

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL DISTRICT,

Appellant,

vs.

LAS VEGAS REVIEW-JOURNAL,

Respondent.

(Filed via fax)
FILED

AUG 07 2017

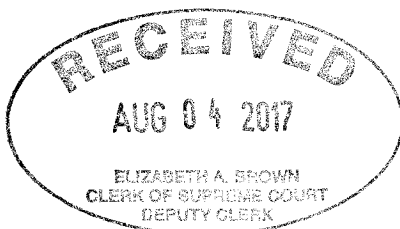
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

SUPREME COURT CASE NO.:
73525

DISTRICT COURT CASE NO.:
A750151

**SUPPLEMENT TO APPENDIX OF EXHIBITS IN SUPPORT OF
RESPONDENT'S RESPONSE TO APPELLANT'S EMERGENCY
MOTION FOR STAY PENDING APPEAL, OR IN THE ALTERNATIVE
STAY PENDING PETITION FOR WRIT OF MANDAMUS OR
PROHIBITION**

Margaret A. McLetchie, Nevada Bar No. 10931
Alina M. Shell, Nevada Bar No. 11711
MCLETCHE SHELL LLC
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
Counsel for Respondent, Las Vegas Review-Journal



17-901588

INDEX TO RESPONDENT'S APPENDIX

<i>Exh.</i>	<i>Documents</i>	<i>Date</i>	<i>Bates Number</i>
A	Amended Petition	03/01/2017	RA001-RA057
B	Letter from Mr. McDade to Ms. McLetchie in response to her March 3, 2017 email	03/13/2017	RA058-RA065
C	Email from Ms. McLetchie to Mr. McDade	03/01/2017	RA066
D	Email from Ms. McLetchie to Mr. McDade and Mr. Honey	03/03/2017	RA067-RA068
E	Email communications between Ms. McLetchie and Mr. Honey	03/13/2017	RA069-RA070
F	Order Granting Writ pf Mandamus as to Jurisdiction and Search Parameters	06/06/2017	RA071-RA084
G	Las Vegas Review-Journal Article "CCSD Investigation Say Trustee Kevin Child Created Hostile, Intimidating Environment" With Memo Attached	12/23/2016	RA085-RA093
H	Excerpts of Transcript of Hearing	06/27/2017	RA094-RA098
I	Clark County School District's Policy 0101	n/a	RA099
J	Notice of Entry of Order Denying Stay ¹	08/04/2017	RA100-RA122

¹ Executed Order Denying Stay was not received by Respondent at the time its Response was submitted.

CERTIFICATE OF SERVICE

I certify that I am an employee of McLetchie Shell, LLC and that
SUPPLEMENT TO APPENDIX OF EXHIBITS IN SUPPORT OF
RESPONDENT'S RESPONSE TO APPELLANT'S EMERGENCY MOTION
FOR STAY PENDING APPEAL, OR IN THE ALTERNATIVE STAY PENDING
PETITION FOR WRIT OF MANDAMUS OR PROHIBITION addressed to:

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

dept16lc@clarkcountycourts.us

Carlos McDade, General Counsel
Adam Honey, Asst. General Counsel
Clark County School District
5100 W. Sahara Ave.
Las Vegas, NV 89146
Counsel for Appellant, Clark County School District
Via Email and U.S. Mail

clmcdade@interact.ccsd.net

ahoney@interact.ccsd.net



Employee of McLetchie Shell LLC

Steven D. Grierson

1 NEOJ
2 MARGARET A. MCLEATCHIE, Nevada Bar No. 10931
3 ALINA M. SHELL, Nevada Bar No. 11711
4 MCLEATCHIE SHELL LLC
5 701 East Bridger Avenue, Suite 520
6 Las Vegas, NV 89101
7 Telephone: (702)-728-5300
8 Email: maggie@nvlitigation.com
9 Counsel for Petitioner

10 EIGHTH JUDICIAL DISTRICT COURT

11 CLARK COUNTY, NEVADA

12 LAS VEGAS REVIEW-JOURNAL,

Case No.: A-17-750151-W

13 Petitioner,

Dept. No.: XVI

14 vs.

NOTICE OF ENTRY OF ORDER

15 CLARK COUNTY SCHOOL DISTRICT,

16 Respondent.

NOTICE OF ENTRY OF ORDER

17 TO: THE PARTIES HERETO AND THEIR RESPECTIVE COUNSEL OF RECORD:
18 PLEASE TAKE NOTICE that on the 4th day of August, 2017, an Order Denying
19 Stay was entered in the above-captioned action. A copy of the Order is attached hereto as
20 Exhibit 1.

21 DATED this 4th day of August, 2017.

22 /s/ Margaret A. McLetchie

23 MARGARET A MCLEATCHIE, Nevada Bar No. 10931

24 ALINA M. SHELL, Nevada Bar No. 11711

25 MCLEATCHIE SHELL LLC

26 701 East Bridger Avenue, Suite 520

27 Las Vegas, Nevada 89101

28 Counsel for Petitioner

1 **CERTIFICATE OF SERVICE**

2 Pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, I hereby certify that on
3 this 4th day of August, 2017, I did cause a true copy of the foregoing NOTICE OF ENTRY
4 OF ORDER in *Las Vegas Review-Journal v. Clark County School District*, Clark County
5 District Court Case No. A-17-750151-W, to be served electronically using the Odyssey
6 File&Serve system, to all parties with an email address on record.

