IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Appellant, vs. LAS VEGAS REVIEW-JOURNAL, Respondent.	Case No.: 78967 Electronically Filed Feb 18 2020 02:17 p.m. Elizabeth A. Brown Clerk of Supreme Court Appeal from the Eighth Judicial District Court, The Honorable Joe Hardy Presiding.

APPELLANT LAS VEGAS METROPOLITAN POLICE DEPARTMENT'S REPLY 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REGULATIONS

I. INTRODUCTION

In this appeal, LVMPD asks this Court to vacate the District Court's order requiring disclosure of LVMPD's patrol officer unit assignments for the years 2014 through 2016 because: (1) LVMPD established that its interests in officer safety outweigh the public's interest in access; and/or (2) LVMPD demonstrated that the release of patrol officer unit assignments involve a nontrivial privacy interest, shifting the burden to LVRJ to demonstrate that the public interest sought to be advanced is a significant one and that the information sought is likely to advance that interest.

LVRJ's Answering Brief ("AB"), first misstates the proper legal standard under the Nevada Public Records Act ("NPRA") as it relates to balancing tests. Contrary to LVRJ's position, LVMPD need not establish that some common law designates unit assignments confidential. Rather, LVMPD must show that its interests in non-disclosure outweighs the public interest in access. Second, despite the District Court's express denial of its waiver argument, LVRJ contends that LVMPD did not properly assert its privileges and has waived its right to assert the same. This Court has previously ruled that waiver of privileges is not supported by the NPRA.

Finally, in addressing both balancing tests, LVRJ simply ignores the fact that it has already been provided with the names and personnel numbers of every officer employed by LVMPD between 2014 and 2016. Limiting the disclosure to unit assignments of patrol officers does not mitigate the risk to officer safety. The disclosure of patrol officer assignments can reveal the identities of past or future undercover and covert officers. To that end, revealing unit assignments of past patrol officers would jeopardize an officer's current undercover or overt operation. LVRJ does not address these risks but merely asserts that unit assignments are a matter of public record.

In summary, LVMPD requests that this Court vacate the District Court's erroneous order requiring disclosure of the patrol officers' unit assignments and determine either that LVMPD's interests in officer safety outweighs LVRJ's interest in access to unit assignments, or that LVMPD met its burden in demonstrating that the disclosure of patrol officer unit assignments involves a nontrivial privacy interest.

II. LEGAL ARGUMENT

A. THE PROPER LEGAL STANDARD UNDER THE NPRA.

In its Answering Brief, LVRJ conflates the various legal standards announced by this Court in cases involving the NPRA. *See* AB 13-16. LVMPD

recognizes that there is no particular statute, ordinance, or other law that deems unit assignments for law enforcement agencies explicitly confidential. Instead, as argued at length in the Opening Brief, LVMPD contends that the District Court erred in applying the two separate balancing tests—*Donrey* and *CCSD*—as recognized by this Court. Under LVRJ's standard, LVMPD would have to: (1) establish that the information sought is protected from disclosure under an exemption and; (2) prove that non-disclosure substantially outweighs the public's interest in access. AB 13-14.

This Court in *Donrey* adopted a competing interest balancing test to determine whether disclosure, in certain circumstances, is appropriate under the NPRA. *Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630, 636, 798 P.2d 144, 148 (1990). Then, in *Reno Newspapers, Inc. v. Gibbons*, the Court clarified the standard in relation to *Donrey*'s competing interests balancing test as a result of the 2007 amendments made to the NPRA. Specifically, in the absence of a statutory provision that explicitly declares a record to be confidential, any limitations on disclosure must be based upon a broad balancing of the interests involved and the government agency bears the burden to prove that its interest in nondisclosure clearly outweighs the public's interest in access. *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011).

Nearly a decade after *Gibbons*, this Court reiterated the appropriate standard when applying the competing interests balancing test when an agency asserts that the records are not subject to disclosure under common law. "In the absence of [a statutory] provision [deeming the records confidential], [the government entity must show] that its interest in nondisclosure clearly outweighs the public's interest in access." *Las Vegas Review-Journal v. City of Henderson*, 441 P.3d 546, *3-4 (Nev. 2019) (unpublished) (citation and internal quotation omitted). This Court further explained that the competing interest balancing test initially adopted in *Donrey* and then clarified in *Gibbons* must be established by a preponderance of evidence. *Id.* By way of example, in *City of Henderson*, this Court concluded that the district court abused its discretion when it failed to consider the competing interests in applying the deliberative process privilege since that privilege is not statute based. *Id.* Importantly, *Donrey* and its progeny does not require a common law privilege, such as the deliberative process privilege, prior to balancing the competing interests. Indeed, in *Donrey* the Court recognized that public policy considerations, including the potential danger to law enforcement personnel, are factors to be considered when weighing the interests of the parties. 106 at 636, 798 at 148.

