**IN THE SUPREME COURT OF THE STATE OF NEVADA**

| | |
|---|---|
| LAS VEGAS METROPOLITAN POLICE DEPARTMENT,<br><br>Appellant,<br><br>vs.<br><br>THE CENTER FOR INVESTIGATIVE REPORTING, INC., A CALIFORNIA NONPROFIT ORGANIZATION,<br><br>Respondent. | Supreme Court Case Nos.: 77617/77965<br><br>Appeal from the Eighth Judicial District Court, the Honorable Elizabeth Gonzalez Presiding |



# APPELLANT LVMPD'S OPENING BRIEF

**Marquis Aurbach Coffing**
Nick D. Crosby, Esq.
Nevada Bar No. 8996
Jackie V. Nichols, Esq.
Nevada Bar No. 14246
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
ncrosby@maclaw.com
jnichols@maclaw.com
*Attorneys for Appellant,*
*Las Vegas Metropolitan Police Department*

## 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 judges of this court may evaluate possible disqualification or recusal.

1. The Las Vegas Metropolitan Police Department ("LVMPD") is a governmental entity and has no corporate affiliation.

2. LVMPD is represented in the District Court and this Court by the law firm of Marquis Aurbach Coffing.

Dated this 10th day of May, 2019.

MARQUIS AURBACH COFFING

By: */s/ Jackie V. Nichols, Esq.*
Nick D. Crosby, Esq.
Nevada Bar No. 8996
Jackie V. Nichols, Esq.
Nevada Bar No. 14246
10001 Park Run Drive
Las Vegas, Nevada 89145
*Attorneys for Appellant,*
*Las Vegas Metropolitan Police Department*

## TABLE OF CONTENTS


I. JURISDICTIONAL STATEMENT ..... 1

II. ROUTING STATEMENT ..... 2

III. ISSUES ON APPEAL ..... 2

A. WHETHER THE DISTRICT COURT ERRED BY DETERMINING THAT CIR PREVAILED. ..... 2

B. WHETHER THE DISTRICT COURT ERRED BY INTERPRETING NRS 239.011(2) IN ISOLATION, TO AWARD CIR ATTORNEY FEES AND COSTS. ..... 2

C. WHETHER THE DISTRICT COURT ERRED BY CONCLUDING THAT NRS 239.012 DOES NOT PROVIDE IMMUNITY TO LVMPD FROM CIR'S REQUESTED ATTORNEY FEES AND COSTS. ..... 3

D. WHETHER THE DISTRICT COURT ERRED IN AWARDING CIR CERTAIN ATTORNEY FEES. ..... 3

IV. STATEMENT OF THE CASE AND SUMMARY OF THE ARGUMENT ..... 3

V. STANDARDS OF REVIEW ..... 7

A. WRIT OF MANDAMUS STANDARD ..... 7

B. STANDARDS FOR REVIEWING AWARDS OF ATTORNEY FEES AND COSTS. ..... 8

VI. FACTUAL BACKGROUND ..... 8

A. CIR'S REQUEST FOR LVMPD'S ENTIRE INVESTIGATIVE FILE ..... 8

B. THE DISTRICT COURT'S PROCEEDINGS .....11

1. The District Court's Preliminary Hearing. .....11

2. The Production of a Portion of the Records Pursuant to the Parties' Agreement.....12

3. The Court Concluded CIR Prevailed. .....13

4. CIR's Motion for Attorney Fees and Costs and the District Court's Order. .....14

VII. LEGAL ARGUMENT .....15

A. CIR DID NOT PREVAIL AND IS PRECLUDED FROM RECOVERING ITS ATTORNEY FEES AND COSTS. .....15

1. The District Court Erred When It Applied the "Catalyst" Standard. .....15

2. CIR Did Not Prevail Under the "Prevailing Party Standard." ..18

3. The District Court Erred by Considering the Parties' Agreement in Determining Whether CIR Prevailed. .....20

B. THE DISTRICT COURT ERRED BY CONSTRUING NRS 239.011(2) IN ISOLATION TO AWARD ATTORNEY FEES AND COSTS TO CIR. .....22

1. Multiple Statutory Provisions Within a Statutory Scheme Must Be Construed Together. .....23

2. Conflicting Statutory Provisions Within a Statutory Scheme Create an Ambiguity, Such that the Legislative History Must Be Consulted. .....24

C. THE DISTRICT COURT ERRED BY CONCLUDING THAT NRS 239.012 DOES NOT PROVIDE IMMUNITY TO LVMPD

FROM CIR'S REQUESTED ATTORNEY FEES AND COSTS.....26

1. The Plain Language of NRS 239.012 Creates an Exception to NRS 239.011(2). .....26

2. The Legislative History Clarifies that the Legislature Intended for Governmental Entities, Like LVMPD, to Enjoy Immunity from Attorney Fees and Costs for Good Faith Refusals to Provide Requested Information Under the NPRA. .....30

D. THE DISTRICT COURT ERRED BY AWARDING CERTAIN ATTORNEY FEES. .....36

VIII. CONCLUSION.....37

## TABLE OF AUTHORITIES

### CASES

*Althouse v. Palm Beach Cnty. Sheriff's Office*,
92 So.3d 899 (Fla. 4th DCA 2012) .....29

*Ashokan v. State, Dep't of Ins.*,
109 Nev. 662, 856 P.2d 244 (1993) .....1

*B&S Utilities, Inc. v. Bakerville-Donovan, Inc.*,
988 So.2d 17, 23 (Fla. 1st DCA 2008) .....28

*Baron v. Dist. Ct.*,
95 Nev. 646, 600 P.2d 1192 (1979) .....8

*Beattie v. Thomas*,
99 Nev. 579 P.2d 268 (1983) .....34

*Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*,
114 Nev. 1348, 971 P.2d 383 (1998) .....29

*City of Reno v. Reno Gazette-Journal*,
119 Nev. 55, 63 P.3d 1147 (2003) .....7

*Cleghorn v. Hess*,
109 Nev. 544, 853 P.2d 1260 (1993) .....23

*Com., Cabinet for Health and Fam. Servs. v. Lexington H-L Servs., Inc.*,
382 S.W.3d 875 (Ky. App. 2012) .....28

*Donrey of Nevada v. Bradshaw*,
106 Nev. 630, 798 P.2d 144 (1990) .....10

*Elec. Privacy Info. Ctr. v. United States Dep't of Homeland Sec.*,
218 F.Supp.3d 27 (D. D.C. 2016) .....16

*Friedmann v. Corrections Corp. of Am.*,
310 S.W.3d 366 (Tenn. App. 2009).....29

*Gibellini v. Klindt*,
110 Nev. 1201, 885 P.2d 540 (1994).....8

*Golightly & Vannah, PLLC v. TJ Allen, LLC*,
132 Nev. Adv. Op. 41, 373 P.3d 103 (2016).....18

*Hardisty v. Astrue*,
592 F.3d 1072 (9th Cir. 2010).....29

*Hensley v. Eckerhart*,
461 U.S. 424 (1983).....18

*Herrera-Castillo v. Holder*,
573 F.3d 1004 (10th Cir. 2009).....25

*Horgan v. Felton*,
123 Nev. 577, 170 P.3d 982 (2007).....28

*Hornwood v. Smith's Food King No. 1*,
105 Nev. 188, 772 P.2d 1284 (1989).....18

*Hunt v. Warden*,
111 Nev. 1284, 903 P.2d 826 (1995).....8

*In re 12067 Oakland Hills, Las Vegas, Nevada 89141*,
134 Nev. Adv. Op. 97, 435 P.3d 672 (Ct. App. Nev. 2018).....36

