IN THE SUPREME COURT OF THE STATE OF NEVADA

THE LAS VEGAS REVIEW-JOURNAL, Appellant, vs. CITY OF HENDERSON, Respondent.	CASE NO.: 81758

JOINT APPENDIX – VOLUME VIII

[JA1363 – JA1599]

Appeal from Eighth Judicial District Court, Clark County
The Honorable Trevor L. Atkin, District Judge
District Court Case No. A-16-747289-W

Margaret A. McLetchie, Nevada Bar No. 10931
Alina M. Shell, Nevada Bar No. 11711
MCLETCHIE LAW
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
Telephone: (702) 728-5300; Fax: (702) 425-8220
Email: maggie@nvlitigation.com
Counsel for The Las Vegas Review-Journal, Inc.

INDEX TO JOINT APPENDIX

VOL.	DOCUMENT	DATE	BATES NUMBERS
VI	City of Henderson's Opposition to Petitioner Las Vegas Review-Journal's Motion for Attorney's Fees and Costs	2/27/2020	JA0961-JA0979
II	City of Henderson's Response to Las Vegas Review-Journal's Amended Public Records Act Application Pursuant to NRS 239.001/Petition for Writ of Mandamus/Application for Declaratory and Injunctive Relief	3/8/2017	JA0191-JA296
IV	Court Minutes Re: Decision - Petitioner Las Vegas Review-Journal's Motion for Attorney's Fees and Costs	8/10/2017	JA0683
VIII	Court Minutes Re: Las Vegas Review Journal's Motion for Attorney's Fees and Costs	6/18/2020	JA1572
III	Court Minutes Re: Petitioner Las Vegas Review-Journal's Motion for Attorney's Fees and Costs	8/3/2017	JA0656
IV	Court Minutes Re: Status Check - Order Setting Further Proceedings Re: Supreme Court Order	12/12/2019	JA0729-JA0730
I	Memorandum in Support of Application Pursuant to Nev. Rev. Stat. 239.001/ Petition for Writ of Mandamus/ Application for Declaratory and Injunctive Relief	2/8/2017	JA0169-JA0190
II	Minutes of Hearing Re: Petition for Writ of Mandamus	3/30/2017	JA0420

VOL.	DOCUMENT	DATE	BATES NUMBERS
III	Notice of Appeal	6/9/2017	JA0524-JA0525
IX	Notice of Appeal	9/3/2020	JA1608-JA1609
IV	Notice of Cross-Appeal	3/26/2018	JA0713-JA0714
IX	Notice of Entry of Decision and Order	8/5/2020	JA1600-JA1607
III	Notice of Entry of Order	5/15/2017	JA0446-JA0451
IV	Notice of Entry of Order	2/15/2018	JA0693-JA0700
VI	Notice of Entry of Order	4/27/2020	JA1118-JA1125
I	Notice of Entry of Stipulation and Order to Allow Las Vegas Review Journal to File an Amended Petition	1/30/2017	JA0026-JA0029
IV	Order Setting Further Proceedings Re: Supreme Court Order	11/8/2019	JA0728
VI	Petitioner Las Vegas Review-Journal's Amended Motion for Attorneys' Fees and Costs	5/11/2020	JA1126-JA1148
III	Petitioner Las Vegas Review-Journal's Motion for Attorney's Fees and Costs	6/1/2017	JA0452-JA0523
V	Petitioner Las Vegas Review-Journal's Motion for Attorney's Fees and Costs	2/6/2020	JA0731-JA0960
I	Public Records Act Application Pursuant to NRS 239.001 / Petition for Writ of Mandamus	11/29/2016	JA0001-JA0023
VIII	Recorder's Transcript of Proceedings Re: Las Vegas Review Journal's Motion for Attorney's Fees and Costs	6/18/2020	JA1573-JA1599

VOL.	DOCUMENT	DATE	BATES NUMBERS
IX	Register of Actions, Case No. A-16-747289-W	1/13/2021	JA1610-JA1613
IV	Remittitur	6/24/2019	JA0715-JA0727
VIII	Reply in Support of Petition Las Vegas Review-Journal's Motion for Attorneys' Fees and Costs	6/15/2020	JA1549-JA1571
III	Reply to City of Henderson's Opposition to Las Vegas Review-Journal's Motion for Attorney's Fees and Costs	7/27/2017	JA0639-JA0655
II	Reply to Respondent City of Henderson's Response to Amended Public Records Act Application Pursuant To NRS 239.001/ Petition For Writ Of Mandamus/ Application For Declaratory And Injunctive Relief	3/23/2017	JA0297-JA0419
IV	Reporter's Transcript of Proceedings Re: Decision - Petitioner Las Vegas Review-Journal's Motion for Attorney's Fees and Costs	8/10/2017	JA0684-JA0692
IV	Reporter's Transcript of Proceedings Re: Petitioner Las Vegas Review-Journal's Motion for Attorney's Fees and Costs	8/3/2017	JA0657-JA0682
IV	Respondent City of Henderson's Notice of Appeal	3/16/2018	JA0701-JA0712
III	Transcript of Proceedings Re: Petition for Writ of Mandamus	3/30/2017	JA0421-JA0445

CERTIFICATE OF SERVICE

I hereby certify that the foregoing JOINT APPENDIX - VOLUME VIII was filed electronically with the Nevada Supreme Court on the 14th day of January, 2021. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Nicholas G. Vaskov, Brandon P. Kemble, and Brian R. Reeve
CITY OF HENDERSON'S ATTORNEY OFFICE
240 Water Street, MSC 144
Henderson, NV 89015

Dennis L. Kennedy, Sarah P. Harmon, and Kelly B. Stout
BAILEY KENNEDY
8984 Spanish Ridge Avenue
Las Vegas, NV 89148

Counsel for Respondent City of Henderson

/s/ Pharan Burchfield
Employee of McLetchie Law

RSPN
NICHOLAS G. VASKOV
City Attorney
Nevada Bar No. 8298
BRIAN R. REEVE
Assistant City Attorney
Nevada Bar No. 10197
240 Water Street, MSC 144
Henderson, NV 89015
(702) 267-1231
(702) 267-1201 Facsimile
brian.reeve@cityofhenderson.com

DENNIS L. KENNEDY
Nevada Bar No. 1462
BAILEY❖KENNEDY
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148-1302
Telephone: 702.562.8820
Facsimile: 702.562.8821
DKennedy@BaileyKennedy.com

Attorneys for Respondent
CITY OF HENDERSON

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CITY OF HENDERSON, Respondent.	Case No. A-16-747289-W Dept. No. VIII Date of Hearing: June 18, 2020 Time of Hearing: 9:00 A.M.

CITY OF HENDERSON'S OPPOSITION TO PETITIONER LAS VEGAS REVIEW-JOURNAL'S AMENDED MOTION FOR ATTORNEY'S FEES AND COSTS

Respondent, City of Henderson (the "City"), submits its Opposition to Petitioner Las Vegas Review-Journal's ("LVRJ") Amended Motion for Attorney's Fees and Costs. This Opposition is based on the Memorandum of Points and Authorities below, the exhibits attached hereto, the papers and pleadings on file with the Court and any oral argument the Court may entertain.

DATED this 1st day of June, 2020.

BAILEY❖KENNEDY

By: */s/ Dennis L. Kennedy*
DENNIS L. KENNEDY
Nevada Bar No. 1462
BAILEY❖KENNEDY
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148-1302

Brian R. Reeve
Assistant City Attorney
City of Henderson
Nevada Bar No. 10197
240 Water Street, MSC 144
Henderson, NV 89015

Attorneys for Respondent
CITY OF HENDERSON

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

LVRJ ***lost*** this case. It did not succeed on ***any*** of its claims for relief. No judgment on the merits has been entered in its favor on ***any*** issue. The Nevada Supreme Court, sitting *en banc*, has already made this indisputable fact abundantly clear in two separate opinions, which is why LVRJ's Motion for Attorney's Fees and Costs ("Motion") is so baffling.

LVRJ filed a premature action for a writ of mandamus purportedly to compel the City to provide access to over 9,000 documents (nearly 70,000 pages) that LVRJ had requested under the Nevada Public Records Act ("NPRA"). LVRJ's action, however, was both legally and factually flawed and, ultimately, the District Court denied each of LVRJ's claims for relief. LVRJ appealed the District Court's decision and, again, lost on every issue decided by the Supreme Court, except for one. That issue—which was remanded back to the District Court for further analysis—pertained to the applicability of the deliberative process privilege to 11 of the 9,000 responsive documents the

City had disclosed to LVRJ. However, rather than waste additional taxpayer funds on costly litigation over 11 documents, the City waived the deliberative process privilege as to these documents and voluntarily produced them to LVRJ.

Based on these events, there is no circumstance under which LVRJ can be considered a "prevailing party" that is entitled to attorney's fees and costs. Thus, LVRJ has resorted to mischaracterizing and misrepresenting the facts of this case in a misguided attempt to paint itself as a prevailing party. Moreover, the entire basis for LVRJ's Motion—a new theory adopted by the Supreme Court in an unrelated case, and after it had decided both appeals in this case—does not apply here. Under the "catalyst theory" a public records requester may be deemed a "prevailing party" when its public records lawsuit causes the government to substantially change its position in the manner the requester wanted, even when the litigation does not result in a judicial decision on the merits. *Las Vegas Metropolitan Police Department v. The Center for Investigative Reporting, Inc.*, 136 Nev. Adv. Op. 15, 460 P.3d 952, 957 (2020) ("*CIR*"). Unfortunately for LVRJ, the catalyst theory is not a panacea. It cannot rewrite history or change the Supreme Court's rulings in this case.

For the reasons set forth below, the Court should deny LVRJ's Motion in its entirety.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. LVRJ's Public Records Request.

On October 4, 2016, the City received a public records request from LVRJ (the "Request") pursuant to the NPRA, NRS Chapter 239. *See* Declaration of Brian R. Reeve in support of City of Henderson's Response to Las Vegas Review-Journal's Amended Public Records Act Application attached hereto as **Exhibit A**. The City performed a search for responsive records that returned over ***9,000 electronic files*** consisting of almost ***70,000 pages of documents***. *Id.* at 1. In compliance with the NPRA, within five business days of the Request, the City provided an initial response to LVRJ that the search generated an enormous universe of documents which would need to be reviewed for

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

confidentiality and privilege before they could be disclosed ("Initial Response"). *See* Order Affirming in Part, Reversing in Part, and Remanding at 1, 4, attached hereto as **Exhibit B**; City's Initial Response attached hereto as **Exhibit C**. As required by NRS 239.055,[1] the City provided LVRJ with a fee estimate to complete the Request. *See* **Exhibit C**. The City also asked for a 50 percent deposit to verify that LVRJ wanted to proceed with the Request and informed LVRJ that it would take three weeks to complete the review once the deposit was received. *See* **Exhibit C**.

The next day, October 12, 2016, LVRJ's attorney called the City and accused it of charging impermissible fees. *See* **Exhibit A** at 2; the Petition attached hereto as **Exhibit D** at ¶ 20. LVRJ's attorney contended that the City could not charge fees to complete the request and asked why the City had so many emails matching its search terms. **Exhibit A** at 2. The parties discussed potentially narrowing the search terms to decrease the number of email hits and whether the City would be willing to lower its fee estimate. *Id.* Counsel for both parties resolved to go back to their clients to work on a solution. *Id.* LVRJ's attorney represented that she would call back on October 17, 2016, to discuss the matter further. *Id.*

LVRJ's attorney never called the City on October 17, 2016. *Id.* After waiting a week with no contact, counsel for the City called LVRJ's attorney to discuss a resolution. *Id.* LVRJ's attorney was unavailable so counsel for the City asked for a return call. *Id.* LVRJ's attorney never returned the City's call. *Id.* Nor did she otherwise attempt to contact the City to discuss a resolution. *Id.*

B. LVRJ Prematurely Files a Public Records Act Application.

After weeks of silence—and ignoring the City's efforts at resolution—LVRJ filed a Public Records Act Application and Petition for Writ of Mandamus (the "Petition") claiming that the City

[1] The NPRA has been amended since the filing of this action. Thus, any citations to the NPRA herein are citations to the version of the statute as it existed in November 2016 when LVRJ filed suit. For example, NRS 239.055 was deleted from the NPRA during the 2019 legislative session. At the time of LVRJ's Request in 2016, however, NRS 239.055 required government entities to "inform the requester, in writing, of the amount of the fee before preparing the requested information."

had refused to provide LVRJ the requested records. *Id.*; *see also* **Exhibit D**. This was false. *See* **Exhibit A** at 2. The plain language of the City's Initial Response shows that the City ***never refused or denied LVRJ's Request***. *Id.*; **Exhibit C**. The City was prepared and fully expected to review and provide copies of all responsive public records as soon as LVRJ confirmed it wanted to proceed with its original, voluminous Request. *See* **Exhibit C**. LVRJ never provided any such confirmation; instead, it rebuffed the City's resolution efforts and filed suit without warning. *See* **Exhibit A** at 2.

