IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA DEPARTMENT OF EMPLOYMENT, TRAINING & REHABILITATION, EMPLOYMENT SECURITY DIVISION, Appellant, vs. SIERRA NATIONAL CORPORATION, doing business as THE LOVE RANCH, a Nevada Corporation, Respondent.	Supreme Court Case No. 76639 District Case No. 17-OC-00221B

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Appeal from First Judicial District Court, State of Nevada,
in and for Carson City

The Honorable James T. Russell

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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

Respondent Sierra National Corporation, doing business as The Love Ranch ("The Love Ranch"), is a Nevada corporation with no parent corporation. No publicly held company owns 10% or more of its stock.

The Love Ranch was initially represented in this case by the law firm of Holland & Hart, LLP. The Love Ranch is now represented by the law firm of Simons Hall Johnston PC.

DATED: February 26, 2019.

/s/ Ricardo N. Cordova
Anthony L. Hall, Esq.,
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I. ROUTING STATEMENT

The Love Ranch disagrees with Appellant Nevada Department of Employment, Training and Rehabilitation, Employment Security Division's ("DETR") claim in its Routing Statement that this dispute "involves a challenge to the decision of an administrative agency regarding a tax determination." *See* AOB 1. This an appeal from a Nevada Public Records Act ("NPRA") proceeding, not an administrative agency appeal from a tax determination. In other words, DETR fundamentally mischaracterizes the nature of this appeal. Nevertheless, The Love Ranch agrees with DETR to the extent it argues that this case should be retained by the Supreme Court because it involves issues of first impression and statewide importance. *See* NRAP 17(a)(13)-(14).

II. ISSUES PRESENTED FOR REVIEW

(1) Whether the district court abused its discretion in rejecting DETR's contention that mandamus was not available to challenge its blanket denial of The Love Ranch's NPRA Request, where the NPRA, this Court's NPRA jurisprudence, and public policy provide an unqualified statutory right to seek such relief;

(2) Whether the district court abused its discretion in rejecting DETR's assertion that The Love Ranch failed to exhaust its

administrative remedies, where the NPRA does not impose any such obligation, and where the district court alternatively found that this case falls within the exceptions to any exhaustion requirement, but DETR fails to challenge that alternative finding on appeal;

(3) Whether the district court abused its discretion in rejecting DETR's contention that The Love Ranch's NPRA Request was not sufficiently specific, where it set forth, in detail, the records sought, in accord with other public records requests this Court has discussed with approval, and where DETR failed to request clarification of any supposed ambiguity;

(4) Whether the district court abused its discretion in rejecting DETR's contention that the requested NPRA records are confidential under NRS 612.265(1)-(2) where DETR failed to meet its burden to show that those provisions expressly and unequivocally declare the requested records confidential, and where any confidentially afforded by those provisions only narrowly, and conditionally, exempts information to the extent disclosure would reveal the identity of a claimant for unemployment benefits or his or her employer;

(5) Whether DETR preserved its claim of confidentiality under NRS 612.265(14) where DETR failed to cogently present the claim below, and raised the claim for the first time in its motion for reconsideration;

(6) Whether DETR can prevail on its claim of confidentiality under NRS 612.265(14) where, even if preserved for appeal, DETR fails to show that the provision expressly and unequivocally declares the requested records to be confidential;

(7) Whether the district court abused its discretion in rejecting DETR's claim that the requested NPRA records are privileged where DETR failed to meet its burden to support its claim with a privilege log, and failed to provide any evidentiary support for its blanket and conclusory invocation of privilege;

(8) Whether the district court abused its discretion in finding that even if the requested records implicated any confidential or privileged information, DETR waived such protections by failing to raise these objections in its denial of the NPRA request, and refusing to provide a log during the writ proceeding; and

(9) Whether the district court abused its discretion in determining that, even if any of the requested public records contained any confidential or privileged information, and even if such protections

were not waived, DETR should have redacted such information, where The Love Ranch's NPRA Request explained that such information should be redacted with an appropriate log, but DETR refused and instead issued a blanket denial.

III. STATEMENT OF THE CASE

The Love Ranch made an NPRA Request to DETR seeking records to expose DETR's systematically biased and arbitrary practices, particularly with respect to its audit determination that The Love Ranch's tenants are supposedly employees rather than independent contractors. The public undoubtedly has a strong interest in rooting out bias and arbitrary practices within public agencies. The NPRA provides citizens an avenue to do so. The Love Ranch noted in its Request that in responding to the request, DETR should redact any alleged confidential information, and provide an appropriate log, along with citation to the specific statute or legal authority that makes the public book or record, or a part thereof, confidential.

DETR issued a blanket denial of the NPRA Request. DETR did not provide any log or description of any records it has withheld. Nor did DETR cite any legal authority that makes the requested records

confidential or privileged. Indeed, DETR did not even assert that the records, or any portions thereof, are confidential or privileged in any way.

The Love Ranch filed a Petition for a Writ of Mandamus ("Petition") to compel DETR to disclose the requested public records. In a comprehensive order, the district court granted the Petition and awarded The Love Ranch the costs and attorney's fees it incurred in the proceeding. The district court also denied DETR's subsequent motion for reconsideration. DETR appealed.

IV. RELEVANT FACTS AND PROCEDURAL HISTORY

A. Background

The Love Ranch operates a legal, fully-licensed brothel in Lyon County, Nevada, where it rents space to tenants licensed to engage in the business of prostitution/adult entertainment. 1 Appellant's Appendix ("AA") 48. The Love Ranch and other brothels have long classified their tenants as independent contractors, rather than employees. *Id.* Accordingly, like other establishments that rent space to tenants, The Love Ranch does not make contributions into the State Unemployment Fund based upon the earnings the tenants receive from their clients. *Id.*

DETR, the agency responsible for collecting unemployment taxes for the State Unemployment Fund, has been well-aware of this

classification. *Id.* Despite conducting audits of The Love Ranch and affiliated brothels over the years, DETR did not object to the classification, nor assert that contributions should be made into the State Unemployment Fund based upon the tenants' earnings. *Id.* DETR has not disputed any of this. In fact, as recently as December of 2016, DETR's own Board of Review issued an order (of which the district court took judicial notice) agreeing that The Love Ranch's tenants are independent contractors, not employees. 3 AA 249-50.

Thereafter, DETR conducted a supposedly random audit of The Love Ranch. 1 AA 48-49. During its audit, however, DETR's auditors/investigators made comments indicating that their superiors had made the decisions to audit The Love Ranch and had already determined that the tenants who lease rooms from The Love Ranch are employees rather than independent contractors. *Id.*

Following its audit, DETR abruptly and arbitrarily reversed course from its own prior audit findings and its Board of Review's previous order, and determined that The Love Ranch's tenants are employees. *Id.* As a result, DETR claimed The Love Ranch owes a substantial tax liability to the State Unemployment Fund. *Id.* at 49. The Love Ranch filed an administrative appeal, which remains pending before an appeals

referee for DETR. *Id.* The appeals referee has stayed the administrative proceeding pending resolution of this appeal. *See* 4 AA 380.

B. The Love Ranch's NPRA Request

The Love Ranch also made an NPRA Request to DETR seeking records to expose DETR's systematically biased and arbitrary practices, particularly with respect to its audit determination that The Love Ranch's tenants are supposedly employees rather than independent contractors. 1 AA at 37-40.

The Love Ranch noted in its Request that in responding, DETR should redact any allegedly confidential information, and provide an appropriate log, along with citation to the specific statute or legal authority that makes the public book or record, or a part thereof, confidential. *Id.* at 37. The Love Ranch invited DETR to contact it with any questions. *Id.*

The Love Ranch also completed the public records request form made available on DETR's website. *Id.* at 38. The Love Ranch included an attachment with its Public Records Request in which it spelled out, in detail, the records it seeks. *Id.* at 39-40.

C. DETR's Blanket Denial of the NPRA Request

DETR refused to provide any of the requested public records. *Id.* at 41. DETR based its blanket denial solely on two grounds: (1) the NPRA Request "does not sufficiently identify any specific records as required by NAC 239.863" and (2) "this agency is not required to create records to satisfy your request." *Id.* DETR did not provide any log or description of any records that it withheld. *Id.* Nor did DETR cite any legal authority that makes the requested records confidential or privileged—indeed, DETR did not assert that the records, or any portions, are confidential or privileged in any way. *Id.*[1]

D. The Love Ranch's Petition and DETR's Answer

The Love Ranch filed a Petition, seeking to compel DETR to disclose the requested public records. 1 AA 47-69. In its Answer, DETR took a kitchen-sink approach, asserting a host of new arguments that it had not raised in its blanket denial of the NPRA Request. 1 AA 71 - 2 AA 162.