*In re Candelaria*,
126 Nev. 408, 245 P.3d 518 (2010).....25

*In re Estate and Trust of Rose Miller*,
125 Nev. 550, 216 P.3d 239 (2009).....8

*Irvine Unified Sch. Dist. v. K.G.*,
853 F.3d 1087 (9th Cir. 2017).....18

*Judicial Watch, Inc. v. United States Dep't of Justice*,
878 F.Supp.2d 225 (D. D.C. 2012) ..... 16

*KPNX-TV v. Sup. Court ex rel. Cnty. of Yuma*,
905 P.2d 598 (Az. App. D1 1995) ..... 29

*Leven v. Frey*,
123 Nev. 399, 168 P.3d 712 (2007) ..... 23, 24

*Loomis v. Lange Fin. Corp.*,
109 Nev. 1121, 865 P.2d 1161 (1993) ..... 4

*LVMPD v. Blackjack Bonding*,
343 P.3d 608 (Nev. 2015) ..... 3, 7, 15, 16, 18

*McKay v. Bd. of Sup'rs of Carson City*,
102 Nev. 644, 730 P.2d 438 (1986) ..... 5, 30

*Mora v. Mukasey*,
550 F.3d 231 (2d Cir. 2008) ..... 25

*Northern Nevada Homes, LLC v. GL Construction, Inc.*,
134 Nev. Adv. Op. 60, 422 P.3d 1234 (2018) ..... 21

*Nuleaf CLV Dispensary, LLC v. State, Dep't of Health and Human Servs.*,
134 Nev. Adv. Op. No. 17, at *8 (Mar. 29, 2018) ..... 5, 24, 25, 34

*Putnam Cnty. Humane Soc'y, Inc. v. Woodward*,
740 So.2d 1238 (Fla. 5th DCA 1999) ..... 28

*Ruckelshaus v. Sierra Club*,
463 U.S. 680 (1983) ..... 29

*S. Nev. Homebuilders v. Clark Cnty.*,
121 Nev. 446 117 P.3d 171 (2005) ..... 5, 23, 24

*Salas v. Allstate Rent-A-Car, Inc.*,
116 Nev. 1165, 14 P.3d 511 (2000) ..... 24

*Sandy Valley Associates v. Sky Ranch Estates Owners Ass'n*,
117 Nev. 948, 354 P.3d 964 (2001) ..... 20, 27

*State Dept. of Human Res. v. Fowler*,
109 Nev. 782, 858 P.2d 375 (1993) .....15

*State ex rel. O'Sullivan v. Dist. Ct.*,
127 Mont. 32, 256 P.2d 1076 (1953) .....27

*Swaner v. Union Mortg. Co.*,
99 Utah 298, 105 P.2d 342 (1940) .....27

*Taylor v. Neill*,
80 Idaho 90, 326 P.2d 391 (1958).....27

*Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*,
489 U.S. 782 (1989). .....18

*United States v. Craig*,
181 F.3d 1124 (9th Cir 1999).....25

*United States v. Heckenliable*,
446 F.3d 1048 (10th Cir. 2006) .....25

*United States v. Manning*,
526 F.3d 611 (10th Cir. 2008) .....25

*Vaughn v. Rosen*,
484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974) ..... 12, 13

*Von Ehrensmann v. Lee*,
98 Nev. 335, 647 P.2d 377 (1982) .....28

*Winston Prods. Co. v. DeBoer*,
122 Nev. 517, 134 P.3d 726 (2006) .....1

*Wood v. Burwell*,
837 F.3d 969 (9th Cir. 2016).....18

*Works v. Kuhn*,
103 Nev. 65, 732 P.2d 1373 (1987) ..... 20, 21

**STATUTES**

5 U.S.C. § 552(a)(4)(E)(i) ..... 17

5 U.S.C. § 552(a)(4)(E)(ii) ..... 17

NRS 179.085 ..... 36

NRS 18.010 ..... 20, 21

NRS 18.010(2)(a) ..... 21

NRS 18.010(2)(b) ..... 34

NRS 18.010(3) ..... 20

NRS 18.020(3) ..... 21

NRS 239.0107(1)(d) ..... 10

NRS 239.011 ..... 2, 4, 1, 6, 11, 30, 32, 33

NRS 239.011(2) 2, 3, 4, 5, 6, 7, 13, 14, 15, 16, 17, 22, 23, 24, 26, 27, 30, 36, 37, 38

NRS 239.012 ..... 2, 3, 4, 2, 3, 4, 5, 6, 7, 14, 23, 26, 27, 30, 33, 34, 36, 37

NRS 7.085 ..... 34

**OTHER AUTHORITIES**

25 C.J.S. DAMAGES, § 2 ..... 27

Assembly Bill 365 (1993) ..... 6, 30, 33

BLACK'S LAW DICTIONARY, 471 (10th ed. 2014) ..... 5, 26, 30

Freedom of Information Act ..... 3, 13, 14, 15, 17

Nevada Public Records Act ..... 4, 2, 3, 5, 15, 16, 17, 21, 30, 33

**RULES**

NRAP 17(a)(10) ..... 2

NRAP 17(a)(11) ..... 2

NRAP 3A(b)(1) ..... 1

NRAP 3A(b)(8) ..... 1

NRCP 68 ..... 34

## I. JURISDICTIONAL STATEMENT

This is an appeal from an order denying as moot the Center for Investigative Reporting, Inc.'s ("CIR") Verified Petition for Writ of Mandamus and Incorporated Application for Order and Expedited Hearing pursuant to NRS 239.011 (the "Petition Order"). The Petition Order is a final, appealable order pursuant to NRAP 3A(b)(1), which allows for an appeal from a final order or judgment. *See Ashokan v. State, Dep't of Ins.*, 109 Nev. 662, 665–666, 856 P.2d 244, 246 (1993). LVMPD also appealed from the District Court's order granting CIR's Motion for Attorney's Fees and Costs ("Fee Order"). *See* Supreme Court Case No. 77965. This Court consolidated LVMPD's appeal of the Fee Order with the instant appeal. *See* Order filed February 2, 2019. The Fee Order is a special order made after final judgment, and therefore is substantively appealable. *See* NRAP 3A(b)(8); *see also Winston Prods. Co. v. DeBoer*, 122 Nev. 517, 525, 134 P.3d 726, 731 (2006). LVMPD timely filed its notice of appeal of the Petition Order on December 4, 2018, which was noticed on November 6, 2018. Likewise, LVMPD timely filed its notice of appeal of the Fee Order on January 16, 2019, which was noticed on January 8, 2019. Therefore, this Court has appellate jurisdiction over this appeal.

## II. ROUTING STATEMENT

LVMPD asks the Supreme Court to retain this appeal according to NRAP 17(a)(10) and (11) since this case involves issues of first impression that are also of statewide public importance. Specifically, whether a party may be deemed a "prevailing party" — and thus eligible for an award of reasonable attorney fees and costs — when it does not succeed on any of its claims for relief in a public records action. Additionally, the Supreme Court should retain this appeal because it concerns the interplay between NRS 239.011(2), dealing with awards of attorney fees and costs under the Nevada Public Records Act ("NPRA"), and NRS 239.012, dealing with governmental immunity for refusing, in good faith, to disclose information requested under the NPRA. The interplay between these statutes has not yet been resolved by this Court. Therefore LVMPD asks the Supreme Court to retain this appeal according to NRAP 17(a)(10) and (11).

