IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL DISTRICT Appellant, vs. THE LAS VEGAS REVIEW-JOURNAL, Respondent.	Electronically Filed Nov 08 2018 09:09 a.m. Elizabeth A. Brown Clerk of Supreme Court CASE NO.: 75534

RESPONDENT'S ANSWERING BRIEF

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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NRAP 26.1 DISCLOSURE

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

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

The law firm whose partners or associates have or are expected to appear for the Las Vegas Review-Journal is MCLETCHIE LAW GROUP, PLLC.

DATED this 7th day of November, 2018.

/s/ Margaret A. McLetchie
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B. Whether the district properly declined to consider legislative history pertaining to Nev. Rev. Stat. § 239.012 on the basis that Nev. Rev. Stat. § 239.011(2) is unambiguous and clear.

C. Whether the legislative history, even if properly before the Court, supports CCSD's position.

D. Whether the district court properly denied the Clark County School District ("CCSD") immunity under Nev. Rev. Stat. § 239.012 from paying the Review-Journal's attorney's fees and costs.

II. STATEMENT OF THE CASE

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

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

fees in this case when its refusals to comply with NPRA requests and litigation tactics necessitated extensive litigation would undermine the purpose of the NPRA and deter access to public records and, thus, transparency.

The NPRA is clear: when a member of the public is forced to hire an attorney to go to court to obtain public records from a governmental entity, the governmental entity should bear the requester's legal expenses. This furthers the NPRA's overarching mandate of transparency[2] by incentivizing governmental entities to comply with requests in a timely manner that does not necessitate the district court's intervention. Without this provision, intransigent government agencies such as CCSD—which essentially ignored NRPA requests until the Review-Journal filed suit—could easily defeat the purpose of the NPRA by forcing members of the public to incur the costs associated with court actions. Further, the Fees Provision renders the enforcement mechanism in Nev. Rev. Stat. § 239.011(1), which allows for court actions to enforce the NPRA, meaningful and feasible for requesters. Allowing prevailing requesters to obtain fees and costs is the correct interpretation of the NPRA—and the only interpretation that is consistent with its mandates and the Legislature's intent. Indeed, CCSD's attempt to read the Fees Provision out of the

[2] The purpose of the NPRA is "to foster democratic principles" by ensuring government records are available to the public. Nev. Rev. Stat. § 239.001(1). Further, its terms—including the Fees Provision—must be construed liberally in favor of access to further this "important purpose." Nev. Rev. Stat. § 239.001(2).

NPRA would undermine the Act itself.

Despite all this—and the central facts that the language of the NPRA and the mandate to interpret the NPRA's provisions liberally (and in favor of access) are crystal clear—CCSD wants this Court to render the NPRA's unambiguous Fees Provision meaningless by engrafting onto it a wholly separate provision of the NPRA.

Although the NPRA immunizes public employees and officials (and their employers) from ***damages*** pursuant to Nev. Rev. Stat. § 239.012 (the "Immunity Provision") if they act in good faith in disclosing or refusing to disclose records, that does not obviate the Fees Provision, which separately and plainly provides for ***attorney's fees and costs***. In the separate Fees Provision, the NPRA mandates that if the "requester prevails, the requester is ***entitled to*** recover his or her costs and reasonable attorney's fees in the proceeding from the governmental entity whose officer has custody of the book or record." Nev. Rev. Stat. § 239.011(2) (emphasis added). The Fees Provision's entitlement is not premised on anything but prevailing in public records litigation, which the Review-Journal did. The district court agreed, and this Court should affirm its decision and reject CCSD's arguments for multiple reasons.

First, the district court properly interpreted the Fees Provision to have a distinct and separate purpose from the Immunity Provision. The Fees Provision of

the NPRA allows for the recovery of attorney's fees from a government agency when the agency fails to produce public records, gets taken to court and loses. The Immunity Provision, on the other hand, immunizes employees from liability for damages that arise out of disclosing or refusing to disclose public records when the employee acts in good faith. While multiple statutory provisions within a statutory scheme should be construed together, non-conflicting provisions with different purposes should not be haphazardly conflated. This Court, and several other courts, have held that attorney's fees are not the same as damages.[3] The only "conflict" or "ambiguity" between these provisions is the product of CCSD's tortured mental gymnastics, a desperate ploy to escape paying the attorney's fees and costs CCSD forced the Review-Journal to incur by withholding public records. Nev. Rev. Stat. §§ 239.011(2) and 239.012 concern completely different things. Therefore, this Court should affirm the district court's holding that the Fees Provision means exactly what it says—a prevailing requester is ***entitled*** to attorney's fees and costs.

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

Second, the district court properly concluded that the Immunity Provision does not provide immunity to CCSD for attorney's fees because, as noted above, attorney's fees are different from damages. CCSD's expansive interpretation of "damages" is not supported by any Nevada statute or case law. Furthermore, keeping attorney's fees and damages distinct would not make the Immunity Provision a "nullity," as CCSD argues. (Appellant's Opening Brief ("OB"), p. 14.) That CCSD cannot conceive of a situation where a requester (or a third party) could seek damages other than attorney's fees (OB, p. 14) does not mean that such a situation is impossible, or even improbable. Indeed, interpreting the "damages" discussed in Nev. Rev. Stat. § 239.012 to include attorney's fees would essentially render Nev. Rev. Stat. § 239.011(b) a nullity by conditioning an entitlement to attorney's fees and costs on a finding of bad faith, which, as evidenced in this case, district courts are reluctant to make despite ample evidence of a governmental entity's obstinance in producing public records.

Third, the district court properly refused to examine the legislative history of the NPRA in holding that the Review-Journal is entitled to attorney's fees and costs under the plain language of the Fees Provision, and CCSD is not protected from paying those fees and costs under the Immunity Provision. However, even if the district court did examine the legislative history of the NPRA to interpret the Fees Provision and the Immunity Provision, it would have found that the legislature

intended to ensure that requesters who prevail in court against a governmental entity could recoup their attorney's fees and costs.

Fourth and finally, even if the Immunity Provision applied to attorney's fees and costs as CCSD dreams it does, CCSD would not be entitled to rely on it. Good faith is an affirmative defense, and the defendant asserting it must prove its elements. Although the district court preliminary held that it did not find that CCSD did not act in bad faith, CCSD has not carried its burden in establishing that it acted in good faith. Therefore, even if this Court adopts CCSD's arguments as to good faith, the Court should remand this matter to the district court for an evidentiary hearing.

III. THE NPRA MANDATES LIBERAL CONSTRUCTION

The NPRA is a comprehensive body of legislation intended to facilitate public access to governmental records. As briefly noted above, the overarching purpose of the NPRA is to "foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law." Nev. Rev. Stat. § 239.001(1). To facilitate that fundamental purpose, the NPRA must be construed liberally, government records are presumed public records subject to the act, and any limitation on the public's access to public records must be construed narrowly. Nev. Rev. Stat. § 239.001(2)-(3). As this Court has explained, "the provisions of the NPRA ***place an unmistakable emphasis on disclosure.***" *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 882, 266 P.3d 623,

629 (2011) (emphasis added).

Every provision of the NPRA "must be construed liberally" to facilitate access to public records,[4] and any privileges and limitations on disclosure must be construed narrowly.[5] Moreover, "[i]t is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly." *DR Partners v. Bd. of Cty. Comm'rs. of Clark Cty.*, 116 Nev. 616, 6 P.3d 465, 468 (2000). This is especially so in the public records context: as noted above, any restriction on disclosure "must be construed narrowly." Nev. Rev. Stat. § 239.001(2)-(3).

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

IV. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

CCSD omits the factual and procedurally history regarding the entire district court action that gave rise to the fee award. While CCSD appealed a narrow portion

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

[5] Nev. Rev. Stat. § 239.001(3).

of the district court's July 11, 2017 order, far more records and requests were at issue in the case than the narrow category of records at issue in CCSD's appeal. As detailed below, CCSD ignored requests and failed to produce responsive records until the Review-Journal filed a petition. CCSD was recalcitrant in its refusals to provide records, but after significant work and winning access, the Review-Journal prevailed. As a result, the Review-Journal was ultimately able to provide the public with reporting on important allegations concerning CCSD Trustee Child.

