. And I had
talked to Mr. Honey and had hoped that in advance of
10:46:28 this hearing, we could have gotten updated
certifications, but we have not, your Honor.
THE COURT: I understand.
MS. MCLETCHIE: Would you like me to address
with the legal issues with regard to the withheld
10:46:37 documents that the Court has been able to review?
THE COURT: Not yet.
MS. MCLETCHIE: Okay, your Honor.
THE COURT: We'll do that next. We'll hear
what Mr. Honey has to say in regards to the
10:46:46 certification issue. And then we'll talk about some of
the basis for assertions of privilege. And this is one
of the important distinctions I think we have to make
as far as the documents being requested here.
There's not a "traditional employer/employee
10:47:04 relationship" here; right? There's not. And as a

10:47:07 1 result, I want you to both tell me why that would be
2 different in case of an elected official. Because
3 that's really and truly what I think the primary issue
4 here is. Because I understand that under certain
10:47:22 5 circumstances how employee files would be privileged,
6 but this wouldn't be an employee file. This is an
7 elected official. So think about that, both of you.
8 But, Mr. Honey, sir, as far as the
9 certification is concerned.
10:47:37 10 MR. HONEY: Pardon me real quickly. When it
11 involves a nonemployee, a trustee and an employee --
12 THE COURT: No. I'm just talking about the
13 certification.
14 MR. HONEY: I know. But I want to say just
10:47:48 15 real quickly. For the employee, it is personnel. So I
16 want to make that distinction because we keep looking
17 at this with a view of the trustee. And the district,
18 we're trying to look at this as the view of the
19 employee, protecting our employee.
10:48:00 20 In regards to the certifications,
21 Ms. McLetchie and I had an opportunity to speak just
22 last Wednesday, six days ago. Since that time and
23 today, we weren't able to get anything further
24 completed or established. She indicated to me her
10:48:15 25 concerns with the certifications. I offered for her to

10:48:19 tell me what you want the certifications to say. Because it seems like whatever I put on something isn't enough. There's always a conspiracy of silence going on from her camp in regards to the school district. So
10:48:31 I don't really know what else to put.

Now, keep in mind that we had to do --

THE COURT: No. I understand that. I understand that. I do.

MR. HONEY: Okay. Okay. Also --

10:48:37 THE COURT: I was actually thinking about this, just to wrap it up, if there's any issues regarding what the thrust and the scope of the search would be and what the processes are, and I understand it's kind of tough to prepare a certification without
10:48:57 knowing exactly what is being requested as it relates to the avenues of discovering, I guess, the procedures out there with Clark County School District just as important, too, from counsel on behalf of the RJ's prospective, it's tough to understand what their
10:49:17 policies and procedures are because you haven't taken their deposition, right?

MS. MCLETCHIE: Correct, your Honor.

THE COURT: Yeah. So I'm sitting here saying to myself, is this the best, simplest way to put this
10:49:30 part of it to bed, is just take the depositions of the

10:49:34 two individuals?

MR. HONEY: It seems like unnecessary additional cost. If Ms. McLetchie would simple tell me what would satisfy you in a certification? What is it

10:49:45 that you need to know? What term of art are you looking for? Because whatever term of art I've chosen, clearly doesn't satisfy her.

And I do want to point out that our certifications were prepared on May 25th, 12 days

10:49:56 before the order. And on the day the order was signed in open court, I'm getting email, an email asking for me to provide the documents before the documents even show up on Odyssey, or what have you.

And my point is, and I don't have a problem

10:50:11 with the email -- her wanting the document as quickly as possible or compliance with the order. But I do want to point out that those certifications were done before there was even an order in place for us to comply with. And then we had literally an hour and a

10:50:24 half. So we weren't going to go back and change the certifications.

THE COURT: I get that.

MR. HONEY: Okay.

THE COURT: See, what I'm trying to do is

10:50:30 this: I'm trying to be efficient.

10:50:31 MR. HONEY: Okay.

THE COURT: And the reason why I say that is this, and it's really this simple. It's kind of like requesting certifications, and it appears that the

10:50:45 plaintiff wants to make sure they've covered everything. And when you look at it from a legal perspective, many times written discovery is insufficient.

MR. HONEY: Sure.

10:51:02 THE COURT: Right.

MR. HONEY: Sure.

THE COURT: It just is. So I'm looking at it, it's kind of like one of the individuals, Mr -- or, say, Cynthia Smith-Johnson, and she was involved in

10:51:13 this.

I would think a lot of the questions regarding the certifications, specifically what was done, could be handled in probably less than an hour in a deposition. Because all it is is what did you do?

10:51:26 What are the processes? What's difficult? What's not difficult? I mean, I --

Am I missing something there, ma'am?

MS. MCLETCHIE: No, your Honor. With regard to this conspiracy of silence I've -- I've -- on the

10:51:41 one hand, opposing counsel complains because I email

10:51:44 and ask him for too much. On the other, he complains
because I haven't given him enough information. But I
do think that the Court issue here is that I do need
more information about what -- why they conducted the
10:51:55 searches the way they did, how they conducted the
searches. I can't give him language because I didn't
conduct the searches.
At the very least, I, obviously, need
information not just about the most recent May
10:52:07 production, in many cases -- not cases, but matters
involving public record disputes, I actually am able to
have a call with an IT department and opposing counsel
and work out some of these issues. And in this case,
they've been unwilling to provide that.
10:52:24 And I think that in light of the fact that we
are in litigation, I can see how that could be
problematic. And I think that your Honor's solution of
a deposition, I had proposed that they be required to
have a conference with me. A deposition would
10:52:37 essentially be a conference regarding the searches that
were conducted so that we can get to the bottom of why
there are some of the issues that I noticed.
THE COURT: And, you know, here's the thing.
And you got to understand this: Maybe they're issues;
10:52:53 maybe they're not issues, but we don't know until we

10:52:56 1 know what the process is.
2 MR. HONEY: Sure.
3 THE COURT: Right. What was done.
4 MR. HONEY: One of things that Ms. McLetchie
10:53:01 5 and I discussed last Wednesday was the emails that she
6 mentioned, that she's surprised that there's no emails
7 to or from Cedric Cole, director of Office of
8 Affirmative Action and Diversity. And we talked about
9 doing a certification from Mr. Cole stating that he
10:53:17 10 turned over his entire hard copy file, and that that is
11 represented in the privilege log of withheld documents,
12 and that he had not received or sent any emails.
13 Now, keep in mind he's on Dan Wray's search.
14 He has been searched --
10:53:30 15 THE COURT: I understand.
16 MR. HONEY: -- for his emails. That being
17 said, we spoke last Wednesday. As I told Maggie, I was
18 in arbitration on Thursday, all day district training
19 on Friday. Mr --
10:53:39 20 I didn't tell you this because I didn't know
21 this at the time.
22 When I spoke to Mr. Cole, he was out of work
23 from yesterday and today. Some of this is timing.
24 That being said, I'd be -- I could be -- I'll say this.
10:53:50 25 If the final decision maker for the district which

10:53:53 identified as general counsel allowed me to provide a certification from Mr. Cole, I'd be happy to do that.

MS. MCLETCHIE: Your Honor, that's -- that doesn't appear to be a commitment to allowing that.

10:54:03 But I also think that rather than have each custodian have to provide a certification that they handed over their documents to Ms. Smith, I think the more efficient thing would be to allow me to take the depositions of both Mr. Wray and Ms. Smith. And I will

10:54:18 do so efficiently. I talk quickly, sometimes too quickly as the court reporter has pointed out today. And I think that's an efficient way to resolve some of these questions once and for all.

While there haven't been that many documents

10:54:32 produced or withheld in this case, there's been a lot of talk over what are -- what are the abilities of the district to search, and we still are a little bit in the dark. And I think that is the best solution, your Honor.

10:54:44 THE COURT: Anything you want to -- because all -- you know, you have to look at it from this perspective: I just want to have some closure on concern issues.

MR. HONEY: Sure. I understand.

10:54:51 THE COURT: I really do. I just want to --

10:54:53 because, potentially, if Mr. Wray's deposition is taken, and it might take half an hour, an hour, I wouldn't anticipate more than that, after that's done, maybe all questions have been answered. And based upon
10:55:11 the deposition, there's no further questions of Mr. Wray. Could be the same thing with Ms. Smith Johnson too.

MR. HONEY: Sure.

THE COURT: And then we can take that and not
10:55:20 worry about that anymore. Then I can focus solely on the privilege log.

MR. HONEY: Your Honor.

THE COURT: Because I just want to put this to bed. I really and truly do.

10:55:29 MS. MCLETCHIE: And I'm sure we would as well, your Honor. I think it's -- I think it's a workable solution because we'll just get the information we need to either answer our questions or identify for the Court what the remaining areas of dispute are.

10:55:42 Or maybe -- maybe hopefully, even work with counsel if there are areas of dispute to resolve them without further court intervention.

THE COURT: I understand.

MR. HONEY: Having time to consider the
10:55:51 depositions, I have no oppositions to that.

10:55:53 THE COURT: That makes sense.
MR. HONEY: Because one of my things was I don't know what languages I could put in a certification that would be the satisfy --
10:55:57 THE COURT: Exactly.
MR. HONEY: -- satisfaction --
THE COURT: Then you're back in front of me again.
MR. HONEY: Exactly.
10:56:01 THE COURT: And what happens under those circumstances, think about it, Mr. Honey, there's no need to even address the issue after that; right?
MR. HONEY: Exactly.
THE COURT: There might be a dispute as to
10:56:13 maybe a certain search, but as far as what he's done and what she has done, there's no dispute anymore. I just want to just move beyond that. That's kind of what I want to do.
And I don't think it would be --
10:56:25 How long do you think you would need for the deposition, ma'am?
MS. MCLETCHIE: Perhaps a little more than an hour. But I would certainly think neither would take more than a half day.
10:56:33 THE COURT: For both?

10:56:35 MS. MCLETCHIE: Yeah.
THE COURT: Okay.
MS. MCLETCHIE: Or half hour. I mean, it would probably be easier to do them -- I find
10:56:40 depositions extremely tiring if I try to do them efficiently. So I prefer to do them on two separate days. And two afternoons, and I would hope that they would take less -- I mean, Mr. Honey may have follow-up questions as well. But they're --
10:56:53 THE COURT: Probably not.
MR. HONEY: Probably not.
MS. MCLETCHIE: It happens sometimes at depositions.
THE COURT: I understand. Not this time.
10:56:58 This is more of a custodian of records deposition; right?
MR. HONEY: Yeah.
MS. MCLETCHIE: So I would hope that it would only take -- it would -- it would take less than two
10:57:05 hours for each deponent, your Honor.
THE COURT: How about this, two hours per deponent?
MS. MCLETCHIE: Okay, your Honor.
THE COURT: All right. That's what it will
10:57:11 be.

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10:57:12 MR. HONEY: Very good. And if it goes a little over two hours, of course, I'll extend a professional courtesy.

MS. MCLETCHIE: Thank you, Mr. Honey.

10:57:17 THE COURT: That way, you at least have something to work towards and get this done. So maybe the only dispute I might have as a result of the certification you might say, Look, Judge, they didn't look into this area. That's fine. We can deal with that.

10:57:30 MS. MCLETCHIE: Sure.

THE COURT: But I don't want to -- I want to put this to bed.

MS. MCLETCHIE: Sounds good, your Honor.

10:57:36 THE COURT: Okay. So you work out a time period. You can prepare an order. I'm going to permit the depositions of Mr. Wray and Ms. Smith-Johnson. Is that it?

MS. MCLETCHIE: Ms. Smith-Johnson. Yes, your Honor.

10:57:45 THE COURT: Yes. All right.

MS. MCLETCHIE: You think we could get this done over the next month? I know that vacation schedules are busy, but I would hope we can get them done over the next 30 days, Mr. Honey.

10:57:52

10:57:54 MR. HONEY: Hopefully, but I will represent to you that I'm out of state from the 8th to the 31st.

MS. MCLETCHIE: Oh.

MR. HONEY: Yeah. So ...

10:58:00 MS. MCLETCHIE: Okay. We'll work together on it --

MR. HONEY: It may be --

MS. MCLETCHIE: -- scheduling. I don't know if somebody else can -- that's quite a long time. So

10:58:06 maybe somebody else could handle those depositions. But we'll work it out.

MR. HONEY: That's what I was thinking. Maybe somebody else from the office can handle it.

THE COURT: Work it out.

10:58:15 MS. MCLETCHIE: Okay.

THE COURT: I'm very sensitive to counsel and their vacations. I'm hyper sensitive to that. I really am because lawyers work very hard. So if you have to take a vacation, ma'am, take one.

10:58:27 MS. MCLETCHIE: I don't have one currently planned until the end of August.

THE COURT: Well, make sure you take it.

MS. MCLETCHIE: Thank you, your Honor. Would you like to address the withheld documents today, your

10:58:36 Honor?

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10:58:36 THE COURT: Yes. Let's talk about the withheld documents.

MS. MCLETCHIE: So, your Honor, I don't want to -- I wish to be brief because a lot of the legal
10:58:48 issues have been briefed a couple of times, both in my memorandum, their log, and then our -- and then our briefing, our briefing in chief in this case.

But, of course, as the Court is well aware, we've discussed many times the burden is squarely on
10:59:05 CCSD to establish not only the existence of a privilege log, but that the privilege outweighs the interest and confidentiality. And your Honor instructed us to specifically address today how this case is different because we're not talking about a traditional
10:59:22 employer/employee relationship. While some of the victims may be employees, Mr. Child is a trustee, not an employee.

And I think it's different for two reasons. First of all, the statutory policy -- and policies
10:59:38 whether or not they trump the Nevada Public Records Act doesn't even matter because those guidelines and issues don't apply to things that aren't part of somebody's personnel records. We haven't requested the personnel records of the victims. These are -- these are
10:59:54 documents that are separate and apart from the

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10:59:57 1 personnel records of CCSD.
2 So while the RJ has disputed that there's an
3 absolute privilege with regard to personnel records,
4 has disputed that internal CCSD policy can trump the
11:00:08 5 Public Records Act, those issues almost don't matter
6 because Mr. Child is not an employee.
7 And not only does his status make the case
8 different, his status also urges this Court to require
9 production of the documents because he's a public
11:00:29 10 official. I think it was in the Deseret News case
11 about a similar situation with a school in a sexual
12 harassment investigation. And in that case, the
13 Court -- the Court explained that it provides a window
14 into official acts and official decision making. And
11:00:49 15 so any interest in confidentiality in that case, the
16 Court found, was outweighed by the interest in allowing
17 the public to know not only what the -- what a public
18 official or public employee had done, but what -- how
19 public officials had handled this issue.
11:01:07 20 And in both that case and in the Marken case,
21 which are both cases that address specifically
22 questions about sexual harassment investigations in the
23 public records context, they -- both those cases we
24 didn't even have as compelling facts as we do here
11:01:25 25 because the people at issue were not a trustee.

11:01:29 As we've -- as we've discussed before in the many hearings in this case, your Honor, Trustee Child is elected by the voters. The voters are entitled, for example, to recall him. They're entitled to know what
11:01:41 he does.

In addition, Superintendent Skorkowski has an incredibly important position at the district. He's a highly paid, important person who has great responsibility for educating teacher -- I mean,
11:01:54 educating students in Clark County. And CCSD is also one of the state's largest employers. And so how CCSD and its officials, like the superintendent, handled complaints about another high-level official, a trustee, the highest level official, there's great
11:02:13 public interest in knowing -- in knowing what occurred.

In looking at the district's arguments again and looking at the redaction log, and the pages that were attached to it, I understand and I respect their concerns about respecting the victim's confidentiality.
11:02:33 In fact, earlier in this case, even though -- even though the district hadn't timely asserted any such privileges, we, the RJ, didn't contest that the names of victims should be redacted. And so I think that what the district fails to do, though, is to establish
11:02:50 why redacting doesn't meet that concern.

11:02:56 Under the Public Records Act, they are required to redact wherever possible. That's not even case law. That's specifically in the statute. And again, we're supposed to interpret things liberally and
11:03:08 to provide as much information as possible. If the interest here is protecting the identities of -- identities of the teachers or other people, other employees who complained, the RJ has no issue with redacting their names consistent with the February
11:03:23 order.

We don't have enough information, your Honor, on my side to know if there's other identifying information in those documents, but any identifying information; although, I think that, historically, CCSD
11:03:38 has interpreted identifying information a little too broadly to include things like school name, but I do think that identifying information can be properly redacted. And I think that it properly meets the concerns the district has -- I think has fairly voiced
11:03:55 with regard to protecting the names of sexual harassment complainants that come forward and say we have an issue with a very important person.

But for the same reasons because it's a very important person and this is a -- and it was very
11:04:07 important people addressing this matter, the public is

11:04:10 1 also entitled to have as much access to information
2 about how Cedric Cole conducted his investigation and
3 about what actually occurred, your Honor.
4 THE COURT: I understand.
11:04:26 5 Mr. Honey, sir.
6 MR. HONEY: Thank you. There's a long record
7 on this case, our opening briefs, answering briefs,
8 replies, multiple hearings. There are a few things I
9 want to touch base on that probably haven't been argued
11:04:43 10 or discussed articulately before.
11 The EEOC at the federal level and the NERC at
12 the state level both have the same purpose. They're to
13 protect people from civil rights violations,
14 discriminations to the point that a person has a right
11:05:00 15 to file a claim with either one of those organizations.
16 And the laws that make up those two state and
17 federal divisions, or commissions, or however you want
18 to call them also require that employee -- or employers
19 of certain size have a designated person in order to
11:05:18 20 take these types of complaints.
21 In this case we're a very large employer,
22 obviously, and so we actually have an office, the
23 Office of Affirmative Action and Diversity, which
24 Cedric Cole is the director of. Now, these three work
11:05:33 25 in conjunction. And as such, they need to be afforded

11:05:38 the same protections from one to the other.
Now, there's no question from our briefing that at the federal level, when complaints of harassment and discrimination such as we have here are
11:05:49 made, an employer has an obligation to investigate it.
And that's what we have done here. In their reply, the Review Journal in discussing non-record materials, I think on page 23 lines 4 and 5, concede that the district has a statutory duty to investigate.
11:06:11 And that's what we've done in this case.
Now, at the federal level, those investigations and the results thereof are confidential. At the state level, under Chapter 233, which is the Nevada Employment Commission --
11:06:27 THE COURT: Wait, wait. Hold it. Hold it. I'm going to follow you.
MR. HONEY: Sure.
THE COURT: That's Chapter 233?
MR. HONEY: Yes. That's NRS 233.190.
11:06:39 THE COURT: Let me pull it for you. 190. Okay. I got it. I think it opened up right in front of me.
MR. HONEY: And it's entitled confidentiality of information. So now we go to the next level of
11:06:49 these three entities that do essentially the same

11:06:52 1 things. And at No. 1, any information by the
2 commission in the course of its investigation of an
3 alleged discriminatory practice in housing, employment
4 or public accommodations is confidential.
11:07:05 5 And then at 2(b), To any other person if the
6 information is provided in a manner which does not
7 include any information that may be used to identify
8 the complainant, the party against whom the unlawful
9 discriminatory action -- practice is alleged or any
11:07:27 10 persons who provided information to the commission
11 during the investigation.
12 And then finally under 3(c), Any information
13 that may be used to identify a person who provided
14 information to the commission during the investigation
11:07:40 15 and who was requested anonymity.
16 Now, here we've got lots -- we have several
17 emails. We have the affidavit of Cedric Cole that
18 employees are concerned about retaliation. I mean, you
19 have emails, people straight up saying, We're reporting
11:07:56 20 this very reluctantly because we're concerned of what
21 may happen as a result.
22 The protections --
23 THE COURT: Now, here's my question for you.
24 MR. HONEY: Yes.
11:08:05 25 THE COURT: And I understand your position,

11:08:07 but when it comes to the application of Chapter 233,
and it appears to me that specifically involves the
Nevada Equal Rights Commission and any complaints filed
with that political subdivision for the State of
11:08:27 Nevada, how does that apply to complaints made on the
school district level regarding an elected official?
MR. HONEY: Thank you.
THE COURT: Because that is the real question
there. Because that's an important issue. And please
11:08:46 explain that to me.
MR. HONEY: Thank you. First of all, I want
to point out that 233.190 is enumerated in Chapter 239
of NRS. It's one of the specified statutes of which
documents are deemed confidential and do not need to be
11:09:03 produced as Public Record Act.
In the connection, what I'm trying to get to,
is that our Office of Diversity -- Office of
Affirmative Action and Diversity is, in essence, the
extension of NERC and the EEOC. We're required to have
11:09:17 that office based on the size of our employee, and we
do the same thing.
Now if we afford less protections to the
school district employees, regardless of who is
harassing them -- I mean, it could be -- it could be
11:09:33 any nonemployee, even if it's not a trustee. It could

11:09:35 1 be a parent. If a parent is harassing or
2 discriminating against an employee, and they report it
3 to us, we need to act on that. We have a duty, a
4 statutory duty to investigate and do such. Same
11:09:46 5 difference with the trustee. Because, again, I'm here
6 to protect the employees here today and throughout this
7 entire case.
8 And so really what my point is is --
9 THE COURT: But here's my question because I
11:09:57 10 know a little bit about the Nevada Equal Rights
11 Commission. And it's my understanding once they
12 conduct their investigation, at that point the report
13 of the Nevada Equal Rights Commission is no longer
14 confidential.
11:10:09 15 So if that's the case then, why wouldn't the
16 report of, especially regarding an investigation as it
17 relates to a trustee, be confidential after the
18 investigation is conducted? And we have a -- I think
19 we have a Nevada case that specifically deals with the
11:10:29 20 loss of confidentiality.
21 But go ahead.
22 MR. HONEY: Well, I think at our -- at our
23 Office of Affirmative Action and Diversity is there is
24 no final report with an action taken such as there is
11:10:41 25 with NERC. I think -- I think that's a distinction.

11:10:45 And what we end up here is if our Office of Affirmative Action and Diversity isn't afforded the same protections to the complainants as NERC, we're then telling people, yeah, we're required by law to have
11:10:58 this office, but don't report it here because it's not confidential. You want to skip us and go straight to NERC or the EEOC.

And that's --

THE COURT: But if they go to NERC or EEOC,
11:11:07 once the hearing occurs then the report is no longer confidential; right?

MR. HONEY: I'm not sure on that, your Honor.

THE COURT: I think that's how it works. I mean, I'm looking here. And it's a specific case.
11:11:20 Hind versus Caruso. And it's a federal case, Ninth Circuit. And I think it says once the Nevada Equal Rights Commission has determined to conduct a hearing on the matter, the report is no longer confidential. That's what that case stands for.

11:11:38 And so I'm looking at it from this perspective. Once it goes to hearing -- Well, what we have here and, I guess, in concern respects, we're having a hearing now as it relates to the investigation of a trustee, and this hearing is being conducted
11:11:59 pursuant to Nevada public records law; right?

11:12:03 And so I'm wondering -- because I'm looking at it from this perspective, I understand there's an investigation, but I'm trying to go figure out specifically how this section applies to the Office of
11:12:20 Diversity. Because from what I can gather in looking at the statute, it doesn't appear to cover the Office of Diversity. I mean, I understand the argument by analogy.

MR. HONEY: And that's really what it is, your
11:12:37 Honor, an argument by analogy.

THE COURT: I got you.

MR. HONEY: I would say for the record, though, I do not believe this is the same as a NERC hearing in regards to alleged discrimination, the
11:12:46 hearing that we're in front of here today.