## III. ISSUES ON APPEAL

**A. WHETHER THE DISTRICT COURT ERRED BY DETERMINING THAT CIR PREVAILED.**

**B. WHETHER THE DISTRICT COURT ERRED BY INTERPRETING NRS 239.011(2) IN ISOLATION TO AWARD CIR ATTORNEY FEES AND COSTS.**

**C. WHETHER THE DISTRICT COURT ERRED BY CONCLUDING NRS 239.012 DOES NOT PROVIDE IMMUNITY TO LVMPD FROM CIR'S REQUESTED ATTORNEY FEES AND COSTS.**

**D. WHETHER THE DISTRICT COURT ERRED IN AWARDING CIR CERTAIN ATTORNEY FEES.**

## IV. STATEMENT OF THE CASE AND SUMMARY OF THE ARGUMENT

This is a case in which the District Court improperly concluded that CIR was a prevailing party, resulting in an award of attorney fees and costs to CIR based upon NRS 239.011(2). *See* 2 Joint Appendix ("JA") 358–363; 4 JA 881–889. Before reaching the merits of the District Court's decision on attorney fees and costs, this Court should first determine whether CIR prevailed in accordance with Nevada precedent. The NPRA clearly provides that only a prevailing requester may seek attorney fees and costs. NRS 239.011(2). This Court previously applied the prevailing party standard to this particular statute. *See LVMPD v. Blackjack Bonding*, 343 P.3d 608, 612 (Nev. 2015). Based on the prevailing party standard, CIR is not entitled to seek its attorney fees and costs because production of the records was not judicially sanctioned. Accordingly, this District Court erred by concluding that CIR prevailed. Indeed, the District Court failed to apply the prevailing party standard, and instead, applied the catalyst standard codified under the Freedom of Information Act ("FOIA"). Despite the clearly established law in

Nevada, the lower court erroneously determined that NRS 239.011(2) differs from the prevailing party standard. If this Court rules CIR is not prevailing party, CIR is precluded from recovering any attorney fees and costs based upon NRS 239.011(2). *See Loomis v. Lange Fin. Corp.*, 109 Nev. 1121, 1129, 865 P.2d 1161, 1165–1166 (1993). Even if the Court reaches the substance of the issues in this appeal, the Court should still reverse or reduce the award of attorney fees and costs to CIR for several reasons.

First, the District Court erred by construing NRS 239.011(2) in isolation to award attorney fees and costs to CIR. The District Court relied upon a single provision in NRS 239.011(2) to award attorney fees and costs to CIR which states: "If the requester prevails, the requester is entitled to recover his or her costs and reasonable attorney's fees in the proceeding from the governmental entity whose officer has custody of the book or record." *Id.* However, the District Court avoided construing this statutory provision with the conflicting provision in NRS 239.012: "A public officer or employee who acts in good faith in disclosing or refusing to disclose information and the employer of the public officer or employee are immune from liability for damages, either to the requester or to the person whom the information concerns." *Id.* As a matter of law, multiple statutory provisions within a statutory scheme must be construed together. *See S. Nev.*

*Homebuilders v. Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). If the multiple statutory provisions within a statutory scheme conflict with each other, an ambiguity is created, such that the legislative history must be consulted. *See, e.g.*, *Nuleaf CLV Dispensary, LLC v. State, Dep't of Health and Human Servs.*, 134 Nev. Adv. Op. No. 17, at *8 (Mar. 29, 2018). Therefore, the Court should first conclude that the District Court's analysis of NRS 239.011(2), to the exclusion of NRS 239.012, was incomplete.

Second, the District Court erred by concluding that NRS 239.012 does not provide immunity to LVMPD from CIR's requested attorney fees and costs. The plain meaning of "damages" in NRS 239.012 encompasses the terms "attorney's fees" and "costs" in NRS 239.011(2), such that LVMPD is immune from CIR's requested attorney fees and costs. *See* BLACK'S LAW DICTIONARY, 471 (10th ed. 2014) (defining "damages" as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury"). The Legislature intended to provide immunity to governmental entities for a good faith refusal to disclose information requested under the NPRA. *See* NRS 239.012. Thus, the District Court erred by ignoring the stated purpose of this statute. *See McKay v. Bd. of Sup'rs of Carson City*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). Since the construction of NRS 239.011(2) together with NRS 239.012 creates an ambiguity, the legislative history

must be consulted for the Legislature's intent. In the legislative discussion for Assembly Bill 365 (1993) ("A.B. 365"), the language of what is now codified as NRS 239.011 and NRS 239.012 is discussed at length, where the following observation was made: "Court costs and attorneys' fees were granted only when it was a denial of what was clearly a public record [bad faith]." 4 JA 730. In this case, LVMPD properly withheld approximately 1,900 pages of records and provided CIR with less than 400 pages without any alterations. The remaining 1,000 pages of records and other media were provided with substantive redactions. CIR never challenged LVMPD's withholding of records or redactions. Accordingly, LVMPD acted in good faith. Therefore, the Court should conclude that LVMPD is immune from CIR's requested attorney fees and costs based upon NRS 239.012.

Third, the District Court erred by awarding certain attorney fees to CIR. Even if the Court were to allow CIR to recover attorney fees based upon an analysis of the competing statutory provisions, the Court should vacate $5,310.00 because these fees were incurred prior to the proceeding. NRS 239.011(2) limits a requester's recovery of attorney fees and costs to those incurred "in the proceeding."

In summary, LVMPD asks this Court to summarily resolve this appeal by vacating the award of attorney fees and costs to CIR because CIR did not prevail for purposes of NRS 239.011(2). Even if the Court reaches the substance of the issues in this appeal, LVMPD asks this Court to determine that NRS 239.011(2) cannot be construed in isolation. When NRS 239.011(2) is construed with NRS 239.012, along with the legislative history, the Court should determine that NRS 239.012 provides immunity to LVMPD from CIR's requested attorney fees and costs since LVMPD acted in good faith in withholding confidential information.

## V. STANDARDS OF REVIEW

### A. WRIT OF MANDAMUS STANDARD.

This Court reviews a district court's decision to grant or deny a petition for a writ of mandamus under an abuse of discretion standard. *See 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.* This Court also reviews a district court's interpretation of case law de novo. *See LVMPD v. Blackjack Bonding*, 343 P.3d 608, 612 (Nev. 2015).

When the Legislature has addressed a matter with "imperfect clarity," it becomes the responsibility of this Court to discern the law. *See Baron v. Dist. Ct.*,

95 Nev. 646, 648, 600 P.2d 1192, 1193–1194 (1979). Given an ambiguous statute, this Court must interpret the statute "in light of the policy and the spirit of the law, and the interpretation should avoid absurd results." *See Hunt v. Warden*, 111 Nev. 1284, 1285, 903 P.2d 826, 827 (1995).

### B. STANDARDS FOR REVIEWING AWARDS OF ATTORNEY FEES AND COSTS.

When an attorney fees matter implicates questions of law, the proper review is de novo. *See In re Estate and Trust of Rose Miller*, 125 Nev. 550, 553, 216 P.3d 239, 241 (2009). Statutes permitting the recovery of costs are to be strictly construed because they are in derogation of the common law. *See Gibellini v. Klindt*, 110 Nev. 1201, 1205, 885 P.2d 540, 543 (1994).

## VI. FACTUAL BACKGROUND

### A. CIR'S REQUEST FOR LVMPD'S ENTIRE INVESTIGATIVE FILE.

On September 7, 1996, rap artist Tupac Amarui Shakur ("Tupac"), more commonly known as "Tupac," was shot multiple times while seated in the front passenger seat of a car driven by record producer Marion "Suge" Knight. *See* 1 JA 34. The shooting occurred on Flaming Road and the Las Vegas Strip. *Id.* To date, no arrest has been made for the murder of Tupac and the case is still an open, active homicide investigation.