While the competing interest balancing test applies to common law privileges and policy considerations that are not based in statute, the privacy interest balancing test is separate and apart from the competing interest balancing test. Although LVRJ devotes a substantial part of its brief to discussing the fact that the NPRA is substantially different than FOIA, it is undisputed that this Court adopted the two-part *Cameranesi*[1] balancing test. *See Clark Cty. Sch. Dist. v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 84, 429 P.3d 313, 320 (2018).

This Court specifically ruled "that Nevada's common law protects personal privacy interests from unrestrained disclosure under the NPRA, and the [*Cameranesi* test is adopted] to balance the public's right to information against nontrivial personal privacy interests." *Id.* In support of adopting the *Cameranesi* test when public records involve privacy interests the Court reasoned:

> This approach is a logical extension of *Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630, 635, 798 P.2d 144, 147 (1990). In *Donrey*, this court implicitly recognized that unless a statute expressly creates an absolute privilege against public disclosure, limitations on disclosure must be based upon balancing interests of nondisclosure against the general policy of open government. 106 Nev. at 634-36, 798 P.2d at 146-47. The *Cameranesi* balancing test facilitates a court's balancing of nontrivial privacy interests against public disclosure. *See Cameranesi*, 856 F.3d at 637. For example, in this case, this test balances the nontrivial privacy interests of teachers having their names publicly disclosed with bringing attention to an

[1] *Cameranesi v. U.S. Dep't of Defense*, 856 F.3d 626, 637 (9th Cir. 2017).

> issue with an elected public official within a public school district. Thus, we believe the *Cameranesi* test provides a better way to determine if a government entity should redact information in a public records request.
>
> This test coheres with both NRS 239.0113 and *Gibbons*, 127 Nev. at 877-78, 266 P.3d at 625-26. It is merely a balancing test . . . of individual nontrivial privacy rights against the public's right to access public information. We explained in *Gibbons* that NRS 239.0113 requires that the state bear the burden of proving that records are confidential. *Gibbons*, 127 Nev. at 878, 266 P.3d at 626. The *Cameranesi* test does that, but also gives the district courts a framework to weigh the public's interest in disclosure, by shifting the burden onto the public record petitioner, once the government has met its burden. This ensures that the district courts are adequately weighing the competing interests of privacy and government accountability.

Id. at 708-09.

LVMPD's interpretation of the privacy interest balancing test is further evidenced by the fact that although CCSD did not meet its burden under the competing interest test, the Court remanded the case back to the district court for a determination of whether the balancing of the government employee's nontrivial privacy interests against the public's right to information. *Id.*

Therefore, in this instance, because LVMPD acknowledged that there is not specific statute or ordinance that deems the unit assignments confidential, the proper standard for LVMPD's competing interest argument under *Donrey* is that LVMPD must prove, by the preponderance of the evidence, that its interest in non-

disclosure of the unit assignments clearly outweighs LVRJ's interest in access. On the other hand, however, in applying the privacy interest balancing test, LVMPD's burden is to demonstrate that the nontrivial privacy interests of LVMPD officers having their unit assignments released, implicating officer safety, outweighs the public's interest in knowing which particular area command officers are stationed.

B. THE DISTRICT COURT PROPERLY REJECTED LVRJ'S WAIVER ARGUMENT.

Despite the District Court's express denial of LVRJ's waiver argument, LVRJ asks this Court to overturn the District Court's Order on waiver. The District Court properly concluded that LVMPD did not waive its ability to assert any applicable privileges. 14 AA 3248. It is LVRJ's position, however, that LVMPD did not timely provide a response to LVRJ's public records request and, therefore, waived any right to assert privileges or confidential status of documents. In the context of the NPRA, LVMPD did not intentionally relinquish a known right, which is the definition of "waiver." *See Nevada Yellow Cab Corp. v. Dist. Ct.*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007). Accordingly, The District Court properly found that LVMPD did not waive its ability to assert privileges.

