

IN THE SUPREME COURT OF THE STATE OF NEVADA

REPUBLICAN ATTORNEYS
GENERAL ASSOCIATION,

Appellant,

vs.

LAS VEGAS METROPOLITAN
POLICE DEPARTMENT,

Respondent.

Supreme Court No.: 77511

[District Court Case No.
A-18-780538-W]

Electronically Filed
Mar 12 2019 11:49 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

**APPELLANT REPUBLICAN ATTORNEYS GENERAL ASSOCIATION'S
OPENING BRIEF**

Appeal from the Eighth Judicial District Court
Order Denying Public Records Act Application/Petition for Writ of Mandamus
The Honorable Kerry Louise Earley, District Court Judge

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NRAP 26.1 DISCLOSURE

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

1. Appellant Republican Attorneys General Association (“RAGA” or “Appellant”) is a tax-exempt organization located in the District of Columbia. It is organized under Section 527 of the U.S. Internal Revenue Code, and it has no corporate affiliation.

2. Appellant RAGA was represented in the district court and is represented in this Court by the undersigned attorneys of the law firm of Clark Hill PLLC.

Dated this 11th day of March, 2019.

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I.

JURISDICTIONAL STATEMENT

This is an appeal from a final order of the Eighth Judicial District Court, Judge Kerry Louise Earley presiding (the “district court”) filed on October 18, 2018. (Joint Appendix (“JA”) Vol. 2 PGS 351 - 354). The District Court’s order denied RAGA’s public records act application/petition for writ of mandamus. (*Id.*).

This Court has jurisdiction over RAGA’s appeal pursuant to NRAP 3A(b)(1), where it is an appeal from a final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered, and NRS 34.310, where it is an appeal from proceedings mentioned in NRS 34.150 to NRS 34.290, inclusive.

Pursuant to NRAP 4(a)(1), “a notice of appeal must be filed after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served.” RAGA filed a timely Notice of Appeal on November 19, 2018. (JA Vol. 3 PGS 426 – 428).

II.

ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court. First, pursuant to NRAP 17(a)(11), it raises as a principal issue a question of first impression and

a question of statewide public importance. Specifically, this Court has not addressed whether a public agency's failure to timely respond to a public records request constitutes a waiver of its claim of confidentiality. Second, pursuant to NRAP 17(a)(12), it raises as a principal issue a question of statewide public importance. Specifically, this appeal asks the Court to address the denial of a public records request for body worn camera audio/video and related records, which are not otherwise confidential and which depict an encounter between then-State Senator and candidate for Nevada Attorney General, Aaron D. Ford (for ease of reference herein "Senator Ford"), and officers employed by Respondent, Las Vegas Metropolitan Police Department ("Metro" or "Respondent"). Senator Ford is believed to be depicted on the body worn camera audio/video in question using his position of authority as an elected official to influence the outcome of the encounter, and officers involved are believed to have covered up Senator Ford's actions by deactivating audio of the encounter in violation of state law and police department policy.

III.

ISSUES PRESENTED FOR REVIEW

This appeal presents the following issues for the Court's determination:

- 1) Whether the district court erred in finding that a public agency's failure to timely respond to a public records request made pursuant to the Nevada

Public Records Act (“NPRA”) does not constitute a waiver of its claim of confidentiality.

2) Whether the district court erred in finding that the body worn camera audio/video and related public records requested by RAGA were confidential “juvenile justice records” under NRS 62H.025.

3) Whether the district court erred by failing to apply the *Donrey* balancing test in favor of RAGA.

4) Whether the district court erred in finding that the general provisions of NRS 62H.025 pertaining to juvenile justice records take precedence over the specific provisions of NRS 289.830 pertaining to body worn camera audio/video.

5) Whether the district court erred in finding that records that do fall under NRS 62H.025 are exempt from disclosure under the NPRA, NRS 239.001, et seq.

IV.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from a decision by the district court denying a public records act application/petition for writ of mandamus filed by RAGA pursuant to the NPRA, specifically NRS 239.011(1), to obtain certain public records from Metro pertaining to an encounter between Senator Ford and Metro police officers, which took place on November 13, 2017.

B. The Public's Interest in the Records.

Shortly after the encounter in question, RAGA received information that suggested Senator Ford used his position of authority as an elected official to influence the outcome of the encounter. RAGA justifiably sought to shine a light on this alleged behavior prior to the November 2018 election wherein Nevadans would decide whether to make Senator Ford their next Attorney General. Toward that end, RAGA submitted four public records requests to Metro for the body worn camera audio/video and other records related to the incident. RAGA submitted these requests between December, 2017 and May, 2018, and Metro did not respond in a timely manner pursuant to NRS 239.0107(1)(d) to any of the requests.

When Metro did respond, it first denied RAGA's request on the basis that the records were part of an active criminal investigation. When RAGA challenged this claim, Metro switched its rationale for its denial to a claim that the records involved confidential juvenile justice records pursuant to NRS 62H.025 and a related statute.