On December 11, 2017, CIR submitted a public record request to LVMPD for:

- Any and all records related to the American rapper Tupac Amarui Shakur, aka 2Pac, aka Makaveli, including but not limited to law enforcement files involving his murder; and

- Any and all records related to the America rapper Christopher Wallace, aka Notorious B.I.G., aka Biggie Smalls, including but not limited to law enforcement files involving his murder.

*See* 1 JA 021–022. Recognizing that the Tupac murder investigation was still ongoing, CIR attempted to justify the disclosure of LVMPD's law enforcement records by claiming no law enforcement privilege exists since the Federal Bureau of Investigation ("FBI") had released its records regarding the murders. *Id.* at 1 JA 022. While it is true the FBI released significantly redacted records of its investigation, the investigation did not involve Tupac's murder. *See* 1 JA 081–183. Rather, the FBI's investigation and its records concerned possible extortion by individuals within the Jewish Defense League involving rappers, including Tupac and Eazy-E. *Id.* Although the FBI's investigative file contains articles on Tupac's death, there is nothing relevant within the disclosures that pertain to LVMPD's investigation—no witnesses or suspects are named, no information on investigative leads are included and nothing pertaining to the evidence is discussed. *Id.*

In response to CIR's request, LVMPD disclosed the police report from the September 6, 1996 shooting of Tupac. *See* 1 JA 033. Not satisfied with the record provided, CIR inquired into whether additional responsive documents existed. 1 JA 036–037. LVMPD explained that the requested records were subject to an open, active criminal investigation. 1 JA 039–040. LVMPD further justified nondisclosure in reliance on several legal authorities pursuant to NRS 239.0107(1)(d) and reasoned that disclosure would jeopardize the apprehension of a suspect(s). *Id.* Disagreeing with LVMPD's interpretation of the law, and in particular the application of *Donrey of Nevada v. Bradshaw*,[1] CIR asserted there was no justification for withholding the records, as the case was decades old and no public policy considerations applied. *See* 1 JA 042–044. LVMPD clarified its reliance on *Donrey of Nevada* and explained:

> LVMPD's interest in protecting the investigative file is to avoid interference with the investigation of the murder of Tupac Shakur which LVMPD is actively pursuing. Disclosing the investigative records may alter persons of interest or possible suspects of the investigation and investigative leads which could cause the destruction or concealment of evidence or other circumvention of the investigation.

[1] *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 634, 798 P.2d 144, 147 (1990).

*See* 1 JA 046. Shortly thereafter, CIR initiated civil proceedings by filing its Verified Petition for Writ of Mandamus and Incorporated Application for Order and Expedited Hearing pursuant to NRS 239.011 (the "Petition"). 1 JA 001–0055.

### B. THE DISTRICT COURT PROCEEDINGS.

CIR filed its Petition on May 2, 2018, seeking to inspect or obtain copies of any and all records related to Tupac, including but not limited to law enforcement files involving his murder, within the legal custody and control of LVMPD. *Id*. LVMPD argued that the investigation concerning Tupac was ongoing and active. *See* 1 JA 061–064. In fact, LVMPD detectives had scheduled a meeting with witnesses in California as part of its active investigation. 1 JA 069-070. LVMPD contended that disclosure of its entire investigative would circumvent these witness meetings and would likely lead to person(s) of interest and potential suspects to flee from LVMPD. 1 JA 062-064.

#### 1. <u>The District Court's Preliminary Hearing.</u>

On May 15, 2018, the Court conducted a hearing on the Petition. *See* 1 JA 218–250. The Court found that, in accordance with Nevada law, a sealed evidentiary hearing was necessary to determine whether disclosure of the requested records was required. 1 JA 239–244. The Court scheduled a sealed evidentiary hearing for Wednesday, May 23rd at 10:00 a.m. *Id.* Notably, the Court did not

compel LVMPD to produce records, nor did it make any substantive ruling. *Id.* Instead, the Court required the Parties to prepare a confidentiality agreement for purposes of the evidentiary hearing. 1 JA 247. A confidentiality agreement was never executed. *See* 2 JA 251; 334–335.

### 2. The Production of a Portion of the Records Pursuant to the Parties' Agreement.

On May 21, 2018, counsel for CIR informed the Court that the Parties had reached an agreement on production. *See* 2 JA 334–335. The Parties agreed that LVMPD would produce portions of its records along with a *Vaughn*[2] index that would identify and describe any redacted or withheld records. *Id.* Notably, CIR reserved the right to challenge LVMPD's redactions and/or withholding of records and its ability to seek attorney fees and costs related to the same. *Id.*

LVMPD's investigative file contained approximately 3,300 pages of records. *See* 4 JA 757–772; 881–892. Over the course of three months, LVMPD provided CIR with approximately 1,400 pages of records and other media related to Tupac's murder. 4 JA 881–892. Of the 1,400 pages, less than 400 pages were

[2] *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

left entirely unaltered. LVMPD withheld approximately 1,900 pages of records in their entirety as a result of a privilege or confidentiality statute. 4 JA 757–772.[3]

### 3. The Court Concluded CIR Prevailed.

CIR never challenged LVMPD's withholding of records or redactions. *See* 2 JA 251. Appearing at a status check on September 13, 2018, counsel for CIR represented that the contested issues had been resolved and there would be no need for the evidentiary hearing. *Id.* CIR sought a court order granting the Petition, but the District Court indicated that opposing counsel's presence was required. *Id.* On September 25, 2018, the District Court held another status check. 2 JA 252. The Parties represented that there was a disagreement on whether CIR was considered a "prevailing party" under NRS 239.011(2). *Id.* As such, the Parties proposed supplemental briefing on the prevailing party issue and the court ordered the same. *Id.*

The Parties each submitted their respective briefs on October 12, 2018. *See* 2 JA 254–338; 339–346. CIR urged the District Court to adopt the "catalyst theory" that is codified in FOIA. 2 JA 262–269. On the other hand, it was LVMPD's position that production of the records was not judicially sanctioned,

[3] The records that were highlighted within the *Vaughn* index were withheld in their entirety.

and thus, CIR did not prevail. 2 JA 339–346. The District Court initially scheduled a status check for the supplemental briefs and proposed findings of fact and conclusions of law for October 19, 2018 in chambers. 2 JA 253. The case, however, was transferred to the Honorable Judge Elizabeth Gonzalez prior to the in chambers hearing. *See* 2 JA 347.

On October 30, 2018, the District Court held a hearing on the prevailing party issue. *Id.* In determining that CIR did prevail, the District Court applied FOIA's codified catalyst theory standard. 2 JA 358–363. Specifically, the District Court concluded that because the filing of the lawsuit caused LVMPD to make a satisfactory production of public records, CIR prevailed. *Id.* 2 JA 362. The court also indicated there is a difference between the terms "prevails" and "prevailing party," thereby requiring a different standard. 2 JA 347.

#### 4. CIR's Motion for Attorney Fees and Costs and the District Court's Order.

After the District Court ruled that CIR prevailed, CIR filed a motion for attorney fees and costs. 2 JA 364–380. CIR's motion relied upon NRS 239.011(2) as the basis to recover attorney fees and costs against LVMPD. *Id.* LVMPD's response relied upon NRS 239.012 for immunity from CIR's requested attorney fees and costs. 2 JA 381–396. LVMPD's response also highlighted the legislative history supporting its position. *Id.* Additionally, LVMPD contended that CIR

mistakenly included fees that occurred prior to the commencement of the lawsuit. *Id.* The District Court did not hold a hearing, and instead, entered a minute order granting CIR's fees in their entirety. 4 JA 880. The Fee Order reflecting CIR's award of attorney fees and costs was then entered on January 8, 2019. 4 JA 881–889.