LVRJ's Petition asked the District Court to issue a writ of mandamus and injunctive relief to compel the City to give LVRJ access to the requested records, without paying any fees. *See* **Exhibit D**. Surprised by the Petition, which the City learned about through an article in *The Las Vegas Review-Journal*, the City sent LVRJ a letter emphasizing that while the parties disagreed over the fees associated with the Request, the City was "not interested in litigation as a method of preventing the disclosure of the requested documents." *See* Letter dated December 5, 2016 attached hereto as **Exhibit M**. *Id.* (emphasis in original). Thus, a short time later, when the City's review for privilege and confidentiality was completed, the City arranged for an LVRJ reporter to inspect the nonprivileged documents on a computer at City Hall. *See* **Exhibit A** at 3. LVRJ's inspection took place over the span of several days. *Id.* Notably, after LVRJ completed its inspection, ***LVRJ did not ask the City for a single copy of any of the documents it reviewed***. *Id.*

The City also provided LVRJ with a privilege log describing the 91 documents it withheld from the inspection due to confidentiality or privilege. *Id.* at 4.; *see also* privilege log attached hereto as **Exhibit E**. Of the 91 documents identified on the privilege log, 78 were withheld based on the attorney-client privilege, two were withheld because they contained confidential health information, and 11 were withheld under the deliberative process privilege (the "DPP Documents"). *Id.*

Around the time the City provided LVRJ with the privilege log, counsel for the City asked LVRJ's attorney to contact him if she had any questions or concerns regarding the privilege log so

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

that the parties could discuss the issues and attempt to resolve them without having to involve the court. *See* **Exhibit A** at 4. LVRJ's attorney never contacted the City about the issues LVRJ would later raise in an amended petition. *Id.*

C. LVRJ Files an Amended Petition, Which the District Court Denies.

On February 28, 2017, LVRJ filed an Amended Public Records Act Application and Petition for Writ of Mandamus ("Amended Petition") attacking the adequacy of the privilege log. *See* Amended Petition (without exhibits) attached hereto as **Exhibit F**. The Amended Petition requested the following: "(1) complete copies of all records that the City withheld and/or redacted as privileged, (2) injunctive relief prohibiting the City from enforcing its public records fee policies, (3) declaratory relief invalidating those municipal policies, and (4) declaratory relief limiting any fees for public records to no more than 50 cents per page." **Exhibit B** at 3-4; **Exhibit F**.

On March 30, 2017, the Honorable J. Charles Thompson held a hearing on LVRJ's Amended Petition. *See* March 30, 2017, Hearing Transcript attached hereto as **Exhibit G**. At the hearing, LVRJ raised for the first time that its three-day inspection of the non-confidential documents at City Hall was insufficient, and that it now wanted the City to provide copies of the inspected documents. *Id.* at 4-6. The District Court probed LVRJ to see if it had asked the City for copies of the documents and LVRJ conceded that it had not:

> THE COURT: But when your reporter went to the City and reviewed them I guess online; is that right? Some computer or something?
>
> MS. SHELL: They had made a computer available specifically for just the review.
>
> THE COURT: ***And did your reporter ask for copies of any of the documents your reporter saw?***
>
> MS. SHELL: ***She did not*** because we still had this issue – or Ms. McLetchie may have an answer to that.
>
> THE COURT: I think that they'll give those to you or I thought that they would have.
>
> MR. KENNEDY: Just for the record, that's correct. No copies were requested or made.

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

THE COURT: Okay.

Id. at 8 (emphasis added). The Court then asked the City: "Are you – are you willing to give them a USB drive with all the documents?" *Id.* The City responded affirmatively. *Id.*

LVRJ then pressed the District Court to issue an injunction and declaratory relief invalidating the City's public records fee policy for being "at odds with the NPRA." *Id.* The District Court denied LVRJ's request. *See* Order Denying LVRJ's Amended Petition attached hereto as **Exhibit H.** Because the City had already allowed LVRJ to inspect the requested documents free of charge, and agreed to provide electronic copies of the documents, the District Court found that LVRJ's arguments regarding the propriety of charging fees were moot. *Id.*

Therefore, the sole matter decided by the District Court pertained to LVRJ's request for mandamus relief to compel the City to provide LVRJ records that the City deemed confidential on its privilege log. *Id.* The District Court ruled that the privilege log was "timely, sufficient and in compliance with the requirements of the NPRA," and, thus, denied LVRJ's Amended Petition with respect to the withheld documents. *Id.* The Order concludes: "Based on the foregoing, LVRJ's request for a writ of mandamus, injunctive relief, and declaratory relief, and any remaining request for relief in the Amended Petition is hereby DENIED." *Id.*

D. Despite Losing, LVRJ Moves for Attorney's Fees and Costs.

Despite failing on each of its claims for relief, LVRJ filed a Motion for Attorney's Fees and Costs. LVRJ contended that it was a "prevailing party" and thus entitled to attorney's fees and costs because it "succeeded" in getting access to public records after initiating the lawsuit. LVRJ requested attorney's fees in the amount of $30,931.50. The City opposed the Motion for Fees.

On August 3, 2017, the Honorable Mark B. Bailus, who had just been assigned to Department 18 relieving Judge Thompson, held a hearing on the Motion for Fees. August 3, 2017 Hearing Transcript attached hereto as **Exhibit I**. Judge Bailus determined that even though LVRJ did not

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

succeed on any of the claims for relief in the Amended Petition, LVRJ was a prevailing party because it obtained copies of the records it requested after initiating this action. *See* Order granting in part LVRJ's Fee Motion attached hereto as **Exhibit J**. The District Court concluded, after reviewing the *Brunzell* factors, that LVRJ was entitled to an award of attorney fees in the amount of $9,010.00 and costs in the amount of $902.84, for a total award of $9,912.84. *Id.*

E. Appellate Proceedings

LVRJ appealed the district court's denial of the Amended Petition, and both parties appealed the District Court's award of attorney's fees. *See* Nevada Supreme Court Case No. 73287 ("Petition Appeal") and Case No. 75407 ("Fee Appeal").

In the Petition Appeal, the Nevada Supreme Court, sitting *en banc*, affirmed the District Court's order in the City's favor in all respects, except for one. *See* **Exhibit B**. Specifically, the Supreme Court affirmed the District Court's determination that issues concerning the City's fees became moot once the City provided the records to LVRJ free of charge. *Id.* at 2-3. The Supreme Court also affirmed the District Court's determination that the City's Initial Response timely complied with the NPRA. *Id.* at 4-5. The Supreme Court concluded:

> Henderson's initial response ***complied with the plain language*** of NRS 239.0107(1)(c) because it gave notice within five business days that it would be unable to produce the records by the fifth business day as it needed to conduct a privilege review, demanded the fee amount, and gave a date the request would be completed once a deposit was received. Henderson estimated that the records would be available three weeks after LVRJ paid the amount required to commence the review, which gave LVRJ a specific date upon which they could rely to follow up pursuant to NRS 239.0107(1)(c)

Id. at 4-5 (emphasis added). Importantly, the Supreme Court specifically found that "***Henderson did not deny LVRJ's request;*** rather, it stated that it needed more time to determine which portions of LVRJ's request it might need to deny in the future [due to confidentiality or privilege]." *Id.* at 5 (emphasis added).

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

Finally, the Supreme Court affirmed the District Court's determination that the City's privilege log complied with the NPRA with respect to the documents withheld under the attorney-client privilege. *Id.* The Supreme Court, however, reversed the District Court with respect to the DPP Documents and remanded solely for the court to determine whether the City's interest in non-disclosure of the DPP Documents clearly outweighs the public's interest in access to the documents. *Id.* at 8. The Supreme Court did ***not*** determine that the deliberative process privilege was inapplicable to the DPP Documents; it merely remanded for findings on the record to support the applicability of the privilege. *Id.*

In the Fee Appeal, the Supreme Court reversed the District Court's award of attorney fees to LVRJ. *See* Order of Reversal attached hereto as **Exhibit K**, at 2. The Supreme Court held that "the district court erred in concluding that, despite failing on the claims for relief as set forth in its writ petition, the LVRJ nevertheless prevailed in its public records action and was entitled to attorney fees under the NPRA." *Id.* The Supreme Court explained that to qualify as a prevailing party in a public records action, the action must proceed to judgment on some significant issue. *Id.* at 3.

The Supreme Court expressly found that "[h]ere, as the district court recognized in its order, ***the LVRJ has not succeeded on any of the issues that it raised in filing the underlying action***." *Id.* (emphasis added). With respect to the 11 DPP Documents, the Supreme Court ruled that "the LVRJ cannot be a 'prevailing party' as to that issue before the action has proceeded to a final judgment." *Id.* at 5. The Supreme Court reiterated that it did ***not*** order the production of the DPP Documents, but simply remanded for the District Court to conduct further analysis. *Id.* With respect to all other issues in the case, however, the Supreme Court emphasized that "the LVRJ did not prevail in its underlying public records action and is not entitled to attorney fees." *Id.* at n.2.

F. In an Effort to Resolve the Years-Long Litigation, the City Voluntarily Provided LVRJ Copies of the 11 DPP Documents.

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

After the City learned that it had prevailed on all the key issues in the Petition Appeal, and that the only remaining substantive issue in the case pertained to the confidentiality of the 11 DPP Documents, it determined that continued litigation over 11 documents was not worth the additional time, effort and expense. *See* Declaration of Brian R. Reeve, Esq. attached hereto as **Exhibit N** at ¶¶ 4-6. Ultimately, on June 10, 2019, the City sent an email to LVRJ's counsel stating that it did not make sense to continue expending time and resources litigating over 11 documents and expressed interest in resolving the case by voluntarily giving LVRJ access to the 11 DPP Documents. *Id.* ¶ 7.

The City's decision to voluntarily disclose the DPP Documents took the following into consideration. First, the case had been remanded to a District Court department with a new judge who was unfamiliar with the case. *Id.* at ¶ 8. The Honorable Judge Thompson ruled on the Amended Petition and the Honorable Judge Bailus ruled on LVRJ's Motion for Attorney's Fees and Costs. *Id.* The City did not want to spend additional time and resources briefing and arguing before a third judge who was new to the case. *Id.*

Second, the City had already spent over $80,000 on outside counsel fees over a two-and-a-half year period litigating this case, including two separate appeals. *Id.* The City itself had also expended significant amounts of time working with outside counsel on the case. *Id.* The City desired to stop spending money and time litigating this case. *Id.*

Finally, with all the key issues having been resolved in the City's favor on appeal, there was little to be gained by continuing to litigate over 11 documents when the universe of documents that was originally at issue comprised over 9,000 documents totaling nearly 70,000 pages. At this point, the litigation had become a nuisance for the City. *Id.* Accordingly, in July 2019, the City voluntarily disclosed copies of the 11 DPP Documents to LVRJ to avoid further litigation. *Id.* at ¶ 9; *see also* Minutes of December 12, 2019 Status Check attached hereto as **Exhibit L**.

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

Unfortunately, instead of resolving this costly and protracted litigation, LVRJ seized upon the City's waiver of the deliberative process privilege and used the City's voluntary disclosure as a basis to seek ***all*** of its fees and costs from the beginning of this case—as if all the issues it had previously lost had been wiped away. On February 6, 2020, LVRJ filed its Motion for Attorney's Fees and Costs. On February 27, 2020, the City timely filed its Opposition. LVRJ's reply brief was originally due on March 12, 2020, but LVRJ requested two separate extensions of time (which the City granted) totaling 44 days to file its reply. *See* March 16, 2020 and March 29, 2020 Stipulations and Orders attached hereto as **Exhibits O** and **P**, respectively.

