ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL DISTRICT, Appellant, vs. LAS VEGAS REVIEW-JOURNAL, Respondent.	CASE NO.: 73525 DISTRICT COURT CASE NO.: A750151

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

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17-901603

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I. INTRODUCTION

The Las Vegas Review-Journal (the "LVRJ") has been fighting for access to records regarding alleged harassment and other serious misconduct by Clark County School District School ("CCSD") Trustee Kevin Child pursuant to the Nevada Public Records Act ("NPRA"), Nev. Rev. Stat. § 239.001 *et seq.* since December of last year. Although all public records are presumed public, access to these records is especially important because they pertain to serious alleged misconduct by an elected official—and how CCSD handled that misconduct. In short, the voters have a right to assess the conduct of its elected official and a taxpayer-funded agency for itself. Recognizing this, the district court, in its July 11, 2017 order (the "Order"), required CCSD to finally produce records pertaining to CCSD's investigation of Trustee Child (the "Withheld Records").

CCSD has appealed the Order, but should be denied a stay. To support its demand for a stay, CCSD maintains that having to finally complying with the NPRA. and produce the Withheld Records will defeat the purpose of its appeal. However, CCSD has repeatedly emphasized that if the Order stands, that *as a policy matter,* future complainants of sexual harassment will be afraid to come forward. Should it prevail on appeal, that issue would of course be remedied. Meanwhile, while CCSD argues it is seeking to protect the identities of victims, it has failed to articulate how

the Order—**which appropriately protects the identities of victims of alleged sexual harassment by Child by providing for redactions**—will cause irreparable harm. Just as it failed to meet its heavy burden in the district court of establishing that the interests in secrecy outweighed the presumption of public access (and is thus not likely to succeed on the merits), in its motion for a stay to this Court, CCSD likewise fails to meet its burden of establishing irreparable harm here and instead relies on conjecture and hyperbole. CCSD's non-established claim of irreparable harm lies in contrast to the irreparable harm the LVRJ and public necessarily face in continued denials of the right to know what public officials and agencies are doing. CCSD argues that LVRJ does not face irreparable harm in delays in its efforts to seek the truth because *some documents* have been provided (also after Court order, notably). This ignores that CCSD has no right to pick and choose which public records the public accesses, and that *all public records* are presumptively public. The LVRJ should not be further stymied in reporting the news, and the public should not be kept in the dark.

CCSD's request for a stay must also be evaluated in the context of its obstinate refusal to comply with its obligations under the NPRA both before and after litigation. The NPRA mandates that, within five (5) days, CCSD must either provide responsive records or provide specific reasons why documents should be withheld. It also mandates that a governmental entity establish why the presumption of

openness does not apply when it is withholding documents. *See generally* Nev. Rev. Stat. § 239.0107. CCSD failed to meaningfully respond to the LVRJ requests, and hid information from the LVRJ and the public by unilaterally and drastically limiting its searches for responsive documents to only certain email inboxes (and not revealing this until forced to well into the litigation). CCSD also resisted providing information on what it was withholding and why, taking the position that it had the right to secretly pick and choose which documents the public had access to. Indeed, CCSD even took the position that information what sources it searched was privileged and not the LVRJ's business. The final privilege log CCSD did produce, after much litigation and a court order, failed to even specify how each document withheld was privileged. Accordingly, the district court after extensive briefing and oral argument—and an *in camera* review—properly found that CCSD had not met its burden of establishing an exception to the NPRA and ordered disclosure.

And now, after this dilatory behavior, CCSD seeks a stay from this Court that would prevent the public from accessing important information about the behavior of an elected official and CCSD's handling of that behavior. CCSD failed to establish its burden in the district court, and should not be able to benefit now from its own delays and defiance of the NPRA. Further, a stay would merely provide incentive for CCSD and other government entities to delay, play hide the ball, and resist compliance with the NPRA, which runs contrary to the NPRA's purpose:

supporting access to public records Finally, a stay is particularly inappropriate because the NPRA requires that legal actions seeking compliance with its terms be expedited and makes all public records presumptively available to the public.