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[1]Although DETR now misleadingly claims it "preserved its objections," *see* AOB 9, DETR merely stated in its blanket denial that "[t]o the extent that any of the information you requested is discoverable pursuant to a proceeding with this agency, this agency does not waive any objections to such request for discovery." 1 AA at 41. As NRS 239.0107(1)(d) and this Court's NPRA jurisprudence make clear, in order to preserve its objections, DETR was required to raise those objections in its response to The Love Ranch's NPRA Request.

DETR argued, among other things, that (1) mandamus was not the proper procedural vehicle to challenge its denial of the NPRA Request, (2) The Love Ranch failed to exhaust its administrative remedies, (3) The Love Ranch engaged in bad faith, (4) relief under the NPRA "only applies in the pre-litigation context," (5) the provisions of NRS 612.265(1)-(2) and 20 C.F.R. § 603.4 make the requested records confidential, and (6) the requested records are protected by the attorney-client and deliberative process privileges. 1 AA 71-86.

The sheer volume of arguments DETR has raised over the course of this dispute—many of which it has now implicitly abandoned—is revealing of DETR's willingness to make virtually any argument to suppress the requested public records.[2] Crucially, however, despite seemingly raising every objection to the Petition it could conceive, nowhere in DETR's entire Answer did it cite, let alone make any

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[2]Given the new arguments in DETR's Answer, The Love Ranch moved for leave to file a reply. 2 AA 176-79. Continuing with its scorched-earth litigation tactics, DETR opposed the motion, *see id.* at 171-75, even though this is the precise situation in which a reply is proper. *See* NRS 34.260; *Kieren v. Feil*, 2016 WL 4082463, at *1 n.1., Case No. 68341 (Nev., July 28, 2016) (unpublished disposition) (refusal to allow a reply was an abuse of discretion where the agency answering the petition "reframed the claim raised in the petition to exclude it from the ambit of mandamus relief."). Fortunately, the district court rejected DETR's attempts to silence The Love Ranch and granted leave to file a reply. 2 AA 222-23.

argument, regarding NRS 612.265(14). In other words, one of the focal points of DETR's appeal is an afterthought.

E. The District Court's Order Granting the Petition

In a thorough order, the district court granted the Petition and awarded The Love Ranch the costs and attorney's fees it incurred in the proceeding. 3 AA 255.

First, the court rejected DETR's contentions that The Love Ranch's NPRA Request was not sufficiently specific, finding that it was more detailed than requests this Court has discussed with approval. *Id.* at 258. In addition, DETR failed to ask for additional information or clarification, despite an invitation in the NPRA Request for DETR to contact The Love Ranch with any questions, which belied its claim that the request was not sufficiently specific. *Id.* at 258-59. And, the NPRA Request simply did not seek the creation of records. *Id.*[3] In fact, these grounds—the only two grounds DETR raised in its denial of the NPRA Request—were so baseless that the court found that they were superfluous and pretextual. *Id.* at 266.

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[3]Tellingly, DETR offers only a perfunctory, one-sentence argument on this issue on appeal, *see* AOB 51, and thus, like it did in the court below, has abandoned it.

The district court was critical of DETR's attempt to raise various claims for the first time in its Answer to the Petition, along with its failure to provide a log detailing the records it claims are confidential or privileged. *Id.* at 259. Given DETR's utter failure to comply with its NPRA obligations, the court found that DETR had waived such claims. *Id.* at 259-60.

Even if not waived, the court determined that DETR's new arguments were unavailing. *Id.* at 260. To begin, it is well-established that mandamus is the appropriate procedural vehicle to compel public records. *Id.* at 260-62. And, the district court noted, NRS 239.011(1) affords an unqualified statutory right to bring such an action. *Id.*

Further, nothing in the NPRA exempts public records that may also be relevant in administrative proceedings under NRS Chapter 612. *Id.* at 261. As the court reasoned, if credited, DETR's position would mean that a party to an administrative dispute has fewer rights under the NPRA than the general public. *Id.* at 262. This would be an absurd result and is unsupported by any caselaw or statutory language. *Id.*

The district court also noted that the NPRA does not require exhaustion of supposedly available administrative remedies to obtain the requested public records. *Id.* at 262-64. The only pre-requisites to

bringing an action under the NPRA is that the petitioner make a request that is denied, both of which were fulfilled here. *Id.* at 263. And, the court found, even if there were an exhaustion requirement, this dispute falls within exceptions to the doctrine. *Id.* at 263-64.

The district court flatly rejected DETR's accusations of bad faith, noting that the requesting party's motives are not relevant to a government entity's duty to disclose public records. *Id.* at 264-65.

The district court further observed that, contrary to DETR's claims, this Court has never held that the NPRA only applies in the "pre-litigation context." *Id.* at 265-66. If anything, a governmental entity's obligations under the NPRA increase after the start of litigation. *Id.*

Next, regarding NRS 612.265(1)-(2) and 20 C.F.R. § 603.4, the district court observed that these provisions only narrowly, and conditionally, exempt information from the NPRA. *Id.* at 267-70. Specifically, these provisions merely prevent disclosure of information to the extent it would reveal the identity of a claimant for unemployment benefits or his or her employer. *Id.* Even then, such information may still be disclosed when it is needed for any proceeding under NRS Chapter 612. *Id.* Further, any confidential portions of the requested records

simply triggered DETR's duty to make redactions, and did not justify its blanket denial of the NPRA Request. *Id.*

The district court also found that DETR waived any privileges by failing to raise them in its response the NPRA Request, and waived any privileges a second time by failing to supply a privilege log in the litigation. *Id.* at 270-75. As the court explained, by failing to provide a privilege log, DETR thwarted The Love Ranch and the court from meaningfully evaluating DETR's alleged privileges. *Id.* at 272. Even if not waived, the court noted, DETR's invocation of privilege was conclusory and unsupported by any evidence. *Id.* And, as with DETR's claims of confidentiality, any allegedly privileged portions of the requested records simply triggered DETR's duty to make redactions and did not justify its blanket denial of the NPRA request. *Id.* at 274-75. Accordingly, the district court granted The Love Ranch's Petition, and ordered DETR to disclose the requested public records within 30 days. *Id.* at 275.

Although NRS 239.0107 contemplates a five-day timeframe, and although DETR already had several months to gather the requested records, DETR requested "a month's period of time" to comply with the district court's order. *See* 4 AA 363-70. This reveals that DETR issued

its blanket denial of the NPRA Request and opposed The Love Ranch's Petition without ever having gathered and reviewed the requested public records.

F. DETR's Motion for Reconsideration

DETR reacted to the district court's order by making a flurry of filings, beginning with a motion for reconsideration. In it, DETR referenced NRS 612.265(14) for the very first time. 3 AA 294-95. Even then, DETR never articulated any argument as to how the provision applies. *See id.*

After DETR prematurely filed a notice of appeal, an inexcusable[4] procedural false-start which created unnecessary delay, DETR's first appeal was dismissed. *See* 4 AA 491-94. On remand, the district court lifted the stay it had previously entered and denied DETR's motion for reconsideration. *Id.* at 445-56. DETR appealed again. 5 AA 559-61

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[4]DETR failed to recognize that its motion for reconsideration tolled the deadline to file a notice of appeal. *See* 3 AA 291. Due to this misapprehension, DETR refused to grant The Love Ranch the professional courtesy of an extension for its opposition to its motion for reconsideration, forcing The Love Ranch to move for an extension. 3 AA 350 - 4 AA 394. To make matters worse, DETR filed a flurry of *ex parte* motions and other submissions to take advantage of the undersigned's scheduling conflicts. In short, DETR's claim that The Love Ranch filed an "*untimely*" opposition to its motion for reconsideration, *see* AOB 14:1, is patently disingenuous.

V. SUMMARY OF THE ARGUMENT

Although DETR has attempted to reinvent its case on appeal, at its core, DETR's appeal is simply its latest baseless attempt to evade its obligations under the NPRA. If accepted, DETR's arguments would result in the precise type of secrecy, unaccountability, and capriciousness the NPRA was intended to root out. The district court was well within its discretion in rejecting DETR's obstructionism and granting The Love Ranch's Petition. Indeed, the district court's order is rooted in comprehensive findings of fact and conclusions of law, all of which are supported by substantial evidence and not clearly erroneous. There is simply no reason to disturb the district court's order.

VI. ARGUMENT

A. Standard of Review

While questions of law are reviewed de novo, the "district court's grant or denial of a writ petition [is reviewed] for an abuse of discretion." *Las Vegas Metropolitan Police Department v. Blackjack Bonding*, 131 Nev. 80, 85, 343 P.3d 608, 612 (2015). In addition, the "district court's findings of fact and conclusions of law, even where predicated upon conflicting evidence, must be upheld if supported by substantial evidence,

and may not be set aside unless clearly erroneous." *Pombo v. Nevada Apartment Ass'n*, 113 Nev. 559, 562, 938 P.2d 725, 727 (1997).