On April 2, 2020, after LVRJ should have already filed its reply brief, the Nevada Supreme Court issued a decision in *Las Vegas Metropolitan Police Dept. v. The Center for Investigative Reporting, Inc.* adopting the "catalyst theory." Thereafter, the parties agreed to a new briefing schedule that would give them both the opportunity to address the *CIR* case.

III. LVRJ'S MISREPRESENTED AND/OR MISCHARACTERIZED FACTUAL ASSERTIONS

In an effort to portray itself as the "prevailing party" in this action and to mold this case into a set of facts similar to those in the *CIR* action, LVRJ riddled its Motion with misrepresentations and/or mischaracterizations—many of which have no citation to evidence. The table below presents a representative sample of the inaccurate factual assertions made by LVRJ and the undisputed evidence refuting those assertions:

LVRJ's Misrepresentations and/or Mischaracterizations of Key Facts	Undisputed Evidence Refuting LVRJ's Misrepresentations and/or Mischaracterizations
"In this case, the Review-Journal did not just prevail on 'any' significant issue, but on the most significant issue of all: obtaining the bulk of the records it sought." Mot. at 2:9-11.	Contrary to LVRJ's characterization, it has not prevailed on a single issue in this case. The Nevada Supreme Court expressly held: "Here, as the district court recognized in its order, the LVRJ ***has not succeeded on any of the issues that it raised in filing the underlying action***." Exhibit K at 3 (emphasis added).
"This case started because ***Henderson denied the Review-Journal's request for public***	It is perplexing that LVRJ continues to falsely assert that the City denied its Request for

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

records . . . ." Mot. at 2:22-23 (emphasis added). "Because of ***Henderson's denial*** of its public records request, the Review-Journal had to file a Petition for Writ of Mandamus . . . ." Mot. at 3:1-2 (emphasis added). "Here, the Review-Journal had to seek judicial intervention to obtain the records Henderson was withholding." Mot. at 8:16-17	withheld records when all of the evidence—including the plain language of the City's response—unequivocally demonstrates the opposite. Exhibit A at 2; Exhibit C. Moreover, the Supreme Court ***rejected*** this argument finding that "***Henderson did not deny LVRJ's request***; rather, it stated that it needed more time to determine which portions of LVRJ's request it might need to deny in the future." Exhibit B at 5 (emphasis added). The Supreme Court also found that the City's response "***complied with the plain language of NRS 239.0107(c)***" because it was timely, demanded the fee amount, and gave a date the request would be completed once the fee deposit was received. Exhibit B at 4-5 (emphasis added). LVRJ's revisionist history is irreconcilable with the evidence and Supreme Court's orders.
"On October 4, 2016, the Review-Journal submitted a public records request to the City of Henderson pursuant to the NPRA seeking ***certain documents*** pertaining to the public relations/communications firm Trosper Communications and its principal, Elizabeth Trosper." Mot. at 3:16-19 (emphasis added).	LVRJ fails to inform the Court that the "certain documents" it requested were actually over ***9,000 electronic files*** consisting of almost ***70,000 pages***. Exhibit A at 1; Exhibit B at 1
"After nearly ***two months of attempting to negotiate access to the requested records proved unfruitful***, the Review-Journal was forced to initiate legal action to obtain the records." Mot. at 4:4-5 (emphasis added). LVRJ "did make good faith efforts to resolve its disputes with Henderson prior to filing suit, including having ***multiple telephone conferences*** with counsel for the City of Henderson, and filed suit when it became apparent that the parties were at an impasse." Mot. at 13:1-5 (emphasis added).	This is patently false. LVRJ's counsel called the City ***one time*** on October 12, 2016 and accused it of charging impermissible fees. LVRJ contended that the City could not charge fees to complete the request but ultimately the parties resolved to go back to their clients to discuss a potential solution. LVRJ's attorney represented that she would call back on October 17, 2016 to discuss the matter further. ***LVRJ's attorney never called***. After waiting a week, counsel for the City called LVRJ's attorney and was told that she was not in the office. Counsel for the City asked for a return phone call. ***LVRJ's attorney never returned the City's phone call. Nor did she attempt to contact the City through other means to discuss a resolution.*** Rather, while the City waited to hear from LVRJ's attorney, LVRJ commenced litigation. Exhibit A at 2.

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

"Counsel for the Review-Journal asked for electronic copies of the records reviewed after the in-person inspection was conducted." Mot. at 4:24-25.	LVRJ's attorney admitted to the District Court that its reporter did ***not*** ask for copies of the documents after completing her inspection. Exhibit G at 8. Further, the District Court's Order denying LVRJ's Amended Petition specifically found that "[***f]ollowing its inspection, LVRJ made no request for copies of the Prepared Documents***; however, following LVRJ's counsel's representations at the hearing that it also wanted electronic copies of the Prepared Documents, the City agreed to provide electronic copies of the Prepared Documents. The City has complied with its obligations under the Nevada Public Records Act." Exhibit H at 2 (emphasis added).
"At the conclusion of the hearing, the district court ***directed*** Henderson to provide the Review-Journal with a 'USB drive with [the requested documents] on it.'" Mot. at 5:8-10 (emphasis added).	Wrong. At the hearing, the District Court ***asked*** the City: "Are you—are you willing to give them a USB drive with all the documents?" Exhibit G at 8. The City was not "directed" or "ordered" to produce the already-inspected documents. The District Court's order denying LVRJ's Amended Petition confirms this. Exhibit H at 2 ("following LVRJ's counsel's representations at the hearing that it also wanted electronic copies of the Prepared Documents, the ***City agreed*** to provide electronic copies") (Emphasis added).

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

IV. LEGAL ARGUMENT

A. LVRJ's Motion Is Improper Because No Judgment has been Entered.

The Court should deny LVRJ's Motion for Fees because no final judgment regarding the DPP Documents has been entered, which is a necessary predicate to filing a motion for attorney's fees.

Under NRCP 54(d)(2), a motion for attorney's fees must "specify *the judgment* ***and*** *the statute, rule, or other grounds* entitling the movant to the award." (Emphasis added). Thus, in order to move for attorney's fees, (1) a judgment must be entered decreeing that a party has in fact succeeded on a significant issue in the case[2] and (2) a statute, rule or other grounds must entitle the

[2] "A party prevails 'if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit.'" *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 615 (2015).

movant to fees. Here, LVRJ bases its right to attorney's fees and costs on NRS 230.011(2); however, LVRJ fails to "specify the judgment" upon which its fee request is based. That is because no judgment concerning the confidentiality of the DPP Documents has been entered entitling LVRJ to attorney's fees. Under NRCP 54(a), a "judgment" is "a decree or any order from which an appeal lies." At this time, no decree or order has been entered from which LVRJ could appeal as an aggrieved party.

The Nevada Supreme Court remanded this case "for the district court to analyze whether requested documents were properly withheld as confidential pursuant to the deliberative process privilege" and emphasized that LVRJ cannot be a prevailing party before the action has proceeded to a final judgment. *See* **Exhibit K** at 5. After the Supreme Court remanded this case, the City voluntarily provided copies of the DPP Documents to LVRJ to avoid spending more time, energy and resources litigating about 11 documents. *See* **Exhibit N**. In doing so, the issue regarding the confidentiality of the DPP Documents became moot.

"[T]he duty of every judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it." *Nat'l Collegiate Athletic Ass'n v. Univ. of Nevada, Reno*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981). "[A] controversy must be present through all stages of the proceeding, and even though a case may present a live controversy at its beginning, subsequent events may render the case moot." *Personhood Nevada v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). (internal citations omitted). The City's voluntary waiver of the deliberative process privilege and disclosure of the DPP Documents in July 2019, makes the confidentiality of the DPP documents moot. Because there is no live controversy for the Court to decide, the only judgment that may be entered is one acknowledging the mootness of the DPP Documents' confidentiality and dismissing the case. But until such judgment is entered, LVRJ's

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

Motion is not ripe, and therefore must be denied under NRCP 54.

B. The Court Should Adhere to the Law of the Case Doctrine and Decline to Consider the Catalyst Theory.

The Court should decline to consider the catalyst theory because it conflicts with the law of the case. In the Fee Appeal, the Supreme Court expressly ***reversed*** Judge Bailus's decision to award attorney's fees based on the catalyst theory under the facts and circumstances of this case (*i.e.* basing the award of fees and costs on the fact that LVRJ obtained copies of the requested records after initiating the lawsuit). Instead, the Court should adhere to the law of the case, which provides that LVRJ is not a prevailing party, and therefore, not entitled to attorney's fees and costs.

"The doctrine of the law of the case provides that the law or ruling of a first appeal must be followed in all subsequent proceedings, both in the lower court and on any later appeal." *Hsu v. County of Clark*, 123 Nev. 625, 629, 173 P.3d 724, 728 (2007). The doctrine "is designed to ensure judicial consistency and to prevent the reconsideration, during the course of a single continuous lawsuit, of those decisions which are intended to put a particular matter to rest." *Id.* at 630.

"The law of the case doctrine, therefore, serves important policy considerations, including judicial consistency, finality, and protection of the court's integrity." *Id.* Given these policy considerations, a court should only depart from a prior holding under "extraordinary circumstances" if it is "convinced that it is clearly erroneous and would work a manifest injustice." *Id.*

In *Hsu*, the Court recognized that in some instances, "equitable considerations" may justify a departure from the law of the case doctrine and determined that when controlling law is substantively changed during the pendency of a remanded matter, "courts of this state ***may*** apply that change ***to do substantial justice***." *Id.* at 632 (emphasis added). In other words, courts have discretion to apply the new law instead of following the law of the case if it is necessary to do substantial justice. This case does not present such an "extraordinary circumstance." Rather, applying the new law, *i.e.* the catalyst theory, instead of following the law of the case would work a manifest *injustice* to the City.

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

The Court should reject the catalyst theory and follow the law of the case for at least three reasons. First, the Nevada Supreme Court explicitly ***reversed*** the District Court's decision to award LVRJ a portion of its fees and costs based on the catalyst theory. In the Fee Appeal, the Supreme Court found that LVRJ did "not succeed[] on any of the issues that it raised in filing the underlying action." **Exhibit K** at 3. Notwithstanding its lack of success, Judge Bailus awarded LVRJ a portion of its fees and costs based on the catalyst theory, *i.e.* "because it was able to obtain copies of the records it requested after initiating this action." *See* **Exhibit J** at 4. The Nevada Supreme Court explicitly rejected the District Court's reasoning:

> We conclude that the district court erred in concluding that, despite failing on the claims for relief as set forth in its writ petition, the LVRJ nevertheless prevailed in its public records action and was entitled to attorney fees under the NPRA. Accordingly, we reverse the district court's partial award of attorney fees to the LVRJ.

See **Exhibit K** at 2. Thus, the Court should deny LVRJ's Motion because it is based on a theory that the Nevada Supreme Court already rejected under the facts and circumstances of this case.

Second, LVRJ has not demonstrated that the Supreme Court's decision in the Fee Appeal was "clearly erroneous and would work a manifest injustice." *Hsu*, 123 Nev. at 630. It has provided no basis for this Court to disregard the law of the case. In fact, LVRJ's Motion does not even address the Supreme Court's reversal of Judge Bailus's fee award based on the catalyst theory. Accordingly, to ensure judicial consistency, finality, and integrity, the Court should not consider the catalyst theory.

Finally, in terms of equity, considering the catalyst theory instead of following the law of the case would work a substantial injustice to the City because this case should have already been decided before the *CIR* case was decided. LVRJ filed its Motion for Attorney's Fees and Costs on February 6, 2020 – two months before the Court's *CIR* opinion. The City timely filed its Opposition on February 27, 2020. LVRJ's Reply was due on March 12, 2020, and the hearing on the Motion was scheduled for March 19, 2020. *CIR* was issued on April 2, 2020. Instead of filing a timely Reply brief, however, LVRJ asked the City for not one, but two, extensions of time totaling 44 days to

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

submit a reply. While neither of those requested extensions was due to an emergency, the City agreed to them as a professional courtesy.