II. PROCEDURAL HISTORY

CCSD's Emergency Motion conveniently omits relevant procedural history in the district court proceedings which demonstrates its bad faith in responding to the LVRJ's request for public records. This omitted procedural history is reflected in the district court's orders and is relevant to whether CCSD is entitled to a stay of the Order. Starting in December 2016, the LVRJ made several requests to CCSD pursuant to the NPRA targeting documents pertaining to the alleged misbehavior of School Board Trustee Kevin Child (the "Requests"). Over the past *eight months*, the LVRJ has also been doggedly working to obtain both access to the records sought by the Requests and information about the extent to which CCSD has complied with the Requests. The convoluted procedural history of this case demonstrates CCSD's recalcitrant attitude toward compliance with the NPRA. The situation CCSD now finds itself in—seeking an emergency stay to avoid disclosing public records pertaining to its investigation of Trustee Child's alleged misbehavior—is a bed of its own making.

This litigation was precipitated by CCSD's failure to comply with the NPRA and efforts to delay and hide information. On or around December 5, 2016, LVRJ

reporter Amelia Pak-Harvey sent CCSD a request pursuant to the NPRA for certain public records pertaining to Trustee Kevin Child's alleged misbehavior. (Exh. 1 to Emergency Petition, ¶ 1.) Despite repeated inquiries from Ms. Pak-Harvey, CCSD failed to provide a meaningful response to her public records request. This failure to respond violated Nev. Rev. Stat. § 239.0107, which requires a governmental entity to either produce requested records within five business days of a request, or give notice of either (1) a date by which the records will be available, or (2) specific citation to either statutes or case law which make the public records confidential. *See* Nev. Rev. Stat. § 239.0107(1); § 239.0107(1)(c); § 239.0107(1)(d). CCSD's failure to provide the requested public records forced the LVRJ to file a petition for writ of mandamus pursuant to Nev. Rev. Stat. § 239.011 with the district court on January 26, 2017. (*Id.*, ¶ 2.)

Unfortunately, CCSD's compliance with the NPRA did not improve as the litigation before the district court needlessly dragged on. Eight weeks after the December Request—and only after the LVRJ filed its petition—CCSD produced one batch of responsive records on February 3, 2017. (Exh. 2 to Emergency Petition, ¶ 5.) It did not, however, provide a privilege log indicating what documents it was keeping secret or why. CCSD also did not indicate it had limited its search in any way.

On February 8, 2017, the district court ordered CCSD to fully produce, in

unredacted form, all the records it was withholding by 12:00 p.m. on February 10, 2017, or the matter would proceed to hearing. (*See* Exh. A to Respondent's Appendix ("RA") 006, ¶ 33.) CCSD did not do so. However, CCSD made various partial productions of the redacted records with changed and various redactions between February 8, 2017 and February 13, 2017, and then again after Court order with fewer redactions on February 24 and February 27, 2017. (Exh. A, RA006-007, ¶¶ 34-40; 52-55.)

CCSD did not voluntarily indicate that it had limited the December Requests, whose records it had searched, what terms it used to search for responsive records, or which records it was withholding. It took extensive (and expensive) litigation just to get information CCSD should have provided months earlier.

CCSD did, however, produce its first log on February 13, 2017 listing the following purported bases for the redactions: Nev. Rev. Stat. § 386.230, and CCSD Regulations 1212 and 4110. 1 (Exh. 1 to Emergency Petition, ¶ 10.) CCSD did not disclose that it was withholding responsive records and had only searched for records in a limited selection of email inboxes.

On February 14, 2017, the district court heard oral argument on the LVRJ's Petition. Following that hearing, on February 22, 2017, the court entered an Order granting the LVRJ's Petition ("February Order"). (*See* Exh. 2 to CCSD Emergency Motion.) In the Order, the court found that, regarding CCSD's proposed broad

redactions of the names of schools, teachers, administrators, and program administrators, CCSD had failed to meet its burden of demonstrating the existence of any applicable privilege. (*Id.*, ¶ 28.) The district court ordered CCSD to provide the LVRJ with new versions of the redacted records and additional redacted records with only "the names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff' redacted. (*Id.*, ¶ 34.) The court further specified that "CCSD may not make any other redactions" and must unredact the names of schools, teachers, and all administrative-level employees. (*Id.*, ¶ 35) (emphasis in original). The court directed CCSD to comply with the Order within two days. (*Id.*, ¶ 36.)