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

Starting in December 2016, the Review-Journal made several requests to CCSD pursuant to the NPRA targeting documents pertaining to the alleged misbehavior of School Board Trustee Kevin Child (the "Requests"). Since that time, the Review-Journal has doggedly worked to obtain both access to the records sought by the Requests and information about the extent to which CCSD complied with the Requests. These efforts culminated in this Court's October 25, 2018 decision affirming the district court's order mandating CCSD produce the documents.[6] *See Clark County School District v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 84,

[6] This Court reversed part of the district court's order regarding redaction, and remanded the matter to the district court for reconsideration of the ordered redactions in light of the new balancing test it adopted in its opinion. *Clark County School District v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 84, 2018 WL 5307729 at *7 (Oct. 25. 2018).

Case No. 73525 (Oct. 25, 2018). Subsequently, CCSD released the documents on October 30, 2018.

1. The Underlying NPRA Litigation in District Court.

On or around December 5, 2016, Review-Journal reporter Amelia Pak-Harvey sent CCSD a request pursuant to the NPRA for certain public records pertaining to Trustee Child's alleged misbehavior. (I AA007, ¶¶ 11-13.) According to Cynthia Smith-Johnson, the Public Records Officer for CCSD, when she received the December 5 request, she "sent it to [CCSD's] legal department for a heads up" and set up a file for the request. (II AA158; III AA449.)[7]

The NPRA mandates that a governmental entity must provide a meaningful response to public records requests within five (5) days. Nev. Rev. Stat. § 239.0107(1). CCSD failed to comply with the NPRA's mandated response. Instead, on December 9, 2016, Ms. Smith-Johnson just informed Ms. Pak-Harvey that she had received her request. (I AA007, ¶ 13.) Also, on December 9, 2016, Ms. Pak-Harvey supplemented her request and asked CCSD to produce any written complaints it had received regarding Trustee Child. (I AA008, ¶ 14.)

Ms. Pak-Harvey made multiple efforts over the course of seven weeks to get information about the status of the December Requests and to resolve any possible

[7] In this brief, Appellant's Appendix is referred to as AA, and Respondent's Appendix is referred to as RA. Page numbers are preceded by volume number, so II AA158 refers to Volume II of Appellant's Appendix, page 158.

concerns. (*See generally* I AA008-09, ¶¶ 15-31.) CCSD still failed to comply with the NPRA. Instead, it repeatedly told the Review-Journal it needed additional time to produce the requested records. (I AA008-09, ¶¶ 16, 20, 23-24, 26.) Ms. Smith-Johnson testified at her deposition in this matter that her failure to provide a meaningful response to the Review-Journal's records request was attributable to CCSD general counsel. According to Ms. Smith-Johnson, she could not provide a response to the Reporter's request without permission from CCSD general counsel and that she did not receive direction. (*See* II AA160 (testimony that she could not proceed with the request because she was "waiting [on] legal for direction what to do"); AA164-65; II AA166; II AA169; III AA451; III AA455-56; III AA457; III AA460 (same).)

CCSD continued to defy the NPRA as litigation dragged on—even in the face of multiple orders from the district court directing CCSD to search for and produce responsive records. Eight weeks after the December Requests—and only after the Review-Journal filed suit—CCSD produced one batch of responsive records on February 8, 2017. (I AA068, ¶ 4.) It did not, however, provide a privilege log indicating what documents it was keeping secret or why. (I AA089.)

On February 8, 2017, the district court ordered CCSD to either fully produce all the records it was withholding in unredacted form by 12:00 p.m. on February 10, 2017, or that the matter would proceed to hearing. (I AA010, ¶ 33.) CCSD did not

do so, instead producing partial productions of redacted records between February 8 and February 13, 2017, and then again with fewer redactions on February 24 and February 27, 2017. (I AA012, ¶¶ 52-55.)

CCSD produced its first privilege log on February 13, 2017 listing the following purported bases for the redactions: Nev. Rev. Stat. § 386.350, and CCSD Regulations 1212 and 4110. 1 (I AA010, ¶ 37.)

On February 14, 2017, the district court heard oral argument on the Review-Journal's Petition. Following that hearing, on February 22, 2017, the district court entered an Order granting the Review-Journal's Petition ("February Order"). (I RA033-43.) In the Order, the district court found that CCSD had failed to meet its burden of demonstrating the existence of any applicable privilege to justify its proposed broad redactions of the names of schools, teachers, administrators, and program administrators. (I RA041.) The district 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. (I RA042.) The district court further specified that "CCSD may not make any other redactions" and must unredact the names of schools, teachers, and all administrative-level employees. (I RA043.) The district court directed CCSD to comply with the Order within two days. (I RA043) Pursuant to this order, CCSD released documents with

fewer redactions on February 24 and February 27, 2017. (I AA069.)

Meanwhile, on February 10, 2017, the Review-Journal submitted a supplemental request for public records to CCSD. (I AA012-17, ¶¶ 56-82.) The Review-Journal was forced to amend its petition on March 1, 2017 after CCSD refused to produce records in response to this supplemental request. (I AA005-061.) Twelve days after the Review-Journal filed its Amended Petition, CCSD revealed for the first time that it had unilaterally limited its searches for responsive records. (I RA076-77.)[8]

After the entry of the Court's February Order, the Review-Journal repeatedly requested that CCSD provide it with a privilege log of the documents it was withholding. (*See, e.g.*, I RA073.) CCSD did not respond to these repeated requests until March 13, 2017, when counsel for CCSD stated via email that CCSD was withholding "a single document. An investigative report concerning allegations of harassment and discrimination by Trustee Child prepared by Cedric Cole of [the]

[8] CCSD never indicated in its correspondence with Ms. Pak-Harvey that it limited the request, which custodians it was limiting their records search to, how they were conducting the search, or whether it anticipated withholding or redacting any of the records. (I RA001-32) Ms. Smith-Johnson, CCSD's Public Information Officer, testified that the first responsive documents she reviewed were provided to her by CCSD legal counsel, and she was not aware of how legal counsel searched for responsive documents. (*See* II AA165; II AA169; III AA456; III AA460 (testifying that legal counsel was responsible for the search for responsive documents).) CSCD also failed to preserve records, as discussed below.

Diversity and Affirmative Action Programs. It consists of 15 pages, which includes an 8 page report and 7 pages of notes." (I RA084.) This turned out to be false. (*See* II AA075, ¶ 59 (finding that CCSD withheld 102 pages of documents)).

The district court heard argument on the Review-Journal's Amended Petition on May 9, 2017. (I RA086-222.) During the hearing in this matter conducted on May 9, 2017, the district court ordered CCSD to conduct additional searches for responsive documents. (I RA086-87.) It also ordered CCSD to produce to the court all documents it had withheld to date, and any additional documents the searches yielded that CCSD contended should not be produced to the Review-Journal for *in camera* review by May 30, 2017. (*Id.*)

On June 6, 2017, the district court entered an order directing CCSD to produce all documents it had withheld to date, and any additional documents the searches yielded that CCSD contended should not be produced to the Review-Journal, for an *in camera* review. (I RA234-235.) It also required CCSD to produce a privilege log, as well as certifications pertaining to the searches it had conducted. (I RA235.)