Had the City declined to grant the extension of time, this case would have been fully briefed and the hearing completed weeks before the *CIR* decision. But by granting the requested extensions, a decision on LVRJ's Motion for Attorney's Fees and Costs was delayed and, during that delay, the Supreme Court adopted the catalyst theory in an unrelated case with entirely distinguishable facts. Accordingly, the Court should not consider an award of attorney's fees under the catalyst theory as doing so would essentially punish the City for granting LVRJ's requested extensions of time.

C. The Catalyst Theory Is Not Applicable Because the City Never Changed its Position or Behavior as a Result of LVRJ's NPRA Action.

Because no judgment has been entered in LVRJ's favor and each of its claims has been expressly denied or declared moot, LVRJ now contends that it should be considered a prevailing party under the "catalyst theory." However, this theory is completely inapplicable to the facts of this case.

"Under the catalyst theory, a requester prevails when its public records suit causes the governmental agency to substantially change its behavior in the manner sought by the requester, even when the litigation does not result in a judicial decision on the merits." *CIR*, 460 P.3d at 957 (*citing Graham v. DaimlerChrysler Corp.*, 101 P.3d 140, 148 (Cal. 2004)). However, courts have recognized that "'[t]here may be a host of reasons why' the government might 'voluntarily release[] information after the filing of a [public records] lawsuit,' including reasons 'having nothing to do with the litigation.'" *Id.* Indeed, "the mere fact that information sought was not released until after the lawsuit was instituted ***is insufficient*** to establish that the requester prevailed." *Id.* (internal quotations omitted; emphasis added).

A requester is only entitled to attorney's fees in NPRA cases absent an order compelling production "when the requester can demonstrate a ***causal nexus*** between the litigation and the voluntary disclosure or change in position by the Government." *Id.* (emphasis added). "A requester

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

seeking fees under NRS 239.011(2) has the burden of proving that the commencement of the litigation caused the disclosure." *Id.* at 958 n.5.

In *CIR*, the Supreme Court identified five factors that courts should consider in determining whether to award attorney's fees under the catalyst theory: (1) when the documents were released; (2) what actually triggered the documents' release; (3) whether the requester was entitled to the documents at an earlier time; (4) whether the litigation was frivolous, unreasonable or groundless; and (5) whether the requester reasonably attempted to settle the matter short of litigation by notifying the government agency of its grievances and giving the agency an opportunity to supply the records within a reasonable time. *Id.* at 957-58. To prevail under the catalyst theory, "there must not only be a causal connection between the lawsuit and the relief obtained, but also a determination by the trial court that the relief obtained was required by law." *Ellis v. J.P. Morgan Chase & Co.*, No. 12-CV-03897-YGR, 2016 WL 5815734, at *5 (N.D. Cal. Oct. 5, 2016). Moreover, courts must determine that a lawsuit's "result was ***achieved 'by threat of victory, not by dint of nuisance and threat of expense***.'" *Graham v. DaimlerChrysler Corp.*, 101 P.3d at 154 (emphasis added).

Here, the City voluntarily made two disclosures of documents. The first occurred in December 2016 when the City allowed an LVRJ reporter to inspect over 69,000 pages of documents on a computer at City Hall ("First Disclosure"). The second disclosure of the 11 DPP Documents occurred in July 2019 after the City prevailed in the Petition Appeal ("Second Disclosure"). Neither of these disclosures was prompted by LVRJ's "threat of victory." Perhaps the best evidence of this is the fact that the City *did litigate* this public records action in both the District Court and the Supreme Court *and prevailed in both venues*. An analysis of the five factors buttresses the City's position.

Factor 1: When the documents were released

The City made the First Disclosure in December 2016 after it learned in a *Las Vegas Review Journal* article that LVRJ was claiming that the City had denied its public records request (which was

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

not true) and had filed suit. Up to this point, the City did not even know that LVRJ still wanted the records because it had refused to communicate with the City about the request and had been silent for six weeks. The lawsuit was particularly surprising because the City had never denied the request and had been trying to work with LVRJ on a way to reduce the fees for completing the request. Moreover, the lawsuit was not about the denial of the records, it was about LVRJ not wanting to pay the fees associated with fulfilling a nearly 70,000-page request and trying—impermissibly—to invalidate the City's policies regarding public records fees via declaratory and injunctive relief.

The Second Disclosure occurred in July 2019, two-and-a-half years from when LVRJ filed suit (Nov. 2016) and on the heels of the City's victory in the Petition Appeal. LVRJ's Motion fails to demonstrate how the timing of these disclosures supports application of the catalyst theory. Again, "the mere fact that information sought was not released until after the lawsuit was instituted is insufficient to establish that the requester prevailed." *CIR*, 460 P.3d at 957.

Factor 2: What actually triggered the documents' release

LVRJ's Motion fails to establish what actually triggered the documents' release. Instead, it merely argues (without pointing to any evidence) that the City never would have provided the records without the lawsuit and therefore the lawsuit must have triggered the disclosures. (Mot. at 11.) As set forth above, the Supreme Court already held that this argument is not enough. *CIR*, 460 P.3d at 957 (explaining that "[t]here may be a host of reasons why the government might voluntarily release[] information after the filing of a [public records] lawsuit, including reasons having nothing to do with the litigation" and that "the mere fact that information sought was not released until after the lawsuit was instituted is insufficient to establish that the requester prevailed." (internal quotations omitted).)

Regarding the First Disclosure, the City allowed LVRJ's reporter to inspect the records because (a) the City had never denied the request and was always willing to disclose the non-confidential records once LVRJ confirmed that it wanted the records and the City completed its

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

privilege review, and (b) so that LVRJ could determine which, if any, of the 70,000 pages of documents it actually wanted. The triggering event was the City finally ***receiving notice*** that LVRJ still wanted the records after the City notified it of the estimated cost to fulfill the request. That notice came via a *Las Vegas Review Journal* article claiming that LVRJ had sued the City for wrongfully denying its public records request. **Exhibit M**. That same notice—with the same result—could have just as easily been accomplished via email or letter or merely by returning the City's telephone call to LVRJ's counsel. In short, the lawsuit was unnecessary to obtain the records.

With respect to the Second Disclosure, the following considerations triggered the City's decision to waive the deliberative process privilege: (a) the case had been remanded to a District Court department with a new judge who was unfamiliar with the case and the City did not want to spend more time and resources briefing and arguing over 11 documents before a judge who was unacquainted with the lengthy procedural history and issues involved in the case; (b) the City had already spent over $80,000 on outside counsel fees over a two-and-a-half year period and did not want to continue spending money and time litigating this case; and (c) with all of the key issues having been resolved in the City's favor on appeal, there was little to be gained by continuing to litigate over 11 documents when the universe of documents originally at issue was over 9,000 and totaled nearly 70,000 pages. At this point, the litigation had become a nuisance and resource drain for the City. **Exhibit N**. For these reasons, the City elected to waive the deliberative process privilege and disclose the DPP Documents.

Factor 3: Whether the requester was entitled to the documents at an earlier time

LVRJ was not entitled to either the First Disclosure or the Second Disclosure at an earlier time. As the Supreme Court determined, LVRJ was not entitled to the First Disclosure at an earlier time because, as set forth in the City's Initial Response, due to the large universe of documents requested, the City needed more time to review and prepare the records to ensure it did not disclose

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

confidential information. Moreover, under the NPRA the City was required to notify LVRJ of the amount of the estimated fee before fulfilling the request so that LVRJ could decide whether it wanted to proceed with the request. LVRJ disputed the City's fee and never advised the City that it wanted to proceed. Therefore, any delay in receiving the records is a result of LVRJ's refusal to communicate with the City. *See* **Exhibit B** at 4 (holding that the City's Initial Response complied with the NPRA because the City gave notice within five business days of LVRJ's request that it would be unable to produce the records until it completed its privilege review, it demanded the fee, and it gave the date upon which the request would be completed once the deposit for the fee was received.).

Furthermore, LVRJ was ***never entitled*** to the Second Disclosure. The 11 DPP Documents were properly withheld under the deliberative process privilege and identified on the City's privilege log. The District Court found that the privilege log was "timely, sufficient and in compliance with the requirements of the NPRA," and therefore denied LVRJ's request to compel the City to produce the documents identified on the privilege log. **Exhibit H**. The Supreme Court did not disagree with the District Court's findings regarding the privilege log, but determined that the District Court should have performed the common law balancing test for the documents withheld under the deliberative process privilege and remanded for that purpose. **Exhibit B** at 5-8. Nor did the Supreme Court determine that the deliberative process privilege was inapplicable to the DPP Documents. The Supreme Court emphasized that "[w]e did not order the production of those records or copies of those records, as the LVRJ requested in its petition" but rather "instructed the district court to conduct further analysis and determine whether, and to what extent, those records were properly withheld." **Exhibit K** at 5. Rather than continue spending more time and resources litigating over 11 documents before a new judge who was unfamiliar with the case, the City elected to waive the privilege and disclose the DPP Documents. Thus, LVRJ has never been entitled to the DPP Documents.

Factor 4: Whether the litigation was frivolous, unreasonable, or groundless

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

LVRJ's Motion glosses over this factor, ostensibly because it knows its lawsuit pushed the proverbial envelope from the get-go. LVRJ contends that its lawsuit was not "frivolous" (no argument as to reasonableness or legal merit) because the parties disagreed over the City's ability to charge fees under the NPRA. *See* Mot. at 12:9-23. But just because the parties disagreed on the City's ability to charge fees does not mean that LVRJ's suit was proper under the NPRA. It was not. Nor does it mean that the lawsuit was reasonable or that the relief LVRJ sought was legally permissible. Indeed, LVRJ neglects to inform the Court that a large portion of this case pertained to whether LVRJ's suit was proper under the NPRA, whether it could obtain declaratory and injunctive relief under the NPRA, and the unreasonable positions LVRJ had taken both before and after filing suit. The City could write an entire brief addressing these issues, but below is a brief summary demonstrating that LVRJ fails under this factor.

First, LVRJ's lawsuit was unreasonable and groundless because the NPRA only allows a requester to file suit if the government agency denies the request. NRS 239.011 ("If a request for inspection, copying or copies of a public book or record *open to inspection and copying* ***is denied***, the requester may apply to the district court . . . for an order: (a) permitting the requester to inspect or copy the book or record") (Emphasis added). The Supreme Court has already found that "***Henderson did not deny LVRJ's request***; rather, it stated that it needed more time to determine which portions of LVRJ's request it might need to deny in the future [due to confidentiality and/or privilege]." **Exhibit B** at 5. This is also clear from the plain language of the City's Initial Response. **Exhibit C**. Put simply, because the City never denied LVRJ's request, LVRJ was not entitled to file suit under the NPRA.[3] LVRJ's decision to rush to file suit was both unreasonable and groundless.

[3] In 2019, the Legislature amended NRS 239.011 so that requesters can now file suit under the NPRA if the requester "believes that the fee charged by the governmental entity for providing the copy of the public book or record is excessive or improper." In 2016, however, at the time LVRJ filed suit, this provision did not exist. Requesters were only permitted to file suit if the request for records was denied.

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

Second, LVRJ's lawsuit was unreasonable and groundless because it included claims for relief and remedies that are not available under the NPRA. It is well 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). "If a statute expressly provides a remedy, courts should be cautious in reading other remedies into the statute." *Builders Ass'n of N. Nevada v. Reno*, 105 Nev. 368, 370, 776 P.2d 1234, 1235 (1989); *see also Richardson Const., Inc. v. Clark County School Dist.*, 123 Nev. 61, 64-65, 156 P.3d 21, 22-23 (2007) (refusing to "read any additional remedies into [a] statute" when the statute itself provided a remedy); *Stockmeier v. Nevada Dept. of Corrections Psychological Review Panel*, 124 Nev. 313, 316-18, 183 P.3d 133, 135-37 (2008) (finding that "[b]ecause the statute's [NRS Chapter 241] express provision of such remedies reflects the Legislature's intent to provide only those specified remedies, we decline to engraft any additional remedies therein.").