B. Applicable NPRA Framework

The Nevada Legislature and this Court have a long history of jealously guarding against abuses of the NPRA by agencies such as DETR. The Legislature has declared that all public books and public records of governmental entities must remain open to the public, unless "otherwise declared by law to be confidential." NRS 239.010(1). The NPRA fosters governmental accountability and transparency by ensuring that records are broadly accessible. *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 878, 266 P.3d 623, 626 (2011). The NPRA must be liberally construed to maximize the public's right of access. *See* NRS 239.001(1)-(2). In contrast, "any limitations or restrictions on the public's right of access must be narrowly construed." *Gibbons*, 127 Nev. at 878, 266 P.3d at 626.

In reviewing public records requests, Nevada courts "begin with the presumption that all government-generated records are open to disclosure." *Id.* at 880, 266 P.3d at 628. "'[O]pen records are the rule,' and any nondisclosure of records is the exception." *Id.* at 880, 266 P.3d at 627 (quoting *Reno Newspapers v. Haley*, 126 Nev. 211, 216, 234 P.3d

922, 926 (2010)). Indeed, "the provisions of the NPRA place an unmistakable emphasis on disclosure." *Id.* at 882, 266 P.3d at 629. The district court correctly applied each of these principles in rejecting DETR's request to depart from established Nevada law.[5]

C. The District Court Did Not Abuse Its Discretion in Determining That Mandamus Relief was Appropriate

DETR theorizes that mandamus relief was not appropriate because there was supposedly a plain, speedy, and adequate remedy available to The Love Ranch to seek the records via the Parties' NRS Chapter 612 administrative proceeding. *See* AOB 42-44. According to DETR, The Love Ranch used its NPRA Request to "override" or "bypass" the administrative process, which, DETR contends, supplies the exclusive

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[5]DETR contends that the Legislature "profoundly amended NRS 239.010(1) in 2013" and suggests that, as a result, the principles recognized in *Haley* and *Gibbons* have been weakened. *See* AOB 22. This argument is meritless. To begin, DETR grossly overstates the impact of the 2013 amendments, which merely added NRS 612.265 to the list of exemptions in NRS 239.010(1). The NPRA framework, including its presumption of openness, rules of construction in favor of open records and against any limitations, were untouched. Not surprisingly, this Court has continued to apply the framework recognized in *Gibbons* and *Haley*. *See, e.g.*, *Clark County School District v. Las-Vegas Review-Journal*, 134 Nev. ___, ___, 429 P.3d 313, 317 (2018). Thus, DETR still bears the burden to overcome the presumption of openness and show that the requested records are expressly and unequivocally declared to be confidential.

means to seek records relating to such proceedings. *See id.*[6] DETR's arguments run afoul of the plain language of the NPRA, this Court's NPRA jurisprudence, and public policy.

1. The NPRA's Plain Language Refutes DETR's Theory

In the NPRA, the Nevada Legislature has declared, in pertinent part, that with certain enumerated exceptions,

> ***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 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.

NRS 239.010(1) (emphasis added).

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[6]DETR's accusation that The Love Ranch's NPRA Request "interrupted and delayed" the administrative proceeding, *see* AOB 40, is baseless. It is DETR's refusal to comply with the NPRA—***for a year and a half and counting***—that created any interruption and delay. And, DETR's accusation is remarkably disingenuous given that it repeatedly implored the appeals referee to stay the administrative proceedings pending resolution of the Parties' NPRA dispute.

Thus, there is no indication that parties involved in litigation against a public entity are excluded from the NPRA. On the contrary, the NPRA states, in the broadest terms conceivable, that public records must be open to inspection by "***any person***." *See* NRS 239.010(1) (emphasis added); *see also* NRS 0.039 ("Except as otherwise expressly provided in a particular statute or required by the context, 'person' means a natural person, any form of business or social organization and any other nongovernmental legal entity including, but not limited to, a corporation, partnership, association, trust or unincorporated organization.").

Nor does NRS 239.010(1) exempt public records from disclosure if such records may prove relevant to administrative proceedings. The only limitations the statute contemplates on the use of such records are those imposed by federal copyright laws. All other public records may be copied "***or may be used in any other way***" to the advantage of the "***general public***."[7] *See* NRS 239.010(1) (emphasis added).

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[7]As the State Bar of Nevada recently observed, the NPRA "clearly and unequivocally states that public records are available to '*any* person'" and provides that "public records may be used in 'any other way . . . to the advantage of the general public,'" which "would encompass the use of public records in connection with discovery." *See* Ethics Opinion 54, *available at* https://www.nvbar.org/wp-content/uploads/Public-Records-Act-Ethics-Opinion-No.-54.pdf (last visited February 19, 2019). Thus, an

The Legislature has also expressly declared that a party who has been denied public records may proceed with an action before the district court:

> If a request for inspection, copying or copies of a public book or record open to inspection and copying is denied, ***the requester may apply to the district court*** in the county in which the book or record is located for an order:
>
> (a) Permitting the requester to inspect or copy the book or record; or
>
> (b) Requiring the person who has legal custody or control of the public book or record to provide a copy to the requester, as applicable.

NRS 239.011(1) (emphasis added).

Thus, nowhere does the NPRA prohibit a party from seeking public records simply because some of those records may also be relevant to an administrative proceeding under a separate statutory scheme. Nor can any such language be read into the statute, particularly given the Legislature's declaration that any purported limitations on disclosure must be narrowly construed. Most importantly, it is undisputed that DETR denied The Love Ranch's NPRA Request. Thus, under the plain

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attorney does not violate Rule 4.2 by making public records requests to an agency, even when the attorney is actively involved in litigation with the agency. *See id.* This analysis is persuasive, and thoroughly refutes DETR's arguments.

language of NRS 239.011(1), The Love Ranch had an unqualified statutory right to bring its Petition. This is especially apparent when the NPRA is construed, as it must be, in favor of disclosure and the presumption of open records.

2. This Court's NPRA Caselaw Defeats DETR's Claims

Applying the NPRA, "[t]his court has repeatedly recognized that mandamus is the appropriate procedural remedy to compel the production of public records under NRS Chapter 239." *Morrow v. LeGrand*, 2017 WL 1397335, at *1, Case No. 68768 (Nev., April 14, 2017) (unpublished disposition). Nevada law is settled on this point. *See DR Partners v. Bd. of County Comm'rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000).[8]

This Court has flatly rejected attempts by the government to withhold public records by maligning the motives of the requesting party,

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[8]*See, e.g.*, *Las Vegas Metropolitan Police Department v. Blackjack Bonding*, 131 Nev. 80, 343 P.3d 608 (2015) (affirming writ of mandamus compelling the disclosure of public records); *PERS v. Reno Newspapers*, 129 Nev. 833, 313 P.3d 221 (2013) (affirming writ of mandamus requiring production of public records); *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 884 n.4, 266 P.3d 623, 630 n.4 (2011) ("mandamus was the appropriate procedural vehicle" to seek access to public records and a log of the withheld records); *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144, 148 (1990) (directing the district court to issue a writ of mandamus compelling the disclosure of public records).

or pointing to the supposed availability of other avenues to obtain the records. This Court's opinion in *Las Vegas Metropolitan Police Department v. Blackjack Bonding, Inc.* is instructive on this point. 131 Nev. ___, 343 P.3d 608 (2015). There, Blackjack Bonding, a private bond company, made an NPRA request for records of telephones used by prison inmates. *Id.* at ___, 343 P.3d at 610-11. The police department that administered the prison denied the request, arguing, among other things, that it "had no duty to fulfill Blackjack's records request because Blackjack purportedly acted to serve a business interest." *Id.* at ___ n.2, 343 P.3d at 611 n.2. This Court concluded that this argument was "without merit," explaining, "***the NPRA does not provide that a requester's motive is relevant to a government entity's duty to disclose public records***." *Id.* (emphasis added).

Also instructive is *City of Sparks v. Reno Newspapers*, 133 Nev. ___, 399 P.3d 352 (2017). There, much like DETR here, the City argued that mandamus relief was not available because it had denied a public records request by invoking a confidentiality regulation which could have been challenged through a declaratory judgment proceeding under the Administrative Procedure Act. *Id.* at ___, 399 P.3d at 354. This Court disagreed, observing "a writ of mandamus is generally the appropriate

means for pursuing the disclosure of public records pursuant to NRS 239.011." *Id.* at ___, 399 P.3d at 355.