7 Pursuant to NRCP 5(b)(2)(B) I hereby further certify that on the 4th day of August,
8 2017, I mailed a true and correct copy of the foregoing NOTICE OF ENTRY OF ORDER
9 by depositing the same in the United States mail, first-class postage pre-paid, to the
10 following:

11 Carlos McDade, General Counsel
12 Adam Honey, Asst. General Counsel
13 **Clark County School District**
14 5100 W. Sahara Ave.
15 Las Vegas, NV 89146
16 *Counsel for Respondent, Clark County School District*

17 /s/ Pharan Burchfield
18 An Employee of MCLETCHIE SHELL LLC
19
20
21
22
23
24
25
26
27
28

MCLETCHIE SHELL

ATTORNEYS AT LAW
701 EAST BRIDGES AVE., SUITE 520
LAS VEGAS, NV 89101
(702) 725-3300 (T) / (702) 425-8220 (F)
WWW.NVLITIGATION.COM

EXHIBIT 1

Steven D. Grierson

1 **ORDR**
2 MARGARET A. MCLEATCHIE, Nevada Bar No. 10931
3 ALINA M. SHELL, Nevada Bar No. 11711
4 MCLEATCHIE SHELL LLC
5 701 East Bridger Avenue, Suite. 520
6 Las Vegas, NV 89101
7 Telephone: (702)-728-5300
8 Email: maggie@nvlitigation.com
9 Counsel for Petitioner

10 **EIGHTH JUDICIAL DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12 LAS VEGAS REVIEW-JOURNAL,

Case No.: A-17-750151-W

13 Petitioner,

Dept. No.: XVI

14 vs.

ORDER DENYING STAY

15 CLARK COUNTY SCHOOL DISTRICT,

16 Respondent.

17 Clark County School District's Motion to Stay Enforcement of Order Granting Writ
18 of Mandamus as to Withheld Records Pursuant to NRCP 62(c), (d), and (e) Pending Appeal
19 on Order Shortening Time having come on for an additional hearing on June 27, 2017, the
20 Honorable Timothy C. Williams presiding, Petitioner LAS VEGAS REVIEW-JOURNAL
21 ("Review-Journal") appearing by and through its attorney, MARGARET A. MCLEATCHIE,
22 and Respondent CLARK COUNTY SCHOOL DISTRICT ("CCSD"), appearing by and
23 through its attorney, CARLOS M. MCDADE, and the Court having read and considered all
24 of the papers and pleadings on file and being fully advised, and good cause appearing
25 therefor, the Court hereby makes the following findings of fact and conclusions of law:

26 ///

27 ///

28 ///

08-01-17 16:49 RCVD

MCLEATCHIE SHELL

ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)415-8210 (F)
WWW.NVLITIGATION.COM

I. PROCEDURAL HISTORY AND FINDINGS OF FACT

Original Requests; Filing of Action

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

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

Initial Proceedings and February 22, 2017 Order

3. On February 8, 2017, the Court ordered CCSD to either fully produce all the requested records in unredacted form by 12:00 p.m. on Friday, February 10, 2017, or that the matter would proceed to hearing. CCSD did not produce all records in unredacted form. Instead, Starting on February 8, 2017 it began producing some records in redacted form and withheld others. CCSD did not disclose that it had limited the sources it searched for records responsive to the Request or the Supplemental Request.

4. The Court conducted an *In camera* review of the unredacted version of the redacted records provided and then, on February 14, 2017, the Court heard oral argument on the Review-Journal's Petition. Following that hearing, on February 22, 2017, the Court entered an Order granting the Review-Journal's Petition. (*See* February 22, 2017 Order (the "February Order"), *see also* February 23, 2017 Notice of Entry of Order).

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

1 victims. (*Id.* at ¶ 35.)

2 6. CCSD did not appeal this order, or seek other relief pertaining to the
3 February Order. To date, CCSD has disclosed 174 pages of documents to the Review-
4 Journal, redacting consistent with the February Order. CCSD has also withheld 102 pages.
5 *February Request, and the Review-Journal's Efforts to Obtain a Privilege Log and Search*
6 *Information*

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

10 8. On February 17, 2017, CCSD notified the Review-Journal via email that it
11 was unable to provide the records listed in the February Request within the five days
12 mandated by Nev. Rev. Stat. § 239.0107. On March 1, 2017, Review-Journal filed its
13 Amended Petition. On March 3, 2017, CCSD provided some documents in response to the
14 February Request. On March 3, 2017, in a letter to counsel, CCSD stated it had redacted
15 information pertaining to the names of individuals who reported a complaint or concern
16 about Trustee Child, information including potentially identifying information about
17 students, and personal phone numbers. That same day, the Review-Journal requested CCSD
18 provide a log of withheld documents that were responsive to the February Request and also
19 asked CCSD to provide it with search information. CCSD responded to these requests via
20 letter on March 13, 2017. Despite previous requests from the Review-Journal, that was the
21 first time CCSD provided any search term information.