Meanwhile, on February 10, 2017, the LVRJ submitted a supplemental request for public records to CCSD. (Exh. A, RA008-013, ¶¶ 56-82.) The LVRJ was forced to amend its petition on March 1, 2017 after CCSD refused to produce records in response to response to this supplemental request. Twelve days after the LVRJ filed its Amended Petition, CCSD revealed for the first time that it had unilaterally limited its searches for responsive records. (Exh. B, RA059-060.)

In addition, after the entry of the district court's February Order, the LVRJ repeatedly requested that CCSD provide it with a privilege log of the documents it was withholding. (Exh. C, RA066; Exh. D, RA067.) CCSD did not respond to these repeated requests until March 13, 2017, when counsel for CCSD stated via email

that CCSD was withholding "a single document. An investigative report concerning allegations of harassment and discrimination by Trustee Child prepared by Cedric Cole of [the] Diversity and Affirmative Action Programs. It consists of 15 pages, which includes an 8 page report and 7 pages of notes." (Exh. E, RA069.) Of course, that turned out not to be true. (*See* Exh. 1 to Emergency Motion, ¶ 59 (finding that CCSD is withholding 102 pages of documents).)

The district court heard argument on the LVRJ's Amended Petition on May 9, 2017. (*Id.*, ¶ 27.) On June 6, 2017, the district court entered an order directing CCSD to produce, for an *in camera* review, all documents it had withheld to date, and any additional documents the searches yielded that CCSD contended should not be produced to the LVRJ (collectively, these are the "Withheld Records"). It also required CCSD to produce a privilege log, as well as certifications pertaining to the searches it had conducted. (Exh. F, RA082-083, ¶¶ 45-48.)

On May 30, 2017, CCSD provided documents to the district court for an *in camera* review. (Exh. 1 to Emergency Petition, ¶ 35.) It additionally provided the district court with two certifications and a privilege log. (*Id.*) Unbeknownst to the court, CCSD counsel did not provide a copy of either of these documents to the LVRJ at that time.[1] (*Id.*, ¶ 36.) At a hearing held on June 6, 2017, CCSD counsel

[1] This appears to be a violation of the prohibition against *ex parte* communications (*see* NRPC 3.5(b)), and reflects CCSD's efforts to stonewall the LVRJ which has had to fight extensively for things like copies of these documents that CCSD should

finally provided a copy of the final log and, later that day, provided copies of the certifications it had provided to the court a week earlier. (*Id.*, ¶ 38.) CCSD's actions further delayed this matter, and created unnecessarily expedited work by the LVRJ, which submitted a memorandum addressing the log and certifications on June 13, 2017. (Exh. 1 to Emergency Petition, ¶ 54.)

The court then held a hearing on CCSD's final privilege log on June 27, 2017. (*Id.*, ¶ 57.) At that hearing, the court found the privileges cited by CCSD did not justify withholding the records in their entirety, and that CCSD had failed to prove by a preponderance of the evidence that any interest in nondisclosure outweighed the strong presumption in favor of public access. (*See generally id.*, ¶¶ 69-88.) The court also found the certifications submitted by CCSD regarding its renewed searches for responsive documents were inadequate, and ordered CCSD to make the two CCSD employees who authored the certifications available to be deposed by the LVRJ as to their efforts to search for, collect, and produce the requested records. (*Id.* at ¶¶ 89-96.) At the hearing, CCSD offered to produce the records to the court by June 30, 2017. (Exh. H, (excerpts of 6/27/2017 transcript) RA097.)

Then, on July 12, 2017, CCSD filed a notice of appeal from the court's July 11, 2017 Order. CCSD also filed a motion for a stay pending appeal with the district court. After that motion was denied by the district court at a July 27, 2017 hearing,

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have provided voluntarily, and as a matter of course.