The District Court's interpretation of NRS 239.0107 is consistent with the legislative history, which demonstrates that the notion of waiver was expressly rejected by the Legislature and removed from the proposed statute. In 2007, the

Legislature added the five-day response time to the NPRA. *See* Hearing on Senate Bill 123 ("SB 123") Before Senate Committee on Government Affairs, 74th Leg. (Nev. Feb. 26, 2007). The purpose of the five-day rule was to ensure that requesters received some sort of response from the government entity and that the requesters had a deadline. *Id.* In fact, as initially proposed, SB 123 included language that would permit waiver of confidentiality in the event that the government entity failed to timely respond, but the Legislature had concerns about waiving statutory confidentiality provisions. *Id.* As such, SB 123 was amended to remove the waiver language related to an untimely response from the government. *See* Hearing on SB 123 Before Subcommittee of the Senate Committee on Government Affairs, 74th Leg. (Nev. April 9, 2007). Thus, the legislative history clearly demonstrates that a government entity's failure to respond to a public records request within the five-day period does not waive the confidential status of the records sought.

As a matter of law, LVRJ's remedy for its refusal to accept LVMPD's position was to apply to the District Court for relief. NRS 239.011. Notably, nothing within NRS 239.0107 or NRS 239.011 suggests that waiver is a remedy. Thus, the District Court properly declined to read an additional remedy of waiver into the NPRA. *See Builders Ass'n of Northern Nevada v. City of Reno*, 105 Nev.

368, 370, 776 P.2d 1234, 1235 (1989) ("If a statute expressly provides a remedy, courts should be cautious in reading other remedies into the statute."); *Stockmeier v. Nev. Dep't of Corrections Psychological Review Panel*, 124 Nev. 313, 317, 183 P.3d 133, 136 (2008) ("declin[ing] to engraft any additional remedies therein."). This Court has previously established that "[w]here a statute gives a new right and prescribes a particular remedy, such remedy must be strictly pursued, and is exclusive of any other." *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220, 225 (1879).

There is no provision for "waiver" in the NPRA, except in NRS 239.052, where it states that the public entity may waive a fee, and NRS 239.170, involving lost or destroyed records. LVRJ contends that NRS 239.0107(d) requires strict compliance. AB 35–36. But, LVRJ cannot point to any waiver language within this statute. The cases upon which LVRJ relies do not discuss waiver of statutory privileges. *Id.* "[I]n determining whether strict or substantial compliance is required, courts examine the statute's provisions, as well as policy and equity considerations." *Leven v. Frey*, 123 Nev. 399, 406–407, 168 P.3d 712, 717 (2007) (citing 3 Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION, § 57:19, at 58 (6th ed. 2001)). Generally, statutes creating time or manner restrictions are construed as mandatory. *Id.* On the other hand, statutes are

directory (i.e., advisory) if they require performance within a reasonable time or if substantial compliance is sufficient. *See Village League to Save Incline Assets, Inc. v. State ex rel. Bd. of Equalization*, 124 Nev. 1079, 1087, 194 P.3d 1254, 1259 (2008). A statute should not be deemed mandatory if it appears to have been prescribed simply as a matter of form. *See Corbett v. Bradley*, 7 Nev. 106, 108 (1871). Furthermore, this Court may construe a statute as directory to avoid "harsh, unfair, or absurd consequences." *Village League*, 124 Nev. at 1088, 194 P.3d at 1260–1261 (citing *Leven*, 123 Nev. at 407, 168 P.3d at 717).

Nevertheless, should this Court determine that NRS 239.0107 requires strict compliance, the remedy available to address any deficiencies in a response provided pursuant to NRS 239.0107 is judicial relief in accordance with NRS 239.011—not waiver. To be sure, nearly two years ago, this Court rejected a similar waiver argument. *See Katz v. Incline Village Gen. Improv. Dist.*, Dkt. No. 70440, at *8–9 (Feb. 26, 2018) (unpublished). In *Katz*, the plaintiff challenged the district court's conclusion that the defendant did not violate the NPRA. *Id.* The defendant had denied plaintiff's public record requests on the basis that the records requested were not public records. *Id.* The plaintiff contended that the defendant's failure to articulate the basis for denying the request violated NRS 239.0107 and, thus, waived its confidentiality arguments. *Id.* This Court expressly rejected the

plaintiff's waiver argument because it refused to read such a requirement into the NPRA. *Id.*

Recently, the Court also rejected LVRJ's waiver argument in *Las Vegas Review-Journal v. City of Henderson*, 441 P.3d 546 (Nev. 2019) (unpublished). There, the Court concluded that under NRS 239.0107 a government agency must do one of four things within five business days of receiving a public records request, including providing notice to the requester that the record would not be available by the end of the fifth business day and when such information may be made available. *Id.* at *2 (citing NRS 239.0107(1)(c). Like the City of Henderson, LVMPD did not deny the request but informed LVRJ that it would not be able to provide the requested information within five business days. *Compare id. with* 1 AA 37–39. Furthermore, LVMPD did not outright deny LVRJ's request. To the contrary, LVMPD objected to the disclosure of the unit assignments but provided LVRJ with the names and personnel numbers of officers on the force from 2014–2016. 1 AA 58–59; 60–224. Thus, LVMPD's response was timely under this Court's logic and decision in *City of Henderson*.