## VII. LEGAL ARGUMENT

### A. CIR DID NOT PREVAIL AND IS PRECLUDED FROM RECOVERING ITS ATTORNEY FEES AND COSTS.

#### 1. The District Court Erred When It Applied the "Catalyst" Standard.

The District Court improperly concluded that CIR prevailed under NRS 239.011(2) when it erroneously applied the catalyst standard codified under FOIA, rather than the prevailing party standard articulated by this Court in *LVMPD v. Blackjack Bonding*. A court may not award attorney fees unless it is authorized by statute, agreement or rule. *State Dept. of Human Res. v. Fowler*, 109 Nev. 782, 784, 858 P.2d 375, 376 (1993). Under the NPRA, a requester is entitled to recover his or her costs and reasonable attorney fees in the proceeding from the governmental entity that has custody of the book or record if the requester ***prevails***. NRS 239.011(2).

In *LVMPD v. Blackjack Bonding*, this Court explained that "[a] party prevails 'if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit.'" 131 Nev. Adv. Op. 10, 343 P.3d 608, 615 (2015). In *Blackjack*, the Court found that Blackjack was a prevailing party because it "obtained a writ compelling the production of the telephone records with CCDC's inmates' identifying information redacted[.]" *Id.* at 615. The court's decision to grant mandamus relief compelling LVMPD to produce the requested records resulted in a court-ordered material alteration in the parties' legal relationship. Thus, the court concluded that Blackjack was entitled to recover its reasonable attorney fees and costs. *Id.*

By virtue of the clear, unambiguous language within NRS 239.011(2), as well as this Court's holding in *Blackjack*, it is evident that the prevailing party standard applies to the NPRA. The District Court, however, ignored this precedent and applied the catalyst standard. *See Elec. Privacy Info. Ctr. v. United States Dep't of Homeland Sec.*, 218 F.Supp.3d 27, 41-42 (D. D.C. 2016) (finding that plaintiff was prevailing party under the "catalyst" theory where defendant's production of records was caused by the plaintiff's lawsuit); *see also Judicial Watch, Inc. v. United States Dep't of Justice*, 878 F.Supp.2d 225, 231-233 (D. D.C. 2012) ("Here, the Court finds that Judicial Watch has adequately shown that this

lawsuit was the catalyst for the DOJ's release of records, thus making it eligible for attorneys' fees under the FOIA."). Like the NPRA, FOIA allows a requester to seek its attorney fees and costs if it prevails in a proceeding. *See* 5 U.S.C. § 552(a)(4)(E)(i). Contrary to the NPRA, and Nevada law, FOIA specifically provides that a complainant has substantially prevailed if it has obtained relief through either:

> (I) a judicial order, or an enforceable written agreement or consent decree; or
>
> (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

5 U.S.C. § 552(a)(4)(E)(ii). The language codified in FOIA is substantially different than the language provided in NRS 239.011(2) ("If a requester prevails . . ."). There is simply no language in the NPRA that justified the District Court's use of the catalyst standard recognized n FOIA when applying NRS 239.011(2).

In an attempt to justify its ruling, the District Court also noted that the term "prevails" differs from the term "prevailing party." This logic, however, is contrary to Nevada case law that applies the prevailing party standard to NRS 239.011(2). Accordingly, the District Court erred when it failed to apply the prevailing party standard.

### 2. CIR Did Not Prevail Under the "Prevailing Party Standard."

The prevailing party analysis articulated in *Blackjack* is rooted in federal case law. *See Hornwood v. Smith's Food King No. 1*, 105 Nev. 188, 192, 772 P.2d 1284, 1287 (1989) (quoting federal case law); *see also Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (stating that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."). Federal courts have since clarified that the "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties[.]" *See Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-93 (1989). Thus, "[a] fee-seeking party must show that (1) there has been a material alteration in the legal relationship of the parties and (2) it was judicially sanctioned." *See Wood v. Burwell*, 837 F.3d 969, 973 (9th Cir. 2016). A litigant whose "success on a legal claim can be characterized as purely technical or de minimis" is not entitled to attorney fees. *See Irvine Unified Sch. Dist. v. K.G.*, 853 F.3d 1087, 1093 (9th Cir. 2017).

Since deciding *Blackjack*, this Court likewise provided additional clarification for the term "prevailing party" in *Golightly & Vannah, PLLC v. TJ Allen, LLC*, 132 Nev. Adv. Op. 41, 373 P.3d 103, 107 (2016). In that case, the law

firm Golightly & Vannah ("G&V") filed an interpleader action seeking a ruling that its attorney lien had priority and that it receive its contingency fee from the recovery. *Id.* One defendant argued that G&V's lien was not properly perfected and therefore had no priority. *Id.* The court ruled in favor of the defendant finding that the attorney lien was not properly perfected and proceeded to award the defendant a full pro-rata share of the recovery at the expense of G&V's requested recovery. *Id.* Although G&V received some money — which achieved some of the benefit it sought in bringing suit — this Court determined that because G&V did not prevail on its sole claim of priority, it was not a prevailing party and therefore was not entitled to recover its costs. *Id.* The Court explained that "***a prevailing party must win on at least one of its claims***." *Id.* (emphasis added).

Applying the same analysis utilized by this Court, it is undisputed that CIR is not a prevailing party. The District Court did not enter an order requiring LVMPD to produce records. Rather, the District Court determined that a sealed evidentiary hearing was necessary to determine whether production would be required. The Court did not have the opportunity to reach the merits of the Petition because the Parties reached an agreement. In fact, CIR admitted the Petition is moot in light of LVMPD's production. *See* 2 JA 261. Thus, this action did not proceed to judgment and the Court never compelled LVMPD to produce records.

Because this Court did not compel production of the requested records, CIR cannot be considered a prevailing party. As such, the District Court's decision that CIR prevailed is erroneous and must be vacated.

### 3. The District Court Erred by Considering the Parties' Agreement in Determining Whether CIR Prevailed.

A party to an action cannot be considered a prevailing party where the action has not proceeded to judgment. *Works v. Kuhn*, 103 Nev. 65, 68, 732 P.2d 1373, 1375-76 (1987) disapproved of on other grounds by *Sandy Valley Associates v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 354 P.3d 964 (2001). In *Works*, the appellant argued that the district court abused its discretion in refusing to award attorney's fees pursuant to NRS 18.010. The parties to the case settled prior to going to trial. *Id.* Appellant, nonetheless moved for attorney fees, which the district court denied. *Id.* The Supreme Court reiterated its previous holdings that a party to an action cannot be considered a prevailing party within the contemplation of NRS 18.010, where the action has not "proceeded to judgment." *Id.* The Court also noted that NRS 18.010(3) appears to contemplate the award of fees following a trial or special proceeding. *Id.* In affirming the lower court's order, the Supreme Court reasoned because the appellant agreed to respondent's offer and respondents voluntarily dismissed their counterclaim, the appellant could not be regarded as having prevailed. *Id.*

Like *Works*, the Parties in the instant case reached an agreement, which prevented this matter from proceeding to judgment. While the NPRA permits recovery of costs and reasonable attorney fees, separate and apart from NRS 18.010, the Supreme Court has used the same standard in determining whether a party prevails. Recently, the Supreme Court published a decision that addressed whether parties who recover from settlement are prevailing parties for purposes of seeking fees and costs. *See Northern Nevada Homes, LLC v. GL Construction, Inc.*, 134 Nev. Adv. Op. 60, 422 P.3d 1234 (2018).