CCSD filed the instant Emergency Motion for a stay pending appeal with this Court.[2] As discussed in detail below, however, CCSD has failed to establish that it is entitled to a stay.

III. ARGUMENT

A. The NRAP 8(c) Factors and the Public Interest in Disclosure Weigh Against a Stay.

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, 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).

This 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

[2] Both the LVRJ and CCSD submitted proposed orders denying CCSD's motion for stay to the district court. As of the date of this filing, the district court has not yet entered either order.

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)). The four factors of NRAP 8(c) weigh against a stay. Moreover, the NPRA and the case law interpreting its provisions demonstrate that the public interest lies with disclosure of the public records CCSD has fought tooth and nail to withhold.

1. The Object of CCSD's Appeal Will Not Be Defeated if a Stay is Denied.

In its Emergency Motion, CCSD indicates the subject of its appeal pertains to "important public policy concerns regarding the right of public employees to raise concerns of all forms of sexual harassment and discriminatory conduct without fear of retaliation and without the loss of confidentiality." (Emergency Motion, pp. 2:26-3:2.) CCSD also indicates it wants to keep the investigative file pertaining to Trustee Child confidential. (*Id.*, p. 4:12-22.) CCSD asserts that a stay is necessary because this issue "become moot" if the Court requires it to disclose the withheld documents consistent with the July 11 Order. (*Id.*, p. 5:21.)

CCSD, which has already provided some documents pertaining to Trustee Child pursuant to the same parameters set forth in the district court's July Order, has repeatedly emphasized that appellate review of the district 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 attempt to obtain this relief even if this Court directs it to release the withheld documents. As this 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 district court's order would not moot CCSD's appeal.

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

CCSD asserts that it will suffer serious injury if it is required to comply with the district court's July Order because disclosing the records will "strip" employees who made complaints against one of their "bosses" of confidentiality. (Emergency Motion, pp. 6:3; 7:28.) CCSD asserts this loss of confidentiality will discourage employees from reporting incidents of discrimination and "undercut their federally mandated right to report and have investigated complaints of sexual harassment." (*Id.*, pp. 7:28-8:3.)

This argument fails on several fronts. First, the orders entered by the district court provide explicit protection for complaining employees. CCSD is explicitly permitted to redact the "names of direct victims of sexual harassment or alleged

sexual harassment, students, and support staff." (*See* Exh. 2 to Emergency Motion, ¶ 34; *see also id.*, ¶ 88.)

Second, CCSD's argument—that other employees will not come forward to make complaints if the records are produced—is also too speculative to warrant a stay. The United States Supreme Court has explained 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). Here, CCSD has pointed to nothing more than the mere possibility that CCSD employees may be less likely to report harassment if CCSD discloses the Withheld Records. This mere possibility of injury articulated by CCSD, however, is contradicted by the record in this case.

CCSD has not established that irreparable harm will occur in the interim if it complies with the district court's July Order. 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)). This 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.

Moreover, the NPRA's mandate that a governmental entity cannot resist disclosure of public records which contain confidential information "if the governmental entity can redact, delete, conceal or separate the confidential information from the information included in the public book or record that is not otherwise confidential." Nev. Rev. Stat. § 239.010(3). CCSD has not met it burden of establishing why redactions cannot address its concerns.

The only evidence of alleged harm CCSD has provided this Court is declaration, which provides:

> As part of my investigation, I interviewed several employees all of whom but one expressed fears of retaliation from Trustee Child.
>
> Most but not all of the employees I spoke with referenced Trustee Child's habit of repeatedly telling them and others that he (Trustee Child) is the "boss" as the basis of their fears of retaliation.
>
> At least two of the employees I spoke with orally expressed fears of repressed opportunities for promotions or advancement within the organization as a form of retaliation from Trustee Child.

(Exh. 3 to Emergency Motion (Declaration of Cedric Cole), p. 2.) However, the conclusory, hearsay assertions in Mr. Cole's declaration does not constitute sufficient evidence to establish CCSD's burden of establishing the likelihood of irreparable harm.