THE COURT: Well, yeah. And I can agree because, I guess, ultimately, the NERC is going to make a factual determination as to whether or not there was harassment and/or determination. I'm not going to do
11:12:57 that. The only thing I'm going to do is decide whether -- what records should be produced. And I agree with you one hundred percent on that, Mr. Honey. I understand.

MR. HONEY: Now, the second area that we -- or
11:13:05 another area that we argued is this whole idea of the

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11:13:08 1 district regulations. I don't think there's any
2 dispute here that CCSD is a local government
3 established by Nevada Revised Statutes, specifically
4 386.010(2).
11:13:21 5 THE COURT: I can take judicial notice this is
6 a public subdivision for the state of Nevada.
7 MR. HONEY: Furthermore, I don't think there's
8 any dispute legally that under NRS 30386.350 --
9 NRS 386.350, that the legislature has empowered the
11:13:41 10 school district with rule making authority to make
11 rules and regulations.
12 Now, our position is that under the portion of
13 Chapter 239, unless otherwise declared by law, that the
14 word law is used on purpose instead of statute. And I
11:13:59 15 briefed that, and we have discussed that before.
16 There's a distinction between the two.
17 THE COURT: What's the distinction between by
18 statute and by law? I just want to make sure I'm not
19 missing anything on that. Because I thought statute
11:14:10 20 would be the law.
21 MR. HONEY: Well, that's my -- well, law is
22 more broad. A law would be --
23 THE COURT: Okay. I understand. I understand
24 what you're saying.
11:14:17 25 MR. HONEY: Okay. So in this case where we

11:14:22 have the authority to make enforceable regulations, we've made an enforceable regulation. And the particular regulation is CCSD Regulation 4110, which says all information -- and this is at (x). All
11:14:37 information gathered by the district in the course of its investigation of an alleged unlawful discriminatory practice will remain confidential. Except and the necessary -- except to the extent necessary to conduct investigation, resolve the complaint, serve other
11:14:52 significant needs, or comply with law.

And our position is that Cedric Cole's office, and by extension those are the records that we have withheld and asserting a privilege, that they fall under the rubric of being an investigation of
11:15:06 discrimination.

And that this does comply with law, specifically 239.010, which right in there. After the enumerated statutes that are confidential, it says: And other documents.

11:15:21 THE COURT: Is there a copy of that regulation? Can you point me to it? I just want to take a quick look.

MR. HONEY: I don't have the full regulation with me in my answering brief. The portion that I read
11:15:33 into the record is on page 18.

11:15:42 THE COURT: Let me see here. Can I pull a copy of that off the website real quick?

MR. HONEY: Yeah. And, your Honor, it is Exhibit 6 to my answering brief.

11:16:24 THE COURT: Okay. Here's my question: What do I do with when an administrative regulation is promulgated by the agency and there's some conflict and/or tension between the regulation of an agency and the acts of the Nevada legislature?

11:16:52 MR. HONEY: And, I guess, that's kind of what we need here because it kind of will be controlling on how, or if, or the matters which may or may not be appealed. If you -- if you're going to rule on the regulation and say, no, this regulation is infirm, and

11:17:08 this is why.

THE COURT: No, no, no. My question is a little bit more specific than that. Under the facts of this case, in listening to your reliance upon the regulation, I guess, that's 4110 as it relates to

11:17:25 discrimination, I think you said discrimination, that's confidential.

Now, in this case I don't know -- I mean, I'm just going to tell you what I'm thinking. Are there any allegations of discrimination, just ordinary

11:17:39 harassment, or conduct unbecoming of a trustee?

11:17:42 Because that's the best way I can say it.
But assuming there's no allegations of discrimination, that No. 1, would this regulation apply? And then No. 2, even if it did apply, if it's
11:17:57 contrary to the public records law, wouldn't the public records law take precedent over the regulation and be controlling?
MR. HONEY: If that were the case. And two things. First of all, I think the term discriminatory
11:18:11 is broad here. I think the act -- the actions of the trustee that could be deemed discriminatory. And additionally --
THE COURT: But can we agree to this, though, that regulation is limited to discriminatory conduct?
11:18:28 MR. HONEY: Without having the entire thing in front of me, but that is what I briefed, your Honor.
THE COURT: Okay. So I'm just -- okay. I get that. I get that. I understand.
MR. HONEY: And so my argument is based on the
11:18:38 language of 239.010, where it has all the enumerated statutes but then has the catchall, the otherwise declared by law. That this is a law. It doesn't say otherwise declared by statute. It does say law. And that this does comply with that law.
11:18:54 I believe the reason that why 239.010 says

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11:18:57 otherwise declared by law is because they know they have all of the state employee enacted Nevada Administrative Code where confidentiality to this type of information is allowed.

11:19:08 And again, that's another argument we made previously. Why should a local government employees -- again, I'm talking about the employee, not the trustee, not the elected official. Why should the employees be given less protections than a state employee?

11:19:21 THE COURT: Now, here's my next question: What acts are contained in the privilege log that would involve discriminatory conduct of the trustee? I got 4110 in front of me right now.

MR. HONEY: I'm going to take the easy way out

11:20:13 and, say, each of them in regards to Cedric Cole. Because, frankly, the distinction between the word discriminatory and what's going on here hasn't been raised in any of the multiple hearings before.

THE COURT: And I want to --

11:20:39 MR. HONEY: I thought we were beyond that point.

THE COURT: No, no. I just want to make sure I understand as far as the confidential, which I have 4110 in front of me now. Which?

11:20:48 MR. HONEY: Sub-part X.

11:20:50 THE COURT: Okay. All right. I understand. Now, looking at the plain language of the -- of paragraph F provides as follows:

All information gathered by the district in
11:21:37 the course of its investigation of an alleged unlawful discriminatory practice will remain confidential except to the extent necessary to conduct an investigation, resolve the complaint, serve other significant needs, or
11:21:57 comply with law.

What does that mean?

MR. HONEY: Did you say X or F, your Honor?

THE COURT: X. I'm sorry. X as in x-ray.

MR. HONEY: Thank you.

11:22:06 THE COURT: Because I think that's the provision you're relying upon, right? Because it seems to me it's not like everything is a broad brush of confidentiality.

MR. HONEY: Sure. And I think here, to the
11:22:19 extent necessary to conduct an investigation. Well, if any of it needed to be disclosed while Mr. Cole was doing his investigation, I think it gives him room to do that.

To resolve the complaint, I think that speaks
11:22:31 for itself.

11:22:32 Serve other significant needs. That's pretty broad. I'm not sure what other significant needs --

THE COURT: That's kind of what I'm getting to.

11:22:39 MR. HONEY: And I understand that to mean the significant other needs of the district. But I don't see where any other significant needs have been demonstrated in this case that would undue the confidentiality of the regulation or comply with law. And then the law portion, my argument is in regards to 239.010 it precisely complies with the law based on the same language of the -- of 239.010.

11:22:55 THE COURT: But remember, from a statutory construction perspective it says: Look, the information gathered will remain confidential except under these circumstances. And one would be the extent necessary to conduct an investigation, resolve the complaint, which is another action, serve other significant needs, or comply with law.

11:23:16 And, I mean, if you looked at that from a statutory interpretation standpoint, yes -- I mean, it could be argued, and it could be the basis of a decision that when I look at this, I can say, Look, yeah, it's confidential. However, I'm required to comply with Nevada law, and more specifically,

11:23:36

11:23:50

11:23:52 Chapter 239 as it relates to the public records disclosure requirement.

MR. HONEY: And that's --

THE COURT: Right?

11:24:03 MR. HONEY: That's what I'm trying to say, your Honor. Under 239.010 it says after the enumerated statute that things remain confidential. They're confidential unless otherwise declared by law.

This isn't saying that there -- this doesn't

11:24:19 go against that. I say this goes exactly with it because this is another law. And this law says it's confidential.

THE COURT: Well, it appears to me, and maybe we can talk about it, but my construction of this

11:24:34 specific regulation would be, yes, it's confidential unless it serves another significant need or to comply with the law. That's how I see that.

And so, in essence, built in here, it's inherent that they understand, you know what, there

11:24:59 might be other reasons under the law to require or compel disclosure. That's kind of how I construe that. And if I'm wrong, that's okay. You can tell me how you feel.

MR. HONEY: Well, I think I -- I don't want to

11:25:13 keep repeating myself.

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11:25:14 THE COURT: That's okay.
MR. HONEY: I think it's well established on the record.
THE COURT: Okay.
11:25:25 MR. HONEY: Okay. We also have the deliberative process privilege at issue here today. And under DR Partners, the scales must reflect that the right of a citizen, or in this case Review Journal, to have access of the records is contrasted with
11:25:44 incidental right of an agency to be free from unreasonable interference.
In order for materials to fall under the deliberative process privilege, they must consist of opinions, recommendations, or advice by agency
11:26:03 policies. And it's important that they can be to a specific situation. They don't have to be encompassing policy that goes on indefinitely. It could be a specific situation.
Here in this case, we have the affidavit of
11:26:15 Cedric Cole saying that he was directed by the superintendent, who is the highest level executive of the school district, hired by the school board, to investigate these allegations that Trustee Child's actions have been inappropriate.
11:26:32 He conducted this investigation. He

11:26:35 1 interviewed people. He took notes. And that resulted
2 in a four-page memorandum to the superintendent that
3 the Las Vegas Review Journal has had since December of
4 2016. Page 4 of his report or memorandum to the school
11:26:55 5 district includes specific recommendations.
6 Now, what policy did this lead to? This led
7 to the December 5 guidelines for trustee visits. That,
8 again, already in the possession of Review Journal.
9 Those guidelines were sent to the executive cabinet,
11:27:18 10 all the school associate superintendents, and all the
11 principles, I believe, of District D, which is Trustee
12 Child's district.
13 So you've got this deliberative process where
14 the highest executive of the school district is asking
11:27:34 15 one of his subordinates, the director of the Office of
16 Affirmative Action and Diversity, to investigate and
17 look into these allegations and tell me, do they rise
18 to the level of discrimination, or harassment, or
19 whatever avenue you want to use to describe the
11:27:53 20 conduct. And I think that report, again, already in
21 possession of Review Journal, demonstrates, based on
22 Mr. Cole's expertise in that area, that there were
23 issues here. And he had recommendations to help
24 resolve those issues.
11:28:08 25 Now, in resolving those issues, the district

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11:28:11 1 is confined to its authority over the trustee, which is
2 admittedly very little. He's an elected official, as
3 has been discussed many times. He's not an employee.
4 So were the steps that we took -- and I think
11:28:25 5 Ms. McLetchie talked about this, that the public
6 deserves to know what did the district do about this.
7 Well, she has the guideline letter of December 5. She
8 has an additional guideline letter from May 31st, 2017.
9 She has three specific letters from the superintendent
11:28:45 10 to the trustee.
11 All of the investigation in the notes
12 occurring from them were generated once the
13 superintendent directed Mr. Cole to look into these
14 allegations. And unless they were all part of the
11:29:18 15 basis of the, I believe, it's the October 19, four-page
16 memorandum and then, of course, the guidelines, which
17 is the act, what did the district do? What did all
18 this deliberation lead to? So we do have a
19 deliberative steps taken by district employees to come
11:29:38 20 up with a specific policy to deal with a specific
21 situation.
22 Now, it wasn't in the briefing of either of
23 the parties, but under DR Partners at page 626, once
24 Clark County School District demonstrates that the
11:30:02 25 document or documents fall under deliberative process

11:30:05 or deliberative privilege, the burden shifts to the other party seeking disclosure. And it needs to demonstrate that the needs for the info exceeds the regulatory interest of the school district.

11:30:17 And in this situation, they already have the October 19 memorandum. They already have what the district did in order to help resolve this issue and to hopefully keep it from happening again in the future.

They have letters to the trustee. Now, the

11:30:43 important need of the school district -- or of the Review Journal shouldn't reach to the level of, what I call, TMZ news reporting.

There's no significant need for the details that start infringing on the privacy of the district

11:31:06 employees. We want them to be able to report this stuff with us without fear of retaliation.

Now, I believe DR Partners also says, well, these can't be hypothetical fears. And they're not hypothetical. We've had -- you've had emails that have

11:31:20 been disclosed either in camera or to the other side where people have written their concerns about reporting these things. And you have the affidavit of Mr. Cole saying that in his conversations with people in doing this investigation have indicated the same

11:31:39 thing.

11:31:40 Because one thing that keeps coming up in this, and I think it was even in one of the letters that was recently provided to Ms. McLetchie, is Mr. Child's propensity to tell everybody that he's the
11:31:54 boss. He's Pat's boss. He's everybody's boss. That's a very chilling effect on people. And I think it makes sense that these people knowing that, having heard that, are fearful of what their reporting of what this type of information is.

11:32:23 THE COURT: I just want to make sure. I mean, I don't know if this has been developed or been discussed, but, truly, does the trustee have the power to terminate a school district employee?

MR. HONEY: I don't think in and of himself he
11:32:45 would have that power. But if we are realistic that this is a board of multiple people, like boards throughout the state and the country, and when majority rules, I would say anything is possible.

To answer your question directly. Can he walk
11:33:09 down to Andre Long, head of human resources for the school district, and say, I want you to fire this person right now? No, he doesn't.

THE COURT: Right.

MR. HONEY: But in reality of how these things
11:33:23 work, can he make things uncomfortable? Can he build a

11:33:26 consensus? I think -- I don't think it's out of the realm of possibility, your Honor.

Now, we would also believe that the deliberative process privilege doesn't apply just to
11:33:40 investigatory notes in regards to the Fall of 2016. It also pertains to any type of investigation materials received by Andre Long in 2017 as well. As he did a second memorandum to the superintendent looking at and analyzing whether or not the prior steps have been
11:34:07 effective, and if any other additional recommendations are called for, additional recommendations were made, and then the superintendent issued another set of guidelines. This time specifically to Kevin Child on May 31st.

11:34:26 And again, this is a deliberative process of determining what can we do in this difficult situation? Situation of first impression where we're getting these complaints and allegations against a trustee, whom is not our employee. We can't fire him. We can't get rid
11:34:44 of him. It's not our choice to do that. It's not our purview. What can we do?

And the superintendent is doing everything that he can within his limited power in regards to this unique situation.

11:34:58 So, again, the deliberative process extends to

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11:35:01 the 2017 information leading up to the additional guidelines authored on May 31st, 2017.

There's several draft documents in the privilege documents. The draft documents are not 11:35:35 evidence or demonstrate an official action by the school district. If we have -- if, LVRJ, Review Journal, already has the October 19, 2016, final memorandum, there's no purpose in then providing them the draft of that. I believe one of them has -- we've 11:35:58 argued that it has an attorney-client privilege because it's written all over by general counsel Carlos McDade. There's others with questions marks on it, and it's handwritten in. And it's very difficult to see. We don't have the greatest technology. But it even has 11:36:14 the watermark for draft on it, but I admit you have to look hard to see it because it doesn't slow up well when we try to print it. Shows up better in the electronic formats, or the earlier copies. We are dealing with copies of copies of copies here.

11:36:34 Traditionally, non-record materials include -- include drafts. Now, it is true it's in a separate section in regards to retention of documents. But if they -- but if they didn't intend it to mean that they were non-records, meaning non-record, I would think 11:36:51 that would mean it was never a record. We're talking

11:36:54 about the Public Records Act. If that was an intention, then they could have called it something else. They could have said these are documents that no longer need to be retained, and they don't have to call
11:37:05 them non-records.

NAC 299.051 gives a list of non-record materials. Non-record is their word, not mine. Non-record materials include informal notes, drafts, and ad hoc reports.

11:37:36 Informal notes and drafts. The notes of Cedric Cole when interviewing these people. Again, it's not the final record of the action taken by the district. It was utilized in him developing this memorandum and recommendations to the superintendent,
11:37:56 who then took specifically action.

These drafts and notes are not served as official action. Notwithstanding all of the arguments previously made in answering brief and here today and at prior hearings, we also have the Donrey balancing
11:38:22 test. So even if none of those other arguments pertain, the Donrey balancing test still is worth consideration in weighing the interests of nondisclosure against the general policy in favor of open government.

11:38:41 And what we have here is based on all the

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11:38:43 emails that have previously been provided and the documentation, specifically the 10-19-2016 memorandum that Review Journal has already had, they already have the information. And providing this additional
11:39:03 information does not shed any additional light.

But it -- but what it does do is it does put the district's employees, when they're identified either directly or can be identified by the alleged wrongdoer Trustee Child, in a position where they're
11:39:32 fearful of retaliation, professional advancement, and such forth related to their employment status with the district.

In your prior order back in February of 2017, there were some protections put in by the Court in
11:39:59 these emails. And those protections included alleged victims of sexual assault, administrators, students, and, I think, maybe parents. I could be mistaken on that one.

But we decided that -- excuse me. I take that
11:40:22 back. I misstated that. We said that administrators would not be redacted, but that principals would go unredacted along with teachers. Support staff would be redacted. Parents and students would be redacted.

I may have made a mess of that. I apologize.

11:40:49 THE COURT: I understand, but --

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11:40:49 MR. HONEY: Okay. Here's what I was going to say.

THE COURT: I don't even know if that's a big issue, though, because I think the Review Journal, based upon Ms. McLetchie's earlier statements, they're not concerned about names.

Is that correct, ma'am?

MS. MCLETCHIE: The names of -- your Honor, paragraph 34 of the February order says that the following can be redacted: The names of direct victims of the sexual harassment or alleged sexual harassment, students, and support staff.

And our position in the subsequent briefing has also been that we're fine with redactions necessary to protect those names.

THE COURT: Yeah.

MR. HONEY: And what I was getting to, so the way I interpret that is the Las Vegas Review Journal is okay with the status quo of your prior order of protecting those limited people.

What I would put forth is that we should mirror Chapter 233.190 which allowed broader protections.

THE COURT: 233.190?

MR. HONEY: Yes. Where at 2 -- excuse me,

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11:41:52 4(c), Any information that may be used to identify a person who provided information to the commission during the investigation.

And my concern here is that we've got one
11:42:06 specific trustee that it would seem would be able to identify these people when we don't redact -- when we redact as little as we have.

He's already indicated to administrators repeatedly that he's the boss, as I talked to before,
11:42:27 and that he's Pat's boss, Pat being the superintendent. And that I think the matter of redaction should be more broad, should allow us more redactions on any -- if any -- in the event any future redactions are considered in order to protect these people.

11:42:43 We've got one. There's one specific one, for example, it has to do with a function at a school. And if I remember right, we weren't allowed to redact the school and we weren't able to redact the name of the function. I think it's highly likely in that situation
11:43:02 we have failed to protect that employee that made that complaint. It's a written, like email to somebody. And we leave the name of the school. We leave the name of the complaint -- or the name of the function it was. I don't think it's too much of a leap that the
11:43:17 superintendent -- that the trustee is able to identify,

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11:43:19 1 Oh, I know who that -- I know where that was. And
2 leading to the person. I think more -- I think more
3 protection can be granted to the people.
4 And it doesn't take away from the heart of the
11:43:31 5 facts of the incident of what exact conduct was
6 troublesome to an employee.
7 Quickly, by reference, probably doesn't need
8 to be done, but the additional arguments that we were
9 made in our answering brief, we still put those forth
11:44:21 10 in regards to two additional -- in regards to
11 everything in there that hasn't been specifically
12 discussed today.
13 Thank you, your Honor.
14 THE COURT: Thank you, sir. And I just have
11:44:35 15 one, one last question before you sit down. When I
16 take a look at the privilege log, are there any areas
17 where a deliberative privilege is being asserted that I
18 should look at?
19 MR. HONEY: Yes. Just a moment, your Honor.
11:44:58 20 It's the District's position that pages 34 to 41, which
21 begin on page 2, or listed on page 2 of the privilege
22 log, are covered by regulation 4110 X, the EEOC
23 regulations.
24 THE COURT: No. I understand that.
11:45:30 25 MR. HONEY: Okay.

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11:45:31 THE COURT: I'm just on --
MR. HONEY: Deliberative process --
THE COURT: -- deliberative process.
MR. HONEY: -- is applicable, we're arguing,
11:45:36 in regards to those pages 34 and 31. We also are
arguing deliberative process to pages 42 to 48, 49 to
53, 54 to 57, 58 to 60, and pages 159 to 177.
THE COURT: Any place bolded on the privilege
log? Is that basically pretty much -- because I'm
11:46:07 looking at the privilege log, and it appears to me that
all the areas that are bolded that where it has a
section that appears to be the basis for the privilege
being asserted, also include Office of Diversity and
Affirmative Action privilege.
11:46:23 MR. HONEY: Correct.
THE COURT: Okay.
MR. HONEY: So looking through my notes here,
we have the deliberative process to everything that's
highlighted but for 231 to 233, which are the last
11:46:49 pages, I believe. Let me double check that. Yes.
That's correct. The highlighted documents are all
Cedric Cole investigation derived other than 231 and
233.
THE COURT: I understand.
11:47:24 MS. MCLETCHIE: Your Honor, may we take a very

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11:47:25 brief break?

THE COURT: Yes. You may, ma'am.

MS. MCLETCHIE: Thank you, your Honor.

-o0o-
(Recess)
-o0o-

THE COURT: Okay. We can go back on the record.

MS. MCLETCHIE: Thank you for your indulgence, your Honor.

12:02:54 I'm going to start with Title 7 -- the Title 7 issues.

Unless I missed something, today is the first time I've heard of this argument. It's interesting, but I don't think well based that their internal

12:03:10 diversity office is essentially like NERC or the EEOC. As this Court pointed out, 233 applies not to investigations by a school district but rather to specific proceedings by NERC.

In addition, your Honor is correct, and we

12:03:30 briefed this in our memorandum as well. There's no absolute confidentiality with regard to EEOC proceedings, NERC proceedings, or Title 7 issues in general. And we gave some examples of that. Not just the two cases that deal with public records, but also

12:03:45 in other context. There's just no such thing as an

12:03:48 1 absolute Title 7 confidentiality. And this Court
2 properly pointed out the difference between a current
3 and a pending investigation.
4 With regard to retaliatory -- retaliation
12:04:02 5 concerns, they did provide a declaration, a hearsay
6 declaration, but they did provide a declaration stating
7 that some of the employees, not all of the employees,
8 had expressed retaliation concerns.
9 And so one issue more broadly with their
12:04:17 10 privilege log is they sort of lump everything together.
11 They say these all fall within, I think they call them
12 the Office of Diversity and Affirmative Action
13 privileges. And it's -- they don't link up. This was
14 the person who said they were concerned about
12:04:33 15 retaliation. And they don't link up and explain to me
16 the person who doesn't have the documents but is trying
17 to assess whether or not the documents are properly
18 withheld how, in fact, each specific document falls
19 within each specific privilege that they're claiming
12:04:51 20 with regard to that, those documents. And on that
21 basis, your Honor, I would argue that they have not met
22 their claim of confidentiality.
23 But again, we have not only briefed for the
24 Court for the fact that Title 7 isn't an absolute
12:05:10 25 privilege, and, more broadly, we've also pointed out to

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12:05:15 1 the Court two specific cases. Unless compelling facts
2 in which courts in applying public records laws, and
3 while the district has tried to distinguish those
4 cases, they did the same kind of balancing test that
12:05:27 5 we've been talking about in this proceeding, your
6 Honor. And they both found for very similar reasons,
7 as we've briefed, that the interest in disclosure
8 outweighed the interest in secrecy.
9 With regard to the administrative policy, I
12:05:44 10 think it's important to start with the idea that --
11 with the structure of -- the statutorily structure of
12 the Public Records Act itself rather than just look at
13 some of the language of the administrative policies
14 they try to rely on.
12:06:01 15 And what the public record law says. Unless
16 otherwise declared by law to be confidential, it's
17 subject to disclosure. The Supreme Court has said you
18 can raise other arguments in favor of confidentiality,
19 but you need to show that the interest in those
12:06:18 20 outweigh the interest in secrecy. In this context
21 there is no absolute declaration of law, even if we're
22 going to argue that the administrative guidelines that
23 they've relied on are, in fact, law that can be used
24 to -- used in this context.
12:06:34 25 There is no absolute declaration of

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12:06:37 1 confidentiality. In addition, it's important that we
2 look at the broader structure of the Public Records Act
3 that also says any limitations have to be construed
4 narrowly, any exceptions have to be construed narrowly.
12:06:51 5 And a decision by a court that an
6 administrative regulation could trump the Public
7 Records Act could be the exception that would swallow
8 the rule that would go directly against that
9 presumption that's not just in case law, but also in
12:07:03 10 legislative findings and declaration itself.
11 In any case, Exhibit FF to our reply brief is
12 Clark County School District policy 0101. That policy
13 discusses the introduction to policies. It's titled
14 Introduction to Policies and Regulations. And I think
12:07:27 15 it's illuminating, your Honor, because it explains the
16 limitations of these policies and how internal they
17 truly are.
18 It specifically says, The purpose of these
19 policies and regulations is to provide directions
12:07:42 20 regarding the details of district operations. Policies
21 are more general principles while regulations contain
22 specific details in procedures.
23 This is not -- these are not the type of
24 things -- we had also previously attached an example of
12:07:57 25 a policy that dealt with gold cards or something.