In addition, the newspaper was challenging the denial of its records request, not merely seeking to determine its rights regarding the confidentiality regulation invoked by the City. *Id.* Thus, NRS 239.011 specifically applied, and took precedence over a separate statute generally providing an alternate avenue of relief. *Id.*

Most recently, in *Comstock Residents v. Lyon County Board of Commissioners*, this Court approved of an NPRA request even though the requested records related to a lawsuit the requesting party simultaneously brought to challenge a zoning change. 134 Nev. ___, 414 P.3d 318 (2018). The fact that the requesting party could have sought the public records during discovery in the zoning lawsuit did not give this Court any pause. *See id.*[9]

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[9]Considering *Comstock*, practitioners have persuasively explained that "public records can be a valuable resource during discovery and pre-litigation fact gathering," and "[t]he NPRA can also be used to obtain documents that may not otherwise be available in discovery." *See* Colleen E. McCarty, *Public Records, Private Devices: The Nevada Public Records Act Enters the Digital Age*, Nevada Lawyer Vol. 26:11, *available at* https://www.nvbar.org/wp-content/uploads/NevadaLawyer_Nov2018_Public-Records.pdf (last visited February 19, 2019).

As *Blackjack Bonding* makes clear, DETR's arguments are meritless because the requesting party's motives are irrelevant under the NPRA. In any event, DETR mischaracterizes The Love Ranch's motives. As part of its anticipated presentation of its case, The Love Ranch made its NPRA Request to expose DETR's systematically biased and arbitrary practices, particularly with respect to its audit determination that The Love Ranch's tenants are supposedly employees rather than independent contractors. The public undoubtedly has an interest in rooting out such activity.[10] And, as *City of Sparks v. Reno Newspapers* and *Comstock* illustrate, the plain language of NRS 239.011(1) unconditionally provides The Love Ranch an avenue to do so, notwithstanding a supposed alternate means to seek out related records.

3. Public Policy Refutes DETR's Contentions

As the district court persuasively reasoned, if credited, DETR's position would mean that parties to administrative disputes have fewer

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[10]*See, e.g.*, *Comstock*, 134 Nev. at ___, 414 P.3d at 319-20 (approving of an NPRA request to ferret out communications by commissioners engaged in an arbitrary zoning decision); *DR Partners*, 116 Nev. at 620, 6 P.3d at 467 (approving of an NPRA request made in connection with investigation into governmental waste and the extent of influence over public officials by private lobbyists); *Bradshaw*, 106 Nev. at 644, 798 P.2d at 145 (approving of an NPRA request to obtain a report generated by the Reno Police Department regarding bribery of a public official).

rights under the NPRA than the general public. Consequently, an entire class of citizens—namely, those unfortunate enough to find themselves adverse to obstructionist state agencies in administrative proceedings—would be stripped of their NPRA rights. This would be a perverse and absurd result and is unsupported by any statutory language or caselaw.[11] Accordingly, the district court did not abuse its discretion in determining that mandamus relief was an appropriate procedural vehicle for The Love Ranch to challenge DETR's blanket denial of its NPRA Request.

4. DETR's Jurisdictional Arguments are Meritless

DETR's related arguments—namely, that the district court supposedly lacked jurisdiction and that venue was improper in the First Judicial District, *see* AOB 11-13, 40-41, fail for the same reasons.

To begin, the argument is premised on DETR's mischaracterization of The Love Ranch's Petition as a supposed challenge to the appeals referee's discovery rulings. *See id.* at 40. Although the distinction is lost on DETR, an action under the NPRA is a separate and independently-authorized proceeding. As detailed, the NPRA provides the district court jurisdiction over such proceedings. *See* NRS 239.011(1). And, venue for

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[11]The cases DETR cites in support of its arguments regarding mandamus relief, *see* AOB 43-44, do not even involve the NPRA, let alone adopt its novel theory.

such proceedings was appropriate in the First Judicial District because the public records at issue are located in Carson City, Nevada. *See id.*

Further, the district court is expressly granted the authority, both by the Nevada Constitution and by statute, to issue writs of mandamus as are proper and necessary to complete the exercise of its jurisdiction. *See* Nev. Const. Art. 6, § 6; NRS 34.160. The district court's jurisdiction to issue such writs is in no way curtailed by NRS Chapter 612, and DETR has not cited any authority showing otherwise. In fact, the limitation DETR seeks to impose would be an unconstitutional and unlawful encroachment upon the district court's authority under Article 6, Section 6 of the Nevada Constitution and the NPRA.

D. The District Court Did Not Abuse Its Discretion in Rejecting DETR's Arguments Regarding Exhaustion

DETR asserts that the district court erred in rejecting its argument that The Love Ranch failed to exhaust its administrative remedies under NRS Chapter 612. *See* AOB 37-42. DETR argues that the district court "unlawfully excused" The Love Ranch from the administrative exhaustion requirement. *Id.* at 42. "Due to the compilation of egregious

errors," DETR insists, this Court "must" reverse the district court. *See id.* at 41-42. DETR's demands are unavailing.[12]

1. The NPRA Does Not Require Exhaustion

DETR's attempts to graft an administrative exhaustion requirement onto the NPRA have no basis in its text. As noted, NRS 239.011(1) declares that a party who has been denied access to public records may proceed with an action before the district court. The Love Ranch is indisputably a party who has been denied access to public records, and thus, under NRS 239.011(1), it was authorized to bring its Petition. The NPRA does not impose any obligation to exhaust supposedly available administrative remedies.

Thus, any exhaustion requirement in NRS Chapter 612 was inapplicable here. Although DETR attempts to twist and

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[12]DETR further claims the undersigned "immediately directed" the district court's order to the appeals referee to "override" him. *See* AOB 41. This is misleading. As the record shows, the appeals referee requested a copy of the order. *See* 3 AA at 277. The referee's interest in the order was unsurprising given that he had stayed the administrative proceedings pending resolution of the Parties' NPRA dispute. Nor was it improper for The Love Ranch to request the order to be added to the record in the administrative proceeding. As detailed, NRS 239.010(1) permits public records to be used for such purposes. DETR itself admitted to the district court that it "intends to ask that all documents filed herein become part of the Administrative Record." *See* 3 AA 290.

mischaracterize The Love Ranch's motives,[13] this is indisputably an NPRA case, and thus, it is specifically governed by the NPRA. *See City of Sparks v. Reno Newspapers*, 133 Nev. at ___, 399 P.3d at 355. Stated simply, the only pre-requites to an NPRA action are that a party make a request that is denied. These pre-requisites were indisputably fulfilled here.[14]

2. DETR Fails to Address the Exceptions to Exhaustion

DETR fails to acknowledge, let alone challenge, the district court's alternative finding that even if exhaustion were required, this action falls within exceptions to the doctrine. This is fatal to DETR's arguments regarding exhaustion. *See Badillo v. American Brands, Inc.*, 117 Nev. 34, 42, 16 P.3d 435, 440 (2001) ("[This Court] need not consider an issue that has not been fully raised by appellants or meaningfully briefed by either party."); *Schwartz v. Eliades*, 113 Nev. 586, 590 n.3, 939 P.2d 1034, 1036 n.3 (1997) ("This court will not consider an issue if no relevant

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[13]DETR also accuses the district court of "invad[ing] the province of the Legislature" and exercising "judicial review" over the appeals referee. *See* AOB 37-38. DETR fundamentally mischaracterizes the limited nature of relief the district court granted under the NPRA, as the Legislature expressly authorized in NRS 239.011.

[14]Like its cases about mandamus relief, the cases DETR compiles regarding exhaustion, *see* AOB 37-38, do not even involve the NPRA, much less impose an exhaustion requirement on NPRA requests.

authority is presented on appeal."). Thus, the district court did not abuse its discretion in rejecting DETR's arguments about exhaustion.

E. The District Court Did Not Abuse its Discretion in Rejecting DETR's Claims Regarding Specificity

DETR argues that The Love Ranch's NPRA Request was "improper" because it was supposedly required to "identify specific records." *See* AOB 44-51. This argument is unavailing.

To begin, DETR is attempting to shift its burden to overcome the NPRA's presumption of openness. Such tactics are directly odds with the provisions of the NPRA, and nearly three decades of NPRA jurisprudence. *See* NRS 239.001(2)-(3); NRS 239.0113; *Gibbons*, 127 Nev. at 877-880, 266 P.3d at 626-28; *Haley*, 126 Nev. at 214-218, 234 P.3d at 924-26; *Donrey*, 106 Nev. at 635, 798 P.2d at 147.

The NPRA simply does not contain the draconian specificity requirements DETR claims. Nor is there any basis for reading such requirements into the NPRA. By authorizing "a written or oral request" for public records, the Legislature expressed its disfavor of such obstacles. *See* NRS 239.0107(1). Bolstering this conclusion, the Legislature declared that the NPRA "must be construed liberally" to maximize the public's right of access, and that, in contrast, any

limitations on access to records "must be construed narrowly." *See* NRS 239.001(1)-(3). And, forcing the party seeking public records to blindly attempt to specifically identify each requested record to the agency that ***is in possession*** of the records would be an absurd, and patently unfair, result.