22 9. In response to the Review-Journal's inquiry regarding what documents
23 were being withheld, CCSD asserted that "the only information that has not been provided
24 is internal information received or gathered by the District in the court of its investigation of
25 an alleged practice of unlawful practice of discrimination, harassment, or hostile work
26 environment which is confidential and not required to be disclosed under the public records
27 law." By email on March 13, 2017, CCSD also stated it was withholding one document—a
28 report prepared by Cedric Cole, CCSD's Executive Manager of Diversity and Affirmative

1 Action, regarding an investigation his office had conducted into hostile work environment
2 allegations against Trustee Child (the "Cole Report"). The Review-Journal responded to
3 CCSD by letter on March 21, 2017. In that letter, the Review-Journal requested CCSD
4 conduct additional email searches for responsive records from additional custodians. The
5 Review-Journal requested that CCSD search those records for documents pertaining to the
6 topics outlined in the December and February Requests. The Review-Journal also requested
7 CCSD produce hard copy records from the Diversity and Affirmative Action Program's hard
8 copy file on Trustee Child, as well as any other hard copy file CCSD maintains on Trustee
9 Child that were responsive to the December and February Requests.

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

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

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

21 ***Order Granting Writ of Mandamus as to Jurisdiction and Search Parameters***

22 11. On May 9, 2017, the Court heard oral arguments on the Review-Journal's
23 Amended Petition for Writ of Mandamus. On June 6, 2017, the Court entered an Order
24 granting the Review-Journal's Amended Petition as to the request that CCSD complete
25 additional searches. (June 6, 2017 Order at ¶ 45, ¶ 46.)

26 12. Further, the Court ordered that, with regard to any documents CCSD had
27 withheld and/or redacted to date and any additional responsive documents it identifies in
28 response to the additional email and hard copy searches it is required to perform but contends

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

July 12 Order

13. On May 30, 2017, CCSD submitted the redacted and documents it was withholding (the "Withheld Records") to the Court for *in camera* review. It additionally provided the Court with two certifications and a privilege log. ("Final Log")

14. Unbeknownst to the Court, and despite its representation to the undersigned, CCSD counsel did not provide a copy of either of these documents to the Review-Journal at that time. At a hearing held on June 6, 2017 the Court made clear it has expected CCSD to engage in the routine practice of providing privilege logs and certifications to opposing counsel in conjunction with *in camera* submissions. At the hearing, CCSD counsel did finally provide a copy of the Final Log and, later that day, provided copies of the certifications it had provided to the Court a week earlier.

///

///

///

///

///

///

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

- 4 • CCSD 034-060; and
- 5 • CCSD 0159-0233.

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

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

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

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

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

15 (*Id.* at LVRJ022.)

16 17. CCSD also claims that the NPRA does not require the release of
17 confidential employee personnel information. (*Id.* at LVRJ023.) In addition, CCSD claims
18 in its Final Log that the records of its investigation of Trustee Child should be kept
19 confidential pursuant to Title VII and guidance from the Equal Opportunity Employment
20 Commission ("EEOC"). (*Id.* at LVRJ019-LVRJ021.) CCSD also claims that withheld
21 internal information it obtained during its investigation of allegations of discrimination or
22 harassment by Trustee Child is subject to the deliberative process privilege because the
23 information "was used as part of the deliberative and decision-making process of District
24 executives" in crafting the Cole Memorandum. (*Id.* at LVRJ023.) CCSD asserts that any
25 withheld information which might constitute "worksheets, drafts, informal notes, or ad hoc
26 reports," it qualifies as "nonrecord material" under NAC 239.051. (*Id.*)

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

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

3 20. At that hearing, CCSD asserted for the first time that in addition to the
4 privileges asserted in its Final Log, Chapter 233 of the Nevada Revised Statutes—which
5 provides for the creation and regulation of the Nevada Equal Rights Commission—applied
6 to investigations conducted by CCSD's Office of Diversity and Affirmative Action.
7 Specifically, CCSD asserted at the hearing that information pertaining to investigation of
8 allegations against Trustee Child must be kept confidential pursuant to Nev. Rev. Stat. §
9 233.190.

10 21. On July 12, 2017 an Order was entered ordering CCSD to produce the
11 Withheld Records, but allowing CCSD to make redaction consistent with the February Order.
12 CCSD is explicitly permitted to redact the "names of direct victims of sexual harassment or
13 alleged sexual harassment, students, and support staff." (See February 23, 2017 Order at ¶
14 34; see also July 12, 2017 Order at ¶ 88 (permitting CCSD to redact names consistent with
15 the February 23, 2017 Order).) The Court further specified that "CCSD may not make any
16 other redactions" and must unredact the names of schools, teachers, and all administrative-
17 level employees that were not direct victims. (See February 23, 2017 Order at ¶ 35; see also
18 July 12, 2017 Order at ¶ 88 (permitting CCSD to redact names consistent with the February
19 23, 2017 Order).)

20 *Appeal and Motion to Stay*

21 22. On July 12, 2017, CCSD filed a Motion to Stay Enforcement of Order
22 Granting Writ of Mandamus as to Withheld Records Pursuant to NRCP 62(c), (d), and (e)
23 Pending Appeal on Order Shortening Time.