C. Course of the Proceedings.

As more fully described in the Statement of Relevant Facts below, this action arose pursuant to the NPRA following Metro's failure to timely or meaningfully respond to RAGA's public records requests, leaving it no alternative but to seek court intervention. RAGA filed its public records act

application/petition for writ of mandamus on September 6, 2018. No discovery was undertaken; rather, this matter was decided on the petition, briefs and oral argument. Upon the filing of the Notice of Entry of Order on October 19, 2018 (JA Vol. 2 PGS 355 – 362), RAGA filed a timely Notice of Appeal on November 19, 2018. (JA Vol. 3 PGS 426 – 428).

D. Disposition Below.

In its order entered on October 19, 2018, the district court denied RAGA’s public records act application/petition for writ of mandamus. As more fully described in the Argument below, the decision of the district court to find in favor of Metro and against RAGA on the basis that the records in question are confidential under NRS 62H.025 and that NRS 62H.025 is expressly exempt from the NPRA pursuant to NRS 239.010(1), is in direct contravention of the plain language of the NPRA, the long-established public records jurisprudence of this Court, and the basic tenants of statutory construction.

V.

STATEMENT OF RELEVANT FACTS

A. RAGA’s Public Records Requests.

On December 5, 2017, Appellant RAGA, through its agent, sent Metro a request pursuant to the NPRA seeking “all body camera footage and or audio from body camera footage” relating to police interactions with then State Senator Aaron Ford between October 1, 2017 to December 5, 2017 (“First Request”). (JA Vol.

PGS 19 – 21). On December 14, 2017, after the statutory deadline for Metro’s response had elapsed, Metro indicated via email that it could not process the request without additional information, i.e. Metro event number, date and time of event, or officer’s badge number. (JA Vol. 1 PG 23). Thereafter, on January 25, 2018, RAGA, through its agent, sent Metro a more detailed request (“Second Request”) pursuant to the NPRA seeking the following public records:

[A]ll body cam footage and or audio from body camera footage (if visual images do not exist), the police or investigative report or summary, witness and or victim statements, all computer aided dispatch (CAD) between all LVMPD personnel at the scene and with dispatch, or any other statements by officers or witnesses relating to an incident with LVMPD Officer Zarkowski concerning minor child . . . and/or . . . Aaron D. Ford (State Senator) at approximately 3:00PM on November 13, 2017 at 7008 Connor Cove Street, Las Vegas, NV 89118.

(JA Vol. PGS 25 – 27).

On February 5, 2018, after the statutory deadline for Metro’s response had again lapsed and no response had been received from Metro regarding the Second Request, RAGA, through its agent, emailed Metro seeking an update of its status. (JA Vol. 1 PG 29). Metro responded to RAGA on February 6, 2018. It refused to provide any records, claiming that because the requested body camera recordings were part of an “active criminal investigation” they were “considered evidence according to the Nevada Public Records Act.” (JA Vol. 1 PGS 32 – 33). Metro did not cite to any specific provision of the NPRA to justify its refusal. (*Id.*).

On March 19, 2018, RAGA sent Metro a third request pursuant to the NPRA (“Third Request”). (JA Vol. 1 PGS 35 – 37). The Third Request sought the identical information previously requested in the Second Request. On May 2, 2018, more than one and a half months after the statutory deadline for Metro’s response had elapsed and no response had been received from Metro, RAGA requested a status update regarding the Third Request from Metro. (JA Vol. 1 PG 39). Metro responded to RAGA on May 15, 2018. (JA Vol. 1 PG 41). This time, Metro refused to provide any of the records sought in the Third Request (which were identical to those sought in the Second Request) because the “investigation involved juvenile suspects” and “juveniles arrested” and were, therefore, confidential. (*Id.*). Metro cited NRS 62H.025 and 62H.030 as authority for its refusal. (*Id.*). Metro provided no explanation for its conflicting responses to the Second and Third Requests. (*Id.*). Further, it failed to indicate whether it completed the investigation of the incident at issue. (*Id.*).

On May 17, 2018, RAGA sent Metro a Fourth Request pursuant to the NPRA (“Fourth Request”), incorrectly titled as a third request, in response to Metro’s denial of its Second and Third Requests. (JA Vol. 1 PGS 43 – 46). The Fourth Request narrowed the records requested in the Second and Third Requests to those “relating to or depicting then Senator Ford’s interactions with LVMPD Officer Zarkowski or other LVMPD personnel...” (*Id.*). The Fourth Request

specifically excluded “any information that may be confidential pursuant to Nevada Revised Statutes NRS 62H.025 and 62H.030” and reminded Metro of its duty pursuant to NRS 239.010(3) to redact, delete, conceal or separate purportedly confidential information to provide responsive records that are otherwise not confidential. (JA Vol. 1 PGS 43 – 44). The Fourth Request further challenged Metro’s overly-broad interpretation of NRS 62H.025 and 62H.030 and its unreasonable delay (57 days at that time) in providing a response to the Third Request. (*Id.*).

On June 15, 2018, after the statutory deadline for Metro’s response had again lapsed, Metro denied the Fourth Request on the basis that it disagreed with RAGA’s “broad interpretation of NRS 62H.025 and 62H.030.” (JA Vol. 1 PG 48). Metro further advised that RAGA should direct its Fourth Request for Metro records to the juvenile courts. (*Id.*). To date, Metro has provided no responsive documents to RAGA for any of the requests made between December, 2017 and May, 2018.