This holding is further supported by this Court's previous rulings on the NPRA. In *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 266 P.3d 623 (2011), this Court addressed an agency's prelitigation duties under NRS 239.0107(d) after

the lower court denied, in part, a petition for writ of mandamus for access to public records. One of the issues before this Court concerned whether an agency was required to submit a log, in the form of a *Vaughn* Index, in response to a public records request prior to the commencement of litigation. *Gibbons*, 127 Nev. at 884–885, 266 P.3d at 630–631. Consistent with the NPRA, this Court ruled that "[n]o log, in the form of a *Vaughn* Index or otherwise, is required under NRS 239.0107(1)(d)." *Id.*, 127 Nev. at 885, 266 P.3d at 631. Instead, if a public records request is denied, the entity "must provide the requesting party with notice and a citation to legal authority that justifies nondisclosure." *Id.*

This Court further clarified that "merely pinning a string of citations" to a blanket denial due to confidentiality does not satisfy an entity's prelitigation obligation under NRS 239.0107(1)(d)(2). *Id.* Because the State made a blanket denial and summarily listed case law, a Nevada Attorney General Opinion, and an internal policy, without any explanation, the Court concluded that the State did not meet its prelitigation duties under NRS 239.0107(1)(d). *Id.* Despite that conclusion, the Court did not determine that the State waived its confidentiality arguments. *Id.* Rather, Gibbons was remanded to the district court to instruct the State to provide the petitioner with a log and then determine whether the records at issue were subject to disclosure based on the privileges asserted. *Id.*, 127 Nev. at

885–886, 266 P.3d at 631. For these reasons, the Court must reject LVRJ's waiver argument.

C. THE DISTRICT COURT ERRED BECAUSE LVMPD SATISFIED ITS BURDEN UNDER *DONREY*'S COMPETING INTEREST TEST.

1. Disclosure of Patrol Unit Assignments Risks Officer Safety.

LVRJ contends that LVMPD did not meet its burden under the *Donrey* balancing test because it failed to demonstrate that unit assignments are confidential either by statute or common law. This reasoning ignores the balancing test announced under *Donrey* in its entirety and creates a new standard that not only has not been recognized by this Court, but simply does not exist. *Donrey* and its progeny make clear that, in the absence of a statute or law deeming the records confidential, the Court is to balance the government interests in non-disclosure against the public's interests in access. 106 at 636, 798 at 148. Nothing in this Court's precedent requires a government entity to rely on established common law, such as the deliberative process privilege, to render the records sought confidential. This is further evidenced by the fact that the *Donrey* Court reviewed public policy considerations in weighing the parties' interests. *Id.* As such, the mere fact LVMPD did not direct the District Court to a particular law, statutory or common, deeming the unit assignments confidential is not dispositive. Rather, LVMPD

contends that its interests in officer safety substantially outweighs the public's interest in access to the unit assignments ordered to be disclosed by the District Court.

With that specific framework in mind, LVMPD has demonstrated that the release of the patrol officer unit assignments would be detrimental to officer safety, which includes risking disclosure and identities of covert officers because LVRJ was already provided with a list of all LVMPD officers employed in 2014 through 2016. LVRJ, along with the District Court, asserts that LVMPD's basis for withholding patrol officer unit assignments is speculative and conclusory.

The disclosure of when and where an officer reports to work inherently involves risk to officer safety. Unit assignments of patrol officers not only reveal the specific area command the officer reports to but the particular area the officer patrols, resulting in the officers becoming targets to endangerment and harassment. This, however, is not the sole concern of LVMPD. Because LVRJ has obtained a list of **all officers** for three years—not just patrol officers—identifying which particular officers on that roster are assigned to patrol reveals officers that are not on patrol and working in undercover and covert capacities. LVRJ argues that because its request is historical that there is not endangerment to officers. This is simply not true. As evidenced by the declarations of Sheriff Lombardo and Steven

Grammas submitted to the lower court, an officer who previously worked undercover or in a covert operation could be assigned as a patrol officer during the years provided. 11 AA 2576–2577. Disclosing the officer's unit assignment in 2016 could allow individuals, who previously interacted with the unknown undercover officer, to seek retaliation or retribution. *Id.* By the same token, an officer may now be assigned to work in a covert or undercover capacity who was previously assigned as a patrol officer in 2014–2016. *Id.* So, disclosure of patrol unit assignments in 2014-2016 still implicates disclosure of officers either currently or previously in undercover or covert operations. Disclosing unit assignments of officers generally could also make it difficult for those officers to work in undercover and covert capacities in the future.