24 23. On July 12, 2017, CCSD also filed a Notice of Appeal to the Nevada
25 Supreme Court.

26 24. On July 19, 2017, Review-Journal filed its Opposition to Motion to Stay
27 Enforcement of Order Granting Writ of Mandamus as to Withheld Records Pursuant to
28 NRCP 62(c), (d), and (e) Pending Appeal on Order Shortening Time.

25. On July 21, 2017, CCSD filed its Reply in Support of Motion to Stay Enforcement of Order Granting Writ of Mandamus as to Withheld Records Pursuant to NRCP 62(c), (d), and (e) Pending Appeal on Order Shortening Time.

26. Only July, 27, 2017, this Court heard and decided on the Motion to Stay Enforcement of Order Granting Writ of Mandamus as to Withheld Records Pursuant to NRCP 62(c), (d), and (e) Pending Appeal on Order Shortening Time.

II. ORDER

27. This Court must consider four factors in deciding whether to issue a stay: (1) "whether the object of the appeal will be defeated if the stay is denied;" (2) "whether appellant will suffer irreparable or serious injury if the stay is denied;" (3) "whether respondent will suffer irreparable or serious injury if the stay is granted;" and (4) "whether appellant is likely to prevail on the merits in the appeal." Nev. R. App. P. 8(c); *accord Hansen v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000); *accord Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). In addition, as the United States Supreme Court has held, courts must also consider "where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (citations omitted); *accord NML Capital, Ltd. v. Republic of Argentina*, No. 2:14-CV-492-RFB-VCF, 2015 WL 3489684, at *4 (D. Nev. June 3, 2015).

28. The Nevada Supreme Court has "not indicated that any one factor carries more weight than the others," and instead "recognizes that if one or two factors are especially strong, they may counterbalance other weak factors. *Mikohn Gaming Corp.*, 120 Nev. at 251, 89 P.3d at 38 (citing *Hansen*, 116 Nev. 650, 6 P.3d 982 (2000)).

29. After considering the four factors set forth in NRAP 8(c), the Court finds that CCSD has not established that a stay is warranted.

///

///

///

1. The Object of CCSD's Appeal Will Not Be Defeated.

30. First, the Court finds that the object of the appeal will not be defeated if a stay is denied.

31. CCSD, which has already provided some documents pertaining to Trustee Child pursuant to the same parameters set forth in this Court's most recent order, has repeatedly emphasized that appellate review of this Court's decision is necessary to address the policy question of whether public employees should be able to raise concerns of all forms of sexual harassment and discriminatory conduct without fear that information concerning those complaints becomes public. CCSD may still seek this relief without a stay. As the Nevada Supreme Court has explained in the context of an appeal addressing whether payment of a monetary judgment pending an appeal renders the appeal moot, "payment of a judgment only waives the right to appeal or renders the matter moot when the payment is intended to compromise or settle the matter." *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 265, 71 P.3d 1258, 1261 (2003); *accord Jones v. McDaniel*, 717 F.3d 1062, 1069 (9th Cir. 2013). Under this precedent, compliance with the Court's Order would not moot CCSD's appeal.

2. CCSD Will Not Suffer Serious or Irreparable Injury if a Stay is Denied.

32. The Court finds that CCSD will not suffer serious or irreparable harm if a stay is denied.

33. The Court emphasizes that CCSD is not required to reveal the identities of any victims of sexual harassment. As noted above, CCSD is explicitly permitted to redact the "names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff." (See February 23, 2017 Order at ¶ 34; *see also* July 12, 2017 Order at ¶ 88 (permitting CCSD to redact names consistent with the February 23, 2017 Order.))

34. The United States Supreme Court has held that the *mere possibility* of irreparable injury is not sufficient to warrant a stay. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (citing *Winter v. Natural Res. Def. Council Inc.*, 555 U.S. 7, 22 (2008)); *accord In re R & S St. Rose Lenders, LLC*, No. 2:17-CV-01322-MMD, 2017 WL 2405368, at *3 (D. Nev.

June 2, 2017).

35. CCSD has not established that irreparable harm will occur in the interim if it complies with the July 12 Order, for the same reasons that it failed to meet its burden of establishing that the withheld records are not subject to the NPRA. If a governmental entity seeks to withhold a document that is not explicitly made confidential by statute, it must prove by a preponderance of the evidence that the records are confidential or privileged, and must also prove by a preponderance of the evidence that the interest in nondisclosure outweighs the strong presumption in favor public access. *See, e.g., Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011); *see also Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630, 635, 798 P.2d 144, 147–48 (1990). In balancing those interests, “the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference.” *DR Partners v. Bd. of Cty. Comm’rs of Clark Cty.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) (quoting *MacEwan v. Holm*, 226 Or. 27, 359 P.2d 413, 421–22 (1961)). The Nevada Supreme Court has made clear that a governmental entity seeking to justify a claim of confidentiality cannot do so by offering hypothetical scenarios in which disclosure of the document could present some harm, either to the entity or to another: “‘it is insufficient [for the public entity] to hypothesize cases where secrecy might prevail and then contend that the hypothetical controls all cases[.]’” *DR Partners*, 116 Nev. at 628 (quoting *Star Pub. Co. v. Parks*, 875 P.2d 837, 838 (Ariz. Ct. App. 1993)). CCSD has not provided evidence to meet this burden.