DETR suggests, however, that in NRS 239.008(3)(1), the Legislature delegated authority to the State Library, Archives and Public Administrator to superimpose such a requirement on the NPRA. *See* AOB 46. Using this as a springboard, DETR argues that the *Nevada Public Records Act: A Manual for State Agencies* ("*Manual*"), related NAC regulations, and DETR's own internal policies and forms, establish a rigorous specificity requirement on anyone who dares to request public records from a state agency. DETR's resort to these materials is fruitless.

For starters, the incomplete quotations to NRS 239.008 in DETR's Opening Brief do not even begin to tell the whole story. NRS 239.008 provides as follows:

> 1. The head of each agency of the Executive Department shall designate one or more employees of the agency to act as records official for the agency.
>
> 2. A records official designated pursuant to subsection 1 shall carry out the duties imposed pursuant to this chapter on the agency of the

> Executive Department that designated him or her with respect to a request to inspect or copy a public book or record of the agency.
>
> 3. The State Library, Archives and Public Records Administrator, pursuant to NRS 378.255 and in cooperation with the Attorney General, shall prescribe:
>
> (a) The ***form*** for a request by a person to inspect or copy a public book or record of an agency of the Executive Department pursuant to NRS 239.0107;
>
> (b) The form for the written notice ***required to be provided by an agency*** of the Executive Department pursuant to paragraph (b), (c) or (d) of subsection 1 of NRS 239.0107; and
>
> (c) By regulation the ***procedures with which a records official must comply*** in carrying out his or her duties.
>
> 4. Each agency of the Executive Department shall make available on any website maintained by the agency on the Internet or its successor the forms and procedures prescribed by the State Library, Archives and Public Records Administrator and the Attorney General pursuant to subsection 3.

(Emphasis added.)

Thus, the thrust of NRS 239.008 imposes obligations on the agency responding to a public records request, not the party requesting public records. Regarding the NPRA requests, the statute merely gives the Archives Administrator authority to create a "form" that agencies can

use. Nothing in NRS 239.008 grants the Archives Administrator, let alone state agencies such as DETR, authority to implement the specificity requirements claimed by DETR. Read properly, the statute merely permits the Archives Administrator to establish internal regulations for responding to records requests. It does not authorize bureaucratic regulations to narrow the rights guarded by the NPRA.

This Court has repeatedly rejected the notion that the Legislature gave government bureaucrats—the same people the NPRA was designed to keep accountable—free reign to make regulatory encroachments on the NPRA. For instance, in *Reno Newspapers v. Gibbons*, this Court flatly rejected State's attempt to withhold records based upon its "informal employee e-mail policy," noting it "does not have the force of law." 127 Nev. at 885, 266 P.3d at 631.

Next, in *Las Vegas Metropolitan Police Department v. Blackjack Bonding*, this Court noted that because the information requested was public under the NPRA, it need not consider whether it would also be considered public under the regulations enacted by the Archives Administrator. 131 Nev. ___, ___ n. 3, 343 P.3d 608, 613 n.3 (2015).

Similarly, in *Comstock Residents Association v. Lyon County Board of Commissioners*, this Court held that the NAC "do[es] not limit the

reach of the NPRA, but merely establish[es] regulations for good records management practices of those local programs." 134 Nev. at ___, 414 P.3d at 322. This Court explained that "[t]he best practices for local government record management and what constitutes a public record for purposes of the NPRA are distinct, and we are careful not to conflate them here." *Id.*[15]

Most recently, in *Clark County School District v. Las Vegas Review-Journal*, this Court reiterated that "internal regulations do not limit the NPRA." 134 Nev. ___, ___, 429 P.3d 313, 318 (2018). As this Court reasoned,

> [a]scribing a force to such regulations that limits the NPRA would create an opportunity for government organizations to make an end-run around the NPRA by drafting internal regulations that render documents confidential by law. While the regulations undoubtedly play an essential role in [the government's] internal operations . . . we hold that they do not render the withheld documents confidential by law under the NPRA.

Id.

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[15]*Blackjack Bonding* and *Comstock* completely defeat DETR's related argument, which it raises for the first time on appeal, and in perfunctory fashion, that The Love Ranch supposedly sought "nonrecord" materials as defined in NRS 239.705. *See* AOB 50.

As *Gibbons*, *Blackjack Bonding*, *Comstock*, and *Clark County School District* make clear, government bureaucrats cannot erect their own barriers to the NPRA, whether by manual, regulation, policy, or otherwise.[16]

DETR's argument is not only legally misguided, but it is factually baseless. As the district court observed, The Love Ranch's NPRA Request spelled out, in detail, the records sought. The description was in accord with other public records requests this Court has reviewed and discussed with approval. *See, e.g.*, *Comstock*, 134 Nev. at ___, 414 P.3d at 320 (approving NPRA request "seeking communications concerning the approval of the zoning change, regardless of whether they occurred on public or private devices"); *Gibbons*, 127 Nev. at 875, 266 P.3d at 625 (approving request for "e-mail communications sent over a six-month time period between Governor Gibbons and ten individuals").

Also unavailing are DETR's criticisms that The Love Ranch's NPRA Request sought "any and all records" regarding the categories identified.

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[16]And, while DETR claims the various materials it has cobbled together create a "responsibility to specifically identify the document(s)," *see* AOB 47, this is an overstatement, at best. For example, NAC 239.863(1)(c), a regulation DETR cited below, but has mysteriously abandoned on appeal, simply purports to require "[a] description of the public record that is ***sufficient*** to identify the record." (emphasis added). The Love Ranch's NPRA Request easily met that standard.

See AOB 49. Again, this Court has approved of similar requests. *See Haley*, 126 Nev. at 213, 234 P.3d at 924 (approving request for "***all*** records 'detailing the status of ***any and all*** [concealed firearms] permits issued by the Washoe County Sheriff's Office to Gov. Jim Gibbons,' and ***all*** 'documents detailing action taken by the Washoe County Sheriff's Office on that permit, ***including*** a decision to suspend, revoke, or hold the permit.'") (emphasis added).[17]

DETR's after-the-fact justifications for its blanket denial of the NPRA Request do not withstand scrutiny. As the district court astutely observed, DETR's arguments regarding specificity were belied by its failure to request additional information or clarification, despite an invitation in the NPRA Request for DETR to contact The Love Ranch with any questions.[18] The district court's rejection of DETR's arguments

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[17]Also meritless is DETR's new criticism that "only three (3) of the thirteen (13) categories in [The Love Ranch's] request contain any date." *See* AOB 49. As the party in possession of the requested records, DETR was in a position to easily ascertain such information. DETR's bickering is further belied by its failure to ask for any clarification.

[18]For similar reasons, DETR's quibbling that it "only has five (5) business days to respond to a request for a public record," *see* AOB 47, is unpersuasive. Under NRS 239.0107(c), if the government agency is unable to provide the record by the end of the fifth business day after the request, the agency can obtain additional time.

is supported by substantial evidence, and therefore, should not be disturbed.

F. The District Court Did Not Abuse its Discretion in Rejecting DETR's Claim of Confidentiality under NRS 612.265(1)-(2)

DETR argues that the requested records are confidential under NRS 612.265(1)-(2). *See* AOB 21-37. "In harmony with the overarching purposes of the NPRA, the burden of proof is imposed on the state entity to prove that a requested record is confidential." *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 882, 266 P.3d 623, 629 (2011); *see* NRS 239.0113. Absent a statutory provision that "expressly and unequivocally" declares a record to be confidential, any limitations on disclosure may only be based upon a broad balancing of the interests involved. *Reno Newspapers v. Haley*, 126 Nev. 211, 214, 234 P.3d 922, 924 (2010).

DETR continues to turn these rules of construction directly on their head. DETR broadly and liberally construes NRS 612.265(1)-(2). At the same time, DETR affords a cramped construction of the NPRA, or ignores its provisions altogether. Because DETR refuses to acknowledge the applicable rules of construction, it has utterly failed to meet its burden to overcome the NPRA's presumption of openness and show that NRS

616.265(1)-(2) expressly and unequivocally declare the requested records to be confidential.

Notwithstanding the selective quotations[19] DETR offers in its Opening Brief, *see, e.g.*, AOB 28:9-12, the provisions of NRS 612.265(1)-(2) provide as follows:

> 1. Except as otherwise provided in this section and NRS 239.0115 and 612.642, information obtained from any employing unit or person pursuant to the administration of this chapter and any determination as to the benefit rights of any person is confidential and may not be disclosed or be open to public inspection ***in any manner which would reveal the person's or employing unit's identity***.
>
> 2. Any claimant or a legal representative of a claimant is entitled to information from the records of the Division, to the extent necessary for the proper presentation of the claimant's claim in any proceeding pursuant to this chapter. A claimant or an employing unit is not entitled to information from the records of the Division for any other purpose.