On May 30, 2017, CCSD provided documents to the district court for *in camera* review. It additionally provided the district court with two certifications and a privilege log. Unbeknownst to the district court, CCSD counsel did not provide a copy of the certifications and the log to the Review-Journal at that time. (*See* I RA237) This reflects CCSD's ongoing refusal to provide information to the Review-

Journal that it should have provided voluntarily, as a routine matter of compliance with the NPRA and a fair adversarial process

On June 5, 2017 CCSD provided an additional thirty-eight pages of documents that it located after conducting the additional searches ordered by the district court. (I AA091.) At that hearing, CCSD counsel finally provided the Review-Journal a copy of the final log and, later that day, provided copies of the certifications it had provided to the Court a week earlier. (*Id*.) CCSD's actions served to delay this matter and created unnecessarily expedited work by the Review-Journal, which submitted a memorandum addressing the log and certifications on June 13, 2017. (*See* II RA238-479, III RA480-516)

The district court then held a hearing on CCSD's final privilege log on June 27, 2017. (III RA517-616.) At that hearing, the district court found the privileges cited by CCSD did not justify withholding the records in their entirety, and that CCSD had failed to prove by a preponderance of the evidence that any interest in nondisclosure outweighed the strong presumption in favor of public access. (*See generally* II AA076-81, ¶¶ 69-88.) The district court also found the certifications submitted by CCSD regarding its renewed searches for responsive documents were inadequate and ordered CCSD to make the two CCSD employees who authored the certifications available to be deposed by the Review-Journal as to their efforts to search for, collect, and produce the requested records. (*See* AA081-83, ¶¶ 89-96) At

the hearing, CCSD offered to produce the records to the district court by June 30, 2017. (III RA596)

On July 12, 2017, CCSD filed a notice of appeal from the district court's July 11 Order. (*See* III RA617-618)

In the interim, the Review-Journal deposed Ms. Smith-Johnson on August 17, 2017 (*See generally* II AA147-245; III AA438-536.), and deposed Mr. Wray on August 18, 2017. (*See generally* II AA246-340; III AA538-632.) Both Ms. Smith-Johnson and Mr. Wray testified that CCSD general counsel dictated the terms and nature of the searches they conducted. (*See* II AA160; II AA164-65; II AA168-69; II AA171; II AA171-72; II AA; III AA451; III AA455-56; III AA459-60; III AA462; III AA462-43 (Smith-Johnson); II AA281-84; II AA290-291; II AA293; II AA303; III AA573-76; III AA582-83; III AA585; III AA595 (Wray).)

In addition to his testimony that CCSD general counsel dictated the terms and nature of the searches he conducted, Mr. Wray also provided testimony regarding CCSD's retention of e-mails sent and received on its internal email service, and—of particular concern here—general counsel's failure to direct him to potentially responsive emails outside CCSD's default retention period. Mr. Wary testified that emails sent and received using CCSD's email service "have a default expiration by the system of 90 days," but that email users could extend that expiration date. (II AA310; III AA602) Although CCSD does retain backups "for the purpose of disaster

recovery," CCSD only retains those backups for 21 days, and they are not searchable. (II AA310-11; III AA602-03.)

Mr. Wray testified that CCSD general counsel did not request he preserve any email accounts to maintain potentially responsive communications. (II AA316; III AA608.) This is particularly disturbing given that, as Mr. Wray testified, CCSD general counsel had directed him to preserve communications in other public records disputes. Specifically, Mr. Wray testified that in 2007, CCSD general counsel directed him to make copies of the e-mail boxes of CCSD Trustees to preserve records responsive to a records request from an activist named Karen Gray. (II AA312-14; II AA315-16; III AA604-06; III AA607-08; *see also* II AA341-84; III AA634-77 (transcript of January 23, 2009 hearing in *Gray v. Clark County School District*, Case No. A-543861*)*.) During an evidentiary hearing which took place in the resulting litigation over Ms. Gray's records request, Mr. Wray testified as follows:

> I was notified in February of 2007 when -- it was my understanding that Ms. Gray went to the school board and said that she wanted to get this information. It's my understanding that Shirley Barber then made that request and at that point [then-CCSD general counsel Bill] Hoffman said you need to make sure you preserve the mailboxes at that point. So we did, we took a snapshot as the system existed that day. We believe the date was February 23, 2007 and preserved that, okay?

(II AA352; III AA645; *see also* II AA314; III AA606.) Mr. Wray explained at the deposition in this matter that CCSD general counsel in the *Gray* matter inquired

whether the trustees' email boxes could be copied. (II AA315; III AA607.) Because the email boxes were too large, Mr. Wray explained that he "took a backup snapshot" of the email boxes as they existed at the time of general counsel's inquiry, and thus preserved potentially responsive records. (II AA315-16; III AA607-08.) Again, in this case, CCSD general counsel provided no such direction to Mr. Wray. (II AA316-17; III AA608-09.) This indicates that CCSD deliberately chose not to take steps to preserve potentially responsive records in spite of knowing, from previous litigation, that such steps are essential. Thus, it is very likely that CCSD deprived the public of full access to records that both the district court and this Court determined it has the right to under the NPRA. *See Clark County School District v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 84, 2018 WL 5307729, *3-5 (Oct. 25, 2018).

2. The Review-Journal Moves for Attorney's Fees and Costs in District Court.

On September 19, 2017, the Review-Journal moved the district court for reasonable attorney's fees and costs pursuant to Nev. Rev. Stat. §§ 18.010(2)(b) and 239.011(2). (I AA084-105.)[9] On January 4, 2018, the district court held a hearing on this motion, and on February 23, 2018 granted the Review-Journal's motion for attorney's fees and costs while declining to rule that CCSD acted in bad faith. (V AA1138-39.) At the hearing, the district court indicated it was not making a finding

[9] On October 3, 2017, the Review-Journal corrected this motion to include a motion to find CCSD acted in bad faith. (IV AA684-705.)

regarding bad faith because the court did not believe it was required by the NPRA. (V AA1059, V AA1065; *see also* V AA1071 (stating that "bad faith is not a requirement to award attorney's fees pursuant to the statutory scheme").) These decisions were memorialized in the district court's written Findings of Facts and Conclusions of Law and Order entered on March 22, 2018. (V AA1140-59.)

On April 4, CCSD timely filed notice of appeal of the district court's March 22, 2018 Order. (V AA1176-98.) The district court granted CCSD's motion for a stay of enforcement of the money judgment pending appeal on May 8, 2018. (VI AA1234-35.)

3. This Court Decides on CCSD's First Appeal, Affirming In Part the District Court's Order Mandating Disclosure.

In its Opening Brief, CCSD notes that "[t]he production of the ODAA's investigative file is currently pending before this Court under Case No. 73525." (OB, p. 9.) This is no longer the case, as this Court affirmed the district court's decision mandating release of the requested records. *See Clark County School District v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 84, Case No. 73525 (Oct. 25, 2018).[10]

[10] Although this took place after CCSD filed notice of appeal, the Court may take judicial notice of this as it is "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute." *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009) (citing Nev. Rev. Stat. § 47.130(2)(b)).

V. STANDARDS OF REVIEW

A. Standard for Interpreting the NPRA.

Questions of law are reviewed *de novo* and it becomes the responsibility of the Court to discern the law when the legislature addresses a matter with "imperfect clarity." *See Baron v. Dist. Ct.*, 95 Nev. 646, 648, 600 P.2d 1192, 1193–1194 (1979). However, when the statute is plain and unambiguous, "this court should not construe that statute otherwise." *MGM Mirage v. Nevada Ins. Guar. Ass'n*, 125 Nev. 223, 228–29, 209 P.3d 766, 769 (2009). *See also Public Employees' Benefits Prog. v. LVMPD*, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008) ("It is well established that, when interpreting a statute, the language of the statute should be given its plain meaning unless doing so violates the act's spirit.") (citation omitted).

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

Furthermore, immunizing governmental entities from paying a prevailing requester's attorney's fees and costs would violate the expressed spirit of the NPRA, which mandates that its provisions be construed liberally in favor of access to public records, and that any exceptions limiting or restricting access to public records be construed narrowly. Nev. Rev. Stat. § 239.001(2)-(3). Thus, under *de novo* review, this Court should interpret the NPRA according to its unambiguous language and affirm the district court's ruling.

B. Standards for Awarding Attorney's Fees and Costs

As discussed above, questions of law are reviewed *de novo*, and when an attorney fee matter implicates a question of law, the proper review is *de novo*. *See In re Estate and Trust of Rose Miller*, 125 Nev. 550, 553, 216 P.3d 239, 241 (2009).