36. The Court also notes the NPRA’s mandate that a governmental entity cannot resist disclosure of public records which contain confidential information “if the governmental entity can redact, delete, conceal or separate the confidential information from the information included in the public book or record that is not otherwise confidential.” Nev. Rev. Stat. § 239.010(3). CCSD has not met its burden of establishing what redactions cannot address its concerns.

///

1 37. CCSD has submitted a declaration in this matter, which provides:

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

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

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

9 Declaration of Cedric Cole (see Exhibit 5 to CCSD's Motion to Stay Enforcement of Order
10 Granting Writ of Mandamus as to Withheld Records Pursuant to NRCP 62(c), (d) & (e)
11 Pending Appeal on Order Shortening Time, at ¶¶ 6-8.)

12 38. At the hearing conducted in this matter, CCSD counsel also contended that
13 the documents it submitted *in camera* established that employees feared retaliation.

14 39. Neither the conclusory, hearsay assertions in the declaration nor the *in*
15 *camera* submissions constitute evidence sufficient to establish CCSD's burden in
16 withholding records under the NPRA. They also do not merit a stay.

17 40. A stay is not needed to encourage CCSD employees to report in the
18 future.

19 41. CCSD argues that other employees may be less likely to report in the future
20 if it does not receive a stay, and that this constitutes irreparable harm. As noted above, the
21 policy issues at hand can still be resolved by the Supreme Court.

22 42. CCSD's argument that other employees will not come forward to make
23 complaints if the records are produced is too speculative to warrant a stay.

24 43. The possibility of injury articulated by CCSD is contradicted by the record
25 in this case. As noted above, to date, CCSD has disclosed 174 pages of public records relating
26 to Trustee Child's alleged misbehavior. (July 11, 2017 Order, ¶ 59.) CCSD has not—and
27 cannot—present any evidence that the release of these public records has resulted in the
28 supposed injury CCSD fears.

44. A stay is also not needed to protect against retaliation. To support its claim of irreparable harm, CCSD has also asserted that it is "not possible to redact enough information to protect an employee who is either a victim or witness from retaliation." (Motion at p. 7:9-11.) This contention is speculative and unsupported, and does not merit a stay. As noted above, for example, CCSD, must redact instead of withhold wherever possible and it has failed to explain why redacting would not meet its concerns.

45. Further, while CCSD has argued that secrecy is necessary to protect employees against retaliation by Trustee Child, Trustee Child is not a supervisor of any employees. Instead, he is only one of seven (7) trustees on the CCSD Board of Trustees. Even if the Board of Trustees has the power to make any decisions about employment of any of the persons who complained about Trustee Child, which CCSD has not established, CCSD's argument assumes that Trustee Child could convince other trustees to conspire with him to retaliate against administrators who may have discussed concerns with his behavior.

46. Finally, the Court also notes that CCSD did not timely provide the Review-Journal with information in response to the NPRA requests it first made in December, resisted providing information, resisted providing information to the Review-Journal about what it was withholding and why before and after litigation commenced, and that the final log it submitted to this Court with *in camera* documents failed to establish any claims of confidentiality with specificity. It would subvert the purpose of the NPRA to allow a governmental entity to fail to meet its burden of timely asserting claims of confidentiality, and to delay responding to NPRA requests and related information, only to then claim it will face irreparable harm if it is required to produce the documents during the pendency of the appeal.

47. CCSD has not established that it will face irreparable harm without a stay.

3. The Review-Journal—and the Public—Would Suffer Serious Injury If a Stay Were Granted.

48. If the Court entered a stay, the Review-Journal and the broader public would suffer injury in two respects. First, on a broader level, the entry of a stay would subvert the

1 NPRA's intent to permit expeditious access to public records. Second, the Review-Journal
2 and the public would be injured by the continued withholding of the documents because the
3 full extent of Trustee Child's alleged misconduct and CCSD's response to that misconduct
4 is not known.

5 49. The legislative intent underpinning the NPRA is to foster democratic
6 principles by ensuring easy and expeditious access to public records. Nev. Rev. Stat. §
7 239.001(1); *Gibbons*, 127 Nev. at 878, 266 P.3d at 626 (holding that "the provisions of the
8 NPRA are designed to promote government transparency and accountability").

9 50. The legislative interest in swift disclosure is woven throughout the NPRA.
10 For example, Nev. Rev. Stat. § 239.0107(1) mandates that, by not later than the end of the
11 fifth business day after receiving a records request, a governmental entity must either (1)
12 make the records available; (2) if the entity does not have custody of the requested records,
13 notify the requester of that fact and direct them to the appropriate government entity; (3) if
14 the records are not available by the end of the fifth business day, provide notice of that fact
15 and a date when the records will be available; or (4) if the records or any part of the records
16 are confidential, provide the requestor with notice of that fact and a citation to the statute or
17 law making the records confidential. Nev. Rev. Stat. § 239.0107(1)(a)-(d).