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12:07:59 1 These are not the type of thing that have the level of
2 law that can turn what's otherwise presumed by law to
3 be a public record into a non -- into a nonpublic
4 record.
12:08:09 5 And as this Court -- as this Court pointed out
6 and as we pointed out in our memorandum, the
7 administrative policy that they rely on, in fact,
8 specifically says: Except to the extent necessary to
9 serve other significant needs or comply with law.
12:08:28 10 So it can't both be law and also be trumped if
11 it's necessary to comply with law. The Nevada Public
12 Records Act is law. And not maintaining the
13 confidentiality set forth in that policy, even if that
14 policy applies, is necessary to comply with law and to
12:08:48 15 serve other significant interests.
16 With regard to deliberative process, there's
17 just a few issues I wanted to point out. Having
18 someone go through a factual investigation is not the
19 same thing as decision making. And as discussed in DR
12:09:12 20 Partners, and the cases on which -- the cases which DR
21 Partners, in turn, discusses, the focus is on actual
22 decision making. So the decision they pointed out --
23 pointed to in this case is the decision by the
24 superintendent to exclude Trustee Child. So if
12:09:31 25 Superintendent Skorkowski was emailing back and forth

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12:09:34 1 with Mr. McDade about what action he could legally take
2 and what action he should take, that would both fall
3 within the attorney-client privilege as well as under
4 the deliberative process privilege.
12:09:45 5 But here, they're arguing at the same time
6 that this -- that their internal diversity office is a
7 fact-finding investigative agency akin to NERC or the
8 EEOC. And, yet, they're also arguing that it's somehow
9 the final decision maker for the district and that
12:10:02 10 they -- that these documents reflect decision making.
11 I think that -- I think that nothing on their
12 privilege log itself explains to me, who doesn't have
13 the documents in front of her again, how any of those
14 documents actually reflect the deliberative process
12:10:19 15 that that privilege is designed to protect.
16 Also, I wanted to point out another thing
17 which is CCSD has contended that if -- that if they
18 establish the deliberative process privilege, which
19 they have not, that the burden shifts to us to explain
12:10:37 20 why we need the information.
21 However, what the Nevada Supreme Court said
22 after saying: Here, because the county never
23 demonstrated by evidentiary proofs that a deliberative
24 process privilege was implicated by the disclosure of
12:10:53 25 the unredacted records, the burden never shifted to the

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12:10:57 1 newspaper. They're talking about the deliberative
2 process privilege.
3 And then they say: Further, the absence of
4 such proof prevented the district court from engaging
12:11:04 5 in the weighing process mandated by Bradshaw.
6 So I wanted to point out to the Court that the
7 deliberative process privilege, when you raise that in
8 a public records case, it does not change the fact that
9 the public entity has the burden of establishing the
12:11:21 10 confidentiality and also establishing, after the other
11 side addresses the need issue, of establishing that
12 even if it exists, that the interest in disclosure is
13 not greater than the interest in the deliberative
14 process privilege.
12:11:37 15 So I just wanted to make that clear. And
16 that's at page, I think it's 471, of the DR Partners
17 case where they explained that they never got there
18 because the -- because the governmental entity in that
19 case had never met their evidentiary burden.
12:11:56 20 And here we do have a declaration from
21 Mr. Cole, but regarding -- regarding some matters --
22 but I don't think that they have met their evidentiary
23 burden of establishing that each document somehow falls
24 within the deliberative process privilege let alone
12:12:15 25 that the interest in secrecy is not outweighed by the

12:12:20 1 interest in disclosure.
2 With regard to attorney-client privilege,
3 there is one document that reflects notes by
4 Mr. McDade. As the Court is well aware, just because
12:12:29 5 an attorney does something doesn't mean it's
6 privileged. And there's nothing on the privilege log
7 indicating to me that the notes were made to render
8 advice, preparation of litigation, or anything like
9 that. It just kind of assumes because these notes were
12:12:43 10 made by Mr. McDade that they're privileged. And that's
11 not how the attorney-client privilege works.
12 In thinking about the attorney-client
13 privilege, I think it's relevant to their deliberative
14 process argument, your Honor. Because they -- in the
12:13:00 15 attorney-client privilege, we all know that just
16 because something is relied upon by an attorney doesn't
17 turn that document into a privileged document.
18 If I have a client who did something bad, and
19 there's an email that reflects that, and they send it
12:13:12 20 to me, I can't all of a sudden claim that that document
21 is privileged. The same is true here. The diversity
22 office is separated from the superintendent's office.
23 And the diversity office was undergoing its usual fact
24 investigation process when something like this happens.
12:13:29 25 And there's nothing, again, that reflects that

12:13:31 1 these documents are actually the documents that reflect
2 did the high-level decision making that the
3 deliberative process is intended to -- is intended to
4 protect.
12:13:43 5 With regard to I think their final argument
6 about not -- their final claim of privilege about
7 non-records. We briefed this at length, and I think
8 we've argued it before. But I do just want to point
9 out that that administrative code is -- it's not --
12:13:58 10 it's not pertinent to the definition of a record for
11 the public record. It pertains to other aspects
12 contained in Chapter 239 which pertains to retention of
13 records that are records of official actions.
14 Obviously, the Public Records Act is broader than those
12:14:18 15 records that are records of official action.
16 And we have briefed this both in our briefing
17 in chief, our opening brief, and our reply brief, and
18 also in our -- in our memo, your Honor.
19 The last -- the last issue I really want to
12:14:35 20 talk about is the burden -- is the burden and this idea
21 that's been put forth today by the district that
22 somehow they can say, Well, we've given them enough.
23 And, you know, it's enough that we've given them. Or
24 it's enough that somehow they got the document through
12:14:52 25 other sources. They've also indicated concerns about

12:14:56 1 TMZ News reporting. And here's the thing. The Public
2 Records Act says that we have a presumption in favor of
3 access. A newspaper never has to show a governmental
4 agency, Hey, we're going to do reporting that, you
12:15:12 5 know, that is sound and good reporting, which the RJ
6 does and has done on this issue and related issues, but
7 that's no requirement that we establish the need for
8 each specific document. Instead, what the Public
9 Records Act says is there's a presumption in favor of
12:15:27 10 access.
11 And when we talk about weighing the interests,
12 it's -- we don't need to establish for each document or
13 even say why we want each document. There's a
14 presumption that we are entitled to those documents,
12:15:39 15 and they need to establish otherwise. They can't say,
16 Well, they've got enough to figure out some of what
17 we've done. And that's just not the case.
18 And, your Honor, the, Review Journal, and more
19 importantly the public is entitled to assess not just,
12:15:56 20 Okay, we know what the superintendent told Mr. Child.
21 We know that the superintendent wrote Mr. Child letters
22 and said you can't come to campus. We're entitled to
23 assess whether that was a sufficient action. We're
24 entitled to assess all of the underlying facts. We're
12:16:13 25 entitled to look at what actually happened and to

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12:16:16 1 make -- and the public is entitled to assess for itself
2 whether or not that was the case.
3 Importantly, your Honor, we've talked a lot
4 today, and the Review Journal, as you know, has
12:16:29 5 conceded and recognized that protecting certain
6 person's identity is a valid -- is a valid undertaking
7 and is something that this Court can act to protect.
8 However, they haven't met their burden that every
9 person that came forward is concerned about
12:16:45 10 retaliation.
11 More importantly, they're concern, and I think
12 they expressed it as anything is possible when this
13 Court asked about whether or not Trustee Child could
14 fire an individual employee. Anything is possible is
12:17:02 15 necessarily hypothetical and speculative and does not
16 met their burden. In fact, I think the facts of this
17 case -- we don't know all the facts, but it seems to me
18 like the district took some significant steps already
19 in the guidelines that they issued to Mr. Child to
12:17:16 20 protect the very interest that they're claiming they're
21 still concerned about today. And that's protecting
22 these employees from retaliation and from inappropriate
23 treatment.
24 Trustee Child can't even contact them. He
12:17:27 25 can't even go to campus. And so the idea that they're

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12:17:30 1 going to somehow lose their jobs or be otherwise
2 retaliated against by Trustee Child, I think that when
3 we look at the facts of this case, the district has
4 taken steps to protect those employees.
12:17:42 5 And further, the compromise that the RJ, you
6 know, conceded to at the -- some of the earlier
7 hearings in this matter of protecting the names of
8 victims, if there were things like social security
9 numbers or other things that would identify specific
12:17:59 10 victims of sexual harassment, we also would not object
11 to that because that truly is identifying information.
12 I don't think the NRS chapter about NERC applies to
13 this case.
14 But with regard to information used to
12:18:14 15 identify a person, again, I think that the district
16 would bear the burden of showing that any additional
17 information would need to be redacted to protect their
18 identity. They haven't done that to date, your Honor.
19 There aren't that many documents in this case.
12:18:29 20 We've had all kinds of briefing. They've had the
21 opportunity to specify what needed to be protected and
22 why. And I think that the idea that, for example,
23 redacting school names because, again, the Review
24 Journal is entitled to assess where these incidents
12:18:42 25 happened goes too far, your Honor.

12:18:45 THE COURT: I understand.
MR. HONEY: Can I address a couple of points?
THE COURT: Yeah, you can.
MR. HONEY: Thank you, your Honor.
12:18:51 THE COURT: You'll get the last word, ma'am.
MR. HONEY: I just want to point out that the district is not arguing that Cedric Cole is the final decision maker. The highest level executive is the superintendent, Pat Skorkowski. And based on the
12:19:06 information that he requested, investigation he requested, and the information shared with him with the recommendations from Cedric Cole, he then made the decision making of what those guidelines would be, and he's the one that penned and is the person that
12:19:22 authored the guidelines.
And then going back to DR Partners and the deliberative process. In that case, the reason why the county didn't establish that deliberative process privilege applied is because the records only contained
12:19:41 numbers and billing information. Okay. These records in this case are notes taken from victims or people that are alleging that they experienced bad acts by the school district. Much different.
THE COURT: But how -- but that wouldn't come
12:19:57 under the purview of deliberative process. Isn't that

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12:20:00 1 part of the investigation of the fact-finding function
2 of the district?
3 MR. HONEY: And that fact finding was done at
4 the bequest of the superintendent so he could make his
12:20:09 5 decision. First thing he needed to know was, Hey,
6 Cedric, are these allegations, are they true? Do they
7 rise to the level of discrimination and harassment?
8 And do you have recommendations of what I can do? And
9 he did an investigation to determine if they had merit,
12:20:24 10 the allegations. He did the 10-19-2016 memorandum with
11 recommendations and then that was utilized.
12 Now, sure, the record doesn't reflect the
13 conversations that Mr. Skorkowski and Mr. Cole had in
14 regards to this. It doesn't reflect meetings between
12:20:41 15 individuals, and it doesn't need to. The idea that
16 somehow conversations don't take place simply because
17 there's not an email, or there's not a document is just
18 unfounded speculation.
19 THE COURT: But if that was the case, wouldn't
12:20:55 20 all public documents come under the deliberative
21 privilege?
22 MR. HONEY: Not necessarily.
23 THE COURT: I mean, I'm trying to figure out
24 if it's anything that the government directs or an
12:21:08 25 agency had directed someone to do, it could be asserted

12:21:12 that that's all part of the deliberative process.
MR. HONEY: Director of the D.M.V. asks someone in the D.M.V. I want a list of all of the driver's license that expired in May of 2017. I don't
12:21:24 think that's a deliberative process-type situation with something there. I think it falls under the category of just being numbers and billing information like in DR Partners.
THE COURT: Well, I want the list of all
12:21:35 individuals that made a complaint about a trustee. How would that be part of the deliberative process? Because that would be the same thing.
MR. HONEY: Well, that wasn't what the trust -- that isn't what Pat Skorkowski directed his
12:21:49 subordinate to do. He didn't say give me a list of all the complaints. He said investigate these allegations. Do they rise to the level of harassment and discrimination? If so, give me recommendations for further action in order to protect our employees so
12:22:02 that I can make a final determination and create a policy to appropriately deal with the situation. That's what happened in this case.
Finally, in regards to the burden, I agree with Ms. McLetchie's recounting of what Chapter 239
12:22:23 says. But she leaves out the subsequent case law such

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12:22:27 1 as DR Partners that says, Okay, once -- once an entity
2 such as CCSD establishes a deliberative process
3 privilege that the burden shifts, and then at that
4 point the RJ needs to demonstrate the need for info
12:22:43 5 excludes the regulatory interest. That goes beyond
6 what 239 says.
7 The same with the Donrey balancing test.
8 Yeah, sure. The statute says what it says. But we
9 have subsequent case law that says in certain
12:22:54 10 situations, such as the deliberative process situation
11 or in the Donrey balancing, that it goes beyond that.
12 So that's not the end-all.
13 I have nothing further, your Honor.
14 THE COURT: Okay. Ma'am, you get the last
12:23:07 15 word.
16 MS. MCLETCHIE: Okay, your Honor. Again, with
17 regard to the deliberative process, they can't have it
18 two ways. They can't argue that statutes and other
19 claims of confidentiality apply because they're acting
12:23:17 20 like NERC or the EEOC and also say that these qualify
21 as deliberative process privilege, which reflects
22 pre-decisional and high-level executive decision
23 making, not fact finding. In any case I think we've
24 well addressed the significant public interests that do
12:23:36 25 weigh in favor of disclosure.

12:23:39 And I do just want to correct opposing counsel again. Deliberative process, no matter what context you raise it, it's never an absolute privilege. If this were another kind of case, someone could raise the
12:23:51 deliberative process. In that case, you -- the burden shifts to the other side requesting the information to show the need.

However, as the Nevada Supreme Court made very clear, that doesn't change the fact that you then also
12:24:05 still need to analyze it within the framework of Donrey. And Donrey does not stand for the proposition that Mr. Honey just said it did. Governmental entities rely on it all the time. But all that -- Donrey found in favor of disclosures. And all that Donrey said is
12:24:21 that a governmental agency can rely on nonstatutory claim of confidentiality, and a non-absolute claim of confidentiality.

They can raise this claim of confidentiality. And then they have -- if they do so, they have the
12:24:36 burden of establishing that that confidentiality applies to the documents they're withholding. And they haven't done that. And no matter what kind of claim it is, and whether there's an extra step in a case like the deliberative process privilege in every single
12:24:53 case, including DR Partners, the Nevada Supreme Court

12:24:56 1 has made clear that they also have a second burden.
2 And the second burden is still on them to establish the
3 public interests in applying the confidentiality and
4 keeping the documents secret outweighs the interest in
12:25:12 5 public disclosure. The requester never has the burden
6 of establishing the public interest outweighs the
7 interest in disclosures except for an interim step in
8 the deliberative process privilege cases, your Honor.
9 And again, they haven't met that burden. They
12:25:26 10 haven't met that burden with specificity on their log.
11 We've been through numerous hearings. And I think at
12 this point, your Honor, the Review Journal is entitled
13 to allow -- to be allowed assess to these records.
14 THE COURT: All right. This is what I'm going
12:25:42 15 to do. I think it's important to point out that when
16 you take a look at the statute, under Nevada law, I'm
17 focusing, I guess, more specifically on NRS 239.010,
18 and that would be the public books, public records are
19 open to inspection. It appears to me to be fairly
12:26:16 20 clear that what the Nevada legislature wanted to do was
21 to make sure that public records of our governments are
22 open to inspection. And there's a very simple reason
23 for that when it comes to public records, public
24 decision -- I mean, decisions made by those in
12:26:39 25 government elected officials, the public has a right to

12:26:42 1 know when it's all said and done. They do. And so
2 that's the first consideration.
3 Secondly, I've taken a look at Nevada
4 Chapter 233. And that's the NERC or Nevada
12:27:01 5 Employment -- Equal Employment Commission and EEOC from
6 the federal side. And it's going to be my decision
7 that Chapter 233 has no application to the diversity to
8 the school district, a diversity department. Does
9 everyone understand that? Because that's not a
12:27:27 10 governmental agency. It's not a state agency. It's
11 not the federal government. So that doesn't apply.
12 I took a look at the derivative process
13 privilege being applied here. And for the record, once
14 again, it's not an absolute privilege. It's not. And
12:27:48 15 so, ultimately, and this is one of the reasons why I'm
16 going to make the decision I'm going to make regarding
17 what should happen. And, specifically, we have
18 competing interests regarding the statutory interest of
19 disclosure versus the interest of secrecy regarding the
12:28:16 20 acts of the Clark County School District.
21 Now, I think it's important to point out we
22 can't overlook this one fact that the focus of the
23 interests of disclosure is not really focusing on the
24 conduct of an employee, but the conduct of an elected
12:28:42 25 official. And I feel that's significant. And that's

12:28:50 on for a couple of reasons. Number one, not only does the public have a right to know, but anyone that wants to participate in the election process has a right to know because they're an elected official.

12:29:05 And then we have an interest of secrecy. I understand that. But it appears to me that the actions of an elected official is very compelling to know exactly what happened, and the public has a right to know that.

12:29:25 Regarding the regulation, and I think that's 4110. And for the record I did have a chance to look at that, and I think that's Roman Numeral X, which provides as follows:

> All information gathered by the district in
> 12:29:42 the course of its investigation of an alleged unlawful discriminatory practice will remain confidential except to the extent necessary to conduct an investigation, resolve the complaint, serve other significant needs, or
> 12:30:00 comply with the law.

It's going to be my decision that the information gathered by the district in this case serves a significant need because it focuses on the acts of an elected official.

12:30:22 And, consequently, this will serve as an

12:30:35 1 exception to the confidentiality requirement under the
2 regulation. And also, I guess, if I was to make a
3 decision that there's a conflict between the regulation
4 and Chapter 239.010, the next provision "or to comply
12:31:09 5 with the law" would take care of that too. So because
6 at the end of the day there's an overwhelming mandate
7 from the Nevada legislature regarding the public's
8 right to access governmental records. So what I'm --
9 and I just want to make sure I covered everything.
12:31:33 10 So what I'm going to do is this: Regarding
11 the documents, I'm going to require them to be
12 disclosed but redacted in accordance with my prior
13 decision where applicable. And so before those are
14 turned over, you can submit them to me with the
12:31:58 15 redactions, and then I'll review them, and then I'll
16 submit them to counsel.
17 Is that fine, ma'am?
18 MS. MCLETCHIE: Yes, your Honor.
19 THE COURT: And how long is it going to take
12:32:05 20 to do that, do you think, Mr. Honey?
21 MR. HONEY: Give me just a moment.
22 THE COURT: I mean, we'll give you, say, to
23 the end of the week if you need time. You know, today
24 is, what, Tuesday. You get them to me with redactions
12:32:19 25 so I can review them, and then just make sure that

12:32:23 we're not missing anything, and the redactions are in accordance with my decision, then I'll transmit it to counsel.

MR. HONEY: Today is Tuesday. You want them

12:32:35 by Friday?

THE COURT: Is Friday fine, ma'am?

MS. MCLETCHIE: That's fine with us, your Honor.

THE COURT: That's a pretty quick turnaround.

12:32:41 MS. MCLETCHIE: Yes. I appreciate it, your Honor. The Review Journal will appreciate it too.

THE COURT: What you can do, ma'am, prepare an order with my decision. And we can incorporate in the order not just what I said verbally, but, you know, the

12:32:54 record as well.

MS. MCLETCHIE: Okay, your Honor. With regard to the deposition, should I include that in the same order, your Honor?

THE COURT: Absolutely.

12:33:01 MS. MCLETCHIE: Okay. And we'll -- Mr. Honey and I will work together to include in that a schedule for the depositions to be completed by, and if any issues persist after that deposition, a briefing schedule on those issues.

12:33:13 THE COURT: And I would hope you don't need to

12:33:15 1 come see me again.
2 MS. MCLETCHIE: I would hope so, too, your
3 Honor. As enjoyable as this is.
4 MR. HONEY: I want to point out. We won't be
12:33:21 5 disclosing the documents prior to any order being filed
6 with the Court, though.
7 THE COURT: Yeah. How long will it take to
8 get the order done, ma'am?
9 MS. MCLETCHIE: The order from today?
12:33:30 10 THE COURT: Yes.
11 MS. MCLETCHIE: I could do it relatively
12 quickly.
13 THE COURT: It will be before Friday, yeah.
14 MS. MCLETCHIE: Yeah.
12:33:36 15 THE COURT: Okay.
16 MR. HONEY: That's fine. I just want to make
17 sure. I didn't want to get in a situation where
18 there's no order, yet, a deadline talked about in
19 court --
12:33:44 20 THE COURT: I understand.
21 MR. HONEY: -- came beforehand.
22 MS. MCLETCHIE: I understand.
23 MR. HONEY: Okay.
24 THE COURT: All right. Everyone, enjoy your
12:33:50 25 day.

12:33:51 MS. MCLETCHIE: Thank you very much, your Honor. I appreciate it.

MR. HONEY: Thank you, your Honor.

12:33:55 (Proceedings were concluded.)

* * * * * * * *

12:33:55 1 REPORTER'S CERTIFICATE

2 STATE OF NEVADA)
:SS
3 COUNTY OF CLARK)

4 I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO
12:33:55 5 HEREBY CERTIFY THAT I TOOK DOWN IN STENOTYPE ALL OF THE
6 PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER AT THE
7 TIME AND PLACE INDICATED, AND THAT THEREAFTER SAID
8 STENOTYPE NOTES WERE TRANSCRIBED INTO TYPEWRITING AT
9 AND UNDER MY DIRECTION AND SUPERVISION AND THE
12:33:55 10 FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE AND
11 ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE
12 PROCEEDINGS HAD.

13 IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED
14 MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF
12:33:55 15 NEVADA.

16

17 _____
PEGGY ISOM, RMR, CCR 541

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Steven D. Grierson
CLERK OF THE COURT

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CLARK COUNTY SCHOOL DISTRICT, Respondent.	Case No.: A-17-750151-W Dept. No.: XVI **NOTICE OF APPEAL**

NOTICE OF APPEAL

Notice is hereby given that Respondent CLARK COUNTY SCHOOL DISTRICT hereby appeals to the Supreme Court of the State of Nevada from the Order Granting Writ of Mandamus as to Withheld Records issued by the Honorable Timothy C. Williams, District Judge, entered in this action on the 12th day of July, 2017.