The only available remedy under NRS 239.011 for an alleged violation of the NPRA is an application to the district court for an order permitting the inspection or compelling the production of the denied records. NRS 239.011. Absent from NRS 239.011, or any other provision of the NPRA, is any mention of declaratory or injunctive relief. Yet, LVRJ's lawsuit sought to obtain declaratory relief invalidating the City's policy on collecting fees and injunctive relief prohibiting the City from charging fees that the NPRA expressly authorized. LVRJ's attempt to obtain remedies not authorized by the NPRA was unreasonable and groundless.

Third, a key component of LVRJ's lawsuit was the erroneous notion that the City somehow waived the right to claim confidentiality over any of the nearly 70,000 pages of documents because it did not provide its privilege log to LVRJ within five business days of receiving the Request. According to LVRJ, no matter how voluminous a public records request may be, a government must review and provide confidentiality designations within five business days or else waive

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

confidentiality. The District Court and Supreme Court both rejected LVRJ's unreasonable and groundless position. The Supreme Court stated: "it would be implausible to provide a privilege log for such requests that capture a large number of documents within five business days" and that "a government entity cannot tell a requester what is privileged, and thus what records will be denied . . . until it has had time to conduct the review." **Exhibit B** at 5.

Finally, perhaps the greatest evidence of the unreasonable and groundless nature of LVRJ's lawsuit is the fact that it did not succeed on ***any*** issue decided by the District Court or Supreme Court. **Exhibit B**; **Exhibit K** ("Here, as the district court recognized in its order, the LVRJ has not succeeded on any of the issues that it raised in filing the underlying action.")

Factor 5: Whether the requester reasonably attempted to settle the matter short of litigation

LVRJ's stance on this factor is best summed up by its oft-repeated refrain: "there is no meet and confer requirement in the NPRA." *See, e.g.*, LVRJ's Reply to Respondents' Response to Amended Public Records Act Application filed on March 23, 2017 at 4; Mot. at 13:1. Before the Supreme Court's recent *CIR* opinion, LVRJ maintained that it did not have to meet and confer to resolve NPRA disputes. *Id.* But now that courts are required to consider whether a requester reasonably attempted to settle the matter short of litigation, LVRJ attempts to engage in revisionist history claiming that "[a]fter nearly two months of attempting to negotiate access to the requested records proved unfruitful, the Review-Journal was forced to initiate legal action to obtain the records." Mot. at 4:4-5. LVRJ also asserts that it had "multiple telephone conferences with counsel for the City" before filing suit. Mot. at 13:3-4. These assertions are false. Notably, LVRJ does not provide a single citation to the record supporting either of them.

LVRJ never reasonably attempted to settle this matter short of litigation. LVRJ's counsel called the City ***one time*** before filing suit. **Exhibit A** at 2. During that call, LVRJ argued that the City was not allowed to charge fees to complete the request but ultimately the parties resolved to go

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

back to their clients to discuss a potential solution. *Id.* LVRJ's attorney represented that she would call back on October 17, 2016, to discuss the matter further. *Id.* LVRJ's attorney never called. *Id.* After waiting a week, counsel for the City called LVRJ's attorney and was told that she was not in the office. *Id.* Counsel for the City asked for a return phone call but LVRJ's attorney never called back. *Id.* Nor did she attempt to contact the City through other means to discuss a resolution. *Id.* One telephone call accusing the City of charging impermissible fees and then refusing to communicate with the City is certainly not "two months of attempting to negotiate access." Nor was it a reasonable attempt to resolve the matter short of litigation.

An analysis of the facts in *CIR*, where the Court found that the requester was entitled to attorney's fees under the catalyst theory, presents a stark contrast from the facts here. In *CIR*, the requester submitted a public records request to the Las Vegas Metropolitan Police Department ("LVMPD"). *CIR*, 460 P.3d at 954. After waiting one month with no response, the requester notified LVMPD that its failure to respond was not in compliance with the NPRA. LVMPD responded that the request had been forwarded to a public information officer for follow-up. *Id.* Twelve days later, the requester reached out again to ascertain the status of the request but received no response. *Id.*

In March 2018, approximately three months after the initial request, the requester followed up for a third time, without success. About two weeks later, the requester's attorney sent a letter to LVMPD demanding a response within seven days. *Id.* LVMPD responded eight days later by producing a two-page report. *Id.* Concerned that LVMPD had not produced all responsive documents, the requester contacted LVMPD again and inquired whether it had withheld responsive documents and, if so, under what legal authority. *Id.* LVMPD responded that it had withheld documents due to confidentiality and cited various bases for withholding records. *Id.* Dissatisfied with LVMPD's response, the requester contacted LVMPD one final time disputing that the records

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

were confidential and asked LVMPD to comply with its obligations under the NPRA. *Id.* at 955. LVMPD refused to change its position and, consequently, the requester filed suit. *Id.*

During a hearing on the requester's petition, the district court indicated that LVMPD had not met its burden of demonstrating that all records in the investigative file were confidential and gave LVMPD two options: "produce the requested records with redactions or participate in an in-camera evidentiary hearing." *Id.* LVMPD opted for the evidentiary hearing, but before the scheduled hearing LVMPD and the requester reached an agreement whereby LVMPD agreed to produce roughly 1,400 responsive documents. *Id.* Under these facts, the Supreme Court applied the catalyst theory and found that CIR prevailed:

> CIR tried to resolve the matter short of litigation. CIR put LVMPD on notice of its grievances and gave LVMPD multiple opportunities to comply with the NPRA. At each juncture, LVMPD either failed to respond or claimed blanket confidentiality. It was not until CIR commenced litigation and the district court stated at a hearing that LVMPD did not meet its confidentiality burden that LVMPD finally changed its conduct.

Id. at 958.

In contrast to CIR's efforts to reasonably resolve its public records request short of litigation, LVRJ took the position that there is no meet and confer requirement under the NPRA. Moreover, neither the District Court nor the Supreme Court found that the City had improperly withheld responsive documents from disclosure. Rather, the Supreme Court held that "***Henderson did not deny LVRJ's request.***" **Exhibit B** at 5 (emphasis added).

Because LVRJ cannot satisfy the test set forth in *CIR* for an award of fees and costs, the catalyst theory is inapplicable. Thus, LVRJ cannot establish a basis for an award of costs and fees.

D. To the Extent the Court Determines LVRJ Is Entitled to Attorney's Fees and Costs, It Should Only Award an Amount Commensurate with LVRJ's "Success" Regarding the DPP Documents.

"In Nevada, 'the method upon which a reasonable fee is determined is subject to the discretion of the court,' which 'is tempered only by reason and fairness.'" *Shuette v. Beazer Homes Holdings*

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

Corp., 121 Nev. 837, 864, 124 P.3d 530, 548-49 (2005). "[I]n determining the amount of fees to award, the court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount, including those based on a 'lodestar' amount or a contingency fee." *Id.* at 549. "[W]hichever method is chosen as a starting point, however, the court must continue its analysis by considering the requested amount in light of the factors enumerated by this court in *Brunzell v. Golden Gate National Bank*, namely, the advocate's professional qualities, the nature of the litigation, the work performed, and the result." *Id.*

Express findings on each *Brunzell* factor "are not necessary for a district court to properly exercise its discretion." *Logan v. Abe*, 131 Nev. Adv. Op. 31, 350 P.3d 1139, 1143 (2015). "Instead, the district court need only demonstrate that it considered the required factors, and the award must be supported by substantial evidence." *Id.* "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012).

The United States Supreme Court has directed courts to exclude time expended on unsuccessful claims from fee awards. *See Hensley v. Eckerhart*, 461 U.S. 424, 434–35 (1983) ("In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants . . . counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been "expended in pursuit of the ultimate result achieved."). Further, the overall success in a case is one of the most critical factors in awarding attorney's fees. *See Id.* at 436 (where a "plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith.").

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

To the extent the Court is inclined to award attorney's fees, the fees should be significantly reduced from the exorbitant $125,327 figure LVRJ is requesting. First, and most important, LVRJ's "success" in this case is extremely limited. As the Amended Petition and the Orders in the Petition Appeal and Fee Appeal make clear, LVRJ raised numerous claims and issues in this case but did not succeed on a single one. Indeed, after deciding the Petition Appeal in the City's favor, the Supreme Court stated in the Fee Appeal: "as the district court recognized in its order, the ***LVRJ has not succeeded on any of the issues that it raised in filing the underlying action***." **Exhibit K** at 3 (emphasis added). Notwithstanding its lack of success in the District Court and both appeals, LVRJ is asking for *all* of its fees from the beginning of the case. It is unreasonable to require the City to pay for LVRJ's fees on the myriad issues that it lost – issues that are completely separate from the City's production of the 11 DPP Documents.

Second, the distinct issues the Supreme Court decided were not so intertwined, as LVRJ suggests, that they could not be separated for attorney's fees purposes. For example, LVRJ failed on its declaratory and injunctive relief claims, which sought to invalidate the City's policy regarding fees for processing public records. The District Court determined that these claims were moot due to the City's voluntary disclosure of the documents free of charge. The Supreme Court affirmed that decision. **Exhibit B** at 4. LVRJ also attacked the entirely separate issue of the adequacy of the City's Initial Response under the NPRA and the timeliness of the production of the City's privilege log. Once again, the Supreme Court ruled in favor of the City on these issues. *Id.* LVRJ also argued that the City's privilege log was insufficient with respect to its descriptions and legal bases for redacting or withholding documents under the attorney-client privilege. Again, the Supreme Court rejected this argument stating: "we disagree with LVRJ's argument that Henderson's proffered descriptions are overly conclusory." *Id.* at 7.

The propriety of the City's policy concerning fees, the mootness issues, the adequacy of the

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

City's Initial Response, the timeliness of the City's privilege log and the contents of the privilege log with respect to documents withheld under the attorney-client privilege are completely separate from the only undecided issue of whether the DPP Documents were properly withheld under the separate common law balancing test for the deliberative process privilege. They are not intertwined at all. Accordingly, even if LVRJ were a prevailing party as to the DPP Documents under the catalyst theory (which it is not), it would not be entitled to fees and costs associated with other distinct issues on which the Nevada Supreme Court has already determined LVRJ did not prevail.

Third, while LVRJ raised numerous separate issues in this case, none of them were overly complex or intricate requiring special knowledge or skill justifying LVRJ's requested attorney's fees. In fact, most of the issues pertained to interpreting the NPRA. Moreover, this case involved a single plaintiff and a single defendant thus avoiding some of the inherent difficulties that can arise in multi-party litigation. No discovery was conducted. Put simply, the character of the work and nature of this case do not justify attorney's fees in the amount of roughly $125,000.

Finally, LVRJ's requested fees are not reasonable. LVRJ's public records request in 2016 yielded over 9,000 electronic files consisting of almost 70,000 pages. LVRJ's current Motion was filed in response to the City's voluntary disclosure of *11 files* that it had withheld under the deliberative process privilege. After years of litigation and two separate appeals, the City voluntarily disclosed the 11 DPP Documents to stop the drain on its resources. Now, despite losing on every issue concerning 99.9% of the documents requested, LVRJ seeks 100% of its fees and costs, including fees and costs for ***two unsuccessful appeals***. By any measure, LVRJ's "success" in obtaining the DPP Documents must be significantly discounted in terms of fees and costs. To the extent the Court is inclined to grant LVRJ's Motion, the award should be commensurate with the level of "success" LVRJ achieved in this case. Using the total number of files requested as a baseline (over 9,000), LVRJ's acquisition of the 11 DPP files constitutes 0.12% of the total files. Because LVRJ only

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

succeeded with respect to 0.12% of the total number of documents requested, it should only be awarded 0.12% of its fees and costs, *i.e.* 0.12% x $125,327.50 = $150.39.

V. CONCLUSION

Based on the foregoing, the Court should deny LVRJ's Motion for Attorney's Fees and Costs in its entirety. Alternatively, the Court should award LVRJ a portion of its fees and costs commensurate with its level of success in this case, *i.e.* $150.39.

DATED this 1st day of June, 2020.