18 51. In addition to this timely notification and disclosure scheme, the NPRA
19 specifically provides for expedited court consideration of a governmental entity's denial of
20 a records request. *See* Nev. Rev. Stat. § 239.011(2) (mandating that a court give an
21 application for public records "priority over other civil matters"). Thus, the NPRA is
22 designed to provide quick access to withheld public records, not to reward non-compliance,
23 hiding of information, and delay.

24 52. As to CCSD's argument that this matter is not time sensitive because the
25 Review-Journal "already knows the nature" of the allegations against Trustee Child's and
26 CCSD's response, knowing the "nature" of what Trustee Child allegedly did and how CCSD
27 responded does not comport with the NPRA's goal of promoting transparency and
28 accountability. However, all records of governmental entities are presumed public and the

1 public is entitled access to any records that are not confidential, not just the records the
2 governmental entity decides suffices.

3 53. Here, the Review-Journal is entitled to report on, and the public is entitled
4 to fully assess, the actions of its elected official and how CCSD handled the accusations
5 levied against the trustee.

6 54. The Review-Journal, as a newspaper, has already faced delays due to
7 CCSD's failure to promptly respond to requests and it should not be subjected to further
8 delays in its reporting.

9 *4. CCSD is Unlikely to Prevail.*

10 55. For the reasons set forth in the July 12 Order, CCSD is unlikely to prevail
11 on the appeal, and this factor weighs against a stay.

12 56. In accordance with the presumption of openness and "emphasis on
13 disclosure,"¹ that underpins the NPRA, both the Act itself and the Nevada Supreme Court
14 place a high burden on a governmental entity to justify non-disclosure. First, the law requires
15 that, if a governmental entity seeks to withhold or redact a public record in its control it must
16 prove by a preponderance of the evidence that the record or portion thereof that it seeks to
17 redact is confidential. See Nev. Rev. Stat. § 239.0113; *see also Gibbons*, 127 Nev. at 882,
18 266 P.3d at 629; *accord Nevada Policy Research Inst., Inc. v. Clark Cty. Sch. Dist.*, No.
19 64040, 2015 WL 3489473, at *2 (D. Nev. May 29, 2015). As a general matter, "[i]t is well
20 settled that privileges, whether creatures of statute or the common law, should be interpreted
21 and applied narrowly." *DR Partner.*, 116 Nev. at 621, 6 P.3d at 468 (citing *Ashokan v. State,*
22 *Dept. of Ins.*, 109 Nev. 662, 668, 856 P.2d 244, 247 (1993)). This is especially so in the
23 public records context: pursuant to the mandates of the NPRA, any restriction on disclosure
24 "must be construed narrowly." Nev. Rev. Stat. § 239.001(2)-(3). Second, after establishing
25 the existence of the privilege it asserts and applying it narrowly, unless the privilege is
26

27
28 ¹ *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 882, 266 P.3d 623, 629 (2011) ("[T]he provisions of the NPRA place an unmistakable emphasis on disclosure").

1 absolute, the governmental entity bears the burden of establishing that the interest in
2 withholding documents outweighs the interest in disclosure pursuant to the balancing test
3 first articulated in *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990). See
4 *DR Partners*, 116 Nev. at 621, 6 P.3d at 468 ("Unless a statute provides an absolute privilege
5 against disclosure, the burden of establishing the application of a privilege based upon
6 confidentiality can only be satisfied pursuant to a balancing of interests."); see also *Gibbons*,
7 127 Nev. at 879, 266 P.3d at 627 ("...when the requested record is not explicitly made
8 confidential by a statute, the balancing test set forth in *Bradshaw* must be employed" and
9 "any limitation on the general disclosure requirements of Nev. Rev. Stat. § 239.010 must be
10 based upon a balancing or 'weighing' of the interests of non-disclosure against the general
11 policy in favor of open government").

12 57. CCSD did not meet its burden in this instance, and is unlikely to
13 demonstrate that the presumptively public records at issue in this case should be kept
14 confidential on appeal for the reasons set forth in the July 12 Order, and below.

15 ***5. Title VII Does Not Provide for Blanket Protection.***

16 58. CCSD's first argument is that its *Burlington/Faragher* duties under Title
17 VII permit it to withhold the requested public records. CCSD asserts that as part of its duty
18 under Title VII, it is required to keep the Cole Report confidential. Its sole authority for this
19 position is EEOC Notice 915.002, Enforcement Guidance on Vicarious Liability for
20 Unlawful Harassment by Supervisors. CCSD asserts that it does not need to release the
21 withheld documents because the EEOC Notice advises that "information about the allegation
22 of harassment should be shared only with those who need to know about it," and "[r]ecords
23 relating to harassment complaints should be kept confidential on the same basis." However,
24 the admonition CCSD relies on falls under the heading "Policy and Complaint Procedures."
25 Indeed, the entire EEOC Notice provides guidance on how to conduct investigations and
26 otherwise act to avoid vicarious liability for sexual harassment. See EEOC Notice 915.002.
27 Thus, while it is true that during investigations information is not to be disseminated, here
28

1 the investigation is complete. Accordingly, Notice 915.002 is of little moment here.