B. RAGA Files Suit.

RAGA filed its public records act application/petition for writ of mandamus pursuant to NRS 239.001 (“Petition”) in the District Court on September 6, 2018 and its opening brief in support of the Petition on September 26, 2018. (JA Vol. 1 PGS 1 – 48 and 65 – 108). RAGA asserted that Metro: (1) waived its ability to

withhold the requested records pursuant to NRS 239.0107(1) as it failed to timely respond to any of RAGA's public records requests; (2) could not establish, by a preponderance of the evidence that the requested records were confidential; (3) could not overcome the public's fundamental right to access pursuant to the balancing test first articulated in *Donrey of Nevada v Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990); and (4) was obligated to produce a privilege log pursuant to *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 266 P.3d 623 (2011).

The day the Petition was filed, the Nevada Independent published an article about the lawsuit which contained a statement from Senator Ford's campaign regarding the incident as follows:

“It was a minor incident on private property involving one of their (Senator and Mrs. Ford's) pre-teen children. Metro called the parents of all the kids involved so that they could deal with the issue privately.”

(JA Vol. 1 PG 83).

As the statement from Senator Ford's campaign contradicted the position previously asserted by Metro, i.e. that the incident involved the criminal investigation of “juvenile suspects” and “juveniles arrested,” counsel for RAGA, Colleen McCarty, contacted counsel for Metro, Jackie Nichols, to discuss whether the matter may be resolved informally. (JA Vol. 1 PGS 111 – 112). Ms. Nichols reiterated that the juveniles were arrested and again asserted that the entirety of the body worn camera video of the encounter concerned juveniles and was thus

confidential pursuant to NRS 62H.025 and 62H.030. (*Id.*).

Given the significant disparity between the statement made by Senator Ford's campaign and Metro's stated position concerning the substance of the body camera videos, Ms. McCarty again contacted Ms. Nichols and requested that Metro stipulate to a temporary protective order for an attorneys' eyes only viewing of the videos. (JA Vol. 1 PGS 111 – 114). Ms. McCarty explained that only by viewing the video could RAGA reconcile the conflicting positions regarding its substance and determine whether redaction of the video was possible. (*Id.*). Ms. Nichols advised that some 16 hours of video of the incident existed, much of it unrelated, because the officers left their body cameras rolling continuously during the entirety of their shifts. (*Id.*). She further denied RAGA's request for an attorneys' eyes only viewing of the video. (*Id.*).

C. RAGA Moves for Attorneys' Eyes Only Examination of Withheld Records.

On September 27, 2018, after informal efforts to resolve the dispute failed, RAGA filed an Emergency Motion for Examination of Withheld Records on Order Shortening Time ("Emergency Motion"). (JA Vol. 1 PGS 109 – 118). In the Emergency Motion, RAGA asserted that an attorneys' eyes only review of the body worn camera video at issue was necessary to ensure adequate adversarial testing pursuant to *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 882-83 266 P.3d 623, 629 (2011) of Metro's claim that the requested records were confidential

and unable to be redacted. Metro filed its Opposition on October 3, 2018 and the district court heard oral argument on October 5, 2018. (JA Vol. 1 PGS 115 - 116).

During the hearing, Ms. Nichols admitted that although she made repeated representations regarding the content of the body worn camera video, she had not actually viewed it. (JA Vol. 1 PGS 160 – 161). She further asserted that the entirety of the requested records, including footage which did not depict juveniles, was confidential pursuant to NRS 62H.025. (JA Vol. 1 PG 144). The district court denied the Emergency Motion finding that an attorneys’ eyes only viewing of the body worn camera video “would be waiving a privilege claimed by Respondent, and the Court does not read *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 266 P.3d 623 (2011) to include such a requirement.” (JA Vol. 2 PGS 263 – 264). The court instead ordered an *in camera* review of the body worn camera footage and thereafter, Metro provided what it purported to be the portions relevant to the incident involving Senator Ford. (JA Vol. 2 PG 264).

On October 8, 2018, RAGA sought emergency review of the district court’s Order before this Court and filed its Emergency Petition for Writ of Mandamus Pursuant to NRAP 21(a) and NRAP 27(e). (JA Vol. 2 PGS 183 – 200). This Court denied the petition on October 15, 2018, declining to intervene in advance of the hearing on the public records request. (JA Vol. 2 PGS 314 – 315).

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D. Metro Reveals Its Officers Muted Audio of Their Encounter With Senator Ford.