In addition to the two declarations provided addressing the particularized concerns in releasing patrol unit assignments after the fact LVRJ already obtained a full roster list for a three-year period. LVMPD also provided evidence where a patrol Sergeant had to seek judicial intervention from an individual. 4 AA 816–860. Even with an actual example of where an officer was harassed by a member of the public, the District Court erroneously determined that LVMPD failed to meet its burden in demonstrating the ***potential*** harm and endangerment to law enforcement personnel. Accordingly, the Court should vacate the District Court's

order requiring LVMPD to release patrol officer unit assignments because LVMPD's interest in officer safety outweigh LVRJ's interest in knowing where particular officers report to work.

2. The Law Relied on by LVMPD Support Its Interests in Non-Disclosure of Unit Assignments.

To support its position that release of unit assignments implicates officer safety and the disclosure of covert positions, LVMPD directed the District Court to case law from other jurisdictions determining that the release of similar information would implicate officer safety and/or reveal the identities of officers working in covert capacities. While LVRJ attempts to distinguish these cases from the instant case, its reasoning fails.

The Tenth Circuit affirmed a lower court's decision to withhold the names of all the individuals staffed at the United States Penitentiary Administrative Maximum Facility. *Jordan v. U.S. Dep't of Justice*, 668 F.3d 1188, 1198 (10th Cir. 2011). In determining that the government agency met its burden, the court agreed that releasing staff names "could reasonably be expected to endanger the life or physical safety of any individual" by exposing them to threats, manipulation, and harm. *Id.* LVRJ attempts to distinguish this case from its request claiming that the Tenth Circuit did not address patrol officers, who have substantial interactions with the public compared to officers at a penitentiary. This

reasoning actually *supports* LVMPD's position. Staff at the maximum facility have limited interactions with the individuals housed at the facility and have policies and procedures in place to protect the safety of staff. In contrast, LVMPD patrol officers have countless interactions with the public on a daily basis and therefore are subject to a greater risk of harm, harassment and threats by the public—which certainly outnumber the amount of individuals housed at a maximum facility. To be sure, LVMPD gave an example where a Sergeant at Convention Center Area Command was forced to seek a temporary protective order from a court because an individual was harassing not only him, but his family. 4 AA 816–860. Thus, LVRJ logic bolsters LVMPD's basis for withholding unit assignments.

LVMPD also cited to *Adionser v. Dep't of Justice*, 811 F. Supp. 2d 284, 301 (D.D.C. 2011), aff'd in part sub nom. *Adionser v. U.S. Dep't of Justice*, No. 11-5093, 2012 WL 5897172 (D.C. Cir. Nov. 5, 2012), wherein the Drug Enforcement Administration ("DEA") withheld information under Exemption 7(F), which protects from disclosure information that "could reasonably be expected to endanger the life or physical safety of any individual."[2] *Id.* (citation omitted).

[2] This Court in *Donrey* recognized this particular exemption as a policy consideration to be addressed in determining whether disclosure under the balancing test is appropriate. LVRJ attempts to distinguish FOIA from the NPRA

While it is unclear what specific record the requester sought, contrary to LVRJ's representation, the DEA asserted this exemption to protect the "identities of special agents, ***law enforcement officers, government employees***, and confidential sources of information" because these individuals may be subject to physical attacks or other threats to their lives if their identities are revealed. *Id.* (emphasis added). Accordingly, the Court determined that the DEA properly applied Exemption 7(F) to protect the physical safety of these individuals. *Id.*

A New York Court likewise concluded that disclosure of the troop, zone and station assignments of each of its sworn members could endanger the life and safety of those officers. *Ruberti, Girvin & Ferlazzo P.C. v. New York State Div. of State Police*, 218 A.D.2d 494, 499, 641 N.Y.S.2d 411 (1996). The state exemption relied on by the government agency is equivalent to FOIA's Exemption 7(F), which exempts from disclosure records that would endanger the life or safety of person. New York's Public Officers Law § 87(2)(f). LVRJ contends that because New York law expressly recognizes an exemption for such information, and

---

by claiming that, unlike FOIA, the NPRA requires an interpretation in favor of disclosure and any exceptions must be narrowly construed. AB 41-42. To the contrary, the Supreme Court has made clear that the goal of FOIA is "broad disclosure" and that the exemptions be "given a narrow compass." *Milner v. Dep't of Navy*, 562 U.S. 562, 571 (2011). Thus, decisions addressing FOIA's Exemption 7(f) are relevant and persuasive, especially because the NPRA and FOIA are to be construed in favor of disclosure and any exemption must be construed narrowly.