In *GL*, the plaintiff initiated an action for damages against the defendant and the defendant later filed a counterclaim for breach of contract. *Id.* at 1236. The district court bifurcated the trial and, three days into trial, the parties settled plaintiff's claims. *Id.* A bench trial proceeded on the counterclaim and the district court found in favor of the defendant. *Id.* The defendant then moved for attorney fees and costs and prevailed. *Id.* While the main issue dealt with offsetting the awards to determine who was the prevailing party, the Supreme Court addressed case law from other states, including California, that have found that parties who recover through settlement are the prevailing party within the meaning of attorney fee statutes. *Id*. at 1237. The Supreme Court was unpersuaded by these holdings. *Id.* Ultimately, the Supreme Court held that NRS 18.010(2)(a) and NRS 18.020(3)

do not intend for the district court, in determining the "prevailing party," to compare a monetary settlement of one party's claim against a judgment for damages on another party's counterclaim. *Id.* In other words, the district court is prohibited from considering an agreement reached between the parties to make a determination of who prevailed. *Id.*

The District Court was prohibited from relying on the Parties' agreement to produce portions of records in reaching a determination as to whether CIR prevailed in this matter. Without reaching a final decision on the merits, *i.e.*, proceeding to judgment, the District Court erroneously concluded that CIR prevailed. Because CIR is not a prevailing party pursuant to Nevada law, it cannot seek its attorney's fees and costs under NRS 239.011(2). The lower court failed to make a substantive ruling on the Petition. Therefore, CIR cannot be deemed the prevailing party in this case.

### B. THE DISTRICT COURT ERRED BY CONSTRUING NRS 239.011(2) IN ISOLATION TO AWARD ATTORNEY FEES AND COSTS TO CIR.

The District Court erred by construing NRS 239.011(2) in isolation to award attorney fees and costs to CIR. The District Court relied upon a single provision in NRS 239.011(2) to award attorney fees and costs to CIR: "If the requester prevails, the requester is entitled to recover his or her costs and reasonable attorney's fees in

the proceeding from the governmental entity whose officer has custody of the book or record." However, the District Court avoided construing this statutory provision with the conflicting provision in NRS 239.012: "A public officer or employee who acts in good faith in disclosing or refusing to disclose information and the employer of the public officer or employee are immune from liability for damages, either to the requester or to the person whom the information concerns." Therefore, the Court should conclude that the District Court's analysis of NRS 239.011(2), to the exclusion of NRS 239.012, was incomplete.

### 1. Multiple Statutory Provisions Within a Statutory Scheme Must Be Construed Together.

As a matter of law, multiple statutory provisions within a statutory scheme must be construed together. *See S. Nev. Homebuilders v. Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). The Legislature's intent is the primary consideration when interpreting an ambiguous statute. *See Cleghorn v. Hess*, 109 Nev. 544, 548, 853 P.2d 1260, 1262 (1993). When construing an ambiguous statutory provision, this Court determines the meaning of the words used in a statute by examining the context and the spirit of the law or the causes which induced the legislature to enact it. *See Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007). In conducting this statutory analysis, "[t]he entire subject matter

and policy may be involved as an interpretive aid." *Id.* Accordingly, this Court will consider "the statute's multiple legislative provisions as a whole." *Id.*

Courts have a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized. *Id.*; *S. Nev. Homebuilders v. Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). In addition, this Court will not render any part of the statute meaningless, and will not read the statute's language so as to produce absurd or unreasonable results. *See Leven*, 123 Nev. at 405, 168 P.3d at 716. Therefore, it was error for the District Court to interpret NRS 239.011(2) in isolation.

### 2. Conflicting Statutory Provisions Within a Statutory Scheme Create an Ambiguity, Such that the Legislative History Must Be Consulted.

If the multiple statutory provisions within a statutory scheme conflict with each other, an ambiguity is created, such that the legislative history must be consulted. *See, e.g., Nuleaf CLV Dispensary, LLC v. State, Dep't of Health and Human Servs.*, 134 Nev. Adv. Op. No. 17, at *8 (Mar. 29, 2018); *see also S. Nev. Homebuilders v. Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (stating that the provisions of a statutory scheme must be considered together, reconciled, and harmonized); *see also Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 1168, 14 P.3d 511, 514 (2000) (courts must look to the entire statutory scheme for

legislative intent). In other words, ambiguity in statutory provisions is not only created by competing interpretations of the same statutory provision. *See In re Candelaria*, 126 Nev. 408, 411, 245 P.3d 518, 520 (2010). Aside from *Nuleaf* decided by this Court, several federal courts have reached the same conclusion regarding ambiguity in construing multiple statutory provisions together. *See, e.g., Herrera-Castillo v. Holder*, 573 F.3d 1004, 1007 (10th Cir. 2009) (holding that a statute is ambiguous where "applying the statute's plain language would render [a specific statutory provision] a nullity"); *see also Mora v. Mukasey*, 550 F.3d 231, 237–238 (2d Cir. 2008) (same); *see also United States v. Heckenliable*, 446 F.3d 1048, 1051 (10th Cir. 2006) (rejecting an interpretation that would render a statute "a nullity in a majority of the states" and explaining that a court's "interpretation must give practical effect to Congress's intent, rather than frustrate it").

When multiple statutory provisions within a particular statutory scheme create an ambiguity, as in the instant case, courts should look to the legislative history to determine the intent for guidance in interpreting the multiple statutory provisions. *See*, *e.g.*, *United States v. Manning*, 526 F.3d 611, 617 (10th Cir. 2008) (considering the reasons that a particular member of Congress introduced the original legislative proposal); *see also United States v. Craig*, 181 F.3d 1124, 1127 (9th Cir 1999) (looking to an act's legislative history, including House floor

statements from several members of Congress, and the underlying genesis of the act, in determining the appropriate interpretation). Since NRS 239.012 creates ambiguity in how NRS 239.011(2) is interpreted, the District Court erred by ignoring and, thus, rendering NRS 239.012 meaningless. Therefore, this Court should consider both statutory provisions together, including the legislative history to conclude that LVMPD is immune from CIR's requested attorney fees and costs.

### C. THE DISTRICT COURT ERRED BY CONCLUDING NRS 239.012 DOES NOT PROVIDE IMMUNITY TO LVMPD FROM CIR'S REQUESTED ATTORNEY FEES AND COSTS.

The District Court erred by concluding that NRS 239.012 does not provide immunity to LVMPD from CIR's requested attorney fees and costs.

#### 1. The Plain Language of NRS 239.012 Creates an Exception to NRS 239.011(2).

The plain meaning of "damages" in NRS 239.012 encompasses the terms "attorney's fees" and "costs" in NRS 239.011(2), such that LVMPD is immune from CIR's requested attorney fees and costs. *See* BLACK'S LAW DICTIONARY, 471 (10th ed. 2014) (defining "damages" as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury"). Otherwise, NRS 239.012 would become a nullity. That is, what other "damages" could a requester, such as CIR, possibly seek under NRS Chapter 239? "'Damages' is a broad term and includes special as well as general damages." *See Taylor v. Neill*,

80 Idaho 90, 94, 326 P.2d 391, 393 (1958) (citing 25 C.J.S. DAMAGES, § 2). Courts have determined that the term "damages" must include "fees." For instance, under a statute that permitted a mortgagor to recover "damages" from a mortgagee who refused to discharge a mortgage, the Supreme Court of Utah considered the law of several other states and concluded that "damages" must include attorney fees. *See Swaner v. Union Mortg. Co.*, 99 Utah 298, 305, 105 P.2d 342, 345–346 (1940). In *State ex rel. O'Sullivan v. Dist. Ct.*, 127 Mont. 32, 35, 256 P.2d 1076, 1078 (1953), the Montana Supreme Court held that with regard to a petition for a writ of mandamus, a statute entitling the petitioner to damages necessarily included the fees incurred. Therefore, based upon the plain language of the term "damages" in NRS 239.012 and the terms "costs" and "attorney's fees" in NRS 239.011(2), the Court should determine that LVMPD is immune from CIR's requested award of attorney fees and costs. Any other construction of these terms would violate the rules of statutory construction by ignoring NRS 239.012, making it a nullity.