2 59. Additionally, CCSD has not established that Notice 915.002 applies to
3 CCSD's investigation of Trustee Child, as Trustee Child is not a "supervisor" of any CCSD
4 employee, and CCCSD has failed to establish he is in any case. Notice 915.002 provide s
5 that "[a]n individual qualifies as an employee's 'supervisor' only if:

- 6 • the individual has authority to undertake or recommend tangible
- 7 employment decisions affecting the employee; or
- 8 • the individual has authority to direct the employee's daily work activities.

9 EEOC Notice 9.15002, § III(A). The United States Supreme Court has refined this definition,
10 holding that "an employee is a 'supervisor' for purposes of vicarious liability under Title VII
11 if he or she is empowered by the employer to take tangible employment actions against the
12 victim." *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013); *see also Baldenegro v.*
13 *Tutor-Saliba Corp.*, No. 2:11-CV-00714-JCM, 2013 WL 459203, at *5 (D. Nev. Feb. 4,
14 2013) ("An individual will qualify as a supervisor for purposes of imputing liability for
15 sexual harassment onto an employer when that individual has the power and authority to
16 directly affect the terms and conditions of the plaintiff's employment, i.e. the authority to
17 make decisions affecting the plaintiff with regard to hiring, firing, promotion, discipline, or
18 reassignment to significantly different duties.") (citations omitted).

19 60. CCSD has not established that Trustee Child is a supervisor of any CCSD
20 employee. Trustee Child is only one of seven (7) elected school board trustees.

21 61. Other courts which have addressed this issue have found that records
22 pertaining to school districts' investigations and findings of sexual harassment are public
23 records. *See, e.g., Marken v. Santa Monica-Malibu Unified Sch. Dist.*, 202 Cal. App. 4th
24 1250, 136 Cal. Rptr. 3d 395 (Cal. App. 2012) (finding that release of an investigation report
25 and disciplinary record of a sexually harassing teacher was warranted under California's
26 public records act due to the public's right to know, even where an explicit privacy statute
27 was also implicated); *Deseret News Pub. Co. v. Salt Lake County*, 182 P.3d 372, 27 IER
28 Cases 1099 (Utah 2008) (holding that a sexual harassment investigation report should be

1 produced because the report "provides a window ... into the conduct of public officials.").

2 62. Even if CCSD established the applicability of a privilege, it has not
3 demonstrated why redaction of identifying information consistent with the Court's February
4 Order would not address its concerns about protecting complainants' privacy.

5 63. Accordingly, CCSD is unlikely to prevail on appeal under this theory.

6 **6. CCSD Has Not Established That Its Internal Regulations Merit Non-disclosure.**

7 64. CCSD argues that it is likely to prevail on appeal because CCSD Regulation
8 4110(X) carries the force of law, and requires information gathered during an investigation
9 of an alleged discriminatory practice must be kept confidential. This argument is not likely
10 to prevail.

11 65. First, the Court cannot apply Regulation 4110(X) in a manner that conflicts
12 with the NPRA. Second, CCSD's internal regulations do not carry the force of law. As CCSD
13 Policy 0101 states, "the purpose of these Policies and Regulations is to provide directions
14 regarding the details of District Operations. Policies are more general principles, while
15 Regulations contain specific details and procedures." Third, it is unclear that the Regulation
16 applies. Fourth, Regulation 4110(X) specifically contemplates that the confidentiality of
17 investigative information is not absolute. Specifically, information gathered during an
18 investigation may be disclosed to, *inter alia*, "serve other significant needs [] or comply with
19 law." In this case, disclosure of the documents serves the "significant need[]" of providing
20 information to the public regarding the alleged misconduct of an elected official and CCSD's
21 handling of the related investigation. Disclosure of the withheld documents is also necessary
22 to "comply with law"—specifically, to comply with the NPRA.

23 66. Accordingly, CCSD is unlikely to prevail on its argument that its internal
24 policy renders the requested records confidential.

25 **7. The Deliberative Process Privilege Does Not Justify Withholding.**

26 67. In *DR Partners v. Board of County Commissioners of Clark County*, 116
27 Nev. 616, 6 P.3d 465 (2000), the Nevada Supreme Court explained that the deliberative
28

process privilege allows governmental entities to conceal public records if the entity can prove that the relevant public records were part of a predecisional and deliberative process that led to a *specific decision or policy*. 116 Nev. 616, 623. "To establish that [the requested records] are 'predecisional,' the [governmental entity] must identify an agency decision or policy to which the documents contributed." *Id.* (citation omitted; emphasis added); *see also Nevada v. U.S. DOE*, 517 F. Supp. 2d 1245 (D. Nev. 2007) (noting that the "deliberative process privilege" applies to draft documents that involve "significant policy decisions").

68. To determine whether a document is predecisional, a court "must be able to pinpoint an agency decision or policy to which these documents contributed. The agency bears the burden of establishing the character of the decision, the deliberative process involved, and the role played by the documents in the course of that process." *Id.* (quoting *Paisley v. C.I.A.*, 712 F.2d 686, 698 (D.C.Cir.1983)). As the Supreme Court explained in *Gibbons*, "state entity cannot meet this burden with a non-particularized showing." *Gibbons*, 127 Nev. at 880, 266 P.3d at 628. (citing *DR Partners*, 116 Nev. at 627-28, 6 P.3d at 472-73).