(Emphasis added).

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[19]In addition, this entire section of DETR's Opening Brief (AOB 21-35) is so disjointed that it is virtually incomprehensible. *See Berkson v. LePome*, 126 Nev. 492, 501, 245 P.3d 560, 566 (2010) ("It is well established that this court need not consider issues not supported by cogent argument and citation to relevant authority.").

Thus, NRS 612.265(1) narrowly exempts information only to the extent that disclosure of such information would reveal the identity of a claimant for unemployment benefits or his or her employer. Even then, this narrow confidentiality is conditional, as NRS 612.265(2) provides that such information may still be disclosed to the extent it is needed for any proceeding pursuant to NRS Chapter 612. In other words, when NRS 612.265(1)-(2) are narrowly construed, as required, *see Gibbons*, 127 Nev. at 878, 266 P.3d at 626-28; *Haley*, 126 Nev. at 214-15, 234 P.3d at 924-25, they do not afford the sweeping protection DETR would have this Court believe. Stated simply, what DETR calls an "expansive shield against release," *see* AOB 27, is nothing of the sort.

Moreover, The Love Ranch expressly explained that it does not seek the identity of any claimant or his or her employer. The Love Ranch specifically requested that any records that arguably would reveal such information simply be redacted, with an appropriate log. The Love Ranch further explained that to the extent such information was reflected in the requested records, such documents should still be disclosed, as they are necessary for the proper resolution of its administrative appeal of DETR's determination that its tenants are employees.

Even if portions of the requested records could have revealed the identity of a claimant or an employing unit, redaction of those limited portions would render the remainder appropriate for disclosure.[20] The notion that ***all*** of the requested records would supposedly reveal such information—which is what DETR would have had to have shown to justify its blanket denial of the NPRA Request—is not just pure speculation, it is absurd. This Court has repeatedly rejected the tactics DETR employed below. *See DR Partners v. Board of County Commissioners*, 116 Nev. 616, 628, 6 P.3d 465, 473 (2000) ("'it is insufficient [for the public entity] to hypothesize cases where secrecy might prevail and then contend that the hypothetical controls all cases'") (quoting *Star Pub. Co. v. Parks*, 875 P.2d 837, 838 (Ariz. 1993)). Accordingly, the district court did not abuse its discretion in rejecting DETR's claims of confidentiality under NRS 612.265(1)(2).

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[20]This exemplifies the reasons a log, with a description of any redactions, is vital. The requesting party, and the court, cannot even begin to address the legitimacy of a claim of confidentiality absent a description of the records and the specific basis for withholding such records.

G. DETR Failed to Preserve its Argument Regarding NRS 612.265(14)

DETR argues, at length, that the requested records are confidential under NRS 612.265(14). *See* AOB 21-35. It is well-established that "[p]arties 'may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below.'" *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 437, 245 P.3d 542, 544 (2010) (quoting *Dermody v. City of Reno*, 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997)).

Further, the district court does not abuse its discretion by not considering arguments raised for the first time on reconsideration. *See Achrem v. Expressway Plaza Limited Partnership*, 112 Nev. 737, 742, 917 P.2d 447, 450 (1996); *see also 389 Orange Street Partners v. Arnold*,179 F.3d 656, 665 (9th Cir. 1999) ("Our abuse of discretion review precludes reversing the district court for declining to address an issue raised for the first time in a motion for reconsideration.").

Below, in contrast to the energy DETR now devotes to NRS 612.265(14) in its Opening Brief,[21] DETR never articulated ***any***

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[21]In an obvious attempt to conceal its failure to preserve NRS 612.265(14), DETR jumbles its arguments regarding this provision amongst an array of other statutes. *See* AOB 21-35.

argument as to how the provision applies at all, let alone expressly and unequivocally makes the requested records confidential. Because DETR failed to do so, the district court's order denying reconsideration did not specifically address NRS 612.265(14). This underscores DETR's glaring failure to preserve this argument. Efficiency, fairness, and judicial economy dictate that DETR cannot reinvent its arguments on appeal. But even if DETR preserved its arguments regarding NRS 612.265(14), the district court did not abuse its discretion in not considering this provision because DETR raised it for the first time on reconsideration.

H. Even if Preserved, DETR's Arguments Regarding NRS 612.265(14) Fail

DETR's arguments regarding NRS 612.265(1) face a high hurdle on appeal, even if preserved, because DETR only arguably presented these arguments to the district court via a motion for reconsideration. The standard of review is particularly deferential in this circumstance. Specifically, in the context of a motion for reconsideration, "only a failure to correct *clear* error" constitutes an abuse of discretion. *See McDowell v. Calderon*, 197 F.3d 1253, 1255 n.4 (9th Cir. 1999); *see also AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1192-93

(2010) (because NRCP 59(e) and 60(b) echo their federal counterparts, Nevada courts "may consult federal law in interpreting them.").

Given DETR's failure to cogently present its arguments about NRS 612.265(14) to the district court, DETR cannot possibly show that the court failed to correct clear error. And, under any standard of review, DETR has failed to meet its burden to show that NRS 612.265(14) expressly and unequivocally declares the requested records to be confidential. Notwithstanding DETR's paraphrasing of this provision,[22] *see, e.g.*, AOB 26:13-16, it reads:

> 14. All letters, reports or communications of any kind, oral or written, from the employer or employee to each other or to the Division or any of its agents, representatives or employees are privileged and must not be the subject matter or basis for any lawsuit if the letter, report or communication is written, sent, delivered or prepared pursuant to the requirements of this chapter.

NRS 612.265(14).

Thus, this provision does not declare any records to be confidential. Instead, NRS 612.265(14) establishes a "privilege." This is significant

[22]The Love Ranch urges this Court to use great caution when assessing DETR's purported quotations and paraphrasing of statutes and cases, and its representations regarding the record.

because elsewhere, particularly the NPRA, the Legislature simply exempts records "declared by law to be confidential." *See* NRS 239.010(1). It must be presumed that the "privilege" discussed in NRS 612.265(14) is not synonymous with "confidential." *See Williams v. State Department of Corrections*, 133 Nev. ___, ___ 402 P.3d 1260, 1264 (2017) (courts presume that "variation in language indicates a variation in meaning.").

NRS 612.265(1) elaborates that "privileged" records must not be the "subject matter or basis for any lawsuit." As such, the term creates a different, and narrower, protection than confidentiality. Specifically, the privilege is from "lawsuits" for defamation, abuse of process, and the like. If the Legislature intended to shield against petitions for writs of mandamus to compel NPRA records, this would certainly be an awkward way to go about it.

Properly construed, the narrow "privilege" created in NRS 612.265(14) creates a privilege from documents being used in a lawsuit, not a privilege from the records being disclosed in the first place. *See DR Partners v. Board of County Commissioners*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) ("It is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied

narrowly."). After all, logically, this narrow privilege presupposes that the documents can be obtained and used for any other purpose.

To fall within the ambit of NRS 612.265(14), at least three additional elements must be established. Specifically, the record must be (1) a letter, report, or communication, (2) from the employer or employee to each other or to DETR, ***and*** (3) written, sent, delivered or prepared pursuant to the requirements of NRS Chapter 612.

Even as "summar[ized]" by DETR, *see* AOB 29-31, the records requested by The Love Ranch hardly implicate these elements. In fact, none of the categories in the NPRA Request sought communications from an employer or employee to each other or to DETR. On the contrary, the bulk of the requested communications were those between DETR's investigators/auditors and other DETR employees.

DETR speculates that The Love Ranch's request might have indirectly implicated such information. But this exercise is academic due to DETR's refusal to provide a log detailing any supposedly confidential records. Even if some portions of the requested records were confidential under NRS 612.265(14), such hypothetical protections would not have given DETR license to issue its blanket denial. *See DR Partners*, 116 Nev. at 628, 6 P.3d at 473. This instead would have merely triggered

DETR's duty to make redactions. Because DETR has not bothered to gather, log, and preserve the requested public records, it would be impossible for it to show that the records are expressly and unequivocally declared by NRS 612.265 to be confidential.

I. The District Court Did Not Abuse Its Discretion in Rejecting DETR's Haphazard Invocation of Privileges

DETR next argues that The Love Ranch's NPRA Request sought information protected by the work product doctrine and the attorney-client and deliberative process privileges. *See* AOB 51-55. DETR's arguments are unavailing.

1. DETR Inexcusably Failed to Supply a Privilege Log

Under the Nevada Rules of Civil Procedure, which are applicable in writ proceedings pursuant to NRS 34.300, a party invoking a privilege must provide a privilege log. In particular,

> [w]hen a party withholds information . . . by claiming that it is privileged . . . the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

See NRCP 26(b)(5).