Indeed, Nevada law recognizes that "damages" may specifically encompass attorney fees in certain circumstances, even though the American Rule generally requires each party to pay its own fees unless a statute, rule, or contract provides otherwise. *See Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev.

948, 957–958, 35 P.3d 964, 970 (2001), *clarified by Horgan v. Felton*, 123 Nev. 577, 584, 170 P.3d 982, 986 (2007). Nevada has also established that where equitable relief is sought, just as in this case, an award of attorney fees is proper if awarded as an item of damages. *See Von Ehrensmann v. Lee*, 98 Nev. 335, 337–338, 647 P.2d 377, 378 (1982). Accordingly, "damages" and "attorney fees" are not mutually exclusive legal concepts.

Other states addressing this issue in the context of public records laws have ruled that a public entity that reasonably refuses, in good faith, to honor a public records request, is not required to pay attorney fees and costs if it is later determined that the records sought were, in fact, public records. *See B&S Utilities, Inc. v. Bakerville-Donovan, Inc.*, 988 So.2d 17, 23 (Fla. 1st DCA 2008) (concluding that a private engineering firm did not unlawfully refuse to permit inspection and, therefore, was not subject to an award of fees and costs); *see also Putnam Cnty. Humane Soc'y, Inc. v. Woodward*, 740 So.2d 1238 (Fla. 5th DCA 1999) (attorney fees were inappropriate where a party acted on a good faith belief that it was not subject to public records law); *see also Com., Cabinet for Health and Fam. Servs. v. Lexington H-L Servs., Inc.*, 382 S.W.3d 875, 882 (Ky. App. 2012) (refusal to provide records based upon a good faith claim of exemption, later found to be incorrect, is insufficient to establish a violation of open records law);

*see also KPNX-TV v. Sup. Court ex rel. Cnty. of Yuma*, 905 P.2d 598, 603 (Az. App. D1 1995) (requesting party not entitled to attorney fees under public records law when state had good faith basis to deny public access to crime scene and surveillance camera videotapes); *see also Althouse v. Palm Beach Cnty. Sheriff's Office*, 92 So.3d 899, 901 (Fla. 4th DCA 2012) (noting a good faith exception to attorney fees provision in public records law); *see also Friedmann v. Corrections Corp. of Am.*, 310 S.W.3d 366, 380–381 (Tenn. App. 2009) (requesting party not entitled to attorney fees when responding party acted in good faith in refusing to disclose records).

"[S]tatutes permitting the recovery of costs are to be strictly construed because they are in derogation of the common law." *See Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998). Awarding fees is also in derogation of the common law, under the American Rule. Thus, it follows that any statutory scheme allowing for an award of attorney fees must be construed narrowly and against the award of attorney fees. *See Hardisty v. Astrue*, 592 F.3d 1072, 1077 (9th Cir. 2010). At the same time, "'[w]aivers of immunity,' of course, "must be construed strictly in favor of the sovereign, and not enlarge[d]…beyond what the language requires." *Id.* (citing *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685–686 (1983)). The Legislature

intended to provide immunity to governmental entities for good faith refusal to disclose information requested under the NPRA. *See* NRS 239.012. By definition, "immunity" is "[a]ny exemption from a duty, liability, or service of process; esp., such an exemption granted to a public official or governmental unit." *See* BLACK'S LAW DICTIONARY, 867 (10th ed. 2014). Thus, the District Court erred by ignoring the stated purpose of NRS 239.012. *See McKay v. Bd. of Sup'rs of Carson City*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986).

**2. <u>The Legislative History Clarifies that the Legislature Intended for Governmental Entities, Like LVMPD, to Enjoy Immunity from Attorney Fees and Costs for Good Faith Refusals to Provide Requested Information Under the NPRA.</u>**

Since the construction of NRS 239.011(2) together with NRS 239.012 creates an ambiguity, the legislative history must be consulted to determine the Legislature's intent. In reviewing the legislative history for Assembly Bill 365 (1993) ("A.B. 365") on May 3, 2003, the language of what is now codified as NRS 239.011 and NRS 239.012 is discussed at length. *See* 4 JA 729–732. Prior to the legislative session, the Legislative Counsel Bureau ("LCB") published a bulletin that explained the overhaul of the NPRA. 2 JA 402–437. The bulletin fully explained the benefits of the writ process, the purpose of the fee and cost-shifting provision, and the purpose of the immunity provision. *Id.* The subcommittee

recommended repealing the criminal penalty and enacting legislation to provide an appeal process to the courts and allow the requester to recover court costs and fees if the requester prevails:

> Testimony before the subcommittee and discussions in the advisory committee meetings raised the issue of whether criminal penalties are appropriate in public records cases. . . .
>
> One option suggested during the course of the hearings was that the criminal penalties should be replaced with civil penalties. As discussed in the section on access to records, the subcommittee elected to establish an expedited procedure in court that grants attorneys fees and court costs to a requesting party that prevails. Because of this provision, the subcommittee determined not to recommend civil penalties, and to repeal the criminal penalties. Therefore, the subcommittee recommended that the Legislature:
>
> Repeal the existing criminal penalty relative to the failure to disclose a public record. (BDR 19-393)
>
> Enact legislation that prescribes the procedures for direct appeal to a court of law seeking an order compelling access and giving such proceedings priority on the court's calendar. Provide for court costs and attorneys' fees if the requester prevails. (BDR 19-393) (also discussed in Section IV regarding access.)

*See* 2 JA 436–437. As a result of the complexity associated with modern public records and the sensitive information contained within the records, the subcommittee determined a good faith standard for liability was appropriate:

> Because of the complexity associated with modern public records and the sensitive information that is contained in some records, the subcommittee determined a need for a liability standard that could be applied to the actions of government employees. The subcommittee

> elected to base the standard on "good faith." Therefore, the subcommittee recommended the following:
>
> Enact legislation providing that governmental entities and employees are immune from suit and liability if they act in good faith in disclosing or refusing to disclose information. (BDR 19-393).

*See* 2 JA 437. The preamble of the bill further supports a finding of immunity from attorney fees and costs:

> AN ACT relating to public information; substituting civil enforcement of access to public books and records for a criminal penalty for denial of access; conferring immunity upon public officers and employees for certain actions in good faith; and providing other matters properly relating thereto.

*See* 4 JA 693. Third, the portion of the bill that provides immunity to governmental entities immediately follows the portion of the bill that provides for the civil writ process and for attorney fees. In other words, in the same bill, the two provisions appear back-to back:

> Sec. 2. If a request for inspection or copying of a public book or record open to inspection and copying is denied, the requester may apply to the district court in the county in which the book or record is located for an order permitting him to inspect or copy it. The court shall give this matter priority over other civil matters to which priority is not given by other statutes. If the requester prevails, he is entitled to recover his costs and reasonable attorney's fees in the proceeding from the agency whose officer has custody of the book or record. [Now codified at NRS 239.011].
>
> Sec. 3. A public officer or employee who acts in good faith in disclosing or refusing to disclose information and his employer are immune from liability for damages, either to the requester or to the

> person whom the information concerns. [Now codified at NRS 239.012].