Nevada does not, the case is inapposite. Furthermore, LVRJ focuses on the fact that the exemption mentions a possibility of endangerment and not actual endangerment. AB 43.

While it is true that Nevada does not have an express exemption for disclosure like FOIA's Exemption 7(F) or New York's specific exemption, this Court acknowledged that the ***potential danger to law enforcement personnel*** is a policy consideration that should be addressed by balancing the competing interests of the parties. *Donrey*, 106 Nev. 635–36, 798 P.2d at 147–48. Furthermore, this Court concluded there is not a meaning difference between the balancing test adopted by the Court and FOIA's Exemption 7 balancing test. *Id.* n. 4. LVRJ's argument that FOIA's and New York's exemptions address the potential for endangerment thus carries no weight as this Court ruled that particular factor to be a policy consideration that must be weighed by the court.

More importantly, however, there is a regulation that provides what information of a public employee is subject to disclosure. Specifically, NAC 284.714 provides:

> 1. The official roster of employees in the public service maintained by the Division of Human Resource Management is a public record and will be open to inspection under reasonable conditions during business hours in the offices of the Division of Human Resource Management or the offices where the records are kept.

2. Except as otherwise provided in subsection 3, the roster must contain, for each employee:

(a) His or her name;

(b) The class title of the position he or she holds;

(c) His or her rate of pay;

(d) Any change in his or her class title, pay or status; and

(e) Other pertinent data as determined by the Administrator.

3. For public inspection purposes, the roster may exclude the actual names of employees who are in **sensitive law enforcement positions where public access to the employees' identities could jeopardize their personal safety or job performance**, in which case the employee will be shown on the roster as an unidentified employee.

(Emphasis added).

Although, this particular regulation concerns state personnel rather than local government personnel, it is clear that Nevada recognizes a particular exception to the disclosure of information that would jeopardize the safety or job performance of law enforcement personnel. There is simply no basis for the Court to apply such logic to a state agency but not to local government personnel, especially a local law enforcement agency raising the very concern of officer safety. This is still true even though NAC 284.714 references names and not unit assignments. LVMPD has already provided names of all officers, including those working in covert capacities. As explained above, the central issue is the aggregate information provided to LVRJ thus far. Because LVRJ has been provided with these names, revealing particular unit assignments poses risks to officer safety in a

multitude of way. The obvious, of course, is revealing where each of the patrol officers are located during their respective work hours. Moreover, however, the release of this particular information will reveal the identities of past or future undercover and covert officers, causing potential harm to such officers. Thus, the policy behind the case law cited above and NAC 284.714 support LVMPD's position that the non-disclosure of patrol unit assignments clearly weighs in favor of LVMPD's interest in officer safety over LVRJ's interest in knowing where particular patrol officers work.

3. The Cases Cited by LVRJ are Inapposite.

In its Answering Brief, LVRJ cites to a variety of cases that concern the disclosure of police officers' names from other jurisdictions. AB 44–48. These cases are distinguishable from LVRJ's request for a number of reasons discussed below.

LVMPD's position is consistent with the first case cited by LVRJ, *King County v Sheehan*, 57 P.3d 307 (Wash. App. 2002). In *Sheehan*, a public records request was made for police officer names and rank. *Id.* at 314-17. Concluding that this information was subject to disclosure, the Washington court recognized that the requester was not asking the county to identify which officers are undercover. *Id.* And, the release of names themselves, would not identify to the

public which officers work in a covert capacity versus an overt capacity. In contrast, the information sought by LVRJ would reveal such information as LVRJ has already obtained the very list the Washington court ordered to be disclosed. Having LVMPD's officer roster for a three-year period, combined with unit assignments for patrol officers undeniably identifies the specific officers that do not work in overt positions. More importantly, the Washington court heavily relied on the fact that county routinely released the names and rank of officers. *Id.* at 314-17. First, there is no evidence in the record before this Court to suggest that LVMPD routinely releases unit assignment of officers. While LVRJ contends that this information is routinely released, it merely cites to LVMPD's social media websites with no citations to particular examples. AB 51 at fn. 22–24. Second, and more importantly, this argument was not raised before the District Court, and therefore, cannot be raised on appeal for the first time. *Otak Nevada, LLC v. Eighth Jud. Dist. Ct.*, 129 Nev. 799, 312 P.3d 491 (2013).