Respectfully submitted, this 12th day of July, 2017.

CLARK COUNTY SCHOOL DISTRICT
OFFICE OF THE GENERAL COUNSEL

Carlos McDade, Nevada State Bar No. 11205
Adam Honey, Nevada State Bar No. 9588
Clark County School District
Office of General Counsel
Counsel for Respondent, Clark County School District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the __ day of July, 2017, I served a true and correct copy of the foregoing **NOTICE OF APPEAL** via electronic filing and electronic service through the EFP Vendor System to all registered parties pursuant to the order for electronic filing and service.

Margaret A. McLetchie, Esq.
MCLETCHIE SHELL LLC
701 East Bridger Avenue, Suite 520
Las Vegas, NV 89101

/s/Christina M. Reeves
AN EMPLOYEE OF THE OFFICE OF THE GENERAL COUNSEL-CCSD

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Mandamus | **COURT MINUTES** | **July 27, 2017**

A-17-750151-W Las Vegas Review-Journal, Plaintiff(s)
vs.
Clark County School District, Defendant(s)

July 27, 2017 **9:00 AM** **Respondent's Motion to Stay Enforcement of Order Granting Writ of Mandamus as to Withheld Records Pursuant to NRCP 62 (c), (d) 7 € Pending Appeal on Order Shortening Time**

HEARD BY: Williams, Timothy C. **COURTROOM:** RJC Courtroom 12D

COURT CLERK: Kory Schlitz

REPORTER: Peggy Isom

PARTIES PRESENT:
McDade, Carlos L — Attorney for Clark County School District
McLetchie, Margaret A. — Attorney for Las Vegas Review-Journal

JOURNAL ENTRIES

- Mr. McDade argued in support of the Motion stating irreparable harm and indicated the limited redaction allowed by the Court regarding the victims and witnesses will not protect their identities. Mr. McDade further argued that once the police report is released it cannot be unreleased and the victims and the employees will further be discouraged against filing new reports since the report will be made public. Mr. McDade requested the Court to order an emergency stay to allow him to pursue the appeal with the Supreme Court and have a case to return, and that will not be the case if the documents are released now. Ms. McLetchie argued against the Motion, stating the School District has failed to establish the records are confidential and stated the CCSD is only concerned about their policy and what a Court ruling would mean for future cases. Ms. McLetchie stated the School District did not even originally respond appropriately to the Public Service Act and requested the documents be released. COURT STATED ITS FINDINGS and ORDERED Motion to Stay Enforcement DENIED; Court directed all victims' names be REDACTED. Colloquy regarding preparing the Order. Court directed parties if they cannot agree on the language in the Order, then both side can submit and Order to Chambers by August 1, 2017.

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL DISTRICT, Appellant, vs. LAS VEGAS REVIEW-JOURNAL, Respondent.	Supreme Court No. 73525 District Court Case No. A730151

Electronically Filed
Jul 27 2017 08:07 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

EMERGENCY MOTION FOR STAY PENDING APPEAL, OR IN THE ALTERNATIVE STAY PENDING PETITION FOR WRIT OF MANDAMUS OR PROHIBITION,[1] FILED UNDER NRAP 27(e)

IMMEDIATE ACTION NECESSARY

COMES NOW, Appellant, CLARK COUNTY SCHOOL DISTRICT (hereinafter "CCSD"), by and through its undersigned counsel, Carlos McDade, General Counsel, and Adam Honey, Assistant General Counsel, and hereby moves this Honorable Court pursuant to Rule 8 and Rule 27 of the Nevada Rules of Appellate Procedure ("NRAP") to stay proceedings in

[1] The District Court's July 12, 2017 decision is appealable under NRAP 3A(b)(1) as a final judgment. If this Court determines it is not a final judgment, the Las Vegas Review-Journal requested declaratory and injunctive relief in its initial Petition for Writ of Mandamus, therefore the District Court's July 12, 2017 decision requiring disclosure of the investigative file is an injunction (or injunctive relief) and there is a right to appeal under NRAP 3A(b)(3). In the alternative, if this Court determines the decision is not a final judgment or an injunction, then CCSD reserves the right to file a Petition for Writ of Mandamus or Prohibition under NRAP 21. In all scenarios, a stay is necessary to allow review by this Court.

Docket 73525 Document 2017-24906

the Eighth Judicial District Court pending appeal of District Judge Timothy C. Williams' Order Granting Writ of Mandamus as to Withheld Records, which was entered on July 12, 2017.

CCSD requests the stay be decided on an ***emergency basis*** pursuant to NRAP 8(a) and NRAP 27(e) because the District Court's Order, entered on July 12, 2017, required CCSD to ***produce documents by June 30, 2017, which has already passed***. A stay is necessary to allow CCSD to appeal without violating the District Court's Order.

This Motion is based upon the following Memorandum of Points and Authorities, Certificate of counsel, and Exhibits attached hereto.

DATED: July 26, 2017

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This matter involves important public policy concerns regarding the right of public employees to raise concerns of all forms of sexual harassment

and discriminatory conduct without fear of retaliation from the accused and without the loss of confidentiality. These issues are presented in the context of a public records request made to CCSD by the Las Vegas Review-Journal ("LVRJ") under the provisions of NRS Chapter 239.

On July 11, 2017, the District Court filed an Order Granting Writ of Mandamus as to Withheld Records. LVRJ served a Notice of Entry of Order on July 12, 2017. *See Ex. 1*. In its Order, the District Court directed CCSD to produce "withheld documents" and stated: "CCSD may redact the names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff." *See Ex. 1* at ¶ 88 (emphasis added). Pursuant to a February 23, 2017 Order: "CCSD may not make any other redactions, and must unredact the names of schools, all administrative level employees, including but not limited to deans, principals, assistant principals, program coordinators, and teachers." *See Ex. 2* at ¶ 35 (emphasis added). **Even though the District Court's Order was not entered until July 12, the Court set a compliance date of June 30, 2017, which has already passed.**

On July 12, 2017, CCSD filed a Notice of Appeal to this Court. On that same date, CCSD filed a Motion for Stay Pending Appeal in the District Court, which is set for hearing on July 27, 2017. In an abundance of caution, CCSD filed the instant Motion for Stay with this Court a day before that hearing so as to not be in contempt if the District Court denies the stay.

CCSD hereby seeks a stay, pending appeal, of the District Court's Order entered on July 12, 2017 that requires disclosure of the "withheld documents" which consist of the investigative file of CCSD's Office of Diversity and Affirmative Action regarding its investigation of alleged discrimination of CCSD employees by Trustee Kevin Child. *See Ex. 1* at ¶¶ 41 and 88. The District Court's Order requires the release of all notes, drafts, memoranda, and chronological summary of the investigation conducted by CCSD's Office of Diversity and Affirmative Action. *Id.* In this motion, the "withheld documents" will be referred to as the "investigative file."

The District Court's Order will result in the release of the identity of CCSD employees including any teacher, principal, counselor, dean, or district administrator unless they were direct victims of sexual harassment. The District Court's decision will result in irreparable injury to CCSD employees and may also discourage future reporting of alleged discrimination. If a stay is not granted, CCSD would be required to immediately produce the documents at the center of the dispute, thus extinguishing the dispute and eviscerating the right to appeal.

II. LEGAL ARGUMENT

A. Standard for obtaining a stay.

In determining whether to grant a stay, this Court considers the four NRAP 8(c) factors: (1) whether the object of the appeal will be defeated

without a stay; (2) whether appellant will suffer irreparable harm/serious injury without a stay; (3) whether respondent will suffer irreparable harm/serious injury if a stay is granted; and (4) appellant's likeliness of prevailing on appeal. *See Fritz Hansen A/S v. Eighth Judicial District Court*, 116 Nev. 650, 6 P.3d 982 (2000). While no one factor is more important, "if one or two factors are especially strong, they may counterbalance other weak factors." *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36 (2004).

The purpose of a stay is to preserve the status quo, which means the stay should be granted until this Court has the opportunity to decide whether the investigative file must be released. *See Nelson*, 121 Nev. at 835, 122 P.3d at 1254; *U.S. v. State of Mich.*, 505 F. Supp. 467 (W.D. Mich. 1980).

B. CCSD has satisfied the NRAP 8(c) factors for granting a stay.

(1) The purpose of this Court's review will be defeated and CCSD will suffer serious injury if a stay is denied.

If the status quo is not maintained, the subject of CCSD's appeal will become moot and irreparable injury will be suffered. These elements of the Rule 8(c) test are especially strong in this case and should be given added significance by the Court. *MiKohn*, 120 Nev. at 251-253, 89 P.3d at 38-39.

The investigation involves complaints and concerns by employees directed at an elected official, a trustee, one of seven members of the Board

of School Trustees, which is the elected governing body of CCSD. In effect, the investigation concerns complaints by employees against one of their "bosses."

In the Order entered on July 12, 2017, the District Court directed CCSD to produce "withheld documents" and stated: "CCSD may redact the names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff." *See Ex. 1* at ¶ 88 (emphasis added). Pursuant to the February 23, 2017 Order: "CCSD may not make any other redactions, and must unredact the names of schools, all administrative level employees, including but not limited to deans, principals, assistant principals, program coordinators, and teachers." *See Ex. 2* at ¶ 35 (emphasis added).

The "withheld documents" consist of the investigative file of CCSD's Office of Diversity and Affirmative Action regarding its investigation of alleged discrimination of CCSD employees by Trustee Kevin Child. *See Ex. 1* at ¶ 41. In particular, the Court's Order requires the release of all notes, drafts, memoranda, and chronological summary of the investigation conducted by the Director of the Office of Diversity and Affirmative Action.

The investigative file includes names of other CCSD employees who are not protected by the Order. The file includes the names of administrators and teachers who were witnesses to sexual harassment (but not actually a "direct victim") or complained of other actions by Trustee Child.

Even if the names of the victims and witnesses were redacted, the investigative file is replete with personally identifiable facts that lead directly to the identity of victims of sexual harassment and witnesses. CCSD has an affirmative obligation under Title VII and IX to protect employees from retaliation taken in response to a complaint or investigation of harassment. Further, this is still an ongoing investigation, and if CCSD is required to release the investigative file, it may prejudice future complaints and/or witness statements or chill reporting or participation in the investigation.

CCSD has a duty to protect employees from retaliation. In his declaration, the Director of the Office of Diversity and Affirmative Action testified to concrete and actual fears of retaliation. Retaliation was a particular concern of some administrators because they work in close proximity with Trustee Child. Also, the promotions or advancement of some administrators must be approved by the Board of Trustees. *See Ex. 3* at ¶¶ 6-8.

CCSD employees' confidence in their ability to report sexual harassment and discrimination (or provide witness statements on behalf of such reports) without fear of retaliation, loss of further professional advancement and public exposure will be undermined if the status quo is not maintained. The chilling effect of stripping the employees of confidentiality

due to a public records request will irreparably injure CCSD and its employees and undercut their federally mandated right to report and have investigated complaints of sexual harassment in the workplace. *See* Title VII, 42 U.S.C. § 2000e *et. seq.*; U.S., Equal Employment Opportunity Commission, EEOC Notice No. 915.002, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, at § V(D)(1) re Failure to Complain (hereinafter "EEOC Notice No. 915.002") (dated 6/18/99, in effect until rescinded or superseded) (emphasis added); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998).

Therefore, this Court should conclude that CCSD has satisfied the first two factors of NRAP 8(c) in favor of granting a stay pending appeal.

(2) Las Vegas Review-Journal will not suffer any serious or irreparable injury if a stay is granted.

The act of seeking a stay pending the resolution of appellate proceedings does not in and of itself constitute harm to the non-moving party. *See Hansen*, 116 Nev. at 658, 6 P.3d 982 at 986-87. A stay will not cause any serious or irreparable injury to the LVRJ because the issue is not time sensitive. Trustee Child has already been identified in articles published by the LVRJ regarding allegedly discriminatory conduct over the course of the last year. Some of the articles were based on social media posts made by Trustee Child. CCSD has already produced approximately

174 pages of emails and documents in response to public record requests that are the basis of this court action. Moreover, the LVRJ has had the final Cole memorandum dated October 19, 2016, with its recommendations to the Superintendent since mid-December 2016. Additionally, the LVRJ has been provided all corrective guidelines issued by the Superintendent to Trustee Child and the Board of School Trustees. *See Ex. 4*. Thus, the LVRJ already knows the nature of Trustee Child's alleged misconduct, how CCSD responded to the alleged discrimination, and the guidelines that have been put in place as a result. Halting the release of the investigative file to allow this important issue to be resolved will not harm LVRJ. Therefore, this Court should conclude CCSD has satisfied the third NRAP 8(c) factor for granting a stay pending appeal.

(3) CCSD is likely to prevail in these proceedings.

In weighing the final factor, this Court has articulated that "a movant does not always have to show a probability of success on the merits, [but] the movant must 'present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay.'" *Hansen*, 116 Nev. at 659, 6 P.3d at 987. CCSD has more than satisfied this final factor for entering a stay.[2]

[2] CCSD reserves the right to include additional grounds for non-disclosure of the investigative file in its Appellate Brief.

(a) CCSD is required to investigate allegations of discrimination under federal law, and federal guidelines call for confidentiality of the investigation.

Internal information received or gathered by CCSD in the course of its investigation of an alleged unlawful practice of discrimination or harassment is confidential and not required to be disclosed under the public records law. Federal statues concerning discrimination and harassment as well as the regulations and case law interpreting those statutes provide ample authority for this proposition.

Federal law obligates CCSD to investigate employee complaints of discrimination and harassment and to protect those employees from retaliation from persons within the organization. The United States Equal Employment Opportunity Commission ("EEOC") has stated **employers are obligated to investigate and address instances of harassment, including sexual harassment. The EEOC has also stated employees who are subjected to harassment frequently do not complain to management due to fear of retaliation**. *See* EEOC Notice No. 915.002 at § V(D)(1) (emphasis added); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). Regarding confidentiality of an investigation, EEOC has stated that "[a]n employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct

an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, **information about the allegation of harassment should be shared only with those who need to know about it. Records relating to harassment complaints should be kept confidential on the same basis**." *See* EEOC Notice No. 915.002, at § V(C)(1) re Confidentiality (emphasis added). "To assure employees that such a fear is unwarranted; the employer must clearly communicate and enforce a policy that no employee will be retaliated against for complaining of harassment." *See* EEOC Notice No. 915.002, at § V(D)(1) re Failure to Complain. This is a federal law that CCSD is subject to, must comply with, and may be found in violation of.

In this case, the best way for CCSD to enforce a policy of no retaliation is by not revealing the investigative file which contains employee names, and other personal information that would lead to the identification of those employees, to the accused or to the public. As such, the contents of the investigative file should be confidential under the federal statutes concerning discrimination and harassment as well as the regulations and case law interpreting those statutes.

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(b) The documents at issue are confidential pursuant to the legally enforceable regulations of CCSD.

NRS 239.010(1) states:

> Except as otherwise provided in this section . . . and **unless otherwise declared by law to be confidential**, all public books and public records of a governmental entity must be open at all times . . . (emphasis added).

CCSD Regulation 4410 lies squarely within the "unless otherwise declared by law to be confidential" language provided in NRS 239.010(1). Pursuant to NRS 386.350, the District Trustees have enacted numerous regulations. These include CCSD Regulation 4110 which sets forth the procedures and requirements related to discriminatory practices. This regulation is entirely consistent with the federal authorities related to unlawful discrimination cited above. Regulation 4110(X) states:

> All information gathered by the District in the course of its **investigation of an alleged unlawful discriminatory practice will remain confidential** except to the extent necessary to conduct an investigation, resolve the complaint, serve other significant needs, or comply with law.

See Ex. 5, CCSD Reg. 4110 (emphasis added). Thus, the investigative file of CCSD's Office of Diversity and Affirmative Action is confidential under CCSD Regulation 4110.

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(c) The investigative file of the Office of Diversity and Affirmative Action is also confidential under the deliberative process privilege.

The investigative file is also not required to be disclosed because it is protected under the deliberative process privilege. *DR Partners v. Board of County Commissioners of Clark County*, 116 Nev. 616, 621 (2000). The Nevada Supreme Court has recognized an "executive privilege" in Nevada in determining whether public records are "confidential by law." "The deliberative process or 'executive' privilege is one of the traditional mechanisms that provide protection to the deliberative and decision-making processes of the executive branch of government. . . ." *Id.* at 622. This privilege "shields from mandatory disclosure 'inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency[.] It also permits 'agency decision-makers to engage in that frank exchange of opinions and recommendations necessary to the formulation of policy without being inhibited by fear of later public disclosure.'" *Id.* at 622-23 (quoting *Paisley v. C.I.A.*, 712 F.2d 686, 697-98 (D.C. Cir. 1983)). "To qualify for non-disclosure under this privilege, the requested documents must be both predecisional and deliberative." *Id.* at 623 (citations omitted). Furthermore, the material must consist of opinions, **recommendations**, or advice about

agency policies and the Court must be able to pinpoint an agency decision or policy to which the documents contributed. *Id.*

Here, Mr. Cole's investigation was conducted at the request of CCSD Superintendent Pat Skorkowsky for the purpose of determining if the Trustee's behavior amounted to discrimination. *See Ex. 3.* The contents of the investigative file (including notes, drafts, memoranda, and chronological summary) formed the basis for Mr. Cole's recommendation to the Superintendent, which has been utilized in policies directed to all trustees and specifically Trustee Child. *See Ex. 4.* Therefore, the entire investigative file is subject to the deliberative process privilege.

(d) The documents are confidential under the *Donrey* balancing test.

The Supreme Court of Nevada has recognized that a "limitation on the general disclosure requirements of NRS 239.010 must be based upon a balancing or 'weighing' of the interests of non-disclosure against the general policy in favor of open government." *DR Partners v. Board of County Comm'rs*, 116 Nev. 616, 622 (2000) (citing *Donrey*, 106 Nev. at 635-36). CCSD's interest in investigating employees' reports of, and protecting them from, discrimination in all of its forms and retaliation clearly outweighs the public's interest in obtaining access to internal investigative information regarding the alleged discriminatory conduct of Trustee Child. The

preceding is particularly true given the public's need for the investigative file is tempered by the fact the information released by CCSD on this topic is already in the public domain, including documents demonstrating the nature of the alleged misconduct and CCSD's response to the allegations.

CCSD has a great likelihood of prevailing on the merits on appeal and has satisfied the final Rule 8(c) factor for entering a stay.

III. CONCLUSION

CCSD respectfully requests that this Court grant an immediate stay so that CCSD is not in contempt of the District Court's order.

DATED: July 26, 2017

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NRAP 27(e) CERTIFICATE

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Attorneys for Respondent,
Las Vegas Review-Journal

The District Court's Order Granting Writ of Mandamus as to Withheld Records was entered on July 12, 2017. In its Order, the District Court directed CCSD to produce "withheld documents" and stated: "CCSD may redact the names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff." *See Ex. 1* at ¶ 88 (emphasis added). Pursuant to a February 23, 2017 Order: "CCSD may not make any other redactions, and must unredact the names of schools, all administrative level employees, including but not limited to deans, principals, assistant

principals, program coordinators, and teachers." *See Ex. 2* at ¶ 35 (emphasis added). The "withheld documents" consist of the investigative file of CCSD's Office of Diversity and Affirmative Action regarding its investigation of alleged discrimination of CCSD employees by Trustee Kevin Child. Even though the District Court's Order was not entered until July 12, 2017, the Court set a compliance date of June 30, 2017 which has already passed.

On July 12, 2017, CCSD filed a Notice of Appeal to this Court. On that same date, CCSD filed a Motion for Stay Pending Appeal in the District Court, which is set for hearing on July 27, 2017. In an abundance of caution, CCSD filed the instant Motion for Stay with this Court a day before that hearing so as to not be in contempt if the District Court denies the stay. Intervention by this Court is needed immediately to prevent CCSD from being in contempt of the District Court's order while awaiting this Court's ruling on the motion to stay. Counsel for Las Vegas Review-Journal was notified in a telephone conversation on Wednesday, July 26, 2017, that Appellants intended to seek emergency relief from this Court, and they were served with a copy of this Motion on July 26, 2017 via email.

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I hereby certify that this Emergency Motion for Stay under NRAP 27(e) relies upon issues raised by Appellants in the District Court, and otherwise complies with the provisions of NRAP 27(e).

DATED: July 26, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion for Stay 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font. I further certify that although the memorandum of points and authorities in support of this Motion for Stay is fifteen pages in length, CCSD has submitted a Motion to Exceed Page Limit requesting that this Court grant permission to file this Motion for Stay in excess of the ten-page limitation set forth in NRAP 27(d)(2).

DATED: July 26, 2017

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CERTIFICATE OF SERVICE

I certify that I am an employee of Clark County School District, Office of the General Counsel and that on July 26, 2017, I caused to be served at Las Vegas, Nevada, a true copy of the **EMERGENCY MOTION FOR STAY PENDING APPEAL, OR IN THE ALTERNATIVE STAY PENDING PETITION FOR WRIT OF MANDAMUS OR PROHIBITION, FILED UNDER NRAP 27(e)** addressed to:

The Honorable Timothy C. Williams
Eighth Judicial District Court, Dept. 16
200 Lewis Avenue
Las Vegas, Nevada 89155
Via Hand Delivery

Margaret McLetchie
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McLetchie Shell LLC
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Attorneys for Respondent,
Las Vegas Review-Journal
Via Email

Christina Reeves
AN EMPLOYEE OF THE CLARK COUNTY SCHOOL DISTRICT

EXHIBIT 1

Electronically Filed
7/12/2017 7:40 AM
Steven D. Grierson
CLERK OF THE COURT

NEOJ
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Counsel for Petitioner

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CLARK COUNTY SCHOOL DISTRICT, Respondent.	Case No.: A-17-750151-W Dept. No.: XVI **NOTICE OF ENTRY OF ORDER**

NOTICE OF ENTRY OF ORDER

TO: THE PARTIES HERETO AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on the 11th day of July, 2017, an Order Granting Writ of Mandamus as to Withheld Records and Requiring Depositions was entered in the above-captioned action. A copy of the Order is attached hereto as Exhibit 1.

DATED this 12th day of July, 2017.

/s/ Margaret A. McLetchie
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CERTIFICATE OF SERVICE

Pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, I hereby certify that on this 12th day of July, 2017, I did cause a true copy of the foregoing NOTICE OF ENTRY OF ORDER in *Las Vegas Review-Journal v. Clark County School District,* Clark County District Court Case No. A-17-750151-W, to be served electronically using the Odyssey File&Serve system, to all parties with an email address on record.

Pursuant to NRCP 5(b)(2)(B) I hereby further certify that on the 12th day of July, 2017, I mailed a true and correct copy of the foregoing NOTICE OF ENTRY OF ORDER by depositing the same in the United States mail, first-class postage pre-paid, to the following:

Carlos McDade, General Counsel
Adam Honey, Asst. General Counsel
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Las Vegas, NV 89146
Counsel for Respondent, Clark County School District

/s/ Pharan Burchfield
An Employee of MCLETCHIE SHELL LLC

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EXHIBIT 1

Electronically Filed
7/11/2017 4:08 PM
Steven D. Grierson
CLERK OF THE COURT

ORDR

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CLARK COUNTY SCHOOL DISTRICT, Respondent.	Case No.: A-17-750151-W Dept. No.: XVI **ORDER GRANTING WRIT OF MANDAMUS AS TO WITHHELD RECORDS AND REQUIRING DEPOSITIONS**

The Las Vegas Review-Journal's Amended Petition for Writ of Mandamus having come on for an additional hearing on June 27, 2017, the Honorable Timothy C. Williams presiding, Petitioner LAS VEGAS REVIEW-JOURNAL ("Review-Journal") appearing by and through its attorneys, MARGARET A. MCLETCHIE and ALINA M. SHELL, and Respondent CLARK COUNTY SCHOOL DISTRICT ("CCSD"), appearing by and through its attorneys, CARLOS M. MCDADE and ADAM HONEY, and the Court having read and considered all of the papers and pleadings on file and being fully advised, and good cause appearing therefor, the Court hereby makes the following findings of fact and conclusions of law:

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I.