This rule "requires a party claiming privilege to describe the nature of the materials that are allegedly privileged." *Valley Health Sys., LLC v. District Court*, 127 Nev. 167, 172, 252 P.3d 676, 679 (2011).[23]

Here, DETR never provided any privilege log, despite The Love Ranch's specific request for a log if DETR withheld any of the requested records. DETR never provided a summary of the subject matter of the supposedly privileged materials, making it impossible to verify its claim that they contain work-product. DETR never identified any allegedly privileged materials by date or otherwise, making it impossible to verify its claim that it is withholding deliberative materials that purportedly predate its audit determination. DETR never identified the parties to any communications it is withholding, making it impossible to verify its claims of attorney-client privilege.

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[23]Federal courts have explained that a privilege log generally must "separately identify each document withheld under claim of privilege, and set forth for each document (1) its type (i.e., letter, memo, notes, etc.), (2) its author, (3) its intended recipients, (4) the names of any other individuals with access to the document, (5) the date of the document, (6) the nature of the claimed privilege (i.e., attorney-client, work-product, etc.), and (7) a brief summary of the subject matter of the document." *Nevada Power Co. v. Monsanto Co.*, 151 F.R.D. 118, 121 n.5 (D. Nev. 1993). Further, failure to provide a privilege log "may constitute an 'implied' waiver of the privilege or protection." *In re Imperial Corp. of Am.*, 174 F.R.D. 475, 477 (S.D. Cal. 1997).

By failing to provide a privilege log, DETR prevented The Love Ranch and the district court from meaningfully evaluating DETR's alleged privileges. DETR does not even attempt to excuse these failures because there is no excuse.

2. DETR's invocation was conclusory and unsupported

"It is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly." *DR Partners v. Board of County Commissioners*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000). The party asserting a privilege bears the burden of establishing that it applies. *Id.*; *see also United States v. Martin*, 278 F.3d 988, 1000 (9th Cir. 2002). "[B]lanket assertions are 'extremely disfavored.'" *Martin*, 278 F.3d at 1000. Thus, the party asserting a privilege "must identify specific communications and the grounds supporting the privilege as to each piece of evidence over which privilege is asserted." *Martin*, 278 F.3d at 1000.

Here, DETR's blanket invocation of privileges failed for multiple reasons. DETR identified no specific communications or the grounds supporting the privilege as to each record over which it asserts its privileges. And, DETR never provided any evidence, such as a

declaration, to support its conclusory claims of privilege. Nor could it. As detailed, DETR refused to ever gather and log the requested records.

As a result of this refusal, even today, DETR cannot possibly have any idea whether any of the requested records, or any portions thereof, are actually privileged. Tellingly, DETR simply contends that the NPRA Request "apparently" sought privileged materials. *See* AOB 51:14. Logically, without having reviewed the requested records, it would be impossible for DETR to overcome the NPRA's presumption of openness. The district court was well within its discretion in determining that DETR wholly failed to meet its burden to show that the requested public records are privileged.

J. The District Court's Finding of Waiver is Supported by Substantial Evidence

Even if DETR had met its burden to show that the requested records are confidential or privileged, substantial evidence supports the district court's finding that it waived such any protections due to its abject failure to comply with its obligations under the NPRA.

1. DETR Completely Failed to Meet its NPRA Obligations

Under NRS 239.0107(d),

> If the governmental entity must deny the person's request to inspect or copy the public book

> or record because the public book or record, or a part thereof, is confidential, [the governmental entity shall] provide to the person, in writing:
>
> (1) Notice of that fact; and
>
> (2) A citation to the ***specific*** statute or other legal authority ***that makes the public book or record, or a part thereof, confidential***.

(Emphasis added).

In *Reno Newspapers, Inc. v. Gibbons*, this Court observed that NRS 239.0107(d) sets forth the state entity's prelitigation duties under the NPRA. 127 Nev. 873, 884, 266 P.3d 623, 630 (2011). There, this Court concluded that the State's "blanket denial" of a newspaper's pre-litigation NPRA request was improper where the State "provided no explanation whatsoever as to why the cases it cited actually supported its claim of confidentiality or were anything other than superfluous." *Id.* Additionally, it noted, "[w]e cannot conclude that merely pinning a string of citations to a boilerplate declaration of confidentiality satisfies the State's prelitigation obligation under NRS 239.0107(1)(d)(2) to cite to 'specific' authority 'that makes the public book or record, or a part thereof, confidential.'" *Id.*

Further, "after the commencement of an NPRA lawsuit, the requesting party is generally entitled to a log." *Id.* at 882, 266 P.3d at 629. As this Court reasoned,

> [i]n view of the emphasis placed on disclosure and the importance of testing claims of confidentiality in an adversarial setting, we agree . . . that "it is anomalous" and inequitable to deny the requesting party basic information about the withheld records, thereby relegating it to a nebulous position where it is powerless to contest a claim of confidentiality. Furthermore, requiring the requesting party to blindly argue for disclosure not only runs contrary to the spirit of the NPRA and our NPRA jurisprudence but it "seriously distorts the traditional adversary nature of our legal system's form of dispute resolution." ***In sum, a claim that records are confidential can only be tested in a fair and adversarial manner, and in order to truly proceed in such a fashion, a log typically must be provided to the requesting party.***

Id. (quoting *Vaughn v. Rosen*, 484 F.2d 820, 823-24 (D.C. Cir. 1973) (emphasis added).

In most cases, "this log should contain, at a minimum, a general factual description of each record withheld and a specific explanation for nondisclosure." *Id.* at 883, 266 P.3d at 629. Applying these principles, this Court noted that although the State had provided the requested records to the district court for *in camera* review along with a log, the State failed to respond to the newspaper with "a log of any type." *Id.* at 884, 266 P.3d at 630. This "response was, in a word, deficient." *Id.*

Here, DETR did even less than the State did in *Gibbons*. In its blanket denial of The Love Ranch's NPRA Request, DETR failed to provide citation to specific legal authority that justified non-disclosure. DETR did not even assert that the records, or any portions thereof, are confidential or privileged in any way. DETR instead based its denial on only two grounds, both of which it largely abandoned in its Answer to Petition. In short, DETR issued a blanket denial first, and invented justifications later.

This was a tactical decision. After all, the Love Ranch's NPRA Request cited both NRS 239.0107 and *Gibbons* and explained that if DETR withheld or redacted the requested records, it should provide a log, and cite authority that makes the records confidential. Instead, DETR held back most of its arguments, and then sprung those claims on The Love Ranch in court. Incredibly, DETR then baselessly attempted to prevent The Love Ranch from replying to the new arguments DETR had raised for the first time in its Answer to the Petition. And, even after The Love Ranch brought its Petition, DETR continued to refuse to provide a log.

On appeal, DETR continues its game of cat and mouse, springing new arguments forward, and jettisoning the pretexts it previously

raised.[24] Yet, even today, DETR has not provided any log describing the requested public records and a specific explanation for nondisclosure. Even today, DETR has not even bothered to gather the requested records. And, even today, DETR has not provided any assurance that it has even preserved the requested records. Nearly a year and a half has now passed since The Love Ranch made its NPRA Request, but DETR has done nothing to comply with its NPRA obligations. DETR's tactics make a mockery of the NPRA.

DETR's alleged belief that it has an "absolute statutory exemption," *see* AOB 32, did not relieve it of its obligation to prepare a log. At its core, DETR's position is akin to arguing that the fox gets to guard the henhouse. This is at odds with the entire NPRA framework. One of the key points of NRS 239.0107(d) and *Gibbons* is that an agency does not get to decide for itself that it need not prepare a log, thereby forcing its adversary to litigate in the dark. Nor is an agency entitled to unilaterally grant itself exemptions to the NPRA. Rather, the entire NPRA framework stresses that any non-disclosure of records is subject to

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[24]As just one example, DETR now only proffers a single-sentence in support of its claim about records creation. *See* AOB 51 ("ESD is not required to create a record to satisfy SNC's request."). Thus, DETR has abandoned the argument. *See Berkson v. LePome*, 126 Nev. 492, 501, 245 P.3d 560, 566 (2010).

judicial scrutiny, in a fair adversarial process. Put simply, DETR fell embarrassingly short of its obligations under the NPRA.