On October 10, 2018, Metro filed its response to the Petition. (JA Vol. 2 240 – 261). In it, Metro advised for the first time that portions of the body worn camera footage involving Senator Ford had been intentionally muted by two of the responding officers at the scene resulting in no recorded audio. (JA Vol. 2 at PGS 243 and 258 – 261). Metro claimed that the officers used the “mute” feature on their body worn cameras, a feature that has since been disabled, consistent with department policy. (JA Vol. 2 at PG 243). Tellingly, Metro failed to include the policy in its response, and, in fact, it does not provide for the muting of audio, or the continuous recording of video throughout an entire shift, or the deactivation of the body worn camera under the circumstances alleged herein. (JA Vol. 2 at PGS 306 – 310). Metro did, however, attach a “Privilege Log” of the body worn camera footage which asserted that the entirety of the video depicting its encounter with Senator Ford, an adult, was privileged pursuant to NRS 62H.025. (JA Vol. 2 PGS 258 – 259). The Privilege Log also revealed that Officers Kelly and Zarkowski, despite the presence of multiple adults and juveniles at the scene, engaged the mute feature almost exclusively during their interactions with Senator Ford. (*Id.*).

Metro’s Response also argued that the entirety of the body worn camera video, inclusive of the video involving Senator Ford, was confidential pursuant to

NRS 62H.025 because it constituted “juvenile justice information” under the statute. (JA Vol. 2 PG 250). And, that because juveniles were arrested, regardless of whether they were ever charged with a crime, they were subject to the jurisdiction of the juvenile court. (*Id.*). In support of this position, Metro attached a declaration from Officer Sebastian Zarkowski, who stated, “[a]s a result of the arrest of the juveniles, LVMPD provided its investigative file to relevant personnel within the juvenile justice system.” (JA Vol. 2 PG 256). Officer Zarkowski did not attest that the “investigative file” included the body worn camera footage, nor did he identify who within the “juvenile justice system” received the file. (*Id.*).

Officer Zarkowski further failed to assert whether the person who ostensibly received the file was a representative of the juvenile court. (*Id.*). Indeed, it would be contrary to the standard practice of the juvenile court to receive body worn camera footage, if at all, immediately upon the arrest of a juvenile. Such evidence is not typically transferred until the juvenile district attorney’s office files charges against a juvenile and is preparing its case for trial. In its Response, Metro provided no actual evidence that it transferred its body worn camera footage to the juvenile court, or even that the juveniles in question were ever charged with a crime such that they were subject to the jurisdiction of the juvenile court. (JA Vol. 2 PGS 240 – 261).

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E. RAGA Replies and the District Court Hears Oral Argument.

On October 15, 2018, RAGA filed its reply challenging the applicability of NRS 62H.025 to the instant matter and arguing that the NPRA does not exempt the statute from its requirements. (JA Vol. 2 PGS 293 – 294). RAGA further asserted that Metro wholly failed to meet its burden to prove by a preponderance of the evidence that the requested records were confidential, as required by the NPRA. (*Id.*). RAGA also argued that NRS 289.830, the specific statute governing body worn camera video which provides, without limitation, that it is a public record, takes precedence over the general provisions of NRS 62H.025 and NRS 62H.030. (JA Vol. 2 PGS 294 – 296).

The district court conducted a hearing on the Petition on October 17, 2018. (JA Vol. 2 PGS 316 – 348). Prior to any oral argument, the court indicated it had reviewed the body worn camera audio/video at issue and that because it was confidential, it was sealing the video to be filed as Court’s Exhibit 1 to the record. (JA Vol. 2 PG 317). On October 18, 2018, the district court entered an order denying RAGA’s Petition. (JA Vol. 2 PGS 351 – 354).

On October 22, 2018, RAGA sought emergency review of the district court’s Order before this Court and filed its Emergency Petition for Writ of Mandamus Pursuant to NRAP 21(a) and NRAP 27(e). (JA Vol. 2 PGS 363 – 386). This Court denied the petition on October 29, 2018, finding that an appeal was the

appropriate mechanism for relief. (JA Vol. 3 PGS 423 - 425). The instant appeal was timely filed thereafter on November 19, 2018. (JA Vol. 3 PGS 426 - 428).

VI.

SUMMARY OF ARGUMENT

RAGA is entitled to reversal and relief from the district court's denial of its public records act application/petition for writ of mandamus for any one of the following five reasons.

First, this appeal represents the latest example of Metro seeking to disregard its duties under the NPRA with impunity. Metro failed to comply with any of the time or manner requirements of the NPRA in responding to RAGA's multiple requests for records. Metro therefore waived the right to rely on any legal authority to justify withholding the records requested by RAGA, and the district court erred in holding that there was no valid legal basis for RAGA's waiver argument.

Second, the district court erred in finding the requested records were confidential juvenile justice records, and in not holding Metro to its burden to prove confidentiality by a preponderance of the evidence. NRS 62H.025, which Metro argued and the district court agreed made the records confidential, however, pertains only to records actually brought before the juvenile court. And, a juvenile only becomes subject to the jurisdiction of the juvenile court when the state files

charges against the juvenile, not at the time of the incident or arrest. Metro never attempted to assert, and the district court never required Metro to prove, that a juvenile was in fact charged, let alone that there was any juvenile court connection to the records in question.

While preponderance of the evidence is not a high standard, the district court was still required to base its findings on some quantum of evidence in the record that Metro's assertions were more likely than not true. The district court erred therefore in finding, without any evidence whatsoever, that the confidentiality provision of NRS 62H.025 applied in the instant case and should be reversed.