LVRJ's reliance on a Pennsylvania decision in 2006 and a 2007 California opinion is similarly misplaced. In *Times Leader v. Hazleton Police Civil Serv. Comm'n*, 909 A.2d 434, 438 (Pa. Commw. Ct. 2006), the court determined that names and test scores of *police officer candidates* were subject to disclosure. *Id.* (emphasis added). Disclosure of names of police officer candidates is substantially

different than disclosing the names of individual officers and unit assignments of officers, reveal the particular work location of an officer. Nevertheless, LVMPD has disclosed the name of officers employed from 2014 through 2016. The concern is officer safety and disclosure of officers in covert capacities by revealing the unit assignments of particular officers—after LVRJ received the identities of all officers employed between 2014 and 2016.

Similarly, a California court ruled that disclosure of names and the ***employing agency*** of law enforcement officers were appropriate because the term "personal data," as codified in the statute did not apply to the information sought. *Comm'n on Peace Officer Standards & Training v. Superior Court*, 42 Cal. 4th 278, 300, 165 P.3d 462, 476 (2007) (emphasis added). Thus, the limited language extracted by LVRJ within the opinion, "information concerning where and when a particular individual has served as a peace officer . . ." relates to the specific law enforcement agency the individual was employed with and not the officer's particular duty assignment. *Id.* Like the Pennsylvania case, this case does not address or even concern officer safety or the disclosure of officers in covert capacities. Rather, the California court was charged with interpreting a particular statute. LVRJ also points to a Tennessee decision addressing photographs of peace officers. AB 46-47 (citing *Henderson v. City of Chattanooga*, 133 S.W.3d 192

(Tenn. Ct. App. 2003). This case is of no relevance especially considering that Nevada has expressly determined that photographs of officers are confidential. NRS 289.025.

Finally, LVRJ directs this Court to another California case where a newspaper sought the names of individual officers involved in particular shootings while on duty. *Long Beach Police Officers Assn. v. City of Long Beach*, 59 Cal. 4th 59, 74, 325 P.3d 460, 469 (2014). Unlike LVRJ's request here, the newspaper sought only names of officers involved in particular incidents. Although the California Supreme Court ordered disclosure of the names of officers, which LVMPD has already provided LVRJ with, it recognized that "if it is essential to protect an officer's anonymity for safety reasons or for reasons peculiar to the officer's duties—as, for example, in the case of an undercover officer—then the public interest in disclosure of the officer's name may need to give way." *Id.*

The issue here, in comparison to the cases cited by LVRJ, is the aggregate information already obtained by LVRJ. None of the cases referenced by LVRJ concern the specific location of the officers or the release of undercover identities. Of all the cases cited by LVRJ, the *Sheehan* decision was the only instance where the requester sought all the names of officers employed by the law enforcement agency. Even then, the requester made clear that it was not seeking which of those

officers were employed in a covert capacity. In comparison, the information sought by LVRJ would directly reveal which officers work in an overt capacity while exposing the particular officers that do not work in a patrol capacity—including those in an undercover capacity in the Investigative Services Division and Homeland Security Division.

D. LVMPD SUFFICIENTLY DEMONSTRATED THAT DISCLOSURE OF UNIT ASSIGNMENTS IMPLICATE NONTRIVIAL PRIVACY INTERESTS OF OFFICERS.

1. LVMPD Timely Raised the *CCSD* Balancing Test.

Even though LVRJ admits that the Court had not yet adopted the nontrivial privacy interest test at the time of its initial request, it nonetheless argues that LVMPD should have filed a motion or supplement "with this Court" but chose not to do so. AB 49. This argument is meritless. First and foremost, this Court decided the *CCSD* matter on October 18, 2018, LVMPD briefed the lower court at its direction on the *CCSD* balancing test in March 2019 (14 AA 3270–72) and the instant notice of appeal was filed June 5, 2019. Accordingly, LVMPD was not required to file anything "with this Court" and the District Court properly considered LVMPD's arguments. Moreover, LVRJ ignores the fact that the underlying litigation was stayed as a result of LVMPD's Petition for Writ of Prohibition, or Alternatively Mandamus, Supreme Court Case No. 76848. There is

simply no support for LVRJ's argument that LVMPD's reliance on *CCSD* is untimely.

2. The Nontrivial Privacy Interest Balancing Test is Not Limited to Investigative Reports.

LVRJ raises for the first time on appeal that the nontrivial balancing test only applies to investigative reports. *Compare* AB 49-50 *with* 14 AA 3293–94. Because LVRJ failed to raise this argument below, this Court should not consider it. *Otak Nevada, LLC v. Eighth Jud. Dist. Ct.*, 129 Nev. 799, 312 P.3d 491 (2013).