VI. LEGAL ARGUMENT

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

This case must be resolved based on the plain language of the NRPA and the specific mandates the legislature provided with regards to interpreting its terms. As this Court has repeatedly held, the starting point in evaluating the Fees Provision is the plain language of Nev. Rev. Stat. § 239.011 itself. *See Williams v. State Dep't of Corr.*, 402 P.3d 1260, 1262 (Nev. 2017) ("To ascertain the Legislature's intent, we look to the statute's plain language.") (citing *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011)). "[W]hen a statute's language is clear and unambiguous, the

apparent intent must be given effect, as there is no room for construction." *Edgington v. Edgington*, 119 Nev. 577, 582–83, 80 P.3d 1282, 1286 (2003). In interpreting the plain language of the statute, the Court "must give [a statute's] terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory." *Southern Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (quotation omitted).

The NPRA states that "[i]f the requester prevails, the requester is entitled to recover his or her costs and reasonable attorney's fees in the proceeding from the governmental entity whose officer has custody of the book or record." Nev. Rev. Stat. § 239.011(2). The Legislature knew what the word "entitle"[11] meant when it drafted the NPRA and voted it into law. The Legislature could have easily placed conditions on the requester's right to attorney's fees by simply altering the language of Nev. Rev. Stat. § 239.011(2). It chose not to. Thus, under a reading of the plain language of the NPRA, awarding fees and costs to a prevailing requester is mandatory, not optional—and there are no exceptions.

Indeed, this Court has already held that prevailing requesters are "entitled" to fees and costs. In *LVMPD v. Blackjack Bonding*, this Court explained:

[11] "To grant a legal right to or qualify for." ENTITLE, Black's Law Dictionary (10th ed. 2014)

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

131 Nev. Adv. Op. 10, 343 P.3d 608, 615 (2015) (citing *DR Partners*, 116 Nev. 616, 629, 6 P.3d 465, 473 (2000)). The Court further noted that "[t]o the extent that the parties raise policy arguments that conflict with NRS 239.011's plain meaning, they are without merit and do not alter our analysis." *Id.*, 343 P.3d at 615, n.6 (citing *Williams v. United Parcel Servs.*, 129 Nev. 386, 391-92, 302 P.3d 1144, 1147 (2013) ("Our duty is to interpret the statute's language; this duty does not include expanding upon or modifying the statutory language because such acts are the Legislature's function.")). Thus, despite CCSD's lengthy protestations to the contrary (*see generally* OB, pp. 10-17), this Court has already found the plain terms of the NPRA's Fees Provision unconditionally entitle a prevailing requester to its reasonable attorney's fees and costs.

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

As this Court has recognized, the unambiguous purpose of the NPRA "is to promote government transparency and accountability by facilitating public access to information regarding government activities." *PERS v. Reno Newspapers Inc.*, 129

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

Thus, any ambiguity must be resolved in a manner that favors access and the unambiguous purpose of the NPRA. *Cf. McKay v. Bd. of Sup'rs of Carson City*, 102 Nev. 644, 651, 730 P.2d 438, 443 (1986) ("…a strict reading of the statute is more in keeping with the policy favoring open meetings expressed in Nev. Rev. Stat. chapter 241 and the spirit of the Open Meeting Law…"). CCSD's interpretation would not further the NPRA's central purpose (transparency) or access to records. Indeed, it would discourage actions to enforce the NPRA. Instead, even if an ambiguity existed, the Fees Provision would have to be interpreted to allow a requester to get fees for having to go to court to get access to records.

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

As discussed above, because the meaning of the Fees Provision is plain, this Court need not look to the legislative history to discern the legislature's intent. However, if the Court does choose to consider the legislative history of the Fees

Provision, that history demonstrates that the legislature intended to create a mechanism for prevailing requesters to recoup reasonable attorney's fees and costs.

During the 1993 legislative session, the legislature considered Assembly Bill 365, which it passed into law as Nev. Rev. Stat. § 239.011. (IV AA800-904 (legislative history of Assembly Bill 365).) Prior to the passage of AB 365, the NPRA provided for criminal penalties for the denial of access to public records. (IV AA810.) AB 365 proposed replacing the criminal penalties with civil enforcement mechanisms. (IV AA810 ("Provide for court costs and attorneys' fees if the requester prevails"); IV AA839; *see also* IV AA841-43 (AB 365 as introduced).) Section 2 of AB 365 specifically contemplated that a prevailing requester "is entitled to recover his costs and attorney's fees in [a public records] proceeding from the agency whose officer has custody of the book or records." (IV AA842.)

During a May 7, 1993 meeting of the Assembly Subcommittee on Government Affairs, there was discussion making clear that, as initially written, Section 2 mandated that, if the requester prevails, "he was entitled to recover his costs and fees and attorney's fees in the proceeding, from the agency whose officer had custody of the record." (IV AA882-83.) During the Subcommittee hearing, there was some discussion about whether a resisting governmental agency should be entitled to fees if it prevailed—an idea which was rejected because it would discourage the public from going to court to fight for access to public records. (IV

AA883.) The Subcommittee recommended only one limitation on the fees and costs provision: it added the word "reasonable" before the words "attorney's fees." (*Id*.) Thus, the legislature always contemplated that a prevailing requester should be compensated for the reasonable fees and costs incurred in taking a public records case to court, without exception.

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

The Fees Provision **entitles** prevailing parties in a specific type of action—an action to enforce the NPRA—to fees "from the governmental entity whose officer has custody of the book or record." Stat. § 239.011(2). There is no limitation on this entitlement to fees whatsoever. In contrast, the Immunity Provision provides that, if a public officer or employee "acts in good faith" in disclosing or failing to disclose a public record in good faith, such officer or employee (and, vicariously, his or her employer) is entitled to immunity from damages—"either to the requester or the person to whom the information concerns." Nev. Rev. Stat. § 239.012. Thus, the Immunity Provision only provides for immunity from **damages** under such circumstances—not immunity from attorney's fees and costs in an action to enforce the NPRA and access records.

In sum, that the NPRA contains an entirely separate provision providing for immunity from damages does not alter the fact that the NPRA expressly and unequivocally mandates that a district court award a prevailing requester fees.

Contrary to CCSD's argument (OB, p. 11 (citing *Cleghorn v. Hess*, 109 Nev. 544, 548, 853 P.2d 1260, 1262 (1993))) the NPRA is not an ambiguous statute. Therefore, the courts need not "determine the meaning of the words used in a statute by examining the content and spirit of the law or the causes which induced the legislature to enact it." (OB, p. 11 (citing *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007)).) Even if this Court were to perform such an inquiry, it would determine that the Legislature's intent, as memorialized in the NPRA's very first section, is to further access to public records. Nev. Rev. Stat. § 239.001(1). Interpreting the Fees and Immunity Provisions into the NPRA separately, as the district court did, does exactly that. Its decision should be affirmed.

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

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

The fact that the Fees and Immunity Provisions address different questions shows the folly in relying on the Immunity Provision to qualify the express, unqualified entitlement to fees in the NPRA.

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

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

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

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

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

CCSD is a "governmental entity" within the meaning of Nev. Rev. Stat. § 239.005(5)(b) and is therefore responsible for attorney's fees under Nev. Rev. Stat. § 239.011(2). By contrast, the officers and employees whose "good faith" actions are immunized under the Immunity Provision are not the "governmental entities" subject to fees in the Attorneys' Fees Provision. This militates heavily against bootstrapping a "good faith" requirement onto Nev. Rev. Stat. § 239.011(2), and further illustrates that the Immunity Provision has no bearing on the Fees Provision.

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

To support its effort to nonetheless engraft the language from the Immunity Provision onto (and therefore devastate) the Fees Provision, CCSD opines that the term "damages" in Nev. Rev. Stat. § 239.012 encompasses the terms "attorneys' fees" and "costs." (OB, pp. 14-17.) CCSD's argument must be rejected because attorney's fees and costs are not damages in this context.

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

CCSD's argument ignores a broad a body of case law holding that damages and attorney's fees are different. For example, in *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 35 P.3d 964 (2001), a case which CCSD cites (OB, p. 15), this Court dedicated several paragraphs to discussing the procedural differences between "attorney fees as a cost of litigation" and "attorney fees as foreseeable damages arising from tortious conduct or a breach of contract." *Sandy Valley*, 117 Nev. at 956, 35 P.3d at 969. This Court explained:

> Procedurally, when parties seek attorney fees as a cost of litigation, documentary evidence of the fees is presented to the trial court, generally in a post-trial motion. . . If the fees are authorized, the trial court examines the reasonableness of the fees requested and the amount of any award. Thus, when a court is requested to award attorney fees as a cost of litigation, the matter is decided based upon pleadings, affidavits and exhibits. . . In contrast, when a party claims it has incurred attorney fees as foreseeable damages arising from tortious conduct or a breach of contract, such fees are considered special damages. They must be pleaded as special damages in the complaint pursuant to NRCP 9(g) and proved by competent evidence just as any other element of damages. . .