Third, the district court erred in not applying the balancing test set forth in *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990). The district court simply found the records RAGA requested were confidential because they purportedly depicted an incident wherein juveniles were arrested. The district court was required to hold Metro to its burden of providing specific information about what, if any, aspects of the requested records contained information to jeopardize an ongoing case, the fairness of a pending trial, the safety of law enforcement personnel, or any other compelling reason that would outweigh the public's fundamental right to access. Had the district court properly applied the *Donrey* balancing test, Metro's failure to articulate such interests should have

resulted in the district court ordering Metro's disclosure of the records in their unredacted form.

Fourth, the district court erred in not allowing NRS 289.830, the specific body worn camera statute, to take precedence over NRS 62H.025, the more general statute pertaining to juvenile justice records. Without conceding its argument that the district court erred in finding NRS 62H.025 applicable, should this Court disagree, RAGA asserts that the rules of statutory construction require NRS 289.830 be given precedence. NRS 62H.025 existed in its current form when the Legislature enacted NRS 289.830 in 2015. And, although the subject matter of NRS 289.830 is not precisely the same as that of NRS 62H.025, the possibility of their overlap compels the Court to attempt to construe them harmoniously and give effect to both. In the event the Court finds the two statutes to be in conflict to the degree they cannot be read in harmony, however, the more specific statute must be the one that controls. And, the more specific statute, by any reasonable review, is NRS 289.830, not NRS 62H.025. Using either statutory construction approach, the district court erred in not undertaking the proper analysis and granting relief in RAGA's favor.

Fifth, and finally, the district court erred in finding records to which NRS 62H.025 may be applicable exempt from disclosure pursuant to the NPRA. Again, without conceding its argument that the district court erred in finding NRS

62H.025 applicable, there are in fact 400+ statutes listed at the beginning of NRS 239.010, the purpose of which are to do nothing more than point the reader to another statute wherein certain confidentiality requirements pertaining to otherwise public records may be found. The district court's conclusion that the mere inclusion of NRS 62H.025 in the listing mandates its exemption from the NPRA would require a determination that the Legislature also intended to exempt provisions of the NPRA from the NPRA, as those provisions are also listed. The district court's determination that NRS 62H.025 is exempt from the NPRA's application is an absurd result and a clear error.

VII.

ARGUMENT

A. Standard of Review.

This Court reviews a district court's decision to grant or deny a petition for writ of mandamus under an abuse of discretion standard. *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003). Questions of statutory construction, however, including the meaning and scope of a statute, are questions of law, which this Court reviews de novo. *Id.*

B. The Nevada Public Records Act.

Under the NPRA, open records are the rule and any nondisclosure of records is the exception. NRS 239.010(1); *see also Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 627 (2011). The purpose of the NPRA is to "foster

democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law[.]” NRS 239.001(1). To that end, the NPRA must be construed liberally; government records are presumed public records subject to the act; and any limitation on the public's access to public records must be construed narrowly. NRS 239.001(2) and 239.001(3); *see also Gibbons*, 127 Nev. at 882, 266 P.3d at 629 (“the provisions of the NPRA place an unmistakable emphasis on disclosure”).

Consistent with that presumption of access, the NPRA places a heavy burden on governmental entities to demonstrate that a public record should be kept confidential. If a statute explicitly makes a record confidential, the public entity may not be required to produce it. NRS 239.0107(1)(d). In that circumstance, as well as in the absence of a statutory basis to assert confidentiality, the burden squarely rests with the entity seeking to withhold records to establish, by a preponderance of the evidence, the existence of the entitlement not to produce the record based upon confidentiality. NRS 239.0113; *see also DR Partners v. Bd. of Cty. Comm’rs of Clark Cty.*, 116 Nev. 616, 621, 6 P.3d 465, 468. “It is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly.” *Id.*

Moreover, the NPRA provides that a governmental entity must provide timely and specific notice if it is denying a request because the entity determined

the documents sought are confidential. Specifically, NRS 239.0107(1)(d) provides that if a governmental entity intends to withhold a public record as confidential, it must, within five business days, provide the requesting party with notice and a citation to legal authority that makes the public record or any part of it confidential. *See also Gibbons*, 127 Nev. at 885, 266 P.3d at 631. Notably, this makes clear that the governmental entity has an obligation to search for responsive records, and to establish confidentiality, within five business days of a public records request.

In the absence of a statutory basis to assert confidentiality, a 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 also DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 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.").

In applying the *Donrey* balancing test, the Court held that the burden remains squarely on the governmental entity:

In balancing the 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....The citizen's predominant interest may be expressed in terms of the burden of proof which is

applicable in this class of cases; the burden is cast upon the agency to explain why the records should not be furnished.

Id. (quoting *MacEwan v. Holm*, 226 Or. 27, 46, 359 P.2d 413, 422 (1961) and citing *Donrey*, 106 Nev. at 635-36, 798 P.2d at 147-48. Further, if a public record contains confidential information only in part, in response to a request for access to the record, a governmental entity shall redact the confidential information and produce the record in redacted form. NRS 239.010(3).