PROCEDURAL HISTORY AND FINDINGS OF FACT

Original NPRA Request and Petition

1. On December 5, 2016, Review-Journal reporter Amelia Pak-Harvey (the "Reporter") sent CCSD a request on behalf of the Review-Journal and pursuant to the Nevada Public Records Act, Nev. Rev. Stat. § 239.001 *et seq.* (the "NPRA"). The request sought certain documents pertaining to CCSD Trustee Kevin Child (the "Request"). The Reporter supplemented the Request on December 9, 2016 ("Supplemental Request").

2. After CCSD failed to provide documents or assert any claim of confidentiality pursuant to Nev. Rev. Stat. § 239.0107, the Review-Journal initiated this action on January 26, 2017, requesting expedited consideration pursuant to Nev. Rev. Stat. § 239.011.

3. On February 8, 2017, the Court ordered CCSD to either fully produce all the requested records in unredacted form by 12:00 p.m. on Friday, February 10, 2017, or that the matter would proceed to hearing.

Reacted Records, Withheld Records, and Order on Redactions

4. CCSD did not produce the records in unredacted form. Instead, on February 8, 2017, CCSD produced the redacted records ("Redacted Records")—as well as an unredacted corresponding set of records—to the Court and, later that day, provided a copy of the Redacted Records to the Review-Journal. It provided other versions of the Redacted Records (with fewer redactions) on February 10 and 13, 2017 and produced additional pages not previously identified (the "Additional Redacted Records") on February 13, 2017.

5. CCSD also withheld records responsive to the December Requests.

6. On February 13, 2017, CCSD provided the Court and the Review-Journal an initial log listing the following bases for the redactions: Nev. Rev. Stat. § 386.230 and CCSD Regulations 1212 and 4110.

7. On February 13, 2017, CCSD also provided a revised version of the log including the Additional Redacted Records and asserting additional based for redactions.

8. The Court conducted an *in camera* review of the Redacted Records, the Additional Redacted Records, and the unredacted versions of both sets of records.

9. On February 14, 2017, the Court heard oral argument on the Review-Journal's Petition. Following that hearing, on February 22, 2017, the Court entered an Order granting the Review-Journal's Petition. (*See* February 22, 2017 Order, *see also* February 23, 2017 Notice of Entry of Order).)

10. The Court ordered CCSD to provide the Review-Journal with new versions of the Redacted Records and Additional Redacted Records with only "the names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff" redacted. (*Id.* at ¶ 34.) The Court further specified that "CCSD may not make any other redactions" and must unredact the names of schools, teachers, and all administrative-level employees. (*Id* at ¶ 35.)

11. The Court directed CCSD to comply with the Order within two days. (*Id.* at ¶ 36.) On February 24, 2017, CCSD produced new versions of the Redacted Records and Additional Redacted Records to the Review-Journal; these new versions of the Redacted Records totaled thirty-three (33) pages.

February Request, and the Review-Journal's Efforts to Obtain a Privilege Log and Search Information

12. On February 10, 2017, the Review-Journal submitted a new records request to CCSD for certain records pertaining to Mr. Child (the "February Request"). The Review-Journal also offered to work with CCSD to develop searches.

13. On February 15, 2017, counsel for the Review-Journal contacted CCSD to discuss the February request.

14. On February 17, 2017, CCSD notified the Review-Journal via email that it was unable to provide the records listed in the February Request within the five days mandated by Nev. Rev. Stat. § 239.0107(d).

15. In that same correspondence, CCSD set forth objections to the February Request.

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16. On March 3, 2017, CCSD provided some documents in response to the February Request.

17. On March 3, 2017, in a letter to counsel, CCSD stated it had redacted information pertaining to the names of individuals who reported a complaint or concern about Trustee Child, information including potentially identifying information about students, and personal phone numbers.

18. That same day, the Review-Journal requested CCSD provide a log of withheld documents that were responsive to the February Request. The Review-Journal also asked CCSD to provide it with search information.

19. CCSD responded to these requests via letter on March 13, 2017. In its letter, CCSD indicated it had searched for the terms "Kevin Child" and "Trustee Child" in the Interact email boxes of Superintendent Patrick Skorkowsky, Chief Academic Officer Mike Barton, each School Associate Superintendent and each of the school principals in Trustee Child's district. Despite previous requests from the Review-Journal, that was the first time CCSD provided any search term information.

20. CCSD did not inform the Review-Journal that it had limited the sources or custodians it had searched. Instead, in response to the Review-Journal's inquiry regarding what documents were being withheld, CCSD asserted that "the only information that has not been provided is internal information received or gathered by the District in the court of its investigation of an alleged practice of unlawful practice of discrimination, harassment, or hostile work environment which is confidential and not required to be disclosed under the public records law."

21. By email on March 13, 2017, CCSD also stated it was withholding one document—a report prepared by Cedric Cole, CCSD's Executive Manager of Diversity and Affirmative Action, regarding an investigation his office had conducted into hostile work environment allegations against Trustee Child (the "Cole Report"). The Review-Journal responded to CCSD by letter on March 21, 2017. In that letter, the Review-Journal requested CCSD conduct additional email searches for responsive records from additional custodians.

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22. The Review-Journal requested that CCSD search those records for documents pertaining to the topics outlined in the December and February Requests.

23. The Review-Journal also requested CCSD produce hard copy records from the Diversity and Affirmative Action Program's hard copy file on Trustee Child, as well as any other hard copy file CCSD maintains on Trustee Child that were responsive to the December and February Requests.

24. CCSD declined to produce the Cole Report and other documents created by the Office of Diversity and Affirmative Action Programs; on March 24, 2017, CCSD supplemented its privilege log to reflect that it was withholding records in addition to the records it had previously identified ("3/24/2017 Log"). This 3/24/2017 Log reflected that, in total, CCSD withheld only the following from documents produced in response to the December Requests and the February Request:

> Investigative memoranda prepared by Cedric Cole, CCSD's Executive Manager of Diversity and Affirmative Action, regarding an investigation his office had conducted into hostile work environment allegations against Trustee Child (the "Cole Report") and Mr. Cole's investigative notes.

(*See* Exhibit E to March 29, 2017 Opening Brief in support of Amended Petition for Writ of Mandamus.)

25. By email on March 27, 2017, CCSD agreed to search school board trustees' email addresses. In its Answering Brief, CCSD also agreed to search emails of persons who sent or received, or were copies on, emails already produced, including cc's.

26. CCSD produced some emails of persons who sent or received prior responsive documents it indicated were responsive to the February Request on April 28, 2017, and produced some trustee emails it indicated were responsive to the February Request on May 3, 2017.

Order Granting Writ of Mandamus as to Jurisdiction and Search Parameters

27. On May 9, 2017, the Court heard oral arguments on the Review-Journal's Amended Petition for Writ of Mandamus.

28. On June 6, 2017, the Court entered an Order finding that it has jurisdiction

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over the Review-Journal's Amended Petition.

29. The Court also granted the Review-Journal's Amended Petition as to the request that CCSD conduct email searches responsive to the December Requests and the February Requests for the additional custodians requested by the Review-Journal. Specifically, the Court ordered CCSD to conduct email searches responsive to the Review-Journal's December and February Requests of the additional custodians. (June 6, 2017 Order at ¶ 45.)

32. The Court directed CCSD to complete this search and produce all responsive records it does not contend are confidential to the Las Vegas Review-Journal by June 6, 2017. (June 6, 2017 Order at ¶ 46.)

33. Further, the Court ordered that with regard to any documents CCSD had withheld and/or redacted to date and any additional responsive documents it identifies in response to the additional email and hard copy searches it is required to perform but contends are confidential and/or privileged, CCSD was to create a single log numbering and identifying each document withheld or redacted (in response to either the December Requests or the February Request) by providing a factual description of each record withheld (by listing to, from, date, and general subject) as well as a specific explanation for non-disclosure for each document withheld or redacted (including confidentiality being claimed, and basis for claim). The Court further ordered that the log must provide sufficient information to the Las Vegas Review-Journal to meaningfully contest each claim of confidentiality asserted. The Court ordered CCSD to provide the final privilege log to the Court by May 30, 2017, along with all redacted documents and documents being withheld for an *in camera* review. The Court also directed CCSD to provide a copy of the privilege log to the Las Vegas Review-Journal. (June 6, 2017 Order at ¶ 47.)

34. Additionally, the Court ordered CCSD to provide the Court with a certification by June 6, 2017 attesting to the accuracy of the searches conducted and evidencing that CCSD had fully searched the sources set forth in Paragraph 45 for records responsive to the December Requests and February Request by detailing the sources

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searched, date searches were conducted, and the search terms used to locate responsive documents. The Court ordered CCSD to provide a copy of the updated privilege log and the certification to the Las Vegas Review-Journal by June 6, 2017. (June 6, 2017 Order at ¶ 48.)

Further Facts Pertinent to CCSD's Certifications and Withheld Records

35. On May 30, 2017, CCSD submitted the redacted and withheld documents to the Court for *in camera* review. It additionally provided the Court with two certifications to meet the certification requirement and a privilege log. ("Final Log")

36. Unbeknownst to the Court, and despite its representation to the undersigned, CCSD counsel did not provide a copy of either of these documents to the Review-Journal at that time.

37. On June 5, 2017 CCSD provided an additional thirty-eight pages of documents that it located after conducting the additional searches ordered by this Court.

38. At a hearing held on June 6, 2017 the Court made clear it has expected CCSD to engage in the routine practice of providing privilege logs and certifications to opposing counsel in conjunction with *in camera* submissions. At the hearing, CCSD counsel did finally provide a copy of the Final Log and, later that day, provided copies of the certifications it had provided to the Court a week earlier.

39. One certification submitted by CCSD was from Dan Wray, CCSD's Chief Technology Officer. Mr. Wray's certification states that he conducted several searches "of email boxes" between December 9, 2016 and May 15, 2017.

40. CCSD also provided a second certification from Public Information Officer Cynthia Smith-Johnson. It explains that "I have personally reviewed 11,907 emails provided by Dan Wray."

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41. In the Final Log, CCSD stated it is withholding the following documents in their entirety on the basis of the privileges it describes as "Office of Diversity and Affirmative Action Privileges:"

- **CCSD 034-060;** and
- **CCSD 0159-0233.**

In the Final Log, CCSD has summarized these documents as follows:

> To the best of CCSD's knowledge, the only information that has not been provided to Petitioner is internal information received or gathered by Cedric Cole, Executive Director, Office of Diversity and Affirmative Action, in the course of his investigation regarding Trustee Child ...

(Exh. GG to June 13, 2017 Review-Journal Memorandum at LVRJ007.)

49. The Final Log also cites CCSD Regulation 4110(X) to justify non-disclosure of the 102 pages of documents it is withholding. That Regulation states that

> All information gathered by the District in the course of its investigation of an alleged unlawful discriminatory practice will remain confidential except to the extent necessary to conduct an investigation, resolve the complaint, serve other significant needs, or comply with law.

(*Id.* at LVRJ022.)

50. CCSD also claims that the NPRA does not require the release of confidential employee personnel information. (*Id.* at LVRJ023.)

51. In addition, CCSD claims in its Final Log that the records of its investigation of Trustee Child should be kept confidential pursuant to Title VII and guidance from the Equal Opportunity Employment Commission ("EEOC"). (*Id.* at LVRJ019-LVRJ021.)

52. CCSD also claims that withheld internal information it obtained during its investigation of allegations of discrimination or harassment by Trustee Child is subject to the deliberative process privilege because the information "was used as part of the deliberative and decision-making process of District executives" in crafting the Cole Memorandum. (*Id.* at LVRJ023.)

53. CCSD asserts that any withheld information which might constitute "worksheets, drafts, informal notes, or ad hoc reports," it qualifies as "nonrecord material"

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under NAC 239.051. (*Id.*)

54. The Review-Journal submitted a Memorandum responding to CCSD's Final Log on June 13, 2017.

55. Subsequently, on June 19, 2017 CCSD provided a two-page letter dated May 31, 2017 from Superintendent Skorkowsky to Trustee Child.

56. Additionally, on June 26, 2017, CCSD provided an additional three pages of documents responsive to the Review-Journal's December and February Requests.

57. This Court held a hearing on CCSD's Final Log and May 30, 2017 *in camera* submission on June 27, 2017.

58. At that hearing, CCSD asserted for the first time that in addition to the privileges asserted in its Final Log, Chapter 233 of the Nevada Revised Statutes—which provides for the creation and regulation of the Nevada Equal Rights Commission—applied to investigations conducted by CCSD's Office of Diversity and Affirmative Action. Specifically, CCSD asserted at the hearing that information pertaining to investigation of allegations against Trustee Child must be kept confidential pursuant to Nev. Rev. Stat. § 233.190.

59. To date, CCSD has disclosed 174 pages of documents to the Review-Journal, some of which have been redacted, and has withheld 102 pages.

II.

ORDER

60. 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[.]" Nev. Rev. Stat. § 239.001(1). Thus, the NPRA reflects and embodies the public's right to know and scrutinize the conduct of governmental entities and officials,

61. To fulfill these purposes, the NPRA must be construed liberally, and any limitation on the public's access to public records must be construed narrowly. Nev. Rev. Stat. § 239.001(2) and § 239.001(3).

62. The Nevada Legislature has made it clear that—unless they are explicitly

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confidential—public records must be made available to the public for inspection or copying. Nev. Rev. Stat. § 239.010(1); *see also Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 879-80, 266 P.3d 623, 627 (2011).

63. The term "record" as used in the NPRA is to be interpreted broadly. *See* Nev. Rev. Stat. § 239.001(2); *see also Gibbons*, 127 Nev. at 878, 266 P.3d at 626 (noting that the Nevada legislature intended the provisions of the NPRA to be "liberally construed to maximize the public's right of access").

64. The NPRA "considers all records to be public documents available for inspection unless otherwise explicitly made confidential by statute or by a balancing of public interests against privacy or law enforcement justification for nondisclosure." *Reno Newspapers v. Sheriff*, 126 Nev. 211,212, 234 P.3d 922, 923 (2010).

65. If a statute explicitly makes a record confidential or privileged, the public entity need not produce it. *Id.*

66. If a public record contains confidential or privileged information only in part, in response to a request for access to the record, a governmental entity shall redact the confidential information and produce the record in redacted form. Nev. Rev. Stat. § 239.010(3)

67. If a governmental entity seeks to withhold a document that is not explicitly made confidential by statute, it must prove by a preponderance of the evidence that the records are confidential or privileged, and must also prove by a preponderance of the evidence that the interest in nondisclosure outweighs the strong presumption in favor public access. *See, e.g., Gibbons*, 127 Nev. at 880, 266 P.3d at 628; *see also Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630, 635, 798 P.2d 144, 147–48 (1990).

68. In balancing those interests, "the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference." *DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) (quoting *MacEwan v. Holm*, 226 Or. 27, 359 P.2d 413, 421–22 (1961)).

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69. Pursuant to the NPRA and Nevada Supreme Court precedent, the Court hereby finds that the privileges cited by CCSD do not justify withholding the requested records from the Review-Journal. CCSD has not proven by a preponderance of the evidence that the withheld records are confidential or privileged such that withholding the records in their entirety is justified, nor has it proven by a preponderance of the evidence that any interest in nondisclosure outweighs the strong presumption in favor public access.

70. In addition, rather than explain how each document on its Final Log was privileged, CCSD instead analyzed them all together. (Exh. GG to June 13, 2017 Review-Journal Memorandum at LVRJ001-LVRJ005.) Accordingly, CCSD did not meet its burden of showing how each document it was withholding was confidential or privileged.

CCSD Regulation 4110(X)

71. Turning first to CCSD's reliance on CCSD Regulation 4110(X), the Court finds that CCSD's internal regulations do not carry the force of law such that they could render a public record confidential. Rather, as set forth in CCSD Policy 0101, CCSD Regulations are meant to provide "details and procedures" for CCSD operations.

72. The Court additionally finds that CCSD Regulation 4110(X) only provides for the confidentiality of "information gathered by the District in the course of an investigation of an alleged unlawful discriminatory practice." Thus, it does not apply to investigations of harassment or sexual harassment.

73. Even if CCSD Regulation 4110(X) applied to the withheld documents and could be relied on in an NPRA matter, the disclosure of documents regarding CCSD's investigation of harassment allegations against Trustee Child is necessary to "serve other significant needs" as contemplated by the Regulation. Specifically, the disclosure of withheld documents serves the significant need of providing the public information about the alleged misconduct of an elected official and CCSD's handling of the related investigation.

74. Moreover, disclosure of the documents is necessary to "comply with law" as contemplated by CCSD Regulation 4110(X). Specifically, disclosure is necessary to comply with the NPRA.

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75. Finally, even if CCSD Regulation 4110(X) did not contain the aforementioned exceptions, the Court cannot apply the Regulation in a manner that conflicts with the NPRA's mandates that the NPRA must be "construed liberally," Nev. Rev. Stat. § 239.001(2), and that "[a]ny exemption, exception or balancing of interests which limits or restricts access to public books and records by members of the public must be construed narrowly." Nev. Rev. Stat. § 239.001(3); *see also Lamb v. Mirin,* 90 Nev. 329, 332, 526 P.2d 80, 82 (1974) ("Whenever a legislature sees fit to adopt a general scheme for the regulation of particular subject, local control over the same subject, through legislation, ceases.").

Deliberative Process Privilege

76. The Court further finds that the deliberative process privilege does not justify withholding the requested documents. The deliberative process privilege protects high-level decision-making—*not* the information relied on in the decision-making process. *DR Partners v. Board of County Com'rs of Clark County*, 116 Nev. 616, 623, 6 P.3d 465, 469 (2000).

77. As the Nevada Supreme Court explained in *DR Partners*, "[t]o qualify as part of 'deliberative' process, the materials requested must consist of *opinions, recommendations, or advice about agency policies*." *Id.* (emphasis added). To qualify as part of the deliberative process, "the documents must be 'pre-decisional,' *i.e.*, they must be generated antecedent to the adoption of agency policy." *Paisley v. C.I.A.*, 712 F.2d 686, 698 (D.C. Cir. 1983), *vacated in part on other grounds by* 724 F.2d 201 (D.C. Cir. 1984) (citation and quotation omitted). Additionally, "the documents must be 'deliberative' in nature, reflecting the 'give-and-take' of the deliberative process and containing opinions, recommendations, or advice about agency policies." *Id.* (citations omitted).

78. The Nevada Supreme Court has also explained that the deliberative process privilege is conditional. *DR Partners*, 116 Nev. at 626, 6 P.3d at 471. Once a governmental entity establishes that a document is privileged, the burden shifts to the party seeking disclosure to "demonstrate that its need for the information outweighs the regulatory interest in preventing disclosure." *Id.*

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79. Further, in a case involving the NPRA, after the party seeking disclosure has made that showing, a court must still "engag[e] in the weighing process mandated by *Bradshaw*." *Id.*

80. CCSD has not met its burden of proving that this privilege applies, let alone that it outweighs disclosure. In contrast, the Review-Journal has established that its need for the information outweighs any interest in preventing disclosure, sufficient to overcome any deliberative process privilege. Even if CCSD had established that the deliberative process privilege applies to any of the withheld documents, it has not established that its interest in secrecy outweighs the public's compelling interest in knowing about the alleged actions of an elected official.

Chapter 233 of the Nevada Revised Statutes

81. The Court further finds that Chapter 233 of the Nevada Revised Statutes does not apply to CCSD's Office of Diversity and Affirmative Action, as that office is not a federal governmental entity, nor is it a state agency. Even if it did, Nev. Rev. Stat. § 233.190 does not pertain to closed investigations.

Nonrecords

82. The Court also finds the withheld documents are not "non-records" under NAC 239.051. Contrary to CCSD's assertions, drafts and informal notes pertaining to its investigation plainly serves as the record of an official action by CCSD—to wit, enacting a policy to protect members of the CCSD community from the alleged misbehavior of Trustee Child.

83. CCSD's argument that the documents may be withheld pursuant NAC 239.705 is likewise unavailing. NAC 239.705 is an administrative regulation defining official state records subject to retention (and nonrecords exempt from retention) that couples with Nev. Rev. Stat. § 239.080, a statute pertaining to the retention and disposition of state records. (*See* Op. Br., pp. 21:24-22:11.) Moreover, NAC 239.705 applies only to records maintained by a governmental entity "as evidence of the organization's functions, policies, decisions, procedures, operation or other activities." NAC 239.705. Accordingly, none of the records

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withheld by CCSD qualify as "non-records" under this section of the Nevada Administrative Code.

Title VII

84. The Court finds that CCSD's duties under Title VII to promptly investigate sexual harassment claims and provide appropriate relief does not establish that it is entitled to withhold documents pertaining to Kevin Child from the public.

85. There is no absolute confidentiality or privilege regarding sexual harassment investigations conducted by a non-employer. While the Nevada Supreme Court has not addressed this specific issue, other courts have found that records pertaining to school districts' investigations and findings of sexual harassment are public records. *See, e.g., Marken v. Santa Monica-Malibu Unified Sch. Dist.*, 202 Cal. App. 4th 1250, 136 Cal. Rptr. 3d 395 (Cal.2012) (finding that release of an investigation report and disciplinary record of a sexually harassing teacher was warranted under California's public records act due to the public's right to know, even where an explicit privacy statute was also implicated); *see also Deseret News Pub. Co. v. Salt Lake County*, 182 P.3d 372, 27 IER Cases 1099 (Utah 2008) (holding that a sexual harassment investigation report should be produced because the report "provides a window ... into the conduct of public officials."). Moreover, any concern regarding confidentiality can be addressed through redaction, consistent with Nev. Rev. Stat. § 239.010(3).

86. In addition to the general presumption of access to public records, there are three reasons why—even if a valid claim of confidentiality applied that was not met by redaction—the interest in disclosure would outweigh the interest in confidentiality. First, the records pertain to the conduct of a government official. Second, the interest in access to such information is especially great in this case because the government official is an elected school board trustee. Third, the information sought pertains to the conduct of a governmental entity. In this case, the records provide a window into the government's investigation of allegations of sexual and other misconduct of a government official. *Deseret News*, 182 P.3d at 383 ("the investigative report provides a window, opaque as that window may be, into the

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conduct of public officials that is not available by other means"). Each of these reasons weigh strongly in favor of disclosure.

Other Privileges

87. With regard to the other privileges asserted by CCSD, including the attorney-client privilege asserted as to the document Bates labeled 0189-0195, the Court finds CCSD has not met its burden of establishing these privileges apply to the withheld documents, nor has it established that any of those privileges outweigh the public's right of access to those records.

88. Accordingly, the Court hereby orders CCSD to produce withheld documents to the Court by June 30, 2017. Pursuant to the Court's February 23, 2017 Order, CCSD may redact the names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff. The Court will then provide the documents to the Review-Journal.