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

the Fees Provision is plain: when a requester prevails, "the requester is entitled to recover his or her costs and reasonable attorney's fees in the proceeding from the governmental entity whose officer has custody of the book or record." Nev. Rev. Stat. § 239.011(2).

Other courts have held that attorney's fees and damages are distinct from each other. *See, e.g., Carolina Cas. Ins. Co. v. Merge Healthcare Sols. Inc*., 728 F.3d 615, 617 (7th Cir. 2013) (noting that "an award of attorneys' fees differs from 'damages'"); *United Labs., Inc. v. Kuykendall,* 335 N.C. 183, 437 S.E.2d 374 (1993) (noting that attorney fees may be awarded for unfair practice, while punitive damages are awarded for tort based on same conduct); *cf. City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (discussing whether the amount of damages recovered by a plaintiff in a civil rights matter affects the calculation of an award of attorney's fees under 42 U.S.C. § 1988).

To support its position, CCSD relies on inapplicable case law from Utah and Montana to assert that the term "damages" could only mean "fees" within the context of the NPRA. (OB, pp. 14-15.) Neither case, however, supports CCSD's broad assertion. In *Swaner v. Union Mortg. Co*., the Utah court stated that "attorney's fees, ***in the absence of statute*** or agreement between the parties, are not ordinarily recoverable as damages." 99 Utah 298, 305, 105 P.2d 342, 346 (1940) (emphasis added). The *Swaner* Court then noted that the statute at issue did not have a provision

for attorneys' fees, but it did have a peculiar construction in its Immunity Provision. *Id*. The statute stated that the party who fails to release a mortgage must pay "***all*** damages ***resulting from*** such a failure." *Id*. (emphasis added). The Utah court then concluded "all damages resulting from" means the damage one incurs by hiring an attorney to bring a legal action to secure the release of a mortgage. *Id*. The Utah court conducted an analysis of the meaning of "all damages" due to an ***absence*** of a statute for attorney's fees. Here, however, there is a statute which explicitly awards attorney's fees: the NPRA's Fees Provision which intentionally excludes a good faith requirement. Nev. Rev. Stat. § 239.011(2).

Similarly, CCSD cites *State ex rel. O'Sullivan v. Dist. Ct*., to assert "damages" are synonymous with attorneys' fees. (OB, pp. 15.) CCSD misrepresents the case. The statute at issue in *Sullivan* specifically provided for the recovery of "costs" in addition to damages. *State ex rel. O'Sullivan v. Dist. Court of Tenth Judicial Dist. In & For Fergus Cty*., 127 Mont. 32, 36, 256 P.2d 1076, 1078 (1953) ("R.C.M.1947, § 93–9112, provides in part: 'If judgment be given for the applicant, he may recover the damages which he has sustained… , ***together with costs***; and for such damages and costs an execution may issue; and a peremptory mandate must also be awarded without delay.") (emphasis added). Therefore, it is of no effect here.

CCSD pontificates on the "American Rule," arguing that this rule requires each party to pay their own fees unless a statute, rule, or agreement provides

otherwise. (OB, p. 15; *see also id.*, p. 17.) CCSD cites several cases for this proposition. (OB, p. 16 (citing *Sandy Valley Assocs. v. Sky Ranch Estate Owners Ass'n*, 117 Nev. 48, 35 P.3d 964 (2001) and *Von Ehrensmann v. Lee*, 98 Nev. 335, 647 P.2d 377 (1982)). Given CCSD's acknowledgement of this Court's precedent—that attorney's fees are permitted only where specifically permitted by statute (emphasis added)—it is puzzling that CCSD then choses to ignore that the NPRA ***specifically provides that a prevailing requester is entitled to attorney's fees***, *see* Nev. Rev. Stat. § 239.011(2), arguing instead that this case deals with "equitable relief." (OB, p. 15-16 (citing *Von Ehrensmann*, 98 Nev. at 337-38, 647 P.2d at 378).) CCSD's "ostrich-like tactic of pretending that potentially dispositive authority against [its] contention does not exist is as unprofessional as it is pointless*."* *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011) (quotation omitted).

CCSD further asserts that because awarding attorney's fees is "in derogation of the common law [] under the American Rule," "any statutory scheme allowing for an award of attorney fees must be construed narrowly." (OB, p. 17 (citing *Bobby Berosini, Ltd. v. PETA*, 114 Nev. at 1352, 971 P.2d at 385); *see also* OB, p. 8 (citing *Gibellini v. Klindt*, 110 Nev. 1201, 1205, 885 P.2d 540, 543 (1994)).) Of course, a truly narrow interpretation of the Fees Provision would militate for the award of fees and costs in this case, as the Fees Provision's plain language places no conditions on

the prevailing requester's entitlement to fees and costs. CCSD's idea of construing the Fees Provision "narrowly" has no basis in law or common sense, as it consists of transplanting an entirely different provision of the NPRA into the Fees Provision.

To further support its nonsensical position, CCSD cites *Hardisty v. Astrue*, 592 F.3d 1072 (9th Cir. 2010). (OB, p. 17.) CCSD's broad citation to *Hardisty* is misleading. In that case, the Ninth Circuit affirmed a district court's decision to deny attorney's fees to a plaintiff in an Equal Access to Justice Act case with respect to issues not reached by a district court in reversing a federal agency's decision. *Hardisty*, 592 F.3d at 1077 (noting that the Equal Access to Justice Act "provides no indication that attorneys' fees should be awarded with respect to positions of the United States challenged by the claimant but unaddressed by the reviewing court"). This holding is of no moment here, where the district court considered each of the claims raised in the Review-Journal's petition and ruled in the newspaper's favor on each one.

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

The NPRA can be contrasted with Nevada statutory provisions such as Nev. Rev. Stat. § 40.655, which expressly defines attorney's fees as an element of damages. *See also Albios v. Horizon Communities, Inc*., 122 Nev. 409, 414, 132 P.3d 1022, 1025 (2006) ("… although Nev. Rev. Stat. § 40.655 allows constructional defect claimants to recover attorney fees and costs as an element of damages, Nev.

Rev. Stat. § 40.655 does not preclude application of the penalty provisions of Nev. R. Civ. P. 68(f) and Nev. Rev. Stat. §17.115(4)"); *Liu v. Christopher Homes, LLC*, 130 Nev. Adv. Op. 17, 321 P.3d 875, 878 (2014) (attorney fees may be awarded as "special damages," but only in "limited circumstances"). This evidences the Legislature's capability to include attorney's fees and costs as an element of damages in certain contexts. That the Legislature chose not to do so in the context of NPRA records litigation demonstrates that it intended the Fees Provision and the Immunity Provision to be read separately.

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

CCSD argues that the Immunity Provision must limit the Fees Provision because no other liability can attach with regard to public records. (OB, p. 14 ("That is, what other 'damages' could a requester, such as LVRJ, possibly seek under NRS Chapter 239?").) This argument is misguided because the NPRA clearly contemplates that liability—separate and apart from being required to produce public records and pay attorney's fees and costs—could stem from both disclosure and non-disclosure of records. Common sense and basic legal analysis also make plain that, absent the Immunity Provision, it would be possible to obtain damages from a governmental entity and/or its employees in connection with the (non-) disclosure of public records, without regard to attorney's fees and costs incurred by

a requester.