BAILEY❖KENNEDY

By: */s/ Dennis L. Kennedy*
DENNIS L. KENNEDY
Nevada Bar No. 1462
BAILEY❖KENNEDY
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148-1302

Brian R. Reeve
Assistant City Attorney
City of Henderson
Nevada Bar No. 10197
240 Water Street, MSC 144
Henderson, NV 89015

Attorneys for Respondent
CITY OF HENDERSON

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

CERTIFICATE OF SERVICE

I certify that I am an employee of the Henderson City Attorney's Office, and that on the 1st day of June, 2020, service of the foregoing CITY OF HENDERSON'S RESPONSE TO PETITIONER LAS VEGAS REVIEW-JOURNAL'S AMENDED MOTION FOR ATTORNEY'S FEES AND COSTS was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system (Odyssey) as follows:

Margaret A. McLetchie *(maggie@nvlitigation.com)*
Alina M. Shell *(alina@nvlitigation.com)*
McLetchie Law
701 East Bridger Avenue, Suite 520
Las Vegas, Nevada 89101

Attorneys for Petitioner
LAS VEGAS REVIEW-JOURNAL

/s/ Cheryl Boyd
Employee of the City of Henderson

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

APEN
NICHOLAS G. VASKOV
City Attorney
Nevada Bar No. 8298
BRIAN R. REEVE
Assistant City Attorney
Nevada Bar No. 10197
240 Water Street, MSC 144
Henderson, NV 89015
(702) 267-1231
(702) 267-1201 Facsimile
brian.reeve@cityofhenderson.com

DENNIS L. KENNEDY
Nevada Bar No. 1462
BAILEY❖KENNEDY
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148-1302
Telephone: 702.562.8820
Facsimile: 702.562.8821
DKennedy@BaileyKennedy.com

Attorneys for Respondent
CITY OF HENDERSON

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CITY OF HENDERSON, Respondent.	Case No. A-16-747289-W Dept. No. VIII Date of Hearing: June 18, 2020 Time of Hearing: 9:00 a.m.

APPENDIX OF EXHIBITS TO CITY OF HENDERSON'S OPPOSITION TO PETITIONER LAS VEGAS REVIEW-JOURNAL'S AMENDED MOTION FOR ATTORNEY'S FEES AND COSTS

Pursuant to EDCR 2.27(b), Respondent, City of Henderson (the "City"), files this Appendix of Exhibits to its Opposition to Petitioner Las Vegas Review-Journal's Amended Motion For Attorney's Fees and Costs.

Exhibit	Description	Page Nos.
A	Declaration of Brian R. Reeve in Support of City of Henderson' Response to Las Vegas Review Journal's Amended Public Records Act Application Pursuant to NRS § 239.001/Petition for Writ of Mandamus/Application for Declaratory and Injunctive Relief	1-5
B	Order Affirming in Part, Reversing in Part, and Remanding	6-14
C	City's Initial Response	7
D	Public Records Act Application Pursuant to NRS § 239.001 / Petition for Writ of Mandamus	8-29
E	COH Privilege Log	30-35
F	Amended Public Records Act Application Pursuant to NRS § 239.001 / Petition for Writ of Mandamus / Application for Declaratory and Injunctive Relief	36-49
G	Transcript of Proceedings Re: Petition for Writ of Mandamus (Thursday, March 30, 2017)	50-74
H	Order (05/12/2017)	75-77
I	Reporter's Transcript of Proceedings Before the Honorable Mark B. Bailus (Thursday, August 3, 2017)	78-103
J	Order (02/15/18)	104-108
K	Order of Reversal (10/17/19)	109-114
L	Minutes re: Status Check (12/12/19)	115
M	Correspondence (12/5/16)	116-119
N	Declaration of Brian R. Reeve, Esq.	120-122
O	Stipulation and Order (3/16/2020)	123-124
P	Stipulation and Order (3/29/2020)	125-127

/ / /

/ / /

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

DATED this 1st day of June, 2020.

BAILEY❖KENNEDY

By: */s/ Dennis L. Kennedy*
DENNIS L. KENNEDY
Nevada Bar No. 1462
BAILEY❖KENNEDY
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148-1302

and

CITY OF HENDERSON

Brian R. Reeve
Assistant City Attorney
Nevada Bar No. 10197
240 Water Street, MSC 144
Henderson, NV 89015

Attorneys for Respondent
CITY OF HENDERSON

CERTIFICATE OF SERVICE

I certify that I am an employee of the Henderson City Attorney's Office and that on the 1st day of June, 2020, service of the foregoing APPENDIX TO CITY OF HENDERSON'S RESPONSE TO PETITIONER LAS VEGAS REVIEW-JOURNAL'S AMENDED MOTION FOR ATTORNEY'S FEES AND COSTS was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing (Odyssey) as follows:

Margaret A. McLetchie *(maggie@nvlitigation.com)*
Alina M. Shell *(alina@nvlitigation.com)*
MCLETCHIE LAW
701 East Bridger Avenue, Suite 520
Las Vegas, Nevada 89101

Attorneys for Petitioner
LAS VEGAS REVIEW-JOURNAL

/s/ Cheryl Boyd
Employee of the City of Henderson

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET MSC 144
HENDERSON, NV 89015

EXHIBIT A

EXHIBIT A

DECLARATION OF BRIAN R. REEVE IN SUPPORT OF CITY OF HENDERSON'S RESPONSE TO LAS VEGAS REVIEW-JOURNAL'S AMENDED PUBLIC RECORDS ACT APPLICATION PURSUANT TO NRS § 239.001/PETITION FOR WRIT OF MANDAMUS/APPLICATION FOR DECLARATORY AND INJUNCTIVE RELIEF

BRIAN R. REEVE, Assistant City Attorney for Respondent City of Henderson (the "City"), hereby declares that the following is true and correct under the penalties of perjury:

1. I make this Declaration in support of the City's Response to Las Vegas Review-Journal's Amended Public Records Request Act Application Pursuant to NRS § 239.001/Petition for Writ of Mandamus/Application for Declaratory and Injunctive Relief (the "Response").

2. I have personal knowledge of the facts set forth herein.

3. I am over the age of eighteen years and am mentally competent.

4. On October 4, 2016, the City received a public records request from the Las Vegas Review-Journal ("LVRJ") asking for certain documents related to Trosper Communications, Elizabeth Trosper, and crisis communications from January 1, 2016 to October 4, 2016.

5. Exhibit B to the Response is a true and correct copy of the Las Vegas Review-Journal's ("LVRJ") October 4, 2016 public records request to the City (the "Request").

6. On October 11, 2016, five business days after receiving the Request, the City provided its initial written response as required by NRS 239.0107 (the "Initial Response"). In its Initial Response, the City informed LVRJ that it had found approximately 5,566 emails matching the search terms set forth in the expansive Request. These 5,566 emails contained nearly 10,000 individual electronic files and consisted of approximately 69,979 pages.

7. Exhibit C to the Response is a true and correct copy of the City's October 11, 2016, Initial Response to LVRJ's October 4, 2016 Request.

8. On October 12, 2016, LVRJ's attorney, Margaret McLetchie, called me to discuss the City's Initial Response.

9. Ms. McLetchie disputed the City's ability to charge extraordinary fees to complete the Request and wanted to know why the City had so many emails matching LVRJ's search terms.

10. I explained to Ms. McLetchie that the City was still in the process of removing duplicate emails in its document review system and that the estimated cost to produce the documents likely would decrease once this process was completed.

11. During the call, Ms. McLetchie and I discussed potentially narrowing the search terms to decrease the number of email hits and whether the City would be willing to lower its fee estimate. Ms. McLetchie and I both resolved to go back to our respective clients to work on a solution. Ms. McLetchie represented that she would call back on October 17, 2016, to discuss the matter further.

12. Ms. McLetchie did not call the City on October 17, 2016.

13. After waiting a week with no contact from Ms. McLetchie, I called Ms. McLetchie's office on October 25, 2016, to further our October 12th discussion in an attempt to work out a resolution. I was informed by Ms. McLetchie's office that Ms. McLetchie was out of town until November 4, 2016. I asked for a return call once Ms. McLetchie returned to the office.

14. Ms. McLetchie never returned the City's phone call and did not otherwise attempt to contact the City to work on a resolution. Instead, after more than six weeks had passed since communicating with the City and without any prior warning, LVRJ filed suit against the City on November 29, 2016, claiming that the City had refused to provide LVRJ with the requested records. This is not true. The City never refused or denied LVRJ's request.

15. After the City was served with the Petition, on December 5, 2016, the City wrote Ms. McLetchie a letter expressing surprise at the lawsuit given LVRJ's silence with respect to the Request for over six weeks and the fact that the City has always worked with LVRJ to modify the scope of records requests by using agreed upon search terms, or other methods to reduce the time and cost of producing large numbers of electronic documents.

16. Exhibit D to the Response is a true and correct copy of the December 5, 2016, letter to Ms. McLetchie.

17. After the City sent the December 5, 2016 letter to Ms. McLetchie, I conferred with her about LVRJ's Request, making the documents available for inspection, and the City's production of an initial confidentiality/privilege log.

18. The City agreed to allow LVRJ to inspect the documents on a computer at City Hall. LVRJ's inspection took place over the span of several days. After completing its inspection of the documents, LVRJ did not request a copy of any of the documents it reviewed.

19. After the City permitted LVRJ to inspect the documents free of charge, I received an email from Ms. McLetchie questioning why LVRJ reviewed a number of documents it believed were not responsive to LVRJ's search terms, including an image of the gorilla Harambe.

20. Exhibit E to the Response is a true and correct copy of an email chain and attachments between Ms. McLetchie, myself, Josh Reid, and Brandon Kemble.

21. On December 20, 2016, the City provided LVRJ with an initial list of documents for which it was asserting confidentiality or privilege.

22. Exhibit F is a true and correct copy of the initial withholding log.

23. Approximately two weeks later, Ms. McLetchie asked the City to provide a more detailed withholding log that would allow her to evaluate the City's confidentiality assertions. The City complied with this request and provided an updated log on January 9, 2017 ("Second Withholding Log").

24. Exhibit G is a true and correct copy of the Second Withholding Log.

25. Ms. McLetchie was not satisfied with the Second Withholding Log because it did not list the actual names of attorneys and paralegals or other staff members sending or receiving correspondence and requested another revised log.

26. The City, once again, accommodated LVRJ's request and provided the attorneys' and paralegals' names to LVRJ in a third version of the withholding log ("Third Withholding Log").

27. Exhibit H to the Response is a true and correct copy of the Third Withholding Log.

28. Around the same time the City provided LVRJ's counsel with the Third Withholding Log, I asked Ms. McLetchie to contact me if she had any questions or concerns regarding the log so that the parties could discuss them and attempt to resolve them without having to involve the Court.

29. Notwithstanding my request to meet and confer about any questions or issues LVRJ might have with the Third Withholding Log, Ms. McLetchie did not contact me about the issues she now raises in the Amended Petition.

30. Exhibit I to the Response is a true and correct copy of S.B. 123, 2007 Leg., 74th Sess. (Nev. 2007).

31. Exhibit J to the Response is a true and correct copy of Amendment 415 to S.B. 123.

32. Exhibit K to the Response is a true and correct copy of the Minutes of the Subcommittee of the Senate Committee on Government Affairs dated April 9, 2007.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 7 day of March, 2017.

By _____

BRIAN R. REEVE
Assistant City Attorney
Nevada Bar No. 10197
240 Water Street, MSC 144
Henderson, NV 89015

EXHIBIT B

EXHIBIT B

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS REVIEW-JOURNAL,
Appellant,
vs.
CITY OF HENDERSON,
Respondent.

No. 73287

FILED

MAY 24 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from a district court judgment denying a petition for a writ of mandamus and an application for injunctive and declaratory relief in a public records request matter. Eighth Judicial District Court, Clark County; Robert E. Estes, Judge.

Appellant Las Vegas Review-Journal (LVRJ) made a public records request to respondent City of Henderson pursuant to the Nevada Public Records Act (NPRA). Henderson performed a search that returned over 9,000 electronic files consisting of almost 70,000 pages of documents. Within five business days of the request, Henderson provided an initial response to LVRJ that the search generated a large universe of documents and that a review for privilege and confidentiality would be required before Henderson would provide LVRJ with copies. Henderson requested $5,787.89 in fees to conduct the privilege review and stated that a deposit of $2,893.94 (50% of the fee) would be due before the privilege review would begin.