2. DETR's Arguments Regarding Waiver Fail

DETR claims that its supposed statutory confidentiality protections cannot be waived as a matter of law. *See* AOB 32-33. It is presumed that laws do "not modify common law unless such intent is explicitly stated." *Branch Banking v. Windhaven & Tollway, LLC*, 131 Nev. ___, ___, 347 P.3d 1038, 1040 (2015). Crucially, none of the confidentiality provisions DETR has invoked state they are non-waivable. This omission is significant because the concept of waiver was well-established under the common law. *See, e.g., Hudson v. Horseshoe Club Operating Co.*, 112 Nev. 446, 457, 916 P.2d 786, 792 (1996). This is also significant because when the Legislature intends to make a provision non-waivable, it knows how to do so.[25]

As such, the omission of any non-waiver language in the provisions cited by DETR must be presumed to be intentional. *See Boucher v. Shaw*,

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[25]*Cf.* NRS 40.453(1) (providing that the rights of borrowers and guarantors under Nevada's deficiency statutes are not waivable by way of home purchase agreements); NRS 87A.195 (setting forth "nonwaivable provisions" to Nevada's Uniform Partnership Act); NRS 612.700(1) ("Any agreement by a person to waive, release or commute his or her rights to benefits or any other rights under this chapter is void").

124 Nev. 1164, 1169-70, 196 P.3d 959, 963 (2008) (the mention of one thing implies the exclusion of another, and if the Legislature intends to deviate from the common law, it must do so explicitly). Thus, such provisions are waivable. This is not only consistent with ordinary cannons of statutory construction, but it is contemplated by NRS 239.0107(d) and *Gibbons*.[26]

To be clear, The Love Ranch is not contending that an agency automatically waives any grounds it fails to raise in its denial of an NPRA request. Rather, where an agency willfully refuses to follow its duties, as clearly outlined in the NPRA and *Gibbons*, the district court has discretion to find a waiver. This concept is well-established. For instance, in *Valley Health System, LLC v. District Court*, this Court concluded that the district court may find that a party waived its claim of statutory privilege where the claim is not presented to the discovery

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[26]Notably, jurisdictions with analogous public records acts have held that statutory exemptions can be waived. *See County of Santa Clara v. Superior Court*, 89 Cal. Rptr. 3d 374, 389 (Ct. App. 2009) (observing that "[e]xemptions can be waived" under the California Public Records Act); *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 474 (Tex. Ct. App. 1999) (agency's failure to timely request an attorney general opinion regarding an exception to disclosure in connection with its partial denial of a public records request constituted a waiver of the exception under the Texas Open Records Act). DETR has not cited a single case holding otherwise.

commissioner. 127 Nev. 167, 252 P.3d 676 (2011). As this Court explained, a contrary holding would lead to the inefficient use of judicial resources by permitting parties to hold "arguments in reserve." *Id.* at 172-73, 252 P.3d at 679-80. Thus, in *Valley Health*, this Court concluded that a party had waived its claim of privilege under NRS 439.875(5) by failing to timely raise the claim. *Id.*

Here, despite a specific request for a log in The Love Ranch's NPRA Request, DETR refused, and instead issued a blanket denial, in total disregard of its prelitigation duties under NRS 239.0107(d). After The Love Ranch brought its petition, DETR continued to refuse to gather and log the requested records, in blatant disregard of this Court's clear instructions in *Gibbons*.[27] These failures made it impossible to properly assess DETR's claims of confidentiality and privilege. DETR compounded these failures by inventing a host of new grounds for its blanket denial for the first time in its Answer to the Petition. In other words, DETR failed to meet its obligations in every possible regard.

DETR has never provided any legitimate excuse for its failure to raise these grounds earlier, let alone its refusal to provide a log. DETR

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[27]Notably, the district judge below was the same judge who presided over the lower court proceedings in *Gibbons*. Although DETR does not, the district court clearly took this Court's guidance in *Gibbons* seriously.

simply announces, without citing any authority, that it should not have to. NRS 239.0107(d) and *Gibbons* leave the appropriate remedy for such failures to the discretion of the district court, and *Valley Health* establishes that waiver is one such remedy. Given DETR's abject refusal to comply with its NPRA obligations, the district court was well within its discretion in finding a waiver.[28] And, there is ample evidence supporting this finding.

K. The District Court Did Not Abuse its Discretion in Determining that Any Confidential or Privileged Information Could Have Been Redacted

As the district court found, even if DETR had met its burden to show that the requested records are confidential or privileged, and even if it did not waive those protections, that simply triggered DETR's obligation to make redactions. DETR continues to claim, however, it has

[28]DETR's only other contention against waiver is that it could supposedly result in a misdemeanor under NRS 612.265(13). *See* AOB at 33. DETR is incorrect. In relevant part, NRS 612.265 merely prohibits the "unauthorized use or dissemination" of information from a list of applicants for work or claimants or recipients of unemployment benefits. The Love Ranch's NPRA Request did not seek such information, and DETR simply could have redacted any such information. Further, by definition, complying with an order compelling records would not constitute unauthorized use or dissemination.

"no obligation for any NRS 239.010(3) redaction." *See* AOB 32. DETR is mistaken.

Under the NPRA,

> [a] governmental entity that has legal custody or control of a public book or record shall not deny a request made pursuant to [NRS 239.010(1)] . . . on the basis that the requested public book or record contains information that is confidential if the governmental entity can redact, delete, conceal or separate the confidential information from the information included in the public book or record that is not otherwise confidential.

NRS 239.010(3).

Thus, under the NPRA, even if a public record contains some confidential information, that does not mean "the entire record is confidential." *Reno Newspapers v. Haley*, 126 Nev. 211, 219, 234 P.3d 922, 927 (2010). Such a circumstance simply triggers the agency's duty to redact the records and make the remaining records available for inspection. *See id.*; *see also Blackjack Bonding*, 131 Nev. at 84, 343 P.3d at 611 ("If the public record contains confidential information that can be redacted, the governmental entity with legal custody or control of the record cannot rely on the confidentiality of that information to prevent disclosure of the public record.").

Below, even though The Love Ranch's NPRA Request specifically requested that any confidential information be redacted from the requested records, DETR refused. Now, for the first time on appeal, DETR argues that redactions would have been possible. *See* AOB 34. Specifically, DETR argues that if the records were "combined" with publicly-available information, it might reveal the identity of a claimant for unemployment benefits or his or her employer, "especially in a small industry such as legal prostitution." *See id.* These arguments are too little, too late.

To begin, DETR is improperly raising these arguments for the first time on appeal. *See Schuck*, 126 Nev. at 437, 245 P.3d at 544. Even if preserved, DETR's arguments are unavailing. Due to DETR's failure to gather and review the requested records, let alone provide the requisite log, its arguments that redaction was not possible are nothing more than conjecture. *See Gibbons*, 127 Nev. at 880, 266 P.3d at 628 (the state entity cannot meet its burden to show that its interest in non-disclosure clearly outweighs the public's interest in non-disclosure "with a non-particularized showing," or "by expressing hypothetical concerns."); *see also DR Partners v. Board of County Commissioners*, 116 Nev. 616, 628, 6 P.3d 465, 472-73 (2000) (rejecting claim that the requested records

implicated private information where "no offer of proof of any kind was submitted to the district court for the purpose of balancing important or critical privacy interests against the presumption in favor of public disclosure").

Accordingly, the district court did not abuse its discretion in determining that even if DETR had met its burden to show that the requested records are confidential or privileged, and even if it did not waive those protections, that simply triggered DETR's obligation to make redactions.[29]

VII. CONCLUSION

Based upon the foregoing, The Love Ranch respectfully submits that this Court should affirm the district court.

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[29]DETR attempts to bury several other perfunctory arguments in its Opening Brief. *See, e.g.*, AOB 18-19 ("The District Court erred when it allowed the Petitioner to raise new issues and new legal argument in a Reply . . . and the Court further erred when it adopted these new issues into its Order Granting Petition for Writ of Mandamus."); AOB 54 ("The District Court unreasonably declined to hold a hearing in this case."). These arguments are not cogently presented, and thus, need not be entertained. *See Berkson v. LePome*, 126 Nev. 492, 501, 245 P.3d 560, 566 (2010)

CERTIFICATE OF COMPLIANCE

I certify that I have read this Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relief on is to be found. The Brief complies with the formatting requirements of NRAP 32(a)(4)-(6) and the type volume limitation stated in NRAP 32(a)(7)(ii) because it is presented in a 14-point Century Schoolbook font and contains 13,201 words, including headings and footnotes, as counted by Microsoft Word—the program used to prepare this brief.

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.

AFFIRMATION

The undersigned does hereby affirm that the preceding document DOES NOT contain the Social Security Number or employer identification number of any person or party.

DATED: February 26, 2019.

/s/ Ricardo N. Cordova
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I electronically filed the forgoing **RESPONDENT'S ANSWERING BRIEF** with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's E-filing system on February 26, 2019.

I further certify that all parties to this case are registered with the Supreme Court of Nevada's E-filing system, and that service has been accomplished to the following individual(s) through the Court's E-filing System:

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Dated this 26th day of February, 2019.

/s/ Jennifer L. Smith

Jennifer L. Smith