CCSD's Certifications

89. As to CCSD's certifications regarding its searches for responsive documents, the Review-Journal raises valid concerns regarding CCSD's searches for and production of the requested records. The Review-Journal also raises valid concerns that the certifications do not establish the accuracy or completeness of CCSD's searches for responsive documents. For example, neither the Wray Certification nor the Smith-Johnson Certification address the hard copy searches CCSD was required to conduct pursuant to Paragraph 45 of this Court's June 6, 2017 Order.

90. The Wray Certification does not make clear what was done with the results of the searches. Mr. Wray further stated that "[t]o the best of my knowledge, between May 12th and May 15, 2017, I conducted 530 searches resulting in 11,907 emails being identified." Mr. Wray explains that the results of the searches conducted between May 12 and 15, 2017—the 11,907 emails—were provided to CCSD Public Information Officer Cynthia Smith-Johnson for her review. Nothing in the Wray Certification explains what happened to the searches conducted before May 12.

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91. Further, while Mr. Wray states that he searched "email boxes," his Certification fails to explain what "email boxes" means—or to explain whether all emails sent or received (including via cc or bcc) were searched, let alone whether CCSD counsel's assertion to this Court that it is not possible to search for emails other than via individual custodians is accurate. Mr. Wray's Certification also fails to identify the date ranges he used when searching the identified email boxes.

92. As with the Wray Certification, the Smith-Johnson Certification does not make clear what occurred with prior searches, including those conducted on Pat Skorkowsky's inbox.

93. Ms. Smith-Johnson's certification states that she "identified 43 pages that [she] believed may be responsive to the record requests..." It is unclear what protocol Ms. Smith-Johnson used to decide if a record should be produced. Similarly, it is unclear what Ms. Smith-Johnson did despite her attestation that she reviewed the emails diligently. Further, while there is no certification from CCSD counsel, Ms. Smith-Johnson's certification states that CCSD counsel made the final determination about what to produce.

94. Neither the Wray or Smith-Johnson Certifications indicate whether CCSD conducted searches of hard copy records it was required to conduct pursuant to Paragraph 45 of the Court's June 6, 2017 Order.

95. At best, taken together, the Certifications only "link up" and properly certify 43 pages produced after May 2017. This does not comply with this Court's mandate for evidence "that CCSD has fully searched the sources ... for records responsive to the December Requests and February Request." (June 6, 2017 Order, ¶ 48.)

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96. Accordingly, the Court hereby orders CCSD to make Mr. Wray and Ms. Smith-Johnson available to be deposed by the Review-Journal as to their efforts to search for, collect, and produce the requested records. The depositions of Mr. Wray and Ms. Smith-Johnson shall each be limited to two hours of questioning by the Review-Journal.

IT IS SO ORDERED this 5th day of July, 2017.

HONORABLE JUDGE TIMOTHY C. WILLIAMS

Respectfully submitted,

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EXHIBIT 2

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CLERK OF THE COURT

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Counsel for Petitioner

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CLARK COUNTY SCHOOL DISTRICT, Respondent.	Case No.: A-17-750151-W Dept. No.: XVI **NOTICE OF ENTRY OF ORDER**

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NOTICE OF ENTRY OF ORDER

TO: THE PARTIES HERETO AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on the 22nd day of February, 2017, an Order Granting Writ of Mandate was entered in the above-captioned action. A copy of the Order is attached hereto as Exhibit 1.

DATED this 23rd day of February, 2017.

/s/ Margaret A. McLetchie
MARGARET A MCLETCHIE, Nevada Bar No. 10931
ALINA M. SHELL, Nevada Bar No. 11711
MCLETCHIE SHELL LLC
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
Counsel for Petitioner

CERTIFICATE OF SERVICE

Pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, I hereby certify that on this 23rd day of February, 2017, I did cause a true copy of the foregoing NOTICE OF ENTRY OF ORDER in *Las Vegas Review-Journal v. Clark County School District,* Clark County District Court Case No. A-17-750151-W, to be served electronically using the Wiznet Electronic Service system, to all parties with an email address on record.

Pursuant to NRCP 5(b)(2)(B), I further hereby certify that on the 23rd day of February, 2017, I mailed a true and correct copy of the foregoing NOTICE OF ENTRY OF ORDER by depositing the same in the United States mail, first-class postage pre-paid, to the following:

Carlos McDade, General Counsel
Adam Honey, Asst. General Counsel
Clark County School District
5100 W. Sahara Ave.
Las Vegas, NV 89146
Counsel for Respondent, Clark County School District

/s/ Pharan Burchfield
An Employee of MCLETCHIE SHELL LLC

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EXHIBIT 1

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CLARK COUNTY SCHOOL DISTRICT, Respondent.	Case No.: A-17-750151-W Dept. No.: XVI **ORDER GRANTING WRIT OF MANDATE**

The Las Vegas Review-Journal's Petition for Writ of Mandamus having come on for hearing on February 14, 2017, the Honorable Timothy C. Williams presiding, Petitioner LAS VEGAS REVIEW-JOURNAL ("Review-Journal") appearing by and through its attorneys, MARGARET A. MCLETCHIE and ALINA M. SHELL, and Respondent CLARK COUNTY SCHOOL DISTRICT ("District Attorney"), appearing by and through his attorneys, CARLOS M. MCDADE and ADAM HONEY, and the Court having read and considered all of the papers and pleadings on file and being fully advised, and good cause appearing therefor, the Court hereby grants the Petition and makes the following findings of fact and conclusions of law:

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I.

PROCEDURAL HISTORY AND FINDINGS OF FACT

1. On December 5, 2016, Review-Journal reporter Amelia Pak-Harvey (the "Reporter") sent CCSD a request on behalf of the Review-Journal and pursuant to the Nevada Public Records Act, Nev. Rev. Stat. § 239.001 *et seq.* (the "NPRA"). The request sought certain documents pertaining to CCSD Trustee Kevin Child (the "Request"). The Request asked CCSD to produce:

- All incident reports filed by CCSD staff, CCSD police or any other CCSD officials that involve grief counselors and Trustee Kevin Child;
- All emails from CCSD staff, CCSD police or CCSD officials regarding school visits conducted by Kevin Child; and
- All emails and correspondence relating to the guidelines issued to CCSD staff on December 5, 2016 regarding Trustee Kevin Child's visits to schools and interaction with staff.

2. On behalf of CCSD's Office of Community and Government Relations, Cynthia Smith-Johnson confirmed receipt on December 9, 2016.

3. The Reporter supplemented the Request on December 9, 2016 ("Supplemental Request"). The Supplemental Request asked CCSD to produce "any written complaints the Clark County School District has received regarding Trustee Kevin Child."

4. After CCSD failed to provide documents or assert any claim of confidentiality pursuant to Nev. Rev. Stat. § 239.0107, the Review-Journal initiated this action on January 26, 2017, requesting expedited consideration pursuant to Nev. Rev. Stat. § 239.011.

5. CCSD subsequently produced thirty six (36) pages of documents but asserted that there were twenty-three (23) additional pages that required redactions (the "Redacted Records"). After informal efforts to set a briefing schedule and/or obtain copies the Redacted Records sought failed, the Review-Journal submitted an ex parte motion for order shortening time and requesting an expedited hearing on February 8, 2017.

6. On February 8, 2017, this Court ordered that CCSD either fully produce all requested records (in unredacted form) by 12 p.m. on Friday, February 14, 2017 or that the matter would proceed to hearing.

7. On February 8, 2017, CCSD provided the Redacted Records, as well as an unredacted corresponding set of records, to the Court. It did not provide a copy of the Redacted Records to the Review-Journal.

8. Then, later on February 8, 2017, in response to the February 8, 2017 Order, CCSD provided a copy of the Redacted Records to the Review-Journal.

9. On February 10, 2017, CCSD provided the Redacted Records with fewer redactions to Court and the Review-Journal.

10. On February 13, 2017, CCSD provided a further version of the Redacted Records to the Court and the Review-Journal, along with a log listing the following legal bases for the redactions: Nev. Rev. Stat § 386.230 and CCSD Regulations 1212 and 4110.

11. On February 13, 2017, CCSD also provided ten (10) additional pages not previously identified (the "Additional Redacted Records"). CCSD also provided a new log ("Revised Log") including the Additional Redacted Records and additionally asserting the following bases for the redactions:

a) "safety and well-being of employees (fear of retaliation) and inherent chilling effect if names of individual employees are released;" and

b) "inherent chilling effect if names of . . . general public are released."

Finally, CCSD provided an unredacted version of the Additional Redacted Records to Court.

12. Nev. Rev. Stat § 239.010 " does not explicitly provide that the records are confidential, and provides that, unless expressly provided for in the NPRA or other listed statutes, Nev. Rev. Stat § 239.010, or "unless otherwise declared by law to be confidential,"

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all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person, and may be fully copied or an abstract or memorandum may be prepared from those public books and public records. Any such copies, abstracts or memoranda may be used to supply the general public with copies, abstracts or memoranda of the records or may be used in any other way to the advantage of the governmental entity or of the general public. This section does not supersede or in any manner affect the federal laws governing copyrights or enlarge, diminish or affect in any other manner the rights of a person in any written book or record which is copyrighted pursuant to federal law.

13. Nev. Rev. Stat § 386.230 ("General powers; exceptions") provides:

Each board of trustees is hereby given such reasonable and necessary powers, not conflicting with the Constitution and the laws of the State of Nevada, as may be requisite to attain the ends for which the public schools, excluding charter schools and university schools for profoundly gifted pupils, are established and to promote the welfare of school children, including the establishment and operation of schools and classes deemed necessary and desirable.

14. CCSD Regulation 1212 ("CONFIDENTIAL INFORMATION: ALL EMPLOYEES") provides that "Confidential information concerning all personnel will be safeguarded.

15. CCSD Regulation 4110 pertains to "EMPLOYMENT DISCRIMINATION, HARASSMENT, AND SEXUAL HARASSMENT: ALL EMPLOYEES."

16. The Redacted Records and Additional Records consist of various records regarding Trustee Child.

17. On February 14, 2017, the Court heard oral arguments on the Review-Journal's Petition for Writ of Mandamus.

18. The Court has also performed an in-camera review of the Redacted Records, the Additional Redacted Records, and the unredacted version of both sets of records.

///

///

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II.

ORDER

19. 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[.]" Nev. Rev. Stat. § 239.001(1). To that end, the NPRA must be construed liberally, and any limitation on the public's access to public records must be construed narrowly. Nev. Rev. Stat. § 239.001(2) and § 239.001(3).

20. Unless explicitly confidential, public records are to be made available to the public for inspection or copying. NRS 239.010(1); *Newspapers, Inc. v. Gibbons*, 127 Nev. Adv. Rep. 79, 12 266 P.3d 623, 628 (2011). If a statute explicitly makes a record confidential or privileged, the public entity need not produce it. *Id.* "

21. If a public record contains confidential or privileged information only in part, in response to a request for access to the record, a governmental entity shall redact the confidential information and produce the record in redacted form. Nev. Rev. Stat. § NRS 239.010(3).

22. A petition for Writ of Mandamus is the appropriate vehicle by which to pursue production under the NPRA, where a governmental entity has refused it. *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 884, n.4, 266 P.3d 623, 630, n.4 (2011); *citing DR Partners v. Board of County Comm'rs*, 116 Nev. 616, 620, 6 P.3d 465, 468, *citing* NRS 34.160.

23. A governmental entity seeking to withhold or redact records must prove by a preponderance of evidence that the records are confidential or privileged. *Gibbons*, 127 Nev. at 880, 266 P.3d at 628 (citations omitted).

24. "[I]n the absence of a statutory provision that explicitly declares a record to be confidential, any limitations on disclosure must be based upon a broad balancing of the interests involved, . . . and the state entity bears the burden to prove that its interest in

nondisclosure clearly outweighs the public's interest in access" *Id.* (citing *DR Partners*, 116 Nev. at 622, 6 P.3d at 468).

25. A governmental entity cannot meet its "... burden by voicing non-particularized hypothetical concerns[.]" *DR Partners v. Board of County Comm'rs*, 116 Nev. 616, 628, 6 P.3d 465, 472-73 (2000).

26. In *Reno Newspapers, Inc. v. Gibbons*, the Nevada Supreme Court held that a Vaughn index is not required when the party that requested the documents has enough information to fully argue for the inclusion of documents. 127 Nev. 873, 881-82 (Nev. 2011). The Nevada Supreme Court has also held that if a party has enough facts to present "a full legal argument," a Vaughn index is not needed. *Id.* at 882. However, the Nevada Supreme Court held that a party requesting documents under NPRA is entitled to a log, unless the state entity demonstrates that the requesting party has enough facts to argue the claims of confidentiality. *Id.* at 883. A log provided by a governmental entity should contain a general factual description of each record and a specific explanation for nondisclosure. *Id.* In a footnote, the Nevada Supreme Court notes that a log should provide as much detail as possible, without compromising the alleged secrecy of the documents. *Id.* at n. 3. Finally, attaching a string cite to a boilerplate denial is not sufficient under the NPRA. *Id.* at 885.

27. The Review-Journal does not contest redacting the names of direct victims of sexual harassment or alleged sexual harassment, or the name of students and staff persons that are not administrators being redacted.

28. With regard to CCSD's other proposed redactions, which include the names of schools, teachers, administrators, and program administrators, the Court finds that CCSD failed to meet its burden in demonstrating the existence of an applicable privilege.

29. First, CCSD failed to assert any claim of confidentiality within five (5) days as required by Nev. Rev. Stat. § 239.0107(d).

30. Second, the Revised Log does not sufficiently articulate that the information

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redacted by CCSD is protected by confidentiality. CCSD Regulation 1212 pertains to personnel records, and the parties agree that the records produced are not personnel records. CCSD Regulation 4110 pertains to protections from sexual harassment. To the extent that it is applicable, the parties have agreed that the names of victims of sexual harassment, or alleged sexual harassment, shall be redacted. This also addresses any chilling effect that may occur. Nev. Rev. Stat. § 239.010 and § 386.230 do not provide that the records are confidential.

31. Third, even if CCSD did assert an applicable privilege by a preponderance of the evidence, it failed to articulate the application to each piece of information it sought to redact. *Gibbons*, 127 Nev. at 883, 266 P.3d at 629.

32. Thus, CCSD failed to prove by a preponderance of evidence that the records are confidential or privileged. *Gibbons*, 127 Nev. at 880, 266 P.3d at 628.

33. Fourth, even if it met its burden of establishing the existence of an applicable privilege, CCSD has failed to establish that the interests in secrecy outweigh the interests in disclosure. *See, e.g., Gibbons*, 127 Nev. at Adv. Rep. at 881, 66 P.3d at 628. (citing *DR Partners*, 116 Nev. at 622, 6 P.3d at 468). "[I]n the absence of a statutory provision that explicitly declares a record to be confidential, any limitations on disclosure must be based upon a broad balancing of the interests involved, . . . and the state entity bears the burden to prove that its interest in nondisclosure clearly outweighs the public's interest in access"

34. Accordingly, both because CCSD did not timely assert any claim of confidentiality and because it still has not met its burden in redacting public records, the Court orders CCSD to provide the Review-Journal with new versions of the Redacted Records and Additional Redacted Records, with only the following redactions: ***the names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff.***

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35. **CCSD may not make any other redactions**, and must unredact the names of schools, all administrative-level employees, including but not limited to deans, principals, assistant principals, program coordinators), and teachers.

36. CCSD must comply with this Order within two (2) days.

IT IS SO ORDERED this 22nd day of February, 2017.

HONORABLE JUDGE TIMOTHY C. WILLIAMS

Respectfully submitted,

Margaret A. McLetchie, Nevada State Bar No. 10931
Alina M. Shell, Nevada State Bar No. 11711
MCLETCHIE SHELL, LLC
701 E. Bridger Avenue, Suite 520
Las Vegas, NV 89101
Counsel for Petitioner, Las Vegas Review-Journal

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EXHIBIT 3

DECLARATION OF CEDRIC COLE

I, CEDRIC COLE, declare as follows:

1. I am employed by Clark County School District ("CCSD" or "the District") as the Executive Manager of the Office of Diversity and Affirmative Action Programs / American Disabilities Act Coordinator. I make this declaration based on my personal knowledge and experience. If called as a witness, I could and would competently testify to the facts set forth herein.

2. The Office of Diversity and Affirmative Action is CCSD's Equal Employment Opportunity Office ("EEO"), meaning it is my office's duty to ensure employees are not discriminated against or subjected to a hostile work environment based upon their status in any protected class in accordance with State and Federal laws including but not limited to Title VII of the Civil Rights Act of 1964

3. I have been in my current positon since approximately January 2014. Prior to my current position, I worked for the Nevada Equal Rights Commission as Compliance Investigator for approximately 3 years. I have a Master's Degree in Public Administration from the University of Nevada, Las Vegas.

4. In September 2016, I was directed by Superintendent, Pat Skorkowsky, to investigate the vocalized concerns of employees and members of the community regarding Trustee Child's conduct.

5. The investigation I performed as Executive Manager of the Office of Diversity and Affirmative Action is similar or akin to an investigation conducted by the federal Equal Employment Opportunity Commission and/or Nevada Equal Rights Commission as the purpose of the investigation was to determine if any employees were being subjected to a hostile work environment and what, if any, corrective action is needed to protect the employees.

6. As part of my investigation, I interviewed several employees all of whom but one expressed fears of retaliation from Trustee Child.

7. Most but not all of the employees I spoke with referenced Trustee Child's habit of repeatedly telling them and others that he (Trustee Child) is the "boss" as the basis of their fears of retaliation.

8. At least two of the employees I spoke with orally expressed fears of repressed opportunities for promotions or advancement within the organization as a form of retaliation from Trustee Child.

9. The recommendations in my investigative report dated October 19, 2016, were used as the basis of the Superintendent's action restricting Trustee Child's access requiring written invitations and prior notices to the Superintendent as memorialized in the memorandum titled, "Guidelines for Trustee Visit" dated December 5, 2016.

I declare under penalty of perjury that the foregoing is true and correct.

Dated 4-12-17

Cedric Cole

EXHIBIT 4

CCSD

5100 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89146 • TELEPHONE (702) 799-5000

CLARK COUNTY
SCHOOL DISTRICT

BOARD OF SCHOOL TRUSTEES

[illegible]

[illegible]

November 30, 2016

Kevin L. Child
Member, Clark County School District Board of Trustees
Office of the Board of School Trustees
Clark County School District
5100 W. Sahara Avenue
Las Vegas, Nevada 89146

Dear Mr. Child:

As you know, the Board of School Trustees has adopted principles and policies that delegate full administrative authority for the day-to-day operation of the Clark County School District to the Superintendent and has committed to provide an environment in which the Superintendent and his staff may function effectively on a thoroughly professional basis.

You were counseled on numerous occasions in the last year that your interactions with District employees made them feel uncomfortable, especially women, and that your habit of dropping in on their work environment impeded their ability to perform the duties of their assignment. It was explained to you that your position as a Trustee and your reference to yourself as "The Boss" could make them uncomfortable with telling you that your actions were objectionable. Finally, you were counseled that the District had an obligation to protect its employees from a hostile environment, and your actions were affecting that obligation. You were given guidelines for your actions to ameliorate those concerns.

The District continues to receive reports from staff members of the same type of inappropriate action on which you were counseled over the past year. You are in repeated violation of the guidelines given to you. Because of the District's obligations to its employees, it now must take further action. Accordingly, as the Superintendent with responsibility over the District's employees and facilities, I am directing you as follows:

1. You are not to enter the administrative offices of the District without a specific written invitation, and prior to following that invitation, you must check in with the front desk of the administrative office to confirm that you have an invitation.

2. If you wish to meet with a staff member of the District on official business, you are to schedule that meeting to occur at the offices of the Board of School Trustees.

OFFICE OF THE SUPERINTENDENT

[illegible]

3. You are not to appear at any of the District schools unless it is to attend a function which is open to the public or upon the specific written request of the Superintendent or the administrator with authority over that school. In the event that you receive such an invitation from an administrator, you are to forward a copy of that invitation to the Superintendent in a timely manner.

4. If you fail to comply with these directives, you will be trespassed off the premises.

5. The District retains its rights to take formal legal action against you as necessary to protect the employees of the District from a hostile work environment.

Pat Skorkowsky
Superintendent of Schools
"Every student in every classroom, without exceptions, without excuses"

ps/ec
By hand delivery (11.30.16)

CCSD
CLARK COUNTY
SCHOOL DISTRICT

Office of the Superintendent
INTEROFFICE MEMORANDUM

DATE: December 5, 2016

TO: Members, Executive Cabinet
School Associate Superintendents
Principals, District D Schools
CCSD Administrative Center Staff
Administration, Human Resources Division
Administration, Transportation Department
Administration, Food Service Department
Administration, Instructional Design and Professional Learning Division

FROM: Pat Skorkowsky, Superintendent of Schools

SUBJECT: Guidelines for Trustee Visit

In order to ensure a safe and respectful working environment, the following guidelines have been implemented:

1. Trustee Child will not enter the administrative offices of the District without a specific written invitation, and prior to following that invitation, he must check in with the front desk of the administrative office to confirm his invitation. The Superintendent must be notified via e-mail or by telephone of all invitations prior to the meeting.

2. If Trustee Child wishes to meet with a staff member of the District on official business, he is to schedule that meeting to occur at the offices of the Board of School Trustees. The Superintendent must be notified via e-mail or by telephone of all invitations prior to the meeting

3. Trustee Child is not to appear at any of the District schools unless it is to attend a function which is open to the public or upon the specific written request of the Superintendent or the administrator with authority over that school. In the event that you extend such invitation, you are to forward a copy of that invitation to the Superintendent via e-mail or by telephone in a timely manner

ps/ec
cc: Board of School Trustees

CCSD
CLARK COUNTY
SCHOOL DISTRICT

April 24, 2017

Kevin L. Child
Member, Clark County School District Board of Trustees
Office of the Board of School Trustees
Clark County School District
5100 W. Sahara Avenue
Las Vegas, Nevada 89146

Dear Mr. Child:

This letter is to reaffirm that the restrictions on access to school district facilities, including administrative buildings and school campuses, as detailed in the Superintendent's memorandum to staff dated December 5, 2016, (attached) are still in effect. The letter from the Superintendent to you dated November 30, 2016, (attached) is also still in effect.

In order to provide a respectful and nondisruptive working environment at the Clark County School District Administrative Center, 5100 W. Sahara Avenue, the following guidelines have been implemented:

- In addition to the restrictions in the communications to you referenced above, access to the administrative offices of District staff, with the exception of the offices of the Board of School Trustees and Board Office staff, will be restricted to District staff. If you have an appointment with staff in the building, upon verification with the Board Office, an escort will take you directly to meet with the employee(s). Signs indicating the restricted area shall be posted and access to these restricted areas will be controlled. If you access the restricted staff area without escort, you will be violating the trespass restrictions and may be cited criminally. The District reserves the right to take any other legal action available to it

Sincerely,

Pat Skorkowsky
Superintendent of Schools
"Every student in every classroom, without exceptions, without excuses"

ps/ec
Attachments
By hand delivery

Copy

CCSD

5100 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89146 • TELEPHONE (702) 799-5000

CLARK COUNTY
SCHOOL DISTRICT

BOARD OF SCHOOL TRUSTEES

Dr. Linda E. Young, President
Chris Garvey, Vice President
Patrice Tew, Clerk
Kevin L. Child, Member
Erin E. Cranor, Member
Carolyn Edwards, Member
Deanna L. Wright, Member

Pat Skorkowsky, Superintendent

May 31, 2017

Kevin L. Child
Member, Clark County School District Board of Trustees
Clark County School District
5100 West Sahara Avenue
Las Vegas, Nevada 89146

Dear Trustee Child:

In previous written directives, you have been provided guidance on the terms by which you may access Clark County School District facilities. That guidance and the procedure by which you may be granted access are still in effect and will remain in effect. This guidance serves to provide you notice of additional guidance and procedures for accessing District properties and events.