For example, if a person claimed that disclosure of a record violated his or her privacy rights and sued the governmental entity for invasion of privacy, the governmental entity could assert immunity under the Immunity Provision. Indeed, this nearly became an issue when the family of a 1 October shooting victim sued the Clark County Coroner (the "Coroner") and the Review-Journal to claw back disclosure of his redacted autopsy report to media outlets who had requested it pursuant to the NPRA. *See Las Vegas Review-Journal v. Eighth Judicial District Court*, 134 Nev. Adv. Op. 7, 412 P.3d 23 (2018). While the Coroner never acted to protect taxpayers' interests in the matter,[12] if it had (and if the plaintiff in that case had pleaded a cognizable cause of action), the Coroner could have asserted the Immunity Provision as a defense against plaintiff's claims.

Additionally, disclosing a public record could also entitle a requester to damages under other circumstances. For example, if a public officer withheld public records from a newspaper but provided it to a competing media outlet that asked for the records, such action could constitute impermissible viewpoint discrimination

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

under the First Amendment and the Equal Protection Clause, which also protects against discriminatory denial of access to public forums or information. *See, e.g.*, *McCoy v. Providence Journal Co.*, 190 F.2d 760, 766 (1st Cir. 1951) ("the refusal of the defendants to accord the plaintiffs their right of inspection [under state public records law] while granting such right to a competitor, the Pawtucket Times, constitutes a denial of equal protection of the laws which gives rise to a case or controversy within federal jurisdiction …"); *American Broadcasting Companies v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) (holding that ABC could not be excluded from post-election activities at campaign headquarters where other members of the press were granted access because "once there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable"); *Telemundo of Los Angeles v. City of Los Angeles*, 283 F. Supp. 2d 1095, 1102–04 (C.D. Cal. 2003) (granting Telemundo's "request for a preliminary injunction granting equal camera positioning, equal number of cameras, equal truck positioning, equal access to stage audio, equal 'access' credentials, equal access to production meetings, and equal access to rehearsal meetings.").

A party whose First Amendment and/or Equal Protection rights are violated in such a fashion could seek damages under several theories, including 42 U.S.C. § 1983. While a state governmental entity would not be entitled to immunity under

such circumstances, these examples illustrate that it is false to argue that the only possible liability that can attach in connection with (non-) disclosure of public records is an award of attorney's fees and costs under the NPRA.

An example from Hawaii is instructive in demonstrating that damages independent of attorney's fees and costs could stem from a governmental entity's (non-) disclosure and negligent retention of public records. In *Molfino v. Yuen*, 134 Haw. 181, 399 P.3d 679 (2014), the plaintiff requested a "pre-existing lot determination"—a public record—from the Planning Department—a governmental entity—concerning a piece of property he had purchased. *Id*. at 182, 680. The defendant, the Planning Director, responded that the piece of property consisted of two pre-existing lots. *Id*. The defendant was unaware that four years earlier, a former Planning Director had determined—in letters that were public records—that the piece of property consisted of six lots. *Id*. The plaintiff sold the property, discovered the defendants' error regarding the number of lots in his former property, and sued for negligence. *Id*.

The Hawaii Supreme Court held that the immunity provision of Hawaii's Freedom of Information Statute—which is similar to that of the NPRA[13]—immunized government entity employees from liability stemming from "participating in good faith in the disclosure or nondisclosure of a government

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

record[.]" *Id*. at 685, 187 (quoting HRS § 92F-16). Therefore, the defendants in *Molfino* could not be held liable for damages—such as the loss in value plaintiff may have suffered selling his property based on inaccurate public records—stemming from defendants' potentially negligent retention and production of inaccurate public records. *Id*. Notably, the *Molfino* court did not once mention attorney's fees and costs; this wholly undermines CCSD's contention that the only damages potentially stemming from (non-) disclosure of public records are attorney's fees and costs.[14]

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

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

For another hypothetical example, what if a police department negligently discloses the identity of one of its confidential informants, who then sues the department after criminals exact physical revenge? The damages in this hypothetical stem, in part, from a governmental entity's production of a public record; however, would then be able to entirely unrelated to attorney's fees and costs. The Immunity Provision would immunize the police department from liability in this instance, without any bearing on whether a public records requester is entitled to attorney's fees and costs. Indeed, in these hypothetical examples of negligent (non-) disclosure there would not even ***be*** a prevailing requester entitled to attorney's fees and costs under the Fees Provision. These examples demonstrate that attorney's fees and costs are far from the only damages a requester (or third party) could suffer from (non-) production of public records. That the legislature contemplated this fact is reflected in the separation of the Immunity Provision and the Fees Provision in the NPRA.

Because damages stemming from (non-) disclosure of public records unrelated to a requester's attorney's fees and costs are possible, interpreting the Immunity Provision separately from the Fees Provision does not create conflict, ambiguity or render either of these provisions a "nullity," as CCSD argues. (*See generally* OB, pp. 12-13 (citing *Nuleaf CLV Dispensary, LLC v. State, Dep't of Health and Human Serv.*, 134 Nev. Adv. Op. 17, at *8 (Mar. 29, 2018); *Southern Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005);

Salas v. Allstate Rent-A-Car, Inc., 116 Nev. 1165, 1168, 14 P.3d 511, 514 (2000); *In re Candelaria*, 126 Nev. 408, 411, 245 P.3d 518, 520 (2010); *Herrera-Castillo v. Holder*, 573 F.3d 1004, 1007 (10th Cir. 2009); *Mora v. Mukasey*, 550 F.3d 231, 237-239 (2d Cir. 2008); *United States v. Heckenliable*, 446 F.3d 1048, 1051 (10th Cir. 2006)).) Therefore, in the absence of such an ambiguity, courts have no reason to, as CCSD argues, "look to the legislative history to determine the intent for guidance in interpreting the multiple statutory provisions." (OB, p. 13 (citing *United States v. Manning*, 526 F.3d 611, 617 (10th Cir. 2008); *United States v. Craig*, 181 F.3d 1124, 1127 (9th Cir. 1999)).)

5. Different Nevada Attorney Fee Statutes Are Irrelevant.

To convince this Court to ignore the plain meaning of the very specific Fees Provision, CCSD relies on irrelevant statutes governing attorney's fees in *other types of matters*. (OB, p. 23) Specifically, CCSD cites Nev. Rev. Stat. § 7.085 and Nev. Rev. Stat. § 18.010(2)(b) as examples where attorney's fees are contingent upon a showing of bad faith. (*Id*.)

Unlike the NPRA's Fees Provision, these statutes set explicit conditions for the award of attorney's fees and costs in their plain language. *See* Nev. Rev. Stat. § 7.085(1)(a) (authorizing fees when "such action or defense is not well-grounded in fact or is not warranted by existing law or by an argument for changing the existing law that is made in ***good faith***.") (emphasis added); Nev. Rev. Stat. § 18.010(2)(b)

(authorizing fees for a "claim, counterclaim, cross-claim or third-party complaint or defense … brought or maintained ***without reasonable ground or to harass the prevailing party***") (emphasis added). This further proves the Review-Journal's contention that the Legislature knew how to condition an award of fees on bad faith or unlawful behavior by making those conditions part of the plain language of the statute. That the Legislature chose not to include any such limitations in the NPRA's Fees Provision, indicates the Legislature intended the Fees Provision to provide a prevailing requester an unconditional entitlement to attorney's fees and costs.

CCSD's argument that because the district court "balances the relative good faith of the parties" to determine an award of attorney's fees to a settlement offeror from a settlement offeree who fails to obtain a more favorable judgment (OB, p. 23, citing Nev. R. Civ. P. 68 and *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983)) has no bearing on whether the district must award attorney's fees pursuant to the Fees Provision of the NPRA. The purpose of Nev. R. Civ. P. 68 is "to encourage settlement[,] not to force plaintiffs unfairly to forego legitimate claims." *Beattie*, 99 Nev. at 588, 668 P.2d at 274. In the context of balancing the interest in the speedy resolution of cases against the rights of plaintiffs to pursue claims, it makes sense to inquire into the good-or-bad faith of the respective parties during settlement negotiations.

Unrelatedly, the purpose of the NPRA is to foster democratic principles by

ensuring government records are available to the public. Nev. Rev. Stat. § 239.001(1). Conditioning the award of attorney's fees to a prevailing requester restricts the public's access to public records, which flies in the face of the NPRA's mandate that such exemptions, exceptions or balancing of interests must be construed narrowly. Nev. Rev. Stat. § 239.001(3). Thus, unlike awarding fees pursuant Nev. R. Civ. P. 68, it would be improper for the district court to inquire about the governmental entity's good faith (or lack thereof) when awarding attorney's fees under the NPRA's Fees Provision.