C. The District Court Erred In Finding Metro Did Not Waive Its Claim of Confidentiality By Failing to Timely Respond to RAGA's Public Records Requests.

As a preliminary matter, RAGA argued below and argues again to this Court that Metro waived its ability to assert any privileges which justified withholding the requested records because it failed to assert any claims of confidentiality within five business days as mandated by NRS 239.0107(1)(d). The NPRA's response time frame is crystal clear, and its provisions are mandatory. By failing to assert any claim of confidentiality within five business days of any of RAGA's four public records requests, Metro waived its right to assert the entitlement to withhold the requested documents based upon a statute or other legal authority. The district court thereafter erred in finding that there was "no valid legal basis for Petitioner's waiver argument..." (JA Vol. 2 PG 353).

NRS 239.0107(1) outlines the actions a governmental entity may take in

responding to a public records request:

1. Not later than the end of the fifth business day after the date on which the person who has legal custody or control of a public book or record of a governmental entity receives a written or oral request from a person to inspect, copy or receive a copy of the public book or record, a governmental entity shall do one of the following, as applicable:
 - (a) Except as otherwise provided in subsection 2, allow the person to inspect or copy the public book or record or, if the request is for the person to receive a copy of the public book or record, provide such a copy to the person.
 - (b) If the governmental entity does not have legal custody or control of the public book or record, provide to the person, in writing:
 - (1) Notice of that fact; and
 - (2) The name and address of the governmental entity that has legal custody or control of the public book or record, if known.
 - (c) Except as otherwise provided in paragraph (d), if the governmental entity is unable to make the public book or record available by the end of the fifth business day after the date on which the person who has legal custody or control of the public book or record received the request, provide to the person, in writing:
 - (1) Notice of that fact; and
 - (2) A date and time after which the public book or record will be available for the person to inspect or copy or after which a copy of the public book or record will be available to the person. If the public book or record or the copy of the public book or record is not available to the person by that date and time, the person may inquire regarding the status of the request.
 - (d) If the governmental entity must deny the person's request because the public book or record, or a part thereof, is confidential, provide to the person, in writing:
 - (1) Notice of that fact; and
 - (2) A citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential.

(Emphases added.). Thus, an entity that withholds records must provide timely

and specific notice, and it must do so within five business days.

Because it failed to respond to RAGA's repeated requests for body worn camera audio/video records in the time and manner prescribed by the NPRA, this Court should find that Metro waived the ability to rely on the legal authority it failed to timely assert. Moreover, Metro simply ignored RAGA's requests for investigative records, witness and/or victim statements, computer aided dispatch communications and other statements related to the incident, made in conjunction with the requests for body worn camera footage. Accordingly, this Court should find that Metro waived the right to rely on any legal authority to justify withholding these requested public records as well.

D. The District Court Erred In Finding the Body Worn Camera Audio/Video and Related Public Records Requested By RAGA Were Confidential Pursuant to NRS 62H.025.

The district court erred in finding that Metro's body worn camera footage and related records involving Senator Ford were confidential juvenile justice records pursuant to NRS 62H.025. The court concluded, incorrectly, following its *in camera* review of the video at issue, that because the video related to the investigation of a "juvenile involved incident" and the "juvenile justice process," it constituted confidential "juvenile justice information" under the statute. (JA Vol. 2 PG 352). The plain language of NRS 62H.025, however, pertains only to records in cases actually brought before the juvenile court. NRS 62H.025(6)(b).

NRS 62H.025 provides for the confidentiality of specifically defined juvenile justice information as follows:

(b) “Juvenile justice information” means any information which is directly related to a child in need of supervision, a delinquent child or any other child who is otherwise subject to the jurisdiction of the juvenile court.

NRS 62H.025(6)(b). A juvenile becomes subject to the jurisdiction of the juvenile court when the state files charges against the juvenile, not at the time of the incident or arrest. *State v. Barren*, 128 Nev. 337, 344-45, 279 P.3d 182, 187 (2012). Accordingly, the confidentiality provision of NRS 62H.025 pertains only to records of cases filed in the juvenile court. And, it does not contemplate the confidentiality of records created by and exclusively held by Metro.

Even if, however, the Court finds NRS 62H.025 may have applicability to the instant matter, the district court nevertheless erred in applying the statute when Metro failed entirely to meet its burden of proof.

NRS 239.0113 clearly establishes that:

Except as otherwise provided in NRS 239.0115, if:

1. The confidentiality of a public book or record, or a part thereof, is at issue in a judicial proceeding,; and
 2. The governmental entity that legal custody or control of a public book or record asserts that the public book or record, or a part thereof, is confidential.
- the governmental entity has the burden of proving by a preponderance of the evidence that the public book or record, or part thereof, is confidential.

(emphasis added). While preponderance of the evidence standard is not a high one, the district court was still required to base its findings on some quantum of evidence in the record that Metro's version of the facts is more likely than not the correct version.