With regard to school facilities, the current procedure remains in place with the following additions:

- The principal must invite you to events only through the Office of the Superintendent and/or Office of the Board of School Trustees.
- All events must be approved by the Superintendent prior to your acceptance to attend the event. You may then attend the event, but shall not loiter on the facility after the event is complete.
- If approval to an event is denied, there will be no explanation offered.

You must have permission from the Superintendent prior to entering any CCSD central office facility, with the following two exceptions:

1. You may access portions of the Edward A. Greer Education Center building without prior permission, as follows: You may enter in the east side entrance directly into the Board Conference Room. You may go into the Superintendent's Conference Room, the lobby, the lobby restroom, and the Board Room itself. You may not go into the office of Human Resources unless permission is given by the superintendent.

2. You may access portions of the CCSD Administrative Center at 5100 West Sahara Avenue, without prior permission, as follows: You may enter the front doors, sign in, and you will be escorted to your Board of Trustees Office. You must stay in the Board of Trustees area of the floor and the public restroom; you may not go down any hallways outside of that area. You will be escorted out of the building when you are ready to leave.

You may not call or text any CCSD employees directly, with the following exceptions: Superintendent, Deputy Chief of Staff/Liaison to the Board of School Trustees, employees assigned to the Office of the Board of School Trustees and Office of the Superintendent employees. These individuals will obtain for you information and documents that you request to perform your duties as a Trustee. You must have written permission of the Superintendent each time prior to contacting any employee who is not mentioned above.

Sincerely,

Pat Skorkowsky
Superintendent of Schools
"Every student in every classroom without exceptions, without excuses"

EXHIBIT 5

CLARK COUNTY SCHOOL DISTRICT REGULATION

R-4110

EMPLOYMENT DISCRIMINATION, HARASSMENT, AND SEXUAL HARASSMENT: ALL EMPLOYEES

I. The Clark County School District (hereafter the "District") is an equal opportunity employer and does not discriminate in any employment practice on the basis of race, color, sex, age, religion or religious creed, national origin, sexual orientation, gender identity or expression, ancestry, or disability. This regulation extends to recruiting and hiring, working conditions, training, promotion, and terms and conditions of employment.

   A. Unlawful discrimination, harassment, and sexual harassment will not be tolerated.

   B. All employees shall cooperate with the investigation, by the District, of an alleged act of discrimination, harassment, or sexual harassment.

   C. The District will not retaliate against any person who has filed a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing conducted by authorized school district representatives.

II. HARASSMENT

   A. Harassment of an individual constitutes unlawful discrimination when the victim perceives the work environment to be hostile and the harassing conduct is sufficiently pervasive or severe that a reasonable person would find it hostile or abusive.

   B. Whether conduct constitutes unlawful harassment depends on all of the circumstances of the particular case. Examples of conduct that may, depending on the particular circumstances, constitute unlawful harassment include, but are not limited to:

      1. Slurs, epithets, derogatory or degrading comments, threats, or verbal abuse;

      2. Offensive and unwelcome posters, drawings, pictures, or gestures;

      3. Offensive and unwelcome jokes, stories, rumors, or teasing; and

      4. Any other physical, verbal, or visual conduct that has the purpose or effect of unreasonably interfering with the individual's work performance or creating an intimidating, hostile, or offensive work environment.

III. SEXUAL HARASSMENT

A. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute unlawful sexual harassment when:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

2. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

B. Examples of conduct that may, depending on the circumstances, constitute unlawful sexual harassment include, but are not limited to:

1. Sexual assault, coerced intercourse, fondling, patting, pinching, or other actual or attempted unwanted physical touching;

2. Sexual propositions, pressure for sex, or insistent and unwelcome invitations for dates;

3. Slurs, epithets, derogatory or degrading comments, sexual innuendoes or remarks, threats, or verbal abuse of a sexual nature;

4. Offensive and unwelcome posters, drawings, pictures, or gestures;

5. Offensive and unwelcome jokes, stories, rumors, sexual horseplay, ogling, or teasing; and

6. Any other physical, verbal, or visual conduct that is related to the individual's sex and has the purpose or effect of unreasonably interfering with the individual's work performance or creating an intimidating, hostile, or offensive work environment.

C. A harasser may be the victim's supervisor, an agent of the employer, a supervisory employee who does not directly supervise the victim, a non-supervisory employee (coworker), or in some circumstances, even a non-employee.

D. The victim does not have to be the person at whom the unwelcome conduct is directed. It can also be someone who is offended by such conduct when it is directed toward another person. For example, the harassment or sexual harassment of a female (or male) employee may create an intimidating,

hostile, or offensive working environment for another female (or male) coworker or unreasonably interfere with the coworker's work performance.

IV. INTERNAL REPORTING PROCEDURES

A. In the event employees or applicants for employment believe that they have been or are being victimized as the result of discrimination, harassment, or sexual harassment, they may use the complaint procedures contained in this document, or if the alleged act(s) of discrimination, harassment, or sexual harassment is related to a decision(s) made by a supervisor or administrator, the employee may use the appeal procedures contained in CCSD Regulation 4313.

B. Applicants or employees who allege discrimination because of a disability under the provisions of the Americans with Disabilities Act of 1990, or who allege that they require a reasonable accommodation, must make their situation known to their appropriate supervising administrator, the ADA Coordinator for the District (Executive Director, Diversity and Affirmative Action Programs) or the Human Resources Division.

C. Although District employees and applicants are encouraged to avail themselves of this procedure, it is understood they may, at any time during the process or at its completion, seek relief in accordance with the provisions of applicable federal or state statutes.

V. VERBAL COMPLAINT

A. In lodging a verbal complaint, the aggrieved person shall orally present the complaint to his or her immediate supervisor, or if that person is the alleged perpetrator, to the next administrator in line of authority, or to the Executive Manager, Diversity and Affirmation Action Programs. The complaint should be made within a reasonable period of time following the occurrence of the alleged unlawful conduct on which the complaint is based. The complainant shall orally define the nature of the complaint, provide particulars such as names, dates, and a detailed description of the alleged conduct, and state the action desired for resolution.

VI. WRITTEN COMPLAINT

A. All employees or applicants for employment who have complaints regarding alleged discrimination, harassment, or sexual harassment, shall be encouraged to file written complaints with their immediate supervisor or next administrator in line or with the Executive Manager, Diversity and Affirmative Action Programs.

B. The written complaint should be made within a reasonable period of time following the occurrence of the alleged unlawful conduct. It shall be detailed and shall include the following:

1. A description of the events in question and the date(s) of the occurrence(s).

2. The name(s) of the individual(s) involved, including persons responsible and witnesses.

3. The specific alleged unlawful acts which were perpetrated against the complainant and any school district policies or practices which were violated.

4. The desired action for resolution.

5. The complainant shall sign and date the written complaint.

VII. INTERNAL INVESTIGATIVE PROCEDURES

A. In the event an employee or applicant for employment has lodged a complaint regarding alleged discrimination, harassment, or sexual harassment, the complaint shall be handled in the following manner:

1. As soon as possible after receiving an oral or written complaint, the supervising administrator will notify the Executive Manager, Diversity and Affirmative Action Programs, or vice versa if the complainant first provides the oral or written complaint to the Executive Manager, Diversity and Affirmative Action Programs. The Executive Manager, Diversity and Affirmative Action Programs and the supervising administrator will determine who will conduct the investigation.

2. The Executive Manager, Diversity and Affirmative Action Programs or the supervising administrator shall investigate the allegations made by the complainant. The investigator shall, at a minimum, accomplish the following:

a. Review all statements, evidence, and documents currently available in order to become acquainted with the facts of the complaint and to help plan the investigation.

b. Determine the scope of the inquiry.

c. Open and organize an investigative file.

d. Determine potential witnesses and evidence to gather, if any.

e. Determine additional or clarifying information needed, if any.

f. Conduct interviews as necessary.

g. Gather supporting documentation and evidence as necessary.

h. Analyze the evidence.

3. Following the investigation, the Executive Manager, Diversity and Affirmative Action Programs or supervising administrator shall make a determination as to whether the complaint is, in whole or in part, justified or unjustified.

4. If the investigation was conducted by the Executive Manager, Diversity and Affirmative Action Programs, the Manager shall submit a written and/or oral report of his or her findings to the supervising administrator with a written and/or oral recommendation for resolution. The supervising administrator shall take into account the recommendation of the Executive Manager, Diversity and Affirmative Action Programs, and shall take appropriate action.

5. If the investigation was conducted by the supervising administrator, the administrator, after consultation with the Executive Manager, Diversity and Affirmative Action Programs, shall determine the resolution and take appropriate action.

VIII. Employees or applicants who allege discrimination or harassment will not be penalized as a result of their allegations in future consideration for recruitment, hiring, transfer, promotion, and other terms and conditions of employment, and no potential employer will be informed that an employee has filed previous discrimination complaints.

IX. In determining whether the conduct at issue in the alleged complaint constitutes discrimination or harassment, the District will look at the record as a whole and at the totality of the evidence collected. A determination and remedy, if appropriate, will be based on the facts, on a case-by-case basis. Employees found to have engaged in inappropriate conduct will receive discipline up to and including termination.

X. All information gathered by the District in the course of its investigation of an alleged unlawful discriminatory practice will remain confidential except to the extent necessary to conduct an investigation, resolve the complaint, serve other significant needs, or comply with law.

XI. EXTERNAL COMPLAINT PROCEDURES

A. An employee or applicant who believes he or she has suffered discrimination, harassment, or sexual harassment may seek relief through external agency or court proceedings.

B. Individuals who wish to file an external complaint should consult the relevant local, state, or federal agency for information concerning filing periods and requirements and/or seek legal assistance as necessary.

C. The Executive Manager, Diversity and Affirmative Action Programs may determine that it is unnecessary to investigate an internal complaint if any county, state, or federal administrative office, which has jurisdiction to adjudicate complaints of discriminatory practices, has previously made a decision upon the complainant's complaint based upon the same facts and legal theory.

Review Responsibility:	Human Resources and Executive Manager, Diversity and Affirmative Action Programs
Adopted:	[4110; 8-14-90]
Revised:	(10-26-93)
Pol Gov Rev:	6/28/01
Revised:	4/12/12

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL DISTRICT,
Appellant,
vs.
LAS VEGAS REVIEW-JOURNAL,
Respondent.

No. 73525

FILED

JUL 28 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER REGARDING MOTION FOR STAY

This appeal, currently pending before the supreme court, challenges the district court's July 11, 2017,[1] "Order Granting Writ of Mandamus as to Withheld Records." On July 27, 2017, the supreme court transferred appellant's emergency motion for a stay of the challenged order pending appeal to this court for resolution.[2] Shortly thereafter, appellant filed a status report indicating that the district court had denied its motion for stay that had been filed with that court. *See* NRAP 8.

Based on our review of the motion and its attachments, it appears that a response to the motion for stay from respondent would be helpful in this court's resolution of the matter. Accordingly, respondent shall have 7 days from the date of this order to file a response to the motion.

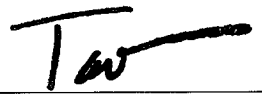
---

[1]In the motion, appellant refers to the order "entered on July 12, 2017." We note that the order attached to the motion is file-stamped on July 11, 2017, with the notice of entry of that order being filed-stamped on July 12, 2017.

[2]All other matters related to this appeal were retained by the supreme court. *See Clark Co. School Dist. v. Las Vegas Review-Journal,* Docket No. 73525 (Order, July 27, 2017); NRAP 17.

See NRAP 27. Appellant shall have 5 days from the date of filing of the response to file any reply in support of the motion. *Id.* Pending receipt and consideration of the response and reply to the motion, we temporarily stay enforcement of the district court's July 11, 2017, Order Granting Writ of Mandamus as to Withheld Records. All filings with this court regarding the pending motion for stay shall be made by facsimile transmission on the appropriate due date, with originals of any such documents submitted by mail.[3]

It is so ORDERED.[4]



_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Timothy C. Williams, District Judge
Clark County School District Legal Department
McLetchie Shell LLC
Eighth District Court Clerk

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[3]The response and reply shall be faxed to the clerk's office at: (775) 684-1601. *See* NRAP 25(a)(2) and (4).

[4]The Honorable Abbi Silver, Chief Judge, voluntarily recused herself from this matter and did not participate in this decision.

Electronically Filed
8/4/2017 2:56 PM
Steven D. Grierson
CLERK OF THE COURT

NEOJ
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Counsel for Petitioner

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CLARK COUNTY SCHOOL DISTRICT, Respondent.	Case No.: A-17-750151-W Dept. No.: XVI **NOTICE OF ENTRY OF ORDER**

NOTICE OF ENTRY OF ORDER

TO: THE PARTIES HERETO AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on the 4th day of August, 2017, an Order Denying Stay was entered in the above-captioned action. A copy of the Order is attached hereto as Exhibit 1.

DATED this 4th day of August, 2017.

/s/ Margaret A. McLetchie
MARGARET A MCLETCHIE, Nevada Bar No. 10931
ALINA M. SHELL, Nevada Bar No. 11711
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CERTIFICATE OF SERVICE

Pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, I hereby certify that on this 4th day of August, 2017, I did cause a true copy of the foregoing NOTICE OF ENTRY OF ORDER in *Las Vegas Review-Journal v. Clark County School District,* Clark County District Court Case No. A-17-750151-W, to be served electronically using the Odyssey File&Serve system, to all parties with an email address on record.

Pursuant to NRCP 5(b)(2)(B) I hereby further certify that on the 4th day of August, 2017, I mailed a true and correct copy of the foregoing NOTICE OF ENTRY OF ORDER by depositing the same in the United States mail, first-class postage pre-paid, to the following:

Carlos McDade, General Counsel
Adam Honey, Asst. General Counsel
Clark County School District
5100 W. Sahara Ave.
Las Vegas, NV 89146
Counsel for Respondent, Clark County School District

/s/ Pharan Burchfield
An Employee of MCLETCHIE SHELL LLC

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EXHIBIT 1

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Steven D. Grierson
CLERK OF THE COURT

ORDR
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CLARK COUNTY SCHOOL DISTRICT, Respondent.	Case No.: A-17-750151-W Dept. No.: XVI **ORDER DENYING STAY**

Clark County School District's Motion to Stay Enforcement of Order Granting Writ of Mandamus as to Withheld Records Pursuant to NRCP 62(c), (d), and (e) Pending Appeal on Order Shortening Time having come on for an additional hearing on June 27, 2017, the Honorable Timothy C. Williams presiding, Petitioner LAS VEGAS REVIEW-JOURNAL ("Review-Journal") appearing by and through its attorney, MARGARET A. MCLETCHIE, and Respondent CLARK COUNTY SCHOOL DISTRICT ("CCSD"), appearing by and through its attorney, CARLOS M. MCDADE, and the Court having read and considered all of the papers and pleadings on file and being fully advised, and good cause appearing therefor, the Court hereby makes the following findings of fact and conclusions of law:

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I. PROCEDURAL HISTORY AND FINDINGS OF FACT

Original Requests; Filing of Action

1. On December 5, 2016, Review-Journal reporter Amelia Pak-Harvey (the "Reporter") sent CCSD a request on behalf of the Review-Journal and pursuant to the Nevada Public Records Act, Nev. Rev. Stat. § 239.001 *et seq.* (the "NPRA") seeking certain documents pertaining to CCSD Trustee Kevin Child; the Reporter supplemented the Request on December 9, 2016 (the "December Requests").

2. After CCSD failed to provide documents or assert any claim of confidentiality pursuant to Nev. Rev. Stat. § 239.0107, the Review-Journal initiated this action on January 26, 2017, requesting expedited consideration pursuant to Nev. Rev. Stat. § 239.011.

Initial Proceedings and February 22, 2017 Order

3. On February 8, 2017, the Court ordered CCSD to either fully produce all the requested records in unredacted form by 12:00 p.m. on Friday, February 10, 2017, or that the matter would proceed to hearing. CCSD did not produce all records in unredacted form. Instead, Starting on February 8, 2017 it began producing some records in redacted form and withheld others. CCSD did not disclose that it had limited the sources it searched for records responsive to the Request or the Supplemental Request.

4. The Court conducted an *in camera* review of the unredacted version of the redacted records provided and then, on February 14, 2017, the Court heard oral argument on the Review-Journal's Petition. Following that hearing, on February 22, 2017, the Court entered an Order granting the Review-Journal's Petition. (*See* February 22, 2017 Order (the "February Order"), *see also* February 23, 2017 Notice of Entry of Order).

5. The Court ordered CCSD to provide the Review-Journal with new versions of records it had produced with only "the names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff" redacted. (*Id.* at ¶ 34.) The Court further specified that "CCSD may not make any other redactions" and must unredact the names of schools, teachers, and all administrative-level employees that were not direct

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victims. (*Id* at ¶ 35.)

6. CCSD did not appeal this order, or seek other relief pertaining to the February Order. To date, CCSD has disclosed 174 pages of documents to the Review-Journal, redacting consistent with the February Order. CCSD has also withheld 102 pages.

February Request, and the Review-Journal's Efforts to Obtain a Privilege Log and Search Information

7. On February 10, 2017, the Review-Journal submitted a new records request to CCSD for certain records pertaining to Mr. Child (the "February Request"). The Review-Journal also offered to work with CCSD to develop searches.

8. On February 17, 2017, CCSD notified the Review-Journal via email that it was unable to provide the records listed in the February Request within the five days mandated by Nev. Rev. Stat. § 239.0107. On March 1, 2017, Review-Journal filed its Amended Petition. On March 3, 2017, CCSD provided some documents in response to the February Request. On March 3, 2017, in a letter to counsel, CCSD stated it had redacted information pertaining to the names of individuals who reported a complaint or concern about Trustee Child, information including potentially identifying information about students, and personal phone numbers. That same day, the Review-Journal requested CCSD provide a log of withheld documents that were responsive to the February Request and also asked CCSD to provide it with search information. CCSD responded to these requests via letter on March 13, 2017. Despite previous requests from the Review-Journal, that was the first time CCSD provided any search term information.

9. In response to the Review-Journal's inquiry regarding what documents were being withheld, CCSD asserted that "the only information that has not been provided is internal information received or gathered by the District in the court of its investigation of an alleged practice of unlawful practice of discrimination, harassment, or hostile work environment which is confidential and not required to be disclosed under the public records law." By email on March 13, 2017, CCSD also stated it was withholding one document—a report prepared by Cedric Cole, CCSD's Executive Manager of Diversity and Affirmative

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Action, regarding an investigation his office had conducted into hostile work environment allegations against Trustee Child (the "Cole Report"). The Review-Journal responded to CCSD by letter on March 21, 2017. In that letter, the Review-Journal requested CCSD conduct additional email searches for responsive records from additional custodians. The Review-Journal requested that CCSD search those records for documents pertaining to the topics outlined in the December and February Requests. The Review-Journal also requested CCSD produce hard copy records from the Diversity and Affirmative Action Program's hard copy file on Trustee Child, as well as any other hard copy file CCSD maintains on Trustee Child that were responsive to the December and February Requests.

10. CCSD declined to produce the Cole Report and other documents created by the Office of Diversity and Affirmative Action Programs; on March 24, 2017, CCSD supplemented its privilege log to reflect that it was withholding records in addition to the records it had previously identified ("3/24/2017 Log"). This 3/24/2017 Log reflected that, in total, CCSD withheld only the following from documents produced in response to the December Requests and the February Request:

> Investigative memoranda prepared by Cedric Cole, CCSD's Executive Manager of Diversity and Affirmative Action, regarding an investigation his office had conducted into hostile work environment allegations against Trustee Child (the "Cole Report") and Mr. Cole's investigative notes.

(*See* Exhibit E to March 29, 2017 Opening Brief in support of Amended Petition for Writ of Mandamus.)

Order Granting Writ of Mandamus as to Jurisdiction and Search Parameters

11. On May 9, 2017, the Court heard oral arguments on the Review-Journal's Amended Petition for Writ of Mandamus. On June 6, 2017, the Court entered an Order granting the Review-Journal's Amended Petition as to the request that CCSD complete additional searches. (June 6, 2017 Order at ¶ 45, ¶ 46.)

12. Further, the Court ordered that, with regard to any documents CCSD had withheld and/or redacted to date and any additional responsive documents it identifies in response to the additional email and hard copy searches it is required to perform but contends

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are confidential and/or privileged, CCSD was to create a single log numbering and identifying each document withheld or redacted (in response to either the December Requests or the February Request) by providing a factual description of each record withheld (by listing to, from, date, and general subject) as well as a specific explanation for non-disclosure for each document withheld or redacted (including confidentiality being claimed, and basis for claim). The Court further ordered that the log must provide sufficient information to the Las Vegas Review-Journal to meaningfully contest each claim of confidentiality asserted. The Court ordered CCSD to provide the final privilege log to the Court by May 30, 2017, along with all redacted documents and documents being withheld for an *in camera* review. The Court also directed CCSD to provide a copy of the privilege log to the Las Vegas Review-Journal. (June 6, 2017 Order at ¶ 47.)

July 12 Order

13. On May 30, 2017, CCSD submitted the redacted and documents it was withholding (the "Withheld Records") to the Court for *in camera* review. It additionally provided the Court with two certifications and a privilege log. ("Final Log")

14. Unbeknownst to the Court, and despite its representation to the undersigned, CCSD counsel did not provide a copy of either of these documents to the Review-Journal at that time. At a hearing held on June 6, 2017 the Court made clear it has expected CCSD to engage in the routine practice of providing privilege logs and certifications to opposing counsel in conjunction with *in camera* submissions. At the hearing, CCSD counsel did finally provide a copy of the Final Log and, later that day, provided copies of the certifications it had provided to the Court a week earlier.

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15. In the Final Log, CCSD stated it is withholding the following documents in their entirety on the basis of the privileges it describes as "Office of Diversity and Affirmative Action Privileges:"

- CCSD 034-060; and
- CCSD 0159-0233.

In the Final Log, CCSD has summarized these documents as follows:

> To the best of CCSD's knowledge, the only information that has not been provided to Petitioner is internal information received or gathered by Cedric Cole, Executive Director, Office of Diversity and Affirmative Action, in the course of his investigation regarding Trustee Child ...

(Exh. GG to June 13, 2017 Review-Journal Memorandum at LVRJ007.)

16. The Final Log also cites CCSD Regulation 4110(X) to justify non-disclosure of the 102 pages of documents it is withholding. That Regulation states that

> All information gathered by the District in the course of its investigation of an alleged unlawful discriminatory practice will remain confidential except to the extent necessary to conduct an investigation, resolve the complaint, serve other significant needs, or comply with law.

(*Id.* at LVRJ022.)

17. CCSD also claims that the NPRA does not require the release of confidential employee personnel information. (*Id.* at LVRJ023.) In addition, CCSD claims in its Final Log that the records of its investigation of Trustee Child should be kept confidential pursuant to Title VII and guidance from the Equal Opportunity Employment Commission ("EEOC"). (*Id.* at LVRJ019-LVRJ021.) CCSD also claims that withheld internal information it obtained during its investigation of allegations of discrimination or harassment by Trustee Child is subject to the deliberative process privilege because the information "was used as part of the deliberative and decision-making process of District executives" in crafting the Cole Memorandum. (*Id.* at LVRJ023.) CCSD asserts that any withheld information which might constitute "worksheets, drafts, informal notes, or ad hoc reports," it qualifies as "nonrecord material" under NAC 239.051. (*Id.*)

18. The Review-Journal submitted a Memorandum responding to CCSD's Final Log on June 13, 2017.

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19. This Court held a hearing on CCSD's Final Log and May 30, 2017 *in camera* submission on June 27, 2017.

