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]

APPELLANT REPUBLICAN ATTORNEYS GENERAL ASSOCIATION'S REPLY 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 10th day of May, 2019.

CLARK HILL PLLC

By: Colleen E. McCarty

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I.

JURISDICTIONAL AND ROUTING STATEMENTS IN REPLY

Pursuant to NRAP 28(b)(1) and (2), Respondent Las Vegas Metropolitan Police Department ("Metro") declined to include either a Jurisdictional Statement or a Routing Statement in its Answering Brief, indicating it was satisfied with RAGA's statements. With the agreement of both parties, therefore, RAGA respectfully reiterates that this Court has jurisdiction over and presumptively retains this matter, pursuant to both NRAP 17(a)(11), as a matter of first impression concerning Metro's waiver of rights, and NRAP 17(a)(12), as a matter of statewide public importance concerning the withholding of public records depicting an encounter between then-State Senator and candidate for Attorney General Aaron Ford ("Attorney General Ford") and Metro Officers on November 13, 2017.

II.

ARGUMENT

A. Metro's Assertion That RAGA's Appeal Is Limited to Body Worn Camera Footage Is Belied By the Record.

Inexplicably, Metro asserts as the lead argument in its Answering Brief that RAGA's public records act application/petition for writ of mandamus ("Petition") "solely addressed access to Body Worn Camera footage." *See* Answering Brief at 11. It then supposes that "RAGA cannot now claim that the District Court erred in

allowing LVMPD to withhold those records." *Id.* These assertions are belied by the record below and are patently false.

First, in its Petition filed below, RAGA cited to and attached each of the four (4) records requests it made pursuant to the Nevada Public Records Act ("NPRA") concerning the November 13, 2017 incident involving Attorney General Ford and Metro officers, including its second request dated January 25, 2018 seeking:

> "[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 the incident…."

(JA Vol. 1 PGS 25 – 27) (emphasis added). This same information was repeated in the table of RAGA's public records requests included in its Opening Brief filed in support of the Petition. (JA Vol. 1 PGS 68 – 69). And, finally, to avoid any confusion of this point, RAGA affirmatively included a footnote in its Reply Brief in support of the Petition reminding the district court that its public records requests were not limited to just body worn camera video and that its statutory construction arguments were applicable to all requested records and only highlighted the body worn camera video for ease of reference. (JA Vol. 2 PG 294).

As the record on appeal makes clear, RAGA in no way limited its request for district court intervention to only body worn camera footage. RAGA never waived its right to seek all requested records, and it can and does respectfully assert in the

instant appeal that the district court erred in allowing Metro to withhold all requested records pertaining to the incident involving Attorney General Ford and Metro officers on November 13, 2017.

B. Metro Failed To Demonstrate By a Preponderance of the Evidence That the Requested Records Were Confidential.

1. *Metro Misconstrues RAGA's Waiver Argument.*

As an issue of first impression, this Court must decide whether Metro's failure to timely respond to all four (4) public records requests submitted by RAGA should be preclusive to its later assertions of confidentiality. The issue is not one of waiver of confidentiality, if any; the issue is one of waiver of the procedural right to assert confidentiality. Metro conflates the two issues in its Answering Brief, and its response fails accordingly.

Setting aside the fact that Metro's first untimely denial was based upon the incorrect assertion that the records were part of an "active criminal investigation" (JA Vol. 1 PGS 32-33), Metro's second untimely denial because the "investigation involved juvenile suspects" and "juveniles arrested" (JA Vol. 1 PG 41) was simply insufficient to meet its burden to establish that RAGA was not entitled to the requested records. The NPRA starts from the presumption that, unless specifically designated as 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 public records." NRS 239.010(1). If a governmental entity intends to deny a request for public records, the NPRA mandates that the entity provide a requester written notice of that fact, with specific citation to the statutory or legal authority it believes makes the record confidential, and it must do so within five (5) business days of receipt of the request. NRS 239.0107(1)(d).

Because it failed to respond to RAGA's repeated requests for records related to the November 13, 2017 incident 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. As Metro itself states in its Answering Brief, statutes creating time or manner restrictions are generally construed as mandatory. Answering Brief at 14 (citing *Leven v. Frey*, 123 Nev. 399, 406-07, 168 P.3d 712, 717 (2007). And, there is no dispute that Metro not only failed to provide timely and specific notice of its intent to withhold the body worn camera footage, it simply ignored RAGA's related 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, Metro waived the right to rely on any legal authority to justify withholding the public records in question.