*See* 4 JA 693. While these provisions are now under separate statutes, it is important for the Court to recognize that the provisions were, nonetheless, part of the same bill. At the time A.B. 365 was enacted, there were several other bills before the Legislature that also pertained to the overhaul of the NPRA. If the statutes were wholly unrelated, and damages did not encompass attorney fees and costs, there would be no reason to draft and enact these statutes through the same bill.

The conversation on the good faith exception continually overlaps with the discussion on what is now NRS 239.011. Ande Englemen of the Nevada Press Association stated:

> Taxpayers were also paying the fees for the agency Mr. Bennett observed. The question was, should the taxpayers, in general, have to cover those costs when the suit might be rather frivolous. Ms. Engleman noted **the bill did not grant court costs and attorneys' fees if a suit was over a record everyone had thought to be confidential.** Court costs and attorneys' fees were granted only when it was a denial of what was clearly a public record [bad faith]. Therefore, she did not think there would be frivolous lawsuits.

*See* 4 JA 730 (emphasis added).

The legislative history certainly demonstrates that the replacement of the criminal penalty with an award of fees and costs to the requester is specifically

exempted in cases of good faith. Fees can only be granted if the governmental entity initially denies the record in bad faith. This approach is fair, and it is consistent with other fee-shifting provisions in the law. A major exception under the American Rule for the recovery of attorney fees is bad faith. *See*, *e.g.*, NRS 7.085 (permitting award of fees when an attorney acts in bad faith); NRS 18.010(2)(b) (permitting award of fees when a litigant acts in bad faith); *see also* NRCP 68 and *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983) (granting courts the discretion to award fees when a party rejects an offer of judgment, but only after balancing the relative good faith of the parties). Certainly, the harmonization of these statutes requires the Court to look to the 1993 legislative history of both of these statutes, which supports LVMPD's reading of these statutes together. *See Nuleaf CLV Dispensary, LLC*, 134 Nev. Adv. Op. No. 17, at *8.

Although the District Court determined that NRS 239.012 did not provide immunity, the court nonetheless determined that LVMPD did not act in good faith. To the contrary, the record demonstrates that LVMPD acted in good faith when it withheld and substantially redacted records related to the ongoing Tupac investigation. LVMPD withheld nearly 1,900 pages of records in their entirety. On the other hand, CIR received less than 400 unredacted pages. The remaining

records LVMPD provided to CIR, approximately 1,000 pages or other media, were significantly redacted. More importantly, CIR did not challenge LVMPD's withholding or redactions of records. In light of the amount of records completely withheld, had the District Court actually reached the merits of CIR's Petition, LVMPD's claims of privileges and confidential statutes would have been justified.

Indeed, LVMPD's initial refusal to release the records was objectively made in good faith because the records dealt with an unsolved, open and active criminal investigation The District Court's conclusion that LVMPD did not act in good faith necessarily means that LVMPD cannot withhold investigative records on any open, active criminal investigation. The District Court, nor CIR, never presented evidence or issued a finding that the Tupac criminal investigation was no longer active. As such, the District Court's Petition Order must be interpreted as one which finds active, open criminal investigative files are subject to public inspection. Such a result is absurd, as disclosure of investigative materials on open, active investigations will certainly create a very real and problematic obstruction or hindrance in the investigation because disclosure could cause potential witnesses or suspects to alter testimony, destroy or alter evidence or, worse yet, threaten or harm potential witnesses or victims.

To be sure, the Court of Appeals of Nevada recently addressed open, active criminal investigations in relation to a motion for return of property under NRS 179.085. *See In re 12067 Oakland Hills, Las Vegas, Nevada 89141*, 134 Nev. Adv. Op. 97, 435 P.3d 672, 678–679 (Ct. App. Nev. 2018). The court recognized that

> [D]isclosure of an active and ongoing criminal investigation may jeopardize the integrity of the investigation itself by revealing to a by revealing to a suspect that he or she is being investigated, how the investigation is being conducted, and by whom.

*Id.* at 678. Given these considerations, it cannot be said LVMPD's denial of the request to release records on an open, active homicide investigation was not made in good faith. Accordingly, LVMPD acted in good faith. Therefore, the Court should determine that LVMPD is immune from CIR's requested attorney fees and costs based upon NRS 239.012, as well as the legislative history.

### D. THE DISTRICT COURT ERRED BY AWARDING CERTAIN ATTORNEY FEES.

Should this Court determine that CIR prevailed and NRS 239.012 does not grant LVMPD immunity, the Court should vacate $5,310.00 of the fee award on the basis that CIR cannot recover pre-litigation fees and costs. *See* NRS 239.011(2) specifically limits the fees and costs that can be recovered to those incurred "in the proceeding." The District Court erred in granting the entirety of

the fees sought by CIR prior to the filing of the Petition, including fees for requesting the documents. Thus, the fees sought by CIR prior to commencement of the lawsuit, from March 26, 2018 through April 19, 2018 which consists of 11.8 hours and $5,310.00, cannot be recovered. *See* 2 JA 373–380.

## VIII. CONCLUSION

LVMPD asks this Court to summarily resolve this appeal by vacating the award of attorney fees and costs to CIR on the basis that CIR did not prevail pursuant to NRS 239.011(2). Even if the Court reaches the substance of the issues in this appeal, LVMPD asks this Court to determine that NRS 239.011(2) cannot be construed in isolation. When NRS 239.011(2) is construed with NRS 239.012, along with the legislative history, the Court should determine that NRS 239.012 provides immunity to LVMPD from CIR's requested attorney fees and costs since LVMPD acted in "good faith" in refusing to disclose information concerning an active, open criminal investigation.

/ / /

/ / /

/ / /

Finally, the Court should vacate $5,310.00 in attorney fees awarded to CIR for work performed prior to litigation if the Court finds that CIR prevailed and LVMPD is not immune to an award of fees and costs pursuant to NRS 239.011(2).

Dated this 10th day of May, 2019.

MARQUIS AURBACH COFFING

By: */s/ Jackie V. Nichols, Esq.*

Nick D. Crosby, Esq.
Nevada Bar No. 8996
Jackie V. Nichols, Esq.
Nevada Bar No. 14246
10001 Park Run Drive
Las Vegas, Nevada 89145
*Attorneys for Appellant,*
*Las Vegas Metropolitan Police Department*

## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this 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 either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 8,436 words; or

☐ does not exceed _____ pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(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 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.

MARQUIS AURBACH COFFING

By: */s/ Jackie V. Nichols, Esq.*
Nick D. Crosby, Esq.
Nevada Bar No. 8996
Jackie V. Nichols, Esq.
Nevada Bar No. 14246
10001 Park Run Drive
Las Vegas, Nevada 89145
*Attorneys for Appellant,*
*Las Vegas Metropolitan Police Department*

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT LVMPD'S OPENING BRIEF** was filed electronically with the Nevada Supreme Court on the 10th day of May, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Philip R. Erwin, Esq.
Samuel Mirkovich, Esq.
Campbell & Williams
700 South Seventh Street
Las Vegas, Nevada 89101
**pre@cwlawlv.com**
**srm@cwlawlv.com**
**rpr@cwlawlv.com**
**maw@cwlawlv.com**
*Attorneys for Respondent,*
*The Center for Investigative Reporting, Inc.*

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

N/A

/s/ Julia Rodionova
An employee of Marquis Aurbach Coffing