Third, a stay is not needed to encourage CCSD employees to report harassment in the future. CCSD argues that other employees may be less likely to report in the future if it does not receive a stay, and that this constitutes irreparable harm. (Emergency Motion, pp. 7:22-8:4.) As noted above, the policy issues at hand can still be resolved by this Court. The possibility of injury articulated by CCSD is contradicted by the record in this case. To date, CCSD has disclosed 174 pages of public records relating to Trustee Child's alleged misbehavior. (Exh. 1 to Emergency Motion, ¶ 59.) CCSD has not—and cannot—present any evidence that the release of these public records has resulted in the supposed injury CCSD fears.

Fourth, CCSD's obstructionist behavior has created the alleged emergency it complains about in its Motion. For example, CCSD complains that "because the District Court's Order, entered July 12, 2017, required CCSD to ***produce documents by June 30, 2017 which has already passed.***" (Emergency Motion, p. 2:6-9) (emphasis in original). As discussed above, CCSD offered at the June 27 hearing to produce the withheld records by June 30, 2017. (Exh. H, RA097.) When the LVRJ sought CCSD's input on its proposed order, CCSD reverted to the sort of gamesmanship which has been its calling card throughout this case: it refused to work with the LVRJ and insisted on submitting a competing order to the district court, and waited until July 3, 2017 to do so. This self-created emergency should not now be used as grounds for the entry of a stay.

Moreover, CCSD's arguments ignore 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). Thus, this factor weighs against a stay.

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3. The LVRJ and the Public Will Suffer Serious Injury if a Stay is Granted.

According to CCSD, because the LVRJ has already learned and reported on "the nature of Trustee Child's alleged misconduct, how CCSD responded to the alleged discrimination, and the guidelines that have been put in place as a result," the LVRJ has no real cause to complain. (Emergency Motion, p. 9:7-12.) This argument is misplaced. If the Court enters a stay, the LVRJ and the broader public will suffer injury in two respects. First, on a broader level, the entry of a stay would subvert the NPRA's intent to permit expeditious access to public records. Second, the LVRJ and the public would be injured by the continued withholding of the documents because despite CCSD's argument to the contrary, the full extent of Trustee Child's alleged misconduct and CCSD's response to that misconduct is not known.

The legislative intent underpinning the NPRA is to foster democratic principles by ensuring easy and expeditious access to public records. Nev. Rev. Stat. § 239.001(1); *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 878, 266 P.3d 623, 626 (2011) (holding that "the provisions of the NPRA are designed to promote government transparency and accountability"). Staying the district court's July Order would run contrary to these principles, and create a perverse incentive for CCSD and other governmental agencies to engage in litigation tactics which would thwart this important goal of the NPRA. Since December 2016, CCSD has resisted

disclosing public records. At every turn, it has taken intervention by the district court to force CCSD to comply with the NPRA. Now, having been ordered by the district court yet again to release public records, CCSD asks this Court to further delay public access to the withheld documents. This request—and CCSD's position throughout the course of this case—subverts the purpose of the NPRA. Should CCSD succeed in obtaining a stay, other governmental entities might be encouraged to follow CCSD's lead in responding to public records requests, and employ the same obstructionist tactics that have infected this case.

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

In addition to this timely notification and disclosure scheme, the NPRA specifically provides for expedited court consideration of a governmental entity's

denial of a records request. *See* Nev. Rev. Stat. § 239.011(2) (mandating that a court give an application for public records "priority over other civil matters").) Thus, the NPRA is designed to provide quick access to withheld public records, not to reward non-compliance, hiding of information, and delay.

As the procedural history above makes plain, the NPRA's important legislative goal of permitting swift access to public records has been repeatedly thwarted by CCSD. CCSD was dilatory in responding to the initial December 2016 records request. Over a month after the December request, CCSD's failure to meaningfully respond as mandated by Nev. Rev. Stat. § 239.0107 prompted the LVRJ to initiate this litigation on January 26, 2017.