2. *Metro Failed to Provide Sufficient Evidence to Meet Its Burden of Proof.*

Should this Court not find waiver by Metro, the record below nevertheless lacks sufficient evidence to show Metro met its burden to justify non-disclosure by a preponderance of the evidence. NRS 239.0113(2); *see also Reno Newspapers Inc. v. Gibbons*, 127 Nev. 873, 882, 266 P.3d 623, 629 (2011). Under this standard, the district court was required to base its findings on some quantum of evidence in the record that Metro's version of the facts was 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 conjunction with the hearing below, which came from Officer Sebastian Zarkowski, simply stated 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 was 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 was offered. Metro provided no evidence that the records requested by RAGA could or should be construed as juvenile justice records protected from disclosure under NRS 62H.025.

The district court's acceptance of Officer Zarkowski's unexamined statement that he turned over his investigative file to someone within the juvenile justice system did not meet the preponderance standard. Officer Zarkowski gave no indication whatsoever of what was in the file, and he made no claim that body worn camera footage was included. As far as the person he turned the file over to, Officer Zarkowski provided no specifics as to name or title, and 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 at the time of the incident on November 13, 2017. This is insufficient to prove by a preponderance of the evidence that the confidentiality provisions of NRS 62H.025 apply here.

Thus, the district court erred by holding in favor of Metro without requiring Metro to sustain its burden of proof.

3. *Metro Incorrectly Relies on the Confidentiality Provisions of NRS 62H.025.*

The records in question from the November 13, 2017 incident are not confidential juvenile justice records pursuant to NRS 62H.025. The district court erred in concluding, 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 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:

> "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). And, as this Court previously determined, 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. It does not, and indeed cannot, contemplate the confidentiality of records created by and exclusively held by Metro.

Thus, the district court erred in finding that Metro's body worn camera footage and related records pertaining to the incident involving Attorney General Ford and Metro officers were confidential juvenile justice records under NRS 62H.025.

C. The District Court Would Not Have Reached the Same Result Had It Properly Applied the *Donrey* Balancing Test.

Metro next attempts to argue in its Answering Brief that the district court's balancing of interests would still have resulted in the denial of RAGA's Petition. Metro concedes that if the Court does not find the confidentiality provision of NRS 62H.025 applicable in the instant case, it should remand the matter back to the district court to conduct the proper *Donrey* balancing test. *See* Answering Brief at 3, 26. RAGA concurs and respectfully requests the Court make just such a finding. Should the Court wish to consider and resolve the matter on appeal, however, RAGA asserts its analysis should prevail and Metro's attempt to rely on this Court's recent decision in *Clark Cty. Sch. Dist. v. Las Vegas Review Journal*, 134 Nev. Adv. Op. 84, 429 P.3d 313, 320 (2018) is misplaced.

1. *The Donrey Balancing Test Favors RAGA.*

In the absence of a statutory basis to claim confidentiality in the records requested by RAGA, Metro bears the burden of establishing that the interest in withholding the records outweighs the interest in disclosure, pursuant to the balancing test first articulated in *Donrey of Nevada, Inc. 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. 616, 621, 6 P.3d 465, 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.

DR Partners, 116 Nev. at 621, 6 P.3d at 468 (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. A governmental entity cannot rely on conjecture or hypothetical concerns to justify nondisclosure of public records. *Id.*, 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, the *Donrey* Court 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).

Here, the district court erred in not applying this guidance 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 November 13, 2017 incident was pending or anticipated. Second, Metro never established that any confidential sources or investigative techniques existed within the requested records. 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 self-generated 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 contained 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 interests, the district court erred by not granting RAGA the

requested relief and requiring Metro to immediately release all records in their un-redacted form.

2. *The Cameranesi Balancing Test Is Not Applicable to the Instant Case.*

Metro attempts to use this Court's recent decision in *Clark Cty. Sch. Dist. v. Las Vegas Review Journal*, 134 Nev. Adv. Op. 84, 429 P.3d 313, 320 (2018), which adopted the *Cameranesi* balancing test, as a basis to claim it would have prevailed below. *See* Answering Brief at 25-26; *see Cameranesi v. U.S. Dep't of Defense,* 856 F.3d 626, 637 (9th Cir. 2017). The *Cameranesi* balancing test, however, is inapplicable to this case. As this Court clearly articulated in *Clark Cty. Sch. Dist.*, the application of the two-part test is limited to "the context of a government investigation." It is not, as Metro suggests, a replacement for the balancing of interests articulated in *Donrey*. *See Clark Cty. Sch. Dist. v. Las Vegas Review Journal,* 134 Nev. Adv. Op. 84, 429 P.3d at 321.