Nevertheless, this Court did not expressly limit the nontrivial balancing interest test to the facts of *CCSD*. In addressing the balancing test, this Court recognized Nevada's common law tort of invasion of privacy. *CCSD*, 429 P.3d at 320. The Court reasoned that the adoption of this balancing test is a logical extension of *Donrey* and coheres with both NRS 239.0113 and *Gibbons*. *Id.* at 320–21. Even if this Court limited the privacy balancing test to investigative reports, the fact that the test is a logical extension of *Donrey* and coheres with both NRS 239.0113 and *Gibbons* is a sufficient basis for the Court to apply such a test in the instant case.

3. LVMPD Carried Its Burden Under the *CCSD* Balancing Test.

Quite tellingly, LVRJ fails to address any of the cases or arguments cited in LVMPD's Opening Brief regarding the nontrivial privacy interest in officer duty assignments or in relation to undercover and covert officers. *See* AB 50–53. Instead, LVRJ points to cases where this Court has determined that information regarding public employees are public records. *Id.* at 52. None of these cases, however, address unit assignments. Furthermore, it appears that LVRJ also ignores the fact that it already has the names and personnel numbers of all officers employed between 2014 through 2016. As argued above, because of this aggregate information, disclosure of only patrol unit assignments still has an effect on past or current undercover and covert officers. However, LVRJ does not address that in relation to privacy interest test announced in *CCSD*. AB 50–53. Nevertheless, several other courts have determined that work locations and duty assignment of government employees involve nontrivial privacy interests. *Roseberry-Andrews v. Dep't of Homeland Sec.*, 299 F. Supp. 3d 9, 30 (D.D.C. 2018) (recognizing that the redaction of "names, telephone numbers, email addresses, ***work locations***, and other personally identifiable information for non-leadership, lower-level ICE employees" was proper) (emphasis added); *Walston v. United States Dep't of Def.*, 238 F. Supp. 3d 57, 67 (D.D.C. 2017) (disclosure of

office location would not shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to).

LVRJ next argues that it sufficiently met its burden under *CCSD*. First and foremost, the District Court did not reach that conclusion, and therefore, that issue is not before this Court. Nevertheless, LVRJ's basis for disclosure is insufficient. Under *CCSD*, the requester must show that the public interest sought to be advanced is a significant one and that the information sought is likely to advance that interest. *CCSD*, 429 P.3d at 320. The Answering Brief merely states that sex trafficking is an extremely significant policy issue in Nevada and the information sought will show how LVMPD allocates its resources to address the serious problem. AB 53–54. LVRJ fails to explain, however, how patrol unit assignments are tied in any way with sex trafficking. Furthermore, nothing in the record supports LVRJ's blanket conclusory statements. Therefore, the Court should reverse the District Court's Disclosure Order (as to unit assignments) and remand with instructions for the District Court to consider whether LVRJ has met its burden in demonstrating that that the public interest sought to be advanced is a significant one and that the information sought is likely to advance that interest.

4. LVRJ's Request for an Evidentiary Hearing is Improper.

LVRJ contends that if the Court determines LVMPD did meet its burden, this Court must remand the case and order the Court to conduct an evidentiary hearing. AB 55–56. First, LVRJ's request is not supported by any authority. Second, and more importantly, LVRJ's request does not address the proper issue. To be sure, LVRJ asks that this Court that in the event it determines LVMPD met its burden under the *CCSD* balancing test to remand this matter to the District Court for the purposes of conducting an evidentiary to determine whether public disclosure of the unit assignment outweighs the officers' nontrivial privacy interest. To be clear, upon remand it would be LVRJ with the burden of demonstrating the public interest sought to be advanced is a significant one and that the information sought is likely to advance that interest. *CCSD*, 429 P.3d at 320. Nevertheless, this Court must reject LVRJ's request for an evidentiary hearing because it is not properly before this Court.

III. CONCLUSION

In summary, this Court should vacate the District Court's Disclosure Order requiring LVMPD to produce patrol officer unit assignments for years 2014, 2015, and 2016 because: (1) LVMPD's interest in protecting its officers substantially outweighs the public's interest in access to patrol officer unit assignments; and

(2) LVMPD established that disclosure of patrol officer unit assignments involves a nontrivial privacy interest, protecting the unit assignments from disclosure.

Dated this 18th day of February, 2020.

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 6,700 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 18th day of February, 2020.

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 LAS VEGAS METROPOLITAN POLICE DEPARTMENT'S REPLY BRIEF** was filed electronically with the Nevada Supreme Court on the 18th day of February, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Margaret A. McLetchie, Esq.
Alina M. Shell, Esq.

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/ Rosie Wesp
An employee of Marquis Aurbach Coffing