As to CCSD's argument that this matter is not time sensitive because the LVRJ "already knows the nature" of the allegations against Trustee Child's and CCSD's response, knowing the "nature" of what Trustee Child allegedly did and how CCSD responded does not comport with the NPRA's goal of promoting transparency and accountability. The LVRJ and the public are entitled to more than just knowing the gist of the allegations against Trustee Child—they are entitled to know specific facts about the alleged misconduct by an elected official overseeing one of the largest school districts in the country, and specific facts about how CCSD responded to that alleged misconduct. Simply having information regarding the results of CCSD's investigation of the allegations against Trustee Child does not

provide the LVRJ or the public with sufficient information to determine: (1) if the documents released to date constitute all the allegations against Trustee Child; (2) if the investigation conducted by CCSD was adequate; (3) if the conclusions CCSD reached during its investigation were accurate; or (4) if the remedial measures CCSD put in place after the investigation were sufficient.

The reality is that the documents released thus far do not give a full accounting of either the allegations against Trustee Child or CCSD's investigation. For example, in the October 19, 2016 memorandum authored by CCSD Diversity and Affirmative Action Director Cedric Cole, Mr. Cole indicates that Trustee Child made statements that "could be reasonably viewed as homophobic." (Exh. G, RA092.) None of the public records released to date reference any alleged homophobic statements made by Trustee Child. The memorandum also indicated Trustee Child had had made comments to female CCSD employees regarding the "'sexiness'" of clothing they wore and "his alerts about which staff members he wants to date." (*Id.*) Again, the documents released thus far do not contain any facts pertaining to these allegations. The memorandum also concluded that Trustee Child "has also been successful in suppressing employee complaints against him" (*id.*), but none of the documents reveal why or how Mr. Cole reached that conclusion.

All this information is critical to understanding the allegations against Trustee Child, CCSD's investigation, and the adequacy of the remedies put in place by

CCSD. Withholding this information violates the NPRA, and limits public understanding of the workings of CCSD. Finally, the LVRJ is entitled to report on, and the public is entitled to fully assess, the actions of its elected official and how CCSD handled the accusations levied against the trustee. The LVRJ, as a newspaper, has already faced delays due to CCSD's failure to promptly respond to requests and it should not be subjected to further delays in its reporting. Accordingly, this factor weighs against a stay.

4. CCSD is Unlikely to Prevail in This Case.

Although CCSD's Emergency Motion only passingly references this (Emergency Motion, p. 3:2-5), it is important for the Court to consider that the issues in this case arose in the context of a records request the LVRJ made pursuant to the NPRA. Although CCSD seems loathe to acknowledge the importance of this context—indeed, CCSD does not even substantively address the NPRA until page 12 of its Emergency Motion—this Court must consider the mandates of the NPRA in considering whether CCSD has demonstrated it is entitled to a stay.

In accordance with the presumption of openness and "emphasis on disclosure,"[3] that underpins the NPRA, both the Act and this Court place a high burden on a governmental entity to justify nondisclosure. First, the law requires that,

[3] *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").

if a governmental entity seeks to withhold or redact a public record in its control it must prove by a preponderance of the evidence that the record or portion thereof that it seeks to redact is confidential. *See* Nev. Rev. Stat. § 239.0113; *see also Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 882, 266 P.3d 623, 629 (2011); *accord Nevada Policy Research Inst., Inc. v. Clark Cty. Sch. Dist.*, No. 64040, 2015 WL 3489473, at *2 (D. Nev. May 29, 2015). As a general matter, "[i]t is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly." *DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) (citing *Ashokan v. State, Dept. of Ins.*, 109 Nev. 662, 668, 856 P.2d 244, 247 (1993)). This is especially so in the public records context: pursuant to the mandates of the NPRA, any restriction on disclosure "must be construed narrowly." Nev. Rev. Stat. § 239.001(2)-(3).