LVRJ filed a petition for a writ of mandamus and an application for declaratory and injunctive relief, asking that Henderson be ordered to provide LVRJ access to the records without paying the privilege review fee. After LVRJ filed its petition, Henderson conducted the privilege review and

permitted LVRJ to inspect the nonprivileged records on a Henderson computer free of charge while they litigated whether the NPRA permitted Henderson to charge LVRJ for the privilege review. Henderson also provided a privilege log to LVRJ. After the inspection and at the hearing on LVRJ's writ petition, Henderson agreed to provide copies of the records, except for the items listed in the privilege log, to LVRJ free of charge. The district court thereafter denied LVRJ's writ petition because Henderson provided the documents without charging for the privilege review. The district court also found the privilege log was timely provided and sufficient under the NPRA. This appeal by LVRJ followed. Reviewing the district court's decision to deny the writ petition for an abuse of discretion and questions of law de novo, *Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 214, 234 P.3d 922, 924 (2010), we affirm in part, reverse in part, and remand.

LVRJ argues that the district court erred in concluding that LVRJ's claims that Henderson's charging policy was impermissible are moot. We disagree. The issue of Henderson's fee became moot once Henderson provided the records to LVRJ free of charge because "a controversy must be present through all stages of the proceeding, and even though a case may present a live controversy at its beginning, subsequent events may render the case moot." *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (internal citations omitted). "[I]n exceptional situations," this court will decline to treat as moot an issue that is "capable of repetition, yet will evade review." *In re Guardianship of L.S. & H.S.*, 120 Nev. 157, 161, 87 P.3d 521, 524 (2004) (internal quotation omitted). This exception requires that the issue "evade review because of the nature of its timing." *Id.* The exception's application turns on whether the issue cannot be litigated before it becomes moot. *See, e.g., Globe*

Newspaper Co. v. Superior Court, 457 U.S. 596, 602-03 (1982) (explaining that an order excluding the public from attending a criminal rape trial during a victim's testimony that expired at the conclusion of the trial is capable of repetition, yet evading review); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 546-47 (1976) (describing how an order prohibiting the press from broadcasting prejudicial confessions before trial that expires once the jury is empaneled is capable of repetition, yet evading review); *In re Guardianship*, 120 Nev. at 161-62, 87 P.3d at 524 (discussing types of issues that are both likely to expire prior to full litigation and are thus capable of repetition, yet evading review).

This is a fundamental requirement of the exception that LVRJ ignores. Indeed, so long as the records in a public records request are not produced, the controversy remains ongoing and can be litigated. In response to future public records requests, should Henderson maintain that it is entitled to an "extraordinary use" fee in the context of a privilege review, NRS 239.055, then the matter will be ripe for this court's consideration. Further, because NRS 239.011 already provides for expedited review of public records request denials, LVRJ's claim need not rely on such a rarely used exception. *See Personhood Nev.*, 126 Nev. at 603, 245 P.3d at 575 (observing that a statute expediting challenges to ballot initiatives generally provides for judicial review before a case becomes moot). Accordingly, we conclude that the district court did not err in concluding that LVRJ's claims regarding the ability to charge such fees and costs are moot.[1]

---

[1]Because LVRJ seeks declaratory and injunctive relief only as to issues rendered moot, we decline to consider whether LVRJ's request for

LVRJ also argues that Henderson failed to timely respond to its records request with a privilege log and thus waived its right to assert claims or privileges pursuant to NRS 239.0107(1)(d). Again, we disagree. "The ultimate goal of interpreting statutes is to effectuate the Legislature's intent." *In re CityCenter Constr. & Lien Master Litig.*, 129 Nev. 669, 673, 310 P.3d 574, 578 (2013). The starting point for determining legislative intent is the statute's plain language. *Robert E. v. Justice Court*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983). If the language is clear and unambiguous, this court does not look beyond it. *Id.*

Under NRS 239.0107(1), a governmental entity must do one of four things within five business days of receiving a public records request; as pertinent here, a governmental entity must provide notice that it will be unable to make the record available by the end of the fifth business day and provide "[a] date and time after which the public book or record will be available" to inspect or copy, NRS 239.0107(1)(c), *or* provide notice that it must deny the request because the record, or a part of the record, is confidential, and provide "[a] citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential," NRS 239.0107(1)(d).

We conclude that Henderson's initial response complied with the plain language of NRS 239.0107(1)(c) because it gave notice within five business days that it would be unable to produce the records by the fifth business day as it needed to conduct a privilege review, demanded the fee amount, and gave a date the request would be completed once a deposit was received. Henderson estimated that the records would be available three

---

declaratory and injunctive relief exceeds the scope of permissible relief under NRS 239.011.

weeks after LVRJ paid the amount required to commence the review, which gave LVRJ a specific date upon which they could rely to follow up pursuant to NRS 239.0107(1)(c). Further, it would be implausible to provide a privilege log for such requests that capture a large number of documents within five business days. Moreover, NRS 239.0107(1)(d) is not relevant because Henderson did not deny LVRJ's request; rather, it stated that it needed more time to determine which portions of LVRJ's request it might need to deny in the future. Put simply, a governmental entity cannot tell a requestor what is privileged, and thus what records will be denied pursuant to NRS 239.0107(1)(d), until it has had time to conduct the review. NRS 239.0107(1)(c) provides the notice mechanism when the governmental entity needs more time to act in response to the request.[2] Accordingly, we conclude the district court did not err in finding that the privilege log was not untimely; Henderson did not waive its right to assert privileges in the records LVRJ requested by not providing a completed privilege log within five business days of LVRJ's request.

Finally, LVRJ argues that Henderson's privilege log was insufficient and noncompliant with the NPRA. More concretely, LVRJ argues that the factual descriptions and legal bases for redaction or withholding in the privilege log were too vague and boilerplate to determine if the attorney-client, work-product, and deliberative process privileges actually applied to the records in question. Additionally, LVRJ argues that some of the factual descriptions provided fall outside of the privilege asserted for that record.

---

[2]Further, to the extent LVRJ asserts waiver is the appropriate remedy for noncompliance with the statute, we need not reach that issue because we conclude Henderson complied with NRS 239.0107(1)(c).

The starting point for NPRA requests is that "all public books and public records of governmental entities must remain open to the public, unless otherwise declared by law to be confidential." *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 877, 880, 266 P.3d 623, 626, 628 (2011) (internal quotation marks omitted). Any limitations or restrictions on the public's right of access must be construed narrowly. *Id.* at 878, 266 P.3d at 626. In light of this mandate, when a governmental entity withholds or redacts a requested record because it is confidential, the governmental entity "bears the burden of proving, by a preponderance of the evidence, that the records are confidential." *Id.* (discussing NRS 239.0113). This court has opined that for the governmental entity to overcome its burden, "[t]he state entity may either show that a statutory provision declares the record confidential, or, in the absence of such a provision, 'that its interest in nondisclosure clearly outweighs the public's interest in access.'" *Pub. Emps.' Ret. Sys. of Nev. v. Reno Newspapers, Inc. (PERS)*, 129 Nev. 833, 837, 313 P.3d 221, 224 (2013) (quoting *Gibbons*, 127 Nev. at 880, 266 P.3d at 628). In *Gibbons*, we held that a privilege log is usually how the governmental entity makes a showing that records should not be disclosed because they are confidential. 127 Nev. at 882-83, 266 P.3d at 629. While we declined to "spell out an exhaustive list of what such a log must contain or the precise form that this log must take," "in most cases, in order to preserve a fair adversarial environment, this log should contain, at a minimum, a general factual description of each record withheld and a specific explanation for nondisclosure." *Id.* at 883, 266 P.3d at 629. We additionally cautioned that "in this log, the state entity withholding the records need not specify its objections in such detail as to compromise the secrecy of the information." *Id.* at 883 n.3, 266 P.3d at 629 n.3 (internal quotation omitted).

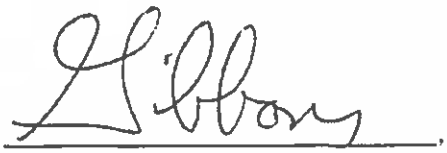
As the attorney-client privilege protects certain records by statute, *see* NRS 49.095, the district court was not obligated to conduct a balancing test for those records withheld or redacted pursuant that privilege.[3] *See PERS*, 129 Nev. at 837, 313 P.3d at 224; *see also* NRS 239.010(1). Instead, the district court was merely obligated to determine whether Henderson established that NRS 49.095 "declares the [withheld or redacted] record[s] confidential." *PERS*, 129 Nev. at 837, 313 P.3d at 224. Below, the district court found that Henderson met this burden. The district court determined that the privilege log followed the guidelines articulated in *Gibbons*, and these guidelines are generally sufficient for the governmental entity to meet its burden in proving confidentiality. 127 Nev. at 883, 266 P.3d at 629. A review of the privilege log shows that Henderson considered individually each document withheld or redacted, described each in turn, and provided that the attorney-client privilege and the work-product privilege was its basis for withholding or redacting that document. As we cautioned in *Gibbons*, "in this log, the state entity withholding the records need not specify its objections in such detail as to compromise the secrecy of the information." 127 Nev. at 883 n.3, 266 P.3d at 629 n.3 (internal quotation omitted). With this in mind, we disagree with LVRJ's argument that Henderson's proffered descriptions are overly conclusory. Accordingly, we conclude that the district court did not abuse its discretion in finding that these factual descriptions and explanations were sufficient

[3]Henderson organized its privilege log by grouping the attorney-client privilege and work-product privilege as one classification. Because LVRJ does not argue that the work-product privilege should be considered separately from attorney-client privilege or contest the designation as to any specific instances, we do not separate the two.

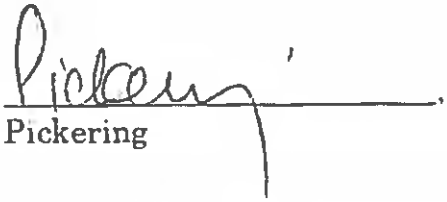
under *Gibbons* with respect to those documents withheld or redacted pursuant to the attorney-client privilege and work-product privilege.

However, we agree with LVRJ's argument in relation to those documents withheld or redacted pursuant to the deliberative process privilege. In Nevada, the deliberative process privilege is not statute based; instead, it is a creature of common law. *See DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 622, 6 P.3d 465, 469 (2000). Therefore, the district court was required to consider whether Henderson proved by a preponderance of the evidence "that its interest in nondisclosure clearly outweighs the public's interest in access." *PERS*, 129 Nev. at 837, 313 P.3d at 224 (internal quotation omitted). Below, the district court did not make this consideration, or consider the difference between documents redacted or withheld pursuant to the statute-based attorney-client privilege and those redacted or withheld pursuant to the common-law-based deliberative process privilege. Accordingly, we conclude that the district court abused its discretion in failing to consider the balancing test for these documents, and we reverse and remand for the district court to do so. Therefore, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



Gibbons, C.J.



Pickering, J.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Stiglich

_____, J.
Cadish

_____, J.
Silver

cc: Chief Judge, The Eighth Judicial District Court
Hon. Robert E. Estes, Senior Judge
Jay Young, Settlement Judge
McLetchie Shell LLC
Henderson City Attorney
Bailey Kennedy
Eighth District Court Clerk

EXHIBIT C

EXHIBIT C

Brian Reeve

From: Brian Reeve
Sent: Tuesday, October 11, 2016 5:11 PM
To: nbruzda@reviewjournal.com; tspousta@reviewjournal.com
Cc: Javier Trujillo; David Cherry; Kristina Gilmore
Subject: Public Records Request regarding Trosper Communications

Dear Ms. Bruzda and Mr. Spousta,

I'm writing in response to your public records request to the City of Henderson dated October 4, 2016 regarding Elizabeth Trosper and Trosper Communications. We are the in process of searching for and gathering responsive e-mails and other documents. Due to the high number of potentially responsive documents that meet your search criteria (we have approximately 5,566 emails alone) and the time required to review them for privilege and confidentiality, we estimate that your request will be completed in three weeks from the date we commence our review.