In this regard, Metro never attempted to assert a juvenile court connection to the November 13, 2017 incident, but only provided evidence that juveniles had been arrested. The only sworn statement provided by Metro in its Response, that of Officer Sebastian Zarkowski, simply states that "juveniles were arrested for an alleged violation of law," and "as a result of the arrest of juveniles, LVMPD provided its investigative file to relevant personnel within the juvenile justice system." (JA Vol. 2 PG 256). No mention is made of the existence of any actual juvenile court case resulting from the incident, and no evidence of the juvenile court exercising jurisdiction over anyone arrested at the scene is ever offered, for *in camera* inspection or otherwise. In short, Metro provided no evidence the body worn camera video sought herein is a juvenile justice record protected from disclosure under NRS 62H.025.

The district court's acceptance of Officer Zarkowski's statement that he turned over his investigative file to someone within the juvenile justice system, without more, did not meet the preponderance standard. Officer Zarkowski gave no indication whatsoever of what was in the file, and he certainly made no claim

that any body worn camera video was included. As far as the person he turned the file over to, Officer Zarkowski provided no specifics as to a name or a title, and, of course, his reference to “relevant personnel within the juvenile justice system” in no way specifically connotes juvenile court personnel or anyone working on behalf of a juvenile court case.

In the end, Metro chose to argue and support nothing more than the assertion that juveniles were arrested on November 13, 2017. This is wholly insufficient to prove by a preponderance of the evidence that the confidentiality provisions of NRS 62H.025 apply in the instant case. Accordingly, the district court erred by holding in favor of Metro without requiring Metro to sustain its burden of proof.

E. The District Court Erred By Not Applying the *Donrey* Balancing Test in Favor of RAGA.

Had the district court properly disregarded Metro’s statutory basis to assert confidentiality and instead applied the correct legal analysis to the facts, RAGA should have prevailed. Metro bears the burden, in the absence of statutory confidentiality, 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 v. Bd. of Cty. Comm’rs of Clark Cty.*, 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.")

In applying the *Donrey* balancing test, this Court held that the burden rests squarely on the governmental entity:

In balancing the 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....The citizen's predominant interest may be expressed in terms of the burden of proof which is applicable in this class of cases; the burden is cast upon the agency to explain why the records should not be furnished.

Id. (quoting *MacEwan v. Holm*, 226 Or. 27, 46, 359 P.2d 413, 422 (1961) and citing *Donrey*, 106 Nev. at 635-36, 798 P.2d at 147-48. Further, if a public record contains confidential information only in part, in response to a request for access to the record, a governmental entity shall redact the confidential information and produce the record in redacted form. NRS 239.010(3). In addition, a governmental entity cannot rely on conjecture or hypothetical concerns to justify nondisclosure of public records. *DR Partners*, 116 Nev. at 628, 6 P.3d at 472-73 (County cannot meet "its burden by voicing non-particularized hypothetical concerns") (citation omitted).

Following its application of the balancing test, this Court in *Donrey* concluded that the investigative report in question should be released to the media entities. *Donrey*, 106 Nev. at 636, 798 P.2d at 147. This conclusion was based on

the facts that no criminal proceeding was pending or anticipated, no confidential sources or investigative techniques were contained in the report, there was no possibility of denying anyone a fair trial, and disclosure did not jeopardize law enforcement personnel. *Id*; see also *Reno Newspapers v. Sheriff*, 126 Nev. 211, 219, 234 P.3d 922, 927 (2010) ("A mere assertion of possible endangerment does not 'clearly outweigh' the public interest in access to these records.") (quotation omitted).

The district court erred in not applying this guidance below and finding that Metro did not meet its burden to show that the body camera footage and other related records should not be released. Metro never asserted that any criminal proceeding related to the incident that took place on November 13, 2017 was pending or anticipated. Second, Metro never established that any confidential sources or investigative techniques exist within the requested records. And, finally, Metro produced no evidence of the possibility of someone being denied a fair trial or law enforcement personnel being jeopardized if the requested records were released.

The district court improperly permitted Metro to rely on conjecture and speculation to justify withholding the requested records. The district court was, in fact, required to hold Metro to its burden by providing specific information about what, if any, aspects of the requested records that contain information that would

jeopardize an ongoing case, the fairness of a pending trial, the safety of law enforcement personnel, or other compelling reason that would outweigh the public's fundamental right to access. In the absence of Metro's articulation of such interest, the district court erred in not granting RAGA the requested relief and requiring Metro to immediately release the records in their un-redacted form.

F. The District Court Erred By Not Considering and Giving Precedence to the Specific Provisions of NRS 289.830 Over the General Provisions of NRS 62H.025.

The district court erred when it failed to consider NRS 289.830, the specific statute which governs body worn camera audio/video and declares it, without limitation, a public record. NRS 289.830(2). Despite RAGA's argument below that the rules of statutory construction mandate the more specific body worn camera statute (NRS 289.830) take precedence over the more general juvenile justice statute (NRS 62H.025), the district court failed to make any findings or conclusions regarding this question of law. This, despite the court advising the parties during oral argument of its intent to review the body worn camera statute prior to drafting its own order. (JA Vol. 2 PG 344).