Second, after establishing the existence of the privilege it asserts and applying it narrowly, unless the privilege is absolute, the governmental entity bears the burden of establishing that the interest in withholding documents outweighs the interest in disclosure pursuant to the balancing test first articulated in *Donrey of Nevada v. Bradshaw,* 106 Nev. 630, 798 P.2d 144 (1990). *See DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.,* 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) ("Unless a statute provides an absolute privilege against disclosure, the burden of establishing the application of a privilege based upon confidentiality can only be satisfied pursuant

to a balancing of interests."); *see also Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 879, 266 P.3d 623, 627 (2011) ("...when the requested record is not explicitly made confidential by a statute, the balancing test set forth in *Bradshaw* must be employed" and "any limitation on the general disclosure requirements of Nev. Rev. Stat. § 239.010 must be based upon a balancing or 'weighing' of the interests of non-disclosure against the general policy in favor of open government").

In its Emergency Motion, CCSD repackages several of the arguments it presented to the district court as grounds for a stay under NRAP 8(c). However, these arguments are insufficient to fulfill the heavy burden the NPRA and this Court's case law has placed on CCSD to demonstrate that these presumptively public records should be kept confidential, or that it is entitled to a stay.

a. There is No Blanket Protection for Reports and Related Documents Regarding Sexual Harassment.

CCSD's first argument regarding its likelihood of success on the merits rehashes an argument it has presented several times to the district court without success: namely, that its *Burlington/Faragher* duties under Title VII permit it to withhold the requested public records. (Emergency Motion, pp. 10:12-11:24.) CCSD asserts that as part of its duty under Title VII, it is required to keep the Cole Report confidential. (Emergency Motion, pp. 10:12-11:7.) Its sole authority for this position is EEOC Notice 915.002, Enforcement Guidance on Vicarious Liability for

Unlawful Harassment by Supervisors.[4] CCSD asserts that it does not need to release the withheld documents because the EEOC Notice advises that "information about the allegation of harassment should be shared only with those who need to know about it," and "[r]ecords relating to harassment complaints should be kept confidential on the same basis." (Emergency Motion, p. 11:2-6) (quoting Notice 915.002). However, the admonition CCSD relies on falls under the heading "Policy and Complaint Procedures." Indeed, the entire EEOC Notice provides guidance on how to conduct investigations and otherwise act to avoid vicarious liability for sexual harassment. *See* EEOC Notice 915.002. Thus, while it is true that during investigations information is not to be disseminated, here the investigation is complete. Accordingly, Notice 915.002 is of little moment here.

Additionally, CCSD has not established Notice 915.002 even applies to its investigation of Trustee Child, as CCSD has failed to demonstrated Trustee Child is a "supervisor" of any CCSD employee. Notice 915.002 provides that "[a]n individual qualifies as an employee's 'supervisor" **only if:**

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

[4] Available online at https://www.eeoc.gov/policy/docs/harassment.html (last accessed August 3, 2017).

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

CCSD has not established that Trustee Child is a supervisor of any CCSD employee. Trustee Child is one of seven elected school board trustees. Mr. Child and his fellow trustees are not empowered to make decisions that directly affect the terms and conditions of complainant's employment. Even CCSD reluctantly conceded as much at the June 27 hearing before the district court. In response to inquiry from the court regarding this precise issue, counsel for CCSD stated: "To answer your question directly. Can he walk down to Andre Long, head of human resources for the school district, and say, I want you to fire this person right now? ***No, he doesn't.***" (Exh. H, RA096) (emphasis added).

Moreover, any likelihood that Trustee Child could affect the terms and conditions of a complainant's employment is further undermined by the fact that, as noted above, Trustee Child is one of ***seven*** trustees. Even if, as CCSD speculates, Trustee Child did attempt to retaliate against a complaining employee, he would not be able to do without the complicity of other trustees; a scenario that is both unlikely and unsupported by the record in this case. Thus, EEOC Notice 915.002 is a weak source of authority for CCSD's assertion that it is likely to prevail on appeal.