In *Clark Cty. Sch. Dist.*, the Court considered whether the privacy interests of persons who participated in an internal investigation by a state agency, specifically public school teachers who reported misconduct by an elected public official within the Clark County School District, should be considered before publishing their identity or identifying information on public records. *Id.* at 320-321. To ensure the district court adequately weighed the competing interests of privacy and government accountability, this Court remanded the matter with

instructions to apply the *Cameranesi* balancing test. *Id.* at 321. The two-part test first requires the government to establish a nontrivial personal privacy interest, and then, if the government makes that showing, shifts the burden to the requestor to demonstrate the public's interest in disclosure. *Id.* at 320. This Court explained that the *Cameranesi* test was appropriate "in cases in which the nontrivial privacy interest of a person named in an investigative report may warrant redaction." *Id.* at 320.

Here, the public records at issue in no way involve the personal privacy interests of an individual who participated in a government investigation, thus rendering the *Cameranesi* balancing test inapplicable. However, even under a broader application of the test, the factors nevertheless weigh in favor of RAGA. Because Metro cannot meet its initial burden to show that the limited information requested implicates a nontrivial personal privacy interest, RAGA need not demonstrate the public's interest in disclosure. Indeed, given the substantial public interest in the actions of its elected officials, there can be no reasonable argument that the public's need for government transparency and accountability are outweighed by any individual privacy interest.

Even if this Court were to conclude that the *Cameranesi* balancing test should be applicable to this matter, the analysis would still demand disclosure of the records.

D. Metro Incorrectly Applies the Rules of Statutory Construction, Which Make NRS 289.830 the Controlling Statute.

Finally, Metro argues that the body worn camera footage requested by RAGA is governed by NRS 62H.025, not NRS 289.830, based on the mandates of statutory construction. *See* Answering Brief at 27-30. Specifically, Metro references the plain meaning rule, in lieu of the general/specific canon of statutory construction referenced by RAGA in its Opening Brief, to attempt to reach the conclusion that the body worn camera statute found in NRS 289.830 applies only generally to records containing confidential information that may not otherwise be redacted, and the juvenile justice information statute found in NRS 62H.025 specifically mandates confidentiality of such records without exception. *See* Answering Brief at 27. The plain meaning of each statute will speak for itself, of course, but the basic tenants of statutory construction clearly show NRS 289.830 to be the controlling statute in the instant case.

"When two statutory provisions conflict, this court employs the rules of statutory construction and attempts to harmonize conflicting provisions so that the act as a whole is given effect." *State v. Eighth Judicial Dist. Court*, 129 Nev. 492, 508, 306 P.3d 369, 380 (2013) (internal citations omitted). "Under the general/specific canon, the more specific statute will take precedence and is construed as an exception to the more general statute, so that, when read together, the two provisions are not in conflict, but can exist in harmony." *Williams v.*

State Dep't of Corr., 402 P.3d 1260, 1265 (2017) (internal citations and quotations omitted).

Here, the district court erred when it failed to consider NRS 289.830, the specific statute that governs body worn camera footage 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 take precedence over the more general juvenile justice statute, the district court failed to make any findings or conclusions in this regard.

RAGA specifically seeks records inclusive of the body worn camera footage from the November 13, 2017 encounter between Attorney General Ford and Metro officers. Pursuant to NRS 289.830, "*Any record* made by a portable event recording device pursuant to this section *is a public record*...." 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 NRS 62H.025 speaks to body worn camera footage 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, Delivery Drivers & Helpers, Int'l Bhd. Of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Local Union No. 14,* 101 Nev. 117, 118-19, 694 P.2d 498, 500 (1985)). NRS 62H.025 existed in its current form when the Legislature enacted NRS 289.830 in 2015. Although the subject matter of NRS 289.830 is not identical to that of NRS 62H.025, the possibility of overlap between the statutes compels the Court to attempt to construe them harmoniously. *Id.*

In this regard, this 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 such that they cannot be read in harmony, then the more specific statute must control. *See, e.g., Piroozi v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 100, 1009, 363 P.3d 1168, 1172 (2015). The more specific statute in the instant case, 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 footage. Regardless of which approach to statutory construction the Court takes, however, the district court erred in not undertaking the analysis, and relief in RAGA's favor is warranted.

III.

CONCLUSION

For all of the reasons stated herein, as well as in its preceding Opening Brief, RAGA respectfully requests that this Court reverse the district court's order entered October 18, 2018 denying RAGA's petition for writ of mandamus/public records act application and enter an order that Metro release all body worn camera footage and related records of the encounter between Nevada Attorney General, Aaron Ford, and Metro Officers that took place on November 13, 2017.

Dated this 10th day of May, 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply 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 Reply 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 3,692 words.

3. Finally, I hereby certify that I have read this Reply 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 Reply 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 10th day of May, 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 10th day of May, 2019, I caused to be served a true and correct copy of the foregoing **APPELLANT REPUBLICAN ATTORNEYS GENERAL ASSOCIATION'S REPLY 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.

- X **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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