69. Here, CCSD asserts that the entire investigative file of CCSD's Office of Diversity and Affirmative Action is subject to the deliberative process privilege because it contains information that formed the basis for Mr. Cole's recommendations to Superintendent Pat Skorkowsky in the Cole Memorandum. This does not satisfy the particularized showing requirement articulated by *DR Partners*.

70. Even if this Court were to find CCSD established that the deliberative process applies to some or all of the documents requested by the Review-Journal, that privilege is conditional, and the public's interest in accessing the documents outweighs CCSD's interest in preventing their disclosure. As explained in *DR Partners*:

Once the court determines that a document is privileged, it must still determine whether the document should be withheld. Unlike some other branches of the executive privilege, the deliberative process privilege is a qualified privilege. Once the agency demonstrates that documents fit within it, the burden shifts to the party seeking disclosure. It must demonstrate that

its need for the information outweighs the regulatory interest in preventing disclosure.

DR Partners, 116 Nev. at 626, 6 P.3d at 471 (quoting *Capital Info. Group v. Office of the Governor*, 923 P.2d 29, 36 (Alaska 1996)) (other citations omitted). The Review-Journal has met this burden. Trustee Child is an elected official charged with making important decisions about the administration of one of the largest school districts in the country. Trustee Child's alleged behavior towards CCSD students, teachers, administrators, and other employees indicate that Trustee Child may not be the sort of official who should be entrusted with this responsibility. Thus, to the extent the deliberative process privilege applies to any part of the withheld records, the public's interest in this information outweighs any interest in continuing to withhold the documents.

71. CCSD is therefore unlikely to prevail on its deliberative process privilege argument.

8. *The Donrey Balancing Test Weighs in Favor of Disclosure.*

72. In addition to first establishing by a preponderance of the evidence that the records are confidential, CCSD also bears the burden in this case of establishing that the interest in withholding documents outweighs the interest in disclosure pursuant to the balancing test first articulated in *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990); *see also DR Partners*, 116 Nev. at 621, 6 P.3d at 468. ("Unless a statute provides an absolute privilege against disclosure, the burden of establishing the application of a privilege based upon confidentiality can only be satisfied pursuant to a balancing of interests.") CCSD has not met its burden of establishing that any of the its asserted rationales for withholding the records outweighs the strong interest in disclosure in this case.

///

///

///

///

///

///

73. The NPRA and the case law interpreting its provisions emphasize the public interest lies with disclosure of the public records and notes the importance of access in the instant case, which involves misconduct by an elected governmental official. If a complaint is lodged against a public official, it is presumptively a public record and the public has a right to right to know about the complaint. CCSD has the burden of establishing otherwise, and it has not done so. Likewise, it has not established that a stay is warranted.

74. Accordingly, the Court hereby denies CCSD's Motion.

IT IS SO ORDERED this 3rd day of August, 2017.


HONORABLE JUDGE TIMOTHY C. WILLIAMS



Respectfully submitted,


Margaret A. McLetchie, Nevada State Bar No. 10931
Alina M. Shell, Nevada State Bar No. 11711
MCLETSCHIE SHELL, LLC
701 E. Bridger Avenue, Suite 520
Las Vegas, NV 89101
Telephone: (702) 728-5300
Fax: (702) 425-8220
Email: maggie@nvlitigation.com
Counsel for Petitioner, Las Vegas Review-Journal

*** RX REPORT ***

RECEPTION OK

TX/RX NO	7436
RECIPIENT ADDRESS	7024258220
DESTINATION ID	
ST. TIME	08/04 14:44
TIME USE	32'31
PGS.	27
RESULT	OK

MCLETSCHIESHELL

ATTORNEYS AT LAW

701 East Bridger Ave., Suite 520
Las Vegas, NV 89101
(702) 728-5300 (T) / (702) 425-8220 (F)
www.nvlitigation.com

FAX

To: State of Nevada Court of Appeals

From: Pharan Burchfield, Paralegal

Fax: (775) 684-1601

Pages: 27 (including cover page)

Phone:

Date: August 4, 2017

Re: NSC # 73525

Please see attached SUPPLEMENT TO APPENIDX OF EXHIBITS IS SUPPORT OF RESPONDENT'S RESPONSE TO APPELLANT'S EMERGENCY MOTION FOR STAY PENDING APPEAL, OR IN THE ALTERNATIVE STAY PENDING PETITION FOR WRIT OF MANDAMUS OR PROHIBITION. Permission to submit the SUPPLEMENT TO APPENIDX OF EXHIBITS IS SUPPORT OF RESPONDENT'S RESPONSE TO APPELLANT'S EMERGENCY MOTION FOR STAY PENDING APPEAL, OR IN THE ALTERNATIVE STAY PENDING PETITION FOR WRIT OF MANDAMUS OR PROHIBITION via facsimile was granted by July 28, 2017 Order Regarding Motion for Stay.

Should you have any questions, please feel free to contact me at (702) 728-5300.

Thank you.