In addition, other courts which have addressed this issue have found that records pertaining to school districts' investigations and findings of sexual harassment are public records. *See, e.g., Marken v. Santa Monica-Malibu Unified Sch. Dist.*, 202 Cal. App. 4th 1250, 136 Cal. Rptr. 3d 395 (Cal. 2012) (finding that release of an investigation report and disciplinary record of a sexually harassing teacher was warranted under California's public records act due to the public's right to know, even where an explicit privacy statute was also implicated); *Deseret News Pub. Co. v. Salt Lake County*, 182 P.3d 372, 27 IER Cases 1099 (Utah 2008) (holding that a sexual harassment investigation report should be produced because the report "provides a window ... into the conduct of public officials."). Moreover, even if there was some merit to CCSD's argument, it has not demonstrated why redaction of identifying information consistent with the district court's February Order would not address its concerns about protecting complainants' privacy. Accordingly, CCSD is

unlikely to prevail on appeal under this theory.

b. CCSD Has Not Established Its Internal Regulations Merit Non-Disclosure.

CCSD also argues that it is likely to prevail on appeal because CCSD Regulation 4110(X) carries the force of law, and requires information gathered during an investigation of an alleged discriminatory practice must be kept confidential. (Emergency Motion, p. 12:1-24.) This argument fails for three reasons. First, as discussed in the district court's July 11 Order, the court cannot apply Regulation 4110(X) in a manner that conflicts with the NPRA. (Exh. 1 to Emergency Motion, ¶ 75.)

Second, CCSD's internal regulations do not carry the force of law. As CCSD Policy 0101 states, "the purpose of these Policies and Regulations is to provide directions regarding the details of District Operations. Policies are more general principals, while Regulations contain specific details and procedures." (Exh. I, RA099; *see also* Exh. 1 to Emergency Motion, ¶ 71.) Third, Regulation 4110(X) expressly contemplates that the confidentiality of investigative information is not absolute. Specifically, information gathered during an investigation may be disclosed to, *inter alia*, "serve other significant needs [] or comply with law." (Exh. 5 to Emergency Motion, p. 5.) Here, disclosure of the documents serves the "significant need[]" of providing information to the public regarding the alleged misconduct of an elected official and CCSD's handling of the related investigation.

Disclosure of the withheld documents is also necessary to "comply with law"—specifically, to comply with the NPRA. Thus, CCSD is unlikely to prevail on this argument.

c. The Deliberative Process Privilege Does Not Justify Withholding.

In *DR Partners v. Board of County Commissioners of Clark County*, 116 Nev. 616, 6 P.3d 465 (2000), this Court explained that the deliberative 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").

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 this Court explained in *Gibbons*, a "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).

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 in contains information that formed the basis for Mr. Cole's recommendations to Superintendent Pat Skorkowsky in the Cole Memorandum. (Emergency Motion, pp. 13:1-14:13.) This does not satisfy the particularized showing requirement articulated by *DR Partners*. Simply saying "all of it was deliberative" without "establishing the character of the decision, the deliberative process involved, and the role played by the documents in the course of that process"[5] is not enough for CCSD to satisfy the heavy burden it bears under this Court's precedent.

Even if this Court were to find some merit to CCSD's argument that the deliberative process applies to some or all the documents requested by the LVRJ, that privilege is conditional, and the public's interest in accessing the documents outweighs CCSD's interest in preventing their disclosure. As the Court 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

[5] *DR Partners*, 116 Nev. at 623.

> 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).

Even if CCSD could establish that the deliberative process applies, the LVRJ 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. CCSD is therefore unlikely to prevail on this argument.

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

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

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.

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IV. CONCLUSION

The public has a strong interest in the disclosure of documents being withheld by CCSD that pertain to the investigation of alleged misconduct by Trustee Kevin Child. None of the factors cited by CCSD in its Emergency Motion for a stay outweigh that strong interest. Accordingly, CCSD's request for a stay of the district court's July Order should be denied.

DATED this 4th day of August, 2017.

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CERTIFICATE OF SERVICE

I certify that I am an employee of McLetchie Shell, LLC and that 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:

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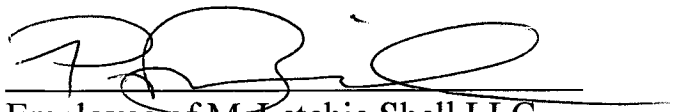

Employee of McLetchie Shell LLC