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

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

Although this Court has previously rejected arguments that conflict with the

plain meaning of the Fees Provision[15] and arguments based on other jurisdictions' public records caselaw,[16] CCSD mistakenly relies on such arguments and caselaw to support its unavailing arguments about the NPRA's unambiguous language. (OB, p. 16.)

Specifically, CCSD cites several Florida state court cases interpreting Florida's Sunshine Law, Fla. Stat. § 119.01 et seq., for the proposition that a governmental entity is not liable for a requester's attorney's fees if it acted in good faith in refusing to disclose public records. (*See* OB, p. 16 (citing, *inter alia, B&S Utilities, Inc. v. Bakerville-Donovan, Inc.*, 988 So.2d 17, 23 (Fla. 1st DCA 2008); *Putnam Cnty. Human Soc'y, Inc. v. Woodward*, 740 So.2d 1238 (Fla. 5th DCA 1999)).) However, unlike the NPRA's Fees Provision, the fees provision in Florida's Sunshine Law explicitly premises an award of attorney's fees on a judicial finding that the governmental entity acted unlawfully:

> (1) If a civil action is filed against an agency to enforce the provisions of this chapter, the court shall assess and award the reasonable costs of enforcement, including reasonable attorney fees, against the responsible agency if the court determines that:
>
> (a) The agency ***unlawfully refused*** to permit a public record to

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

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

> be inspected or copied; and
> (b) The complainant provided written notice identifying the public record request to the agency's custodian of public records at least 5 business days before filing the civil action, except as provided under subsection (2).

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

In its desperation, CCSD even goes so far as to rely on a case that has been overruled, without mentioning that fact. CCSD cites *Althouse v. Palm Beach Cnty. Sheriff's Office*, 92 So.3d 899, 901 (Fla. 4th DCA 2012) for the proposition that there is "a good faith exception to attorney fees provision in [Florida] public records law." (OB, p. 17.) However, CCSD failed to note that the Florida Supreme Court explicitly held that "[t]here is no additional requirement, before awarding attorney's fees under the Public Records Act, that the trial court find that the public agency did not act in good faith, acted in bad faith, or acted unreasonably" and disapproved of *Althouse* and similar cases "to the extent that [*Althouse* and similar cases] require a showing that the public agency acted unreasonably or in bad faith before allowing recovery of attorney's fees under the Public Records Act." *Bd. of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, 189 So. 3d 120, 122 (Fla. 2016).[17] CCSD's

[17] This is another example of CCSD engaging in an "ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist." *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011) (citing

attempt to mislead the Court regarding the validity of other courts' precedents should not be countenanced.

CCSD's reliance on cases interpreting Kentucky's open records law[18] is also misplaced because, unlike the Fees Provision, the provision of Kentucky's open records law pertaining to attorney's fees explicitly premises an award of fees "upon a finding that the records were willfully withheld in violation of [Kentucky's open records law]." Ky. Rev. Stat. Ann. § 61.882. CCSD also attempts to mislead this Court with its citation to *KPNX-TV v. Superior Court In & For Cty. of Yuma*, 183 Ariz. 589, 593, 905 P.2d 598, 602 (Ct. App. 1995).[19] This case is also inapposite because—unlike the Fees Provisions—Arizona's open records law explicitly premises the award of attorney's fees on a judicial finding of bad faith. *See* Ariz. Rev. Stat. Ann. § 39-121.02(B).[20] The final out-of-state case cited by CCSD,

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Mannheim Video, Inc. v. County of Cook, 884 F.2d 1043, 1047 (7th Cir.1989), quoting *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1198 (7th Cir.1987)).

[18] (OB, p. 16 (citing *Com., Cabinet for Health & Family Servs. v. Lexington H-L Servs., Inc.*, 382 S.W.3d 875 (Ky. Ct. App. 2012).))

[19] (OB, p. 16-17.)

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

Friedmann v. Corr. Corp. of Am., 310 S.W.3d 366 (Tenn. Ct. App. 2009)[21], is inapplicable here because Tennessee's Public Records Act similarly premises an award of attorney's fees on a finding "that the governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and willfully refused to disclose it." Tenn. Code Ann. § 10-7-505(g). In any case, even if we were in Tennessee, not Nevada, CCSD did withhold records it concedes are public records and did so willfully.

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

7. CCSD's Reliance on the Legislative History to Support its Position Is Misplaced.

Even though the statute is clear on its face, and even though the legislative

[21] (OB, p. 17.)

intent favoring access to public records is spelled out in the NPRA itself, CCSD asks this Court to look at the legislative history to interpret the statute. (OB, pp. 18-23.) This runs afoul of basic canons of statutory interpretation which mandate that "when a statute is clear on its face, a court cannot go beyond the statute in determining legislative intent." *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) (citation and internal quotation marks omitted); *see also Robert E. v. Justice Court*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983) (same); *Coast Hotels & Casinos, Inc. v. Nevada State Labor Comm'n*, 117 Nev. 835, 840, 34 P.3d 546, 550 (2001) ("When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it.")[22]

Here, the language of the Fees Provision is plain: if a requester prevails in an action to obtain public records, "the requester is entitled to recover his or her reasonable costs and attorney's fees in the proceeding from the governmental entity whose officer has custody of the book or record." Nev. Rev. Stat. § 239.011(2). The statute does not require a requester to demonstrate a governmental entity acted in

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

bad faith; it only requires that the requester prevail. Despite all this, CCSD is asking this Court to rely on outside "legislative history" to negate a foundational provision of the NPRA. This Court should not do so.

Even if the Court considers the legislative history, CCSD's argument still fails. CCSD starts with a misleading discussion of Legislative Counsel Bureau ("LCB") Bulletin No. 93, a bulletin which explained recommended changes to the NPRA. (*See* OB, pp. 19-20; *see also* IV AA800-37 (Bulletin No. 93).) In arguing that the Legislature intended the Fees Provision and the Immunity Provisions to be considered together, CCSD cites only to the final two pages of the Bulletin, which summarizes the LCB's recommendations regarding enforcement of public records laws and cross-references the Fees Provision. (OB, pp. 19-20.) This conveniently ignores the several sections of the Bulletin which in fact demonstrate that the LCB considered the Fees Provision and the Immunity Provisions to be conceptually distinct.

Specifically, in the "Summary of Recommendations" section, the recommended adoption of what would become the Fees Provision appears in a subsection entitled "Procedures for Access to Public Records." (IV AA807-08.) The recommendation for what would become the Immunity Provision, on the other hand, was included in a subsection entitled "Enforcement of Public Records Laws." (IV AA810.) Similarly, in the more detailed sections of the Bulletin, the LCB discussed

the recommended Fees Provision in a section of the Bulletin entitled "Procedures Upon Denial of Access to Records," (IV AA828-29), while discussing the eventual Immunity Provision in a section dealing with enforcement of public records laws. (IV AA836-37.)

CCSD also argues that because the Fees Provision and the Immunity Provisions of AB 365 appear back-to-back, they must be read together. (OB, pp. 21-22 (citing IV AA842).) In addition to not citing any case law to support this absurd argument, CCSD ignores textual clues in AB 365 which demonstrate that the legislature intended these two provisions to have separate meaning and effect.

Significantly, CCSD's argument ignores the different language of the two sections of AB 365. Section 2—which eventually became the Fees Provision—provides that a prevailing requester is entitled to recover attorney's fees and costs "from the ***agency*** whose officer has custody of the book or record." (IV AA842 (emphasis added).) Section 3—which eventually became the Immunity Provision—uses different language, providing that a "***public officer or employee*** who acts in good faith in disclosing or refusing to disclose information is immune from liability from damages, either to the requester or to the person whom the information concerns." (*Id.*) (emphasis added).