20. At that hearing, CCSD asserted for the first time that in addition to the privileges asserted in its Final Log, Chapter 233 of the Nevada Revised Statutes—which provides for the creation and regulation of the Nevada Equal Rights Commission—applied to investigations conducted by CCSD's Office of Diversity and Affirmative Action. Specifically, CCSD asserted at the hearing that information pertaining to investigation of allegations against Trustee Child must be kept confidential pursuant to Nev. Rev. Stat. § 233.190.

21. On July 12, 2017 an Order was entered ordering CCSD to produce the Withheld Records, but allowing CCSD to make redaction consistent with the February Order. CCSD is explicitly permitted to redact the "names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff." (*See* February 23, 2017 Order at ¶ 34; *see also* July 12, 2017 Order at ¶ 88 (permitting CCSD to redact names consistent with the February 23, 2017 Order).) The Court further specified that "CCSD may not make any other redactions" and must unredact the names of schools, teachers, and all administrative-level employees that were not direct victims. (*See* February 23, 2017 Order at ¶ 35; *see also* July 12, 2017 Order at ¶ 88 (permitting CCSD to redact names consistent with the February 23, 2017 Order).)

Appeal and Motion to Stay

22. On July 12, 2017, CCSD filed a Motion to Stay Enforcement of Order Granting Writ of Mandamus as to Withheld Records Pursuant to NRCP 62(c), (d), and (e) Pending Appeal on Order Shortening Time.

23. On July 12, 2017, CCSD also filed a Notice of Appeal to the Nevada Supreme Court.

24. On July 19, 2017, Review-Journal filed its Opposition to Motion to Stay Enforcement of Order Granting Writ of Mandamus as to Withheld Records Pursuant to NRCP 62(c), (d), and (e) Pending Appeal on Order Shortening Time.

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25. On July 21, 2017, CCSD filed its Reply in Support of Motion to Stay Enforcement of Order Granting Writ of Mandamus as to Withheld Records Pursuant to NRCP 62(c), (d), and (e) Pending Appeal on Order Shortening Time.

26. Only July, 27, 2017, this Court heard and decided on the Motion to Stay Enforcement of Order Granting Writ of Mandamus as to Withheld Records Pursuant to NRCP 62(c), (d), and (e) Pending Appeal on Order Shortening Time.

II. ORDER

27. This Court must consider four factors in deciding whether to issue a stay: (1) "whether the object of the appeal will be defeated if the stay is denied;" (2) "whether appellant will suffer irreparable or serious injury if the stay is denied;" (3) "whether respondent will suffer irreparable or serious injury if the stay is granted;" and (4) "whether appellant is likely to prevail on the merits in the appeal." Nev. R. App. P. 8(c); *accord Hansen v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000); *accord Mikohn Gaming Corp. v. McCrea,* 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). In addition, as the United States Supreme Court has held, courts must also consider "where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (citations omitted); *accord NML Capital, Ltd. v. Republic of Argentina*, No. 2:14-CV-492-RFB-VCF, 2015 WL 3489684, at *4 (D. Nev. June 3, 2015).

28. The Nevada Supreme Court has "not indicated that any one factor carries more weight than the others," and instead "recognizes that if one or two factors are especially strong, they may counterbalance other weak factors. *Mikohn Gaming Corp.*, 120 Nev. at 251, 89 P.3d at 38 (citing *Hansen*, 116 Nev. 650, 6 P.3d 982 (2000)).

29. After considering the four factors set forth in NRAP 8(c), the Court finds that CCSD has not established that a stay is warranted.

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1. The Object of CCSD's Appeal Will Not Be Defeated.

30. First, the Court finds that the object of the appeal will not be defeated if a stay is denied.

31. CCSD, which has already provided some documents pertaining to Trustee Child pursuant to the same parameters set forth in this Court's most recent order, has repeatedly emphasized that appellate review of this Court's decision is necessary to address the policy question of whether public employees should be able to raise concerns of all forms of sexual harassment and discriminatory conduct without fear that information concerning those complaints becomes public. CCSD may still seek this relief without a stay. As the Nevada Supreme Court has explained in the context of an appeal addressing whether payment of a monetary judgment pending an appeal renders the appeal moot, "payment of a judgment only waives the right to appeal or renders the matter moot when the payment is intended to compromise or settle the matter." *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 265, 71 P.3d 1258, 1261 (2003); *accord Jones v. McDaniel*, 717 F.3d 1062, 1069 (9th Cir. 2013). Under this precedent, compliance with the Court's Order would not moot CCSD's appeal.

2. CCSD Will Not Suffer Serious or Irreparable Injury if a Stay is Denied.

32. The Court finds that CCSD will not suffer serious or irreparable harm if a stay is denied.

33. The Court emphasizes that CCSD is not required to reveal the identities of any victims of sexual harassment. As noted above, CCSD is explicitly permitted to redact the "names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff." (*See* February 23, 2017 Order at ¶ 34; *see also* July 12, 2017 Order at ¶ 88 (permitting CCSD to redact names consistent with the February 23, 2017 Order.))

34. The United States Supreme Court has held that the ***mere possibility*** of irreparable injury is not sufficient to warrant a stay. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (citing *Winter v. Natural Res. Def. Council Inc.*, 555 U.S. 7, 22 (2008)); *accord In re R & S St. Rose Lenders, LLC*, No. 2:17-CV-01322-MMD, 2017 WL 2405368, at *3 (D. Nev.

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June 2, 2017).

35. CCSD has not established that irreparable harm will occur in the interim if it complies with the July 12 Order, for the same reasons that it failed to meet its burden of establishing that the withheld records are not subject to the NPRA. If a governmental entity seeks to withhold a document that is not explicitly made confidential by statute, it must prove by a preponderance of the evidence that the records are confidential or privileged, and must also prove by a preponderance of the evidence that the interest in nondisclosure outweighs the strong presumption in favor public access. *See, e.g., Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011); *see also Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630, 635, 798 P.2d 144, 147–48 (1990). In balancing those interests, "the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference." *DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) (quoting *MacEwan v. Holm*, 226 Or. 27, 359 P.2d 413, 421–22 (1961)). The Nevada Supreme Court has made clear that a governmental entity seeking to justify a claim of confidentiality cannot do so by offering hypothetical scenarios in which disclosure of the document could present some harm, either to the entity or to another: "'it is insufficient [for the public entity] to hypothesize cases where secrecy might prevail and then contend that the hypothetical controls all cases[.]'" *DR Partners,* 116 Nev. at 628 (quoting *Star Pub. Co. v. Parks*, 875 P.2d 837, 838 (Ariz. Ct. App. 1993)). CCSD has not provided evidence to meet this burden.

36. The Court also notes the NPRA's mandate that a governmental entity cannot resist disclosure of public records which contain confidential information "if the governmental entity can redact, delete, conceal or separate the confidential information from the information included in the public book or record that is not otherwise confidential." Nev. Rev. Stat. § 239.010(3). CCSD has not met it burden of establishing what redactions cannot address its concerns.

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37. CCSD has submitted a declaration in this matter, which provides:

> As part of my investigation, I interviewed several employees all of whom but one expressed fears of retaliation from Trustee Child.
>
> Most but not all of the employees I spoke with referenced Trustee Child's habit of repeatedly telling them and others that he (Trustee Child) is the "boss" as the basis of their fears of retaliation.
>
> At least two of the employees I spoke with orally expressed fears of repressed opportunities for promotions or advancement within the organization as a form of retaliation from Trustee Child.

Declaration of Cedric Cole (*see* Exhibit 5 to CCSD's Motion to Stay Enforcement of Order Granting Writ of Mandamus as to Withheld Records Pursuant to NRCP 62(c), (d) & (e) Pending Appeal on Order Shortening Time, at ¶¶ 6-8.)

38. At the hearing conducted in this matter, CCSD counsel also contended that the documents it submitted *in camera* established that employees feared retaliation.

39. Neither the conclusory, hearsay assertions in the declaration nor the *in camera* submissions constitute evidence sufficient to establish CCSD's burden in withholding records under the NPRA. They also do not merit a stay.

40. **A stay is not needed to encourage CCSD employees to report in the future.**

41. CCSD argues that other employees may be less likely to report in the future if it does not receive a stay, and that this constitutes irreparable harm. As noted above, the policy issues at hand can still be resolved by the Supreme Court.

42. CCSD's argument that other employees will not come forward to make complaints if the records are produced is too speculative to warrant a stay.

43. The possibility of injury articulated by CCSD is contradicted by the record in this case. As noted above, to date, CCSD has disclosed 174 pages of public records relating to Trustee Child's alleged misbehavior. (July 11, 2017 Order, ¶ 59.) CCSD has not—and cannot—present any evidence that the release of these public records has resulted in the supposed injury CCSD fears.

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44. **A stay is also not needed to protect against retaliation.** To support its claim of irreparable harm, CCSD has also asserted that it is "not possible to redact enough information to protect an employee who is either a victim or witness from retaliation." (Motion at p. 7:9-11.) This contention is speculative and unsupported, and does not merit a stay. As noted above, for example, CCSD, must redact instead of withhold wherever possible and it has failed to explain why redacting would not meet its concerns.

45. Further, while CCSD has argued that secrecy is necessary to protect employees against retaliation by Trustee Child, Trustee Child is not a supervisor of any employees. Instead, he is only one of seven (7) trustees on the CCSD Board of Trustees. Even if the Board of Trustees has the power to make any decisions about employment of any of the persons who complained about Trustee Child, which CCSD has not established, CCSD's argument assumes that Trustee Child could convince other trustees to conspire with him to retaliate against administrators who may have discussed concerns with his behavior.

46. Finally, the Court also notes that CCSD did not timely provide the Review-Journal with information in response to the NPRA requests it first made in December, resisted providing information, resisted providing information to the Review-Journal about what it was withholding and why before and after litigation commenced, and that the final log it submitted to this Court with *in camera* documents failed to establish any claims of confidentiality with specificity. It would subvert the purpose of the NPRA to allow a governmental entity to fail to meet its burden of timely asserting claims of confidentiality, and to delay responding to NPRA requests and related information, only to then claim it will face irreparable harm if it is required to produce the documents during the pendency of the appeal.

47. CCSD has not established that it will face irreparable harm without a stay.

3. The Review-Journal—and the Public—Would Suffer Serious Injury If a Stay Were Granted.

48. If the Court entered a stay, the Review-Journal and the broader public would suffer injury in two respects. First, on a broader level, the entry of a stay would subvert the

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NPRA's intent to permit expeditious access to public records. Second, the Review-Journal and the public would be injured by the continued withholding of the documents because the full extent of Trustee Child's alleged misconduct and CCSD's response to that misconduct is not known.

49. The legislative intent underpinning the NPRA is to foster democratic principles by ensuring easy and expeditious access to public records. Nev. Rev. Stat. § 239.001(1); *Gibbons*, 127 Nev. at 878, 266 P.3d at 626 (holding that "the provisions of the NPRA are designed to promote government transparency and accountability").

50. The legislative interest in swift disclosure is woven throughout the NPRA. For example, Nev. Rev. Stat. § 239.0107(1) mandates that, by not later than the end of the fifth business day after receiving a records request, a governmental entity must either (1) make the records available; (2) if the entity does not have custody of the requested records, notify the requester of that fact and direct them to the appropriate government entity; (3) if the records are not available by the end of the fifth business day, provide notice of that fact and a date when the records will be available; or (4) if the records or any part of the records are confidential, provide the requestor with notice of that fact and a citation to the statute or law making the records confidential. Nev. Rev. Stat. § 239.0107(1)(a)-(d).

51. In addition to this timely notification and disclosure scheme, the NPRA specifically provides for expedited court consideration of a governmental entity's denial of a records request. *See* Nev. Rev. Stat. § 239.011(2) (mandating that a court give an application for public records "priority over other civil matters"). Thus, the NPRA is designed to provide quick access to withheld public records, not to reward non-compliance, hiding of information, and delay.

52. As to CCSD's argument that this matter is not time sensitive because the Review-Journal "already knows the nature" of the allegations against Trustee Child's and CCSD's response, knowing the "nature" of what Trustee Child allegedly did and how CCSD responded does not comport with the NPRA's goal of promoting transparency and accountability. However, all records of governmental entities are presumed public and the

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public is entitled access to any records that are not confidential, not just the records the governmental entity decides suffices.

53. Here, the Review-Journal is entitled to report on, and the public is entitled to fully assess, the actions of its elected official and how CCSD handled the accusations levied against the trustee.

54. The Review-Journal, as a newspaper, has already faced delays due to CCSD's failure to promptly respond to requests and it should not be subjected to further delays in its reporting.

4. CCSD is Unlikely to Prevail.

55. For the reasons set forth in the July 12 Order, CCSD is unlikely to prevail on the appeal, and this factor weighs against a stay.

56. In accordance with the presumption of openness and "emphasis on disclosure,"[1] that underpins the NPRA, both the Act itself and the Nevada Supreme Court place a high burden on a governmental entity to justify non-disclosure. First, the law requires that, if a governmental entity seeks to withhold or redact a public record in its control it must prove by a preponderance of the evidence that the record or portion thereof that it seeks to redact is confidential. See Nev. Rev. Stat. § 239.0113; *see also Gibbons*, 127 Nev. at 882, 266 P.3d at 629; *accord Nevada Policy Research Inst., Inc. v. Clark Cty. Sch. Dist.*, No. 64040, 2015 WL 3489473, at *2 (D. Nev. May 29, 2015). As a general matter, "[i]t is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly." *DR Partner.*, 116 Nev. at 621, 6 P.3d at 468 (citing *Ashokan v. State, Dept. of Ins.*, 109 Nev. 662, 668, 856 P.2d 244, 247 (1993)). This is especially so in the public records context: pursuant to the mandates of the NPRA, any restriction on disclosure "must be construed narrowly." Nev. Rev. Stat. § 239.001(2)-(3). Second, after establishing the existence of the privilege it asserts and applying it narrowly, unless the privilege is

[1] *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 882, 266 P.3d 623, 629 (2011) ("[T]he provisions of the NPRA place an unmistakable emphasis on disclosure").

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absolute, the governmental entity bears the burden of establishing that the interest in withholding documents outweighs the interest in disclosure pursuant to the balancing test first articulated in *Donrey of Nevada v. Bradshaw,* 106 Nev. 630, 798 P.2d 144 (1990). *See DR Partners,* 116 Nev. at 621, 6 P.3d at 468 ("Unless a statute provides an absolute privilege against disclosure, the burden of establishing the application of a privilege based upon confidentiality can only be satisfied pursuant to a balancing of interests."); *see also Gibbons,* 127 Nev. at 879, 266 P.3d at 627 ("...when the requested record is not explicitly made confidential by a statute, the balancing test set forth in *Bradshaw* must be employed" and "any limitation on the general disclosure requirements of Nev. Rev. Stat. § 239.010 must be based upon a balancing or 'weighing' of the interests of non-disclosure against the general policy in favor of open government").

57. CCSD did not meet its burden in this instance, and is unlikely to demonstrate that the presumptively public records at issue in this case should be kept confidential on appeal for the reasons set forth in the July 12 Order, and below.

5. Title VII Does Not Provide for Blanket Protection.

58. CCSD's first argument is that its *Burlington/Faragher* duties under Title VII permit it to withhold the requested public records. CCSD asserts that as part of its duty under Title VII, it is required to keep the Cole Report confidential. Its sole authority for this position is EEOC Notice 915.002, Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors. CCSD asserts that it does not need to release the withheld documents because the EEOC Notice advises that "information about the allegation of harassment should be shared only with those who need to know about it," and "[r]ecords relating to harassment complaints should be kept confidential on the same basis." However, the admonition CCSD relies on falls under the heading "Policy and Complaint Procedures." Indeed, the entire EEOC Notice provides guidance on how to conduct investigations and otherwise act to avoid vicarious liability for sexual harassment. See EEOC Notice 915.002. Thus, while it is true that during investigations information is not to be disseminated, here

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the investigation is complete. Accordingly, Notice 915.002 is of little moment here.

59. Additionally, CCSD has not established that Notice 915.002 applies to CCSD's investigation of Trustee Child, as Trustee Child is not a "supervisor" of any CCSD employee, and CCCSD has failed to establish he is in any case. Notice 915.002 provide s that "[a]n individual qualifies as an employee's 'supervisor" only if:

- the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or
- the individual has authority to direct the employee's daily work activities.

EEOC Notice 9.15002, § III(A). The United States Supreme Court has refined this definition, holding that "an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim." *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013); *see also Baldenegro v. Tutor-Saliba Corp.*, No. 2:11-CV-00714-JCM, 2013 WL 459203, at *5 (D. Nev. Feb. 4, 2013) ("An individual will qualify as a supervisor for purposes of imputing liability for sexual harassment onto an employer when that individual has the power and authority to directly affect the terms and conditions of the plaintiff's employment, i.e. the authority to make decisions affecting the plaintiff with regard to hiring, firing, promotion, discipline, or reassignment to significantly different duties.") (citations omitted).

60. CCSD has not established that Trustee Child is a supervisor of any CCSD employee. Trustee Child is only one of seven (7) elected school board trustees.

61. Other courts which have addressed this issue have found that records pertaining to school districts' investigations and findings of sexual harassment are public records. *See, e.g., Marken v. Santa Monica-Malibu Unified Sch. Dist.*, 202 Cal. App. 4th 1250, 136 Cal. Rptr. 3d 395 (Cal. App. 2012) (finding that release of an investigation report and disciplinary record of a sexually harassing teacher was warranted under California's public records act due to the public's right to know, even where an explicit privacy statute was also implicated); *Deseret News Pub. Co. v. Salt Lake County*, 182 P.3d 372, 27 IER Cases 1099 (Utah 2008) (holding that a sexual harassment investigation report should be

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produced because the report "provides a window ... into the conduct of public officials.").

62. Even if CCSD established the applicability of a privilege, it has not demonstrated why redaction of identifying information consistent with the Court's February Order would not address its concerns about protecting complainants' privacy.

63. Accordingly, CCSD is unlikely to prevail on appeal under this theory.

6. CCSD Has Not Established That Its Internal Regulations Merit Non-disclosure.

64. CCSD argues that it is likely to prevail on appeal because CCSD Regulation 4110(X) carries the force of law, and requires information gathered during an investigation of an alleged discriminatory practice must be kept confidential. This argument is not likely to prevail.

65. First, the Court cannot apply Regulation 4110(X0 in a manner that conflicts with the NPRA. Second, CCSD's internal regulations do not carry the force of law. As CCSD Policy 0101 states, "the purpose of these Policies and Regulations is to provide directions regarding the details of District Operations. Policies are more general principles, while Regulations contain specific details and procedures." Third, it is unclear that the Regulation applies. Fourth, Regulation 4110(X) specifically contemplates that the confidentiality of investigative information is not absolute. Specifically, information gathered during an investigation may be disclosed to, *inter alia*, "serve other significant needs [] or comply with law." In this case, disclosure of the documents serves the "significant need[]" of providing information to the public regarding the alleged misconduct of an elected official and CCSD's handling of the related investigation. Disclosure of the withheld documents is also necessary to "comply with law"—specifically, to comply with the NPRA.

66. Accordingly, CCSD is unlikely to prevail on its argument that its internal policy renders the requested records confidential.

7. The Deliberative Process Privilege Does Not Justify Withholding.

67. In *DR Partners v. Board of County Commissioners of Clark County*, 116 Nev. 616, 6 P.3d 465 (2000), the Nevada Supreme Court explained that the deliberative

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process privilege allows governmental entities to conceal public records if the entity can prove that the relevant public records were part of a predecisional and deliberative process that led to a *specific decision or policy*. 116 Nev. 616, 623. "To establish that [the requested records] are 'predecisional,' the [governmental entity] must identify an agency decision or policy to which the documents contributed." *Id.* (citation omitted; emphasis added); *see also Nevada v. U.S. DOE*, 517 F. Supp. 2d 1245 (D. Nev. 2007) (noting that the "deliberative process privilege" applies to draft documents that involve "significant policy decisions").

68. To determine whether a document is predecisional, a court "must be able to pinpoint an agency decision or policy to which these documents contributed. The agency bears the burden of establishing the character of the decision, the deliberative process involved, and the role played by the documents in the course of that process." *Id.* (quoting *Paisley v. C.I.A.*, 712 F.2d 686, 698 (D.C.Cir.1983)). As the Supreme Court explained in *Gibbons*, "state entity cannot meet this burden with a non-particularized showing." *Gibbons*, 127 Nev. at 880, 266 P.3d at 628. (citing *DR Partners*, 116 Nev. at 627–28, 6 P.3d at 472–73).

69. Here, CCSD asserts that the entire investigative file of CCSD's Office of Diversity and Affirmative Action is subject to the deliberative process privilege because it contains information that formed the basis for Mr. Cole's recommendations to Superintendent Pat Skorkowsky in the Cole Memorandum. This does not satisfy the particularized showing requirement articulated by *DR Partners*.

70. Even if this Court were to find CCSD established that the deliberative process applies to some or all of the documents requested by the Review-Journal, that privilege is conditional, and the public's interest in accessing the documents outweighs CCSD's interest in preventing their disclosure. As explained in *DR Partners*:

> Once the court determines that a document is privileged, it must still determine whether the document should be withheld. Unlike some other branches of the executive privilege, the deliberative process privilege is a qualified privilege. Once the agency demonstrates that documents fit within it, the burden shifts to the party seeking disclosure. It must demonstrate that

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its need for the information outweighs the regulatory interest in preventing disclosure.

DR Partners, 116 Nev. at 626, 6 P.3d at 471 (quoting *Capital Info. Group v. Office of the Governor*, 923 P.2d 29, 36 (Alaska 1996)) (other citations omitted). The Review-Journal has met this burden. Trustee Child is an elected official charged with making important decisions about the administration of one of the largest school districts in the country. Trustee Child's alleged behavior towards CCSD students, teachers, administrators, and other employees indicate that Trustee Child may not be the sort of official who should be entrusted with this responsibility. Thus, to the extent the deliberative process privilege applies to any part of the withheld records, the public's interest in this information outweighs any interest in continuing to withhold the documents.

71. CCSD is therefore unlikely to prevail on its deliberative process privilege argument.

8. The Donrey Balancing Test Weighs in Favor of Disclosure.

72. In addition to first establishing by a preponderance of the evidence that the records are confidential, CCSD also bears the burden in this case of establishing that the interest in withholding documents outweighs the interest in disclosure pursuant to the balancing test first articulated in *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990); *see also DR Partners*, 116 Nev. at 621, 6 P.3d at 468. ("Unless a statute provides an absolute privilege against disclosure, the burden of establishing the application of a privilege based upon confidentiality can only be satisfied pursuant to a balancing of interests.") CCSD has not met its burden of establishing that any of the its asserted rationales for withholding the records outweighs the strong interest in disclosure in this case.

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73. The NPRA and the case law interpreting its provisions emphasize the public interest lies with disclosure of the public records and notes the importance of access in the instant case, which involves misconduct by an elected governmental official. If a complaint is lodged against a public official, it is presumptively a public record and the public has a right to right to know about the complaint. CCSD has the burden of establishing otherwise, and it has not done so. Likewise, it has not established that a stay is warranted.

74. **Accordingly, the Court hereby denies CCSD's Motion.**

IT IS SO ORDERED this 3rd day of august, 2017.

HONORABLE JUDGE TIMOTHY C. WILLIAMS

Respectfully submitted,

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