As set forth in the Statement of Relevant Facts above, RAGA specifically seeks in part the body worn camera audio/video of the November 13, 2017 encounter between then Senator Ford and Metro officers. Pursuant to NRS 289.830:

Any record made by a portable event recording device¹ pursuant to this section is a public record which may be:

- (a) Requested only on a per incident basis; and
- (b) Available for inspection only at the location where the record is held if the record contains confidential information that may not otherwise be redacted.

NRS 289.830(2) (emphasis added). This clear and unambiguous language renders all body worn camera video available to the public, period, with a limitation only as to the location of viewing if it is determined that the video contains confidential information. In the event body worn camera video is held to contain confidential information that may not otherwise be redacted, it is available for inspection only at the location where the record is housed. *Id.* Nothing in the specific body worn camera video statute allows for the preclusion of public access in its entirety. And, nothing about the NRS 62H.025 speaks to body worn camera audio/video records specifically, only to records brought before the juvenile court generally.

“When the legislature enacts a statute it must be presumed that it did so with full knowledge of existing statutes related to the same subject.” *State, Div. of Ins. v. State Farm Mut. Auto Ins. Co.*, 116 Nev. 290, 295, 995 P.2d 482, 486 (2000) (quoting *City of Boulder v. General Sales Drivers*, 101 Nev. 117, 118-19, 694 P.2d 498, 500 (1985)). NRS 62H.025 existed in its current form when the Legislature

¹ “‘Portable event recording device’ means a device issued to a peace officer by a law enforcement agency to be worn on his or her body and which records both audio and visual events occurring during an encounter with a member of the public while performing his or her duties as a peace officer.” NRS 289.830(3)(b).

enacted NRS 289.830 in 2015. Although the subject matter of NRS 289.830 is not precisely the same as that of NRS 62H.025, the possibility of their overlap compels the Court to attempt to construe them harmoniously. *Id.* In this regard, the Supreme Court has specifically stated that, where there is “nothing to suggest [a] rule and [a] statute cannot be read in harmony[,]” a court should give effect to both. *Watson Rounds v. Eighth Jud. Dist. Ct.* 131 Nev. Adv. Op. 79, 358 P.3d 228, 232 (2015).

But even if the Court finds the two statutes to be in conflict to the degree they cannot be read in harmony, then the more specific statute must be the one that controls. *See, e.g., Piroozi v. Eighth Jud. Dist. Ct.*, 131 Nev. 1004, 1009, 363 P.3d 1168, 1172 (2015). The more specific statute, by any reasonable review, is NRS 289.830, not NRS 62H.025 pertaining to cases before the juvenile court which may or may not involve body worn camera audio/video. Regardless of which approach to statutory construction the Court takes, however, relief in RAGA’s favor is warranted.

G. The District Court Erred In Finding Records That Fall Under NRS 62H.025 Are Exempt From Disclosure Under the Nevada Public Records Act.

In contravention of the NPRA’s clear mandates, the district court simply got it wrong when it found the NPRA “expressly creates an exemption to the disclosure of such records falling under NRS 62H.025.” (emphasis added) (JA Vol.

2 PGS 351 – 352). The Court based its erroneous finding, in part on the fact that NRS 62H.025, which allows for the maintenance and release of juvenile justice information under certain circumstances, is among the many, many statutes listed in NRS 239.010(1). (*Id.*).

NRS 239.010 provides in pertinent part:

Except as otherwise provided in this section and [statutes omitted] and unless otherwise declared by law to be confidential, all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person and may be fully copied or an abstract or memorandum may be prepared from those public books and those public records.

NRS 239.010(1) (emphasis added). There are, in fact, 400+ statutes listed at the beginning of NRS 239.010, the purpose of which are to do nothing more than point the reader to another statute wherein certain confidentiality requirements pertaining to otherwise public records may be found. In addition to NRS 62H.025, two provisions of the NPRA itself are also listed, i.e. NRS 239.0105 and NRS 239.0113.

The district court's conclusion that the mere inclusion of NRS 62H.025 in the listing mandates its exemption from the NPRA would require a determination that the Legislature also intended to exempt provisions of the NPRA from the NPRA. The district court must consider "the policy and spirit of the law and....seek to avoid an interpretation that leads to an absurd result." *Leven v. Frye*,

123 Nev. 399, 405, 168 P.3d 712, 716 (2007) (*quoting CityPlan Dev. v. State Labor Comm'r*, 121 Nev. 419, 435, 117 P.3d 182, 192 (2005)). The district court's determination that NRS 62H.025 is exempt from the NPRA's application is an absurd result and a clear error.

VIII.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the district court's order and remand the case with instructions to grant the relief sought by Appellant.

Dated this 11th day of March, 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

2. I further certify that this Opening Brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 7,886 words.

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

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

Dated this 14th day of March, 2019.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this 11th day of March, 2019, I caused to be served a true and correct copy of the foregoing **APPELLANT REPUBLICAN ATTORNEYS GENERAL ASSOCIATION'S OPENING BRIEF** by the method indicated to the counsel stated below:

- ☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
- ☐ **BY PERSONAL DELIVERY:** by causing personal delivery of the document(s) listed above to the person(s) at the address(es) set forth below.
- ☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

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