This Court has stated that it will "construe statutes to give meaning to all of their parts and language, and this court will read each sentence, phrase, and word to

render it meaningful within the context of the purpose of the legislation." *Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) (citation omitted). The uses of the term "agency" in Section 2 and the terms "public officer or employee" in Section 3 demonstrate that the legislature intended the two sections to be distinct provisions. Had the legislature intended to carve out some sort of immunity from attorney's fees and costs for a governmental ***agency***, it could have easily done so. But it did not, and neither should this Court. Thus, conflating the two provisions of AB 365 simply because they appear "back-to-back" would run afoul of this Court's precedent and would render the legislature's specifically chosen language nugatory, a result CCSD consistently reminds this Court that it must avoid. Also telling is the absence of any bad faith requirement in Section 2. All that AB 365 required for a requester to recoup attorney's fees and costs is that he or she prevails in the litigation in district court. (3JA549.) Unlike Section 3, there is no requirement that a requester demonstrate an agency acted in bad faith.

Moreover, reading these two separate sections of AB 365 together as CCSD argues would be inconsistent with the purpose of AB 365 and the overall purpose of the NPRA. As the Society for Professional Journalists explained during public testimony on the bill, AB 365 was designed "so a signal is sent to the public employees who hold public records that it is their job to ensure the public has easy access to those documents which indeed are open to review by taxpayers." (IV

AA854.) Rendering the Fees Provision meaningless would be inconsistent with this purpose, which, as detailed above, is now enshrined in the NPRA's plain language.

Thus, the bill was designed to revamp and strengthen access to public records. It set forth a mechanism by which a requester could go to court—and recoup fees and costs upon prevailing. It also separately replaced a prior provision that imposed criminal liability with one limiting civil liability to those cases in which the governmental officer or employee did not act in good faith. Nothing in the record shows that Section 3 was intended as a limitation on Section 2.

CCSD cites to an isolated portion of testimony by Ande Engleman of the Nevada Press Association for the proposition that an award of attorney's fees must be predicated upon a showing of bad faith. (OB, pp. 22.) While Ms. Engleman may have testified that costs and fees would be "granted only when it was a denial of what was clearly a public record" (IV AA879), that sentence was sandwiched in a discussion of frivolous lawsuits. (*Id.*) Ms. Engleman was not urging a limitation on the fees and costs provision—she was assuring legislators that public agencies would not be on the hook for fees and costs if a lawsuit was frivolous. In any case, such "legislative history" certainly cannot be used to dodge the plain text of the NPRA. Moreover, at the same hearing where Ms. Engleman testified, Assembly Subcommittee on Government Affairs Chairman Rick Bennett explained that "[a]s currently written, if the requester prevailed, he was entitled to recover his costs and

attorneys' fees in the proceeding, from the agency whose officer had custody of the record." (IV AA882-83.)

When interpreting a statute, this court resolves any doubt as to legislative intent in favor of what is reasonable, and against what is unreasonable. *Hunt v. Warden, Nevada State Prison*, 111 Nev. 1284, 1285, 903 P.2d 826, 827 (1995) (citing *Oakley v. State*, 105 Nev. 700, 702, 782 P.2d 1321, 1322 (1989)). Further, even if any ambiguity results in interpreting the Fees Provision, it must be resolved in a manner that favors access and the unambiguous purpose of the NPRA. *Cf. McKay v. Bd. of Sup'rs of Carson City*, 102 Nev. 644, 651, 730 P.2d 438, 443 (1986) ("…a strict reading of the statute is more in keeping with the policy favoring open meetings expressed in NRS chapter 241 and the spirit of the Open Meeting Law…"); *see also State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) ("To interpret an ambiguous statute, we look to the legislative history and construe the statute in a manner that is ***consistent with reason and public policy***.") (emphasis added) (citations omitted). As discussed above, the purpose of the NPRA is to further public access to government records. Using a contorted interpretation of legislative history to cancel out a provision of the NPRA which entitles requesters to recoup their attorney's fees for having to drag a governmental entity to court to obtain public records is both unreasonable and contrary to that important purpose.[23]

[23] CCSD also asserts that the district court committed reversible error by

E. Even if the Immunity Provision Applies to the Fees Provision, CCSD Is Not Entitled to Rely on it.

Even if the Immunity Provision applies as CCSD imagines it does, CCSD has not sufficiently demonstrated that it acted in good faith in this matter.

1. The Immunity Provision Is an Affirmative Defense, Which Must Be Proved by CCSD.

If the Immunity Provision even applied to attorney's fees and costs—which it does not—it would be an affirmative defense to liability, all elements of which must be proven by the defendant. *See Nevada Ass'n Servs., Inc. v. Eighth Jud. Dist. Ct.*, 130 Nev. 949, 955, 338 P.3d 1250, 1254 (2014) (citing *Schwartz v. Schwartz*, 95 Nev. 202, 206 n.2, 591 P.2d 1137, 1140 n.2 (1979)) ("because the voluntary payment doctrine is an affirmative defense, the defendant bears the burden of proving its applicability"); *see also Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1007 (9th Cir. 2004) ("good faith is an affirmative defense as to which defendants have the burden of proof" regarding violations of Worker Adjustment and Retraining Notification Act). The requirement that a defendant bear the burden of proving the affirmative defense of good faith is especially pertinent when the defendant is the government. *See Benigni v. City of Hemut*, 879 F.2d 473, 479 (9th Cir. 1988) ("We

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"interpret[ing] NRS 239.011(2) in isolation." (OB, p. 10-14.) This necessarily ignores that in declining CCSD's request to conflate Nev. Rev. Stat. §§ 239.011 and 239.012, the district court found that such an interpretation would be inconsistent with the purposes and policies animating the entire NPRA. (*See* V AA1155-56.)

have expressly held that good faith is an affirmative defense that a police officer must prove."); *McDonald v. United States*, 102 F.3d 1009, 1010 (9th Cir. 1996) (In a case dealing with an alleged improper tax disclosure, "[g]ood faith is an affirmative defense which the government must prove"); *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992) (In a Section 1983 civil rights action, "qualified immunity is an affirmative defense, and the burden of proving the defense lies with the official asserting it") (*citing Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982)).

2. If the Immunity Provision Applies, the Review-Journal Is Entitled to an Evidentiary Hearing or Trial to Determine Whether CCSD Acted in Good Faith.

For the many reasons set forth herein, this Court should reject the argument that the Immunity Provision limits the Fees Provision. If it does not do so, the issue of whether CCSD acted in good faith remains unresolved—and must be resolved at an evidentiary hearing or trial. Although the district court held that CCSD did not act in bad faith, CCSD has not met its burden to demonstrate it has acted in good faith.

At such a proceeding, the Review-Journal would be entitled to examine CCSD officials, CCSD counsel, and any other the other person(s) responsible for the decision to withhold the requested records.

Even assuming CCSD has asserted sufficient facts for the Court to consider the affirmative defense of good faith, such a defense is one that is resolved by the

trier of fact. *See W. Indus., Inc. v. Gen. Ins. Co.*, 91 Nev. 222, 228, 533 P.2d 473, 476–77 (1975) (the question of whether a corporate officer has breached his duty of good faith, honesty and full disclosure is "a question the trier of fact must resolve after scrutinizing all the evidence"); *see also G. Golden Assocs. Of Oceanside, Inc. v. Arnold Foods Co*., 870 F. Supp. 472, 478 (E.D.N.Y. 1994) ("Whether a party has acted in good faith is typically a question to be answered by the trier of fact . . . Issues of motive simply are not easily determinable before trial on the basis of a limited record without the ability to assess the credibility of witnesses."); *Safeco Ins. Co. v. City of White House, Tenn*., 36 F.3d 540, 548 (6th Cir. 1994) (good faith is a question of fact).

VII. CONCLUSION

This Court must affirm the decision of the district court in its entirety.[24]

DATED this 7th day of November, 2018.

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[24] This matter should be remanded to the district court for the purpose of determining if additional fees and costs should be paid for work performed subsequent to the entry of the fee award at issue.

CERTIFICATE OF COMPLIANCE

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

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

I further certify that this ANSWERING BRIEF complies with the type-volume limitation of Nev. R. App. P. 32(a)(7)(A)(ii) because it contains 13,971 words.

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

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 7th day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONDENT'S ANSWERING BRIEF was filed electronically with the Nevada Supreme Court on the 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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