The documents you have requested will require extraordinary research and use of City personnel. Accordingly, pursuant to NRS 239.052, NRS 239.055, and Henderson Municipal Code 2.47.085, we estimate that the total fee to complete your request will be $5,787.89. This is calculated by averaging the actual hourly rate of the two Assistant City Attorneys who will be undertaking the review of potentially responsive documents ($77.99) and multiplying that rate by the total number of hours it is estimated it will take to review the emails and other documents (approximately 5,566 emails divided by 75 emails per hour equals 74.21 hours). Under the City's Public Records Policy, a fifty percent deposit of fees is required before we can start our review. Therefore, please submit a check payable to the City of Henderson in the amount of $2,893.94. Once the City receives the deposit, we will begin processing your request. When your request is completed, we will notify you and, once the remained of the fee is received, the records and any privilege log will be released to you.

Please let me know if you have any questions or would like to discuss your request further.

Regards,

Brian R. Reeve
Assistant City Attorney
702.267.1385

EXHIBIT D

EXHIBIT D

PET
MARGARET A. MCLETCHIE, Nevada Bar No. 10931
ALINA M. SHELL, Nevada Bar No. 11711
MCLETCHIE SHELL LLC
701 East Bridger Avenue, Suite. 520
Las Vegas, NV 89101
Telephone: (702)-728-5300
Email: alina@nvlitigation.com
Counsel for Petitioner

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL,

Petitioner,

vs.

CITY OF HENDERSON,

Respondent.

Case No.: A-16-747289-W

Dept. No.: I

PUBLIC RECORDS ACT APPLICATION PURSUANT TO NRS § 239.001/ PETITION FOR WRIT OF MANDAMUS

EXPEDITED MATTER PURSUANT TO NEV. REV. STAT. § 239.011

COMES NOW Petitioner the Las Vegas Review-Journal (the "Review-Journal"), by and through its undersigned counsel, and hereby brings this Petition for Writ of Mandamus for declaratory and injunctive relief, ordering the City of Henderson to provide Petitioner access to public records. Petitioner also requests an award for all fees and costs associated with its efforts to obtain withheld and/or improperly redacted public records as provided for by Nev. Rev. Stat. § 239.011(2). The Review-Journal also respectfully asks that this matter be expedited pursuant to Nev. Rev. Stat. § 239.011(2).

Petitioner hereby alleges as follows:

NATURE OF ACTION

1. Petitioner brings this application for relief pursuant to Nev. Rev. Stat. § 239.011. *See also Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 884, 266 P.3d 623, 630, n.4 (2011).

2. The Review Journal's application to this court is the proper means to secure Henderson's compliance with the Nevada Public Records Act. *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 884, 266 P.3d 623, 630 n.4 (2011); *see also DR Partners v. Bd. Of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) (citing *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990)) (a writ of mandamus is the appropriate procedural remedy to compel compliance with the NPRA).

3. Petitioner is entitled to an expedited hearing on this matter pursuant to Nev. Rev. Stat. § 239.011, which mandates that "the court shall give this matter priority over other civil matters to which priority is not given by other statutes."

PARTIES

4. Petitioner, the Review-Journal, a daily newspaper, is the largest newspaper in Nevada. It is based at 1111 W. Bonanza Road, Las Vegas, Nevada 89125.

5. Respondent City of Henderson ("Henderson") is an incorporated city in the County of Clark, Nevada. Henderson is subject to the Nevada State Public Records Act pursuant to Nev. Rev. Stat. § 239.005(b).

JURISDICTION AND VENUE

6. This Court has jurisdiction pursuant to Nev. Rev. Stat. § 239.011, as the court of Clark County where all relevant public records sought are held.

7. Venue is proper in the Eighth Judicial District Court of Nevada pursuant to Nev. Rev. Stat. § 239.011. All parties and all relevant actions to this matter were and are in Clark County, Nevada.

STANDING

8. Petitioner has standing to pursue this expedited action pursuant to Nev. Rev. Stat. § 239.010 because public records it has requested from Henderson have been unjustifiably withheld and Henderson is improperly attempting to charge fees for the collection and review of potentially responsive documents, which is not permitted by law.

///

///

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

FACTS

9. On or around October 4, 2016, the Las Vegas Review-Journal sent Henderson a request pursuant to the Nevada Public Records Act, Nev. Rev. Stat. § 239.001 *et seq.* (the "NPRA") seeking certain documents dated from January 1, 2016 pertaining to Trosper Communications and its principal, Elizabeth Trosper (the "Request"). A true and correct copy of the Request is attached as Exhibit 1. The request was directed to Henderson's Chief Information Officer and the Director of Intergovernmental Relations. (*See* Exh. 1.)

10. Trosper Communications is a communications firm that has a contract with the City of Henderson and also has assisted with the campaigns of elected officials in Henderson.

11. On October 11, 2016, Henderson provided a partial response ("Response"), a true and correct copy of which is attached as Exhibit 2.

12. This Response fails to provide timely notice regarding any specific confidentiality or privilege claim that would limit Henderson in producing (or otherwise making available) all responsive documents.

13. Instead, in its Response, Henderson indicated that it was "in process of searching for and gathering responsive e-mails and other documents," but that "[d]ue to the high number of potentially responsive documents that meet your search criteria (we have approximately 5,566 emails alone) and the time required to review them for privilege and confidentiality, we estimate that your request will be completed in three weeks from the date we commence our review." (Ex. 2.)

14. In addition to stating that it would need additional time, Henderson demanded payment of almost $6,000.00 to continue its review. It explained the basis of the demand as follows:

> The documents you have requested will require extraordinary research and use of City personnel. Accordingly, pursuant to NRS 239.052, NRS 239.055, and Henderson Municipal Code 2.47.085, **we estimate that the total fee to complete your request will be $5,787.89**. This is calculated by averaging the actual **hourly rate of the two Assistant City Attorneys** who will be undertaking the review of potentially responsive documents

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

($77.99) and multiplying that rate by the total number of hours it is estimated it will take to **review the emails and other documents** (approximately 5,566 emails divided by 75 emails per hour equals 74.21 hours).

(Exh. 2 (emphasis added.)

15. Thus, Henderson has improperly demanded that the Review-Journal pay its assistant city attorneys to review documents to determine whether they could even be released. The Response made clear that Henderson would not continue searching for responsive documents and reviewing them for privilege without payment, and demanded a "deposit" of $2,893.94, explaining that this was its policy:

> Under the City's Public Records Policy, a fifty percent deposit of fees is required before we can start our review. Therefore, please submit a check payable to the City of Henderson in the amount of $2,893.94. **Once the City receives the deposit, we will begin processing your request.**

(*Id.*)

16. A copy of Henderson's Public Records Policy, available online through Henderson's official city website, is attached as Exhibit 3. Part V of that policy, Henderson charges fees for any time spent in excess of thirty minutes "by City staff or any City contractor" to review the requested records "in order to determine whether any requested records are exempt from disclosure, to segregate exempt records, to supervise the requestor's inspection of original documents, to copy records, to certify records as true copes and to send records by special or overnight methods such as express mail or overnight delivery." (Ex. 3 at p. 3.)

17. Henderson informed the Review-Journal that it would not release any records until the total final fee was paid. The Response also states:

> When your request is completed, we will notify you and, once the remained [sic] of the fee is received, the records and any privilege log will be released to you.

(*Id.*)

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE, SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

18. Even if the NPRA allowed for fees in this case, which it does not, the fee calculation used by Henderson is inconsistent with the statute on which it relies, which caps fees at fifty (50) cents a page. *See* Nev. Rev. Stat. § 239.055(1).

19. The Review-Journal is in an untenable position. Henderson has demanded a huge sum just to meaningfully respond to the Request, and has made clear that it may not even provide the Review-Journal with the documents it was seeking. Thus, Henderson has demanded Review-Journal to pay for review of documents it may never receive, without even knowing the extent to which Henderson would fulfill its request and actually comply with the NPRA.

20. Henderson's practice of charging impermissible fees deters NPRA requests from Review-Journal reporters.

LEGAL AUTHORITY

21. The NPRA reflects that records of governmental entities belong to the public in Nevada. Nev. Rev. Stat. § 239.010(1) mandates that, unless a record is confidential, "all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person, and may be fully copied..." The NPRA reflects specific legislative findings and declarations that "[its purpose is to foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law" and that it provisions "must be construed liberally to carry out this important purpose."

22. The Supreme Court of Nevada has repeatedly held that a court considering a claim of confidentiality regarding a public records request starts from "...the presumption that all government-generated records are open to disclosure." *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011); *see also Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 234 P.3d 922 (2010); *DR Partners v. Board of County Comm'rs*, 116 Nev. 616, 6 P.3d 465 (2000). The Supreme Court of Nevada has further held that when refusing access to public records on the basis of claimed confidentiality, a government entity bears the burden of proving "...that its interest in

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

nondisclosure clearly outweighs the public's interest in access," and that the "...state entity cannot meet this burden with a non-particularized showing, or by expressing a hypothetical concern." *Reno Newspapers, Inc. v. Gibbons,* 127 Nev. 873, 880 266 P.3d 623, 628.

23. The NPRA provides that a governmental entity must provide timely and specific notice if it is denying a request because the entity determines the documents sought are confidential. Nev. Rev. Stat. § 239.0107(1)(d) states that, within five (5) business days of receiving a request,

> [i]f the governmental entity must deny the person's request because the public book or record, or a part thereof, is confidential, provide to the person, in writing: (1) Notice of that fact; and (2) A citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential.

24. The NPRA does not allow for fees to be charged for a governmental entity's privilege review.

25. The only fees permitted are set forth in Nev. Rev. Stat. § 239.052 and Nev. Rev. Stat. § 239.055(1).

26. Nev. Rev. Stat. § 239.052(1) provides that "a governmental entity may charge a fee for providing a **copy** of a public record." (Emphasis added.)

27. Nev. Rev. Stat. § 239.055(1), the provision Henderson is relying on for its demand for fees, allows for fees for "extraordinary use." It provides that "... if a request for a copy of a public record would require a governmental entity to make extraordinary use of its personnel or technological resources, the governmental entity may, in addition to any other fee authorized pursuant to this chapter, **charge a fee not to exceed 50 cents per page** for such extraordinary use...."

28. Interpreting Nev. Rev. Stat. § 239.055 to limit public access by requiring requesters to pay public entities for undertaking a review for responsive documents and confidentiality would be inconsistent with the plain terms of the statute and with the mandate to interpret the NPRA broadly.

///

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

29. Further, allowing a public entity to charge a requester for legal fees associated with reviewing for confidentiality is impermissible because "[t]he public official or agency bears the burden of establishing the existence of privilege based upon confidentiality." *DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000).

30. Even if Respondent could, as it has asserted, charge for its privilege review as "extraordinary use," such fees would be capped at 50 cents per page. Nev. Rev. Stat. § 239.055(1).

31. Henderson Municipal Code 2.47.085 indicates that if a public records request requires "extraordinary use of personnel or technology," Henderson charges $19.38 to $83.15 per hour (charged at the actual hourly rate of the position(s) required to conduct research. *See* HMC § 2.47.085. This conflicts with the NPRA's provision that a governmental entity may only "charge a fee not to exceed 50 cents per page" for "extraordinary use of its personnel or technological resources." Nev. Rev. Stat. § 239.055(1).

CLAIM FOR RELIEF

32. Petitioner re-alleges and incorporates by reference each and every allegation contained in paragraphs 1-31 with the same force and effect as if fully set forth herein.

33. The Review-Journal should be provided with the records it has requested regarding Trosper Communications pursuant to the NPRA.

34. The records sought are subject to disclosure, and Respondent has not met its burden of establishing otherwise.

35. A writ of mandamus is necessary to compel Respondent's compliance with the NPRA.

36. Respondent has violated the letter and the spirit of Nev. Rev. Stat. § 239.010 by refusing to even determine whether responsive documents exist and whether they are confidential unless the Las Vegas Review-Journal tenders an exorbitant sum.

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

37. The NPRA does not permit the fees Henderson is demanding.

38. The NPRA permits governmental entities to charge a fee of up to 50 cents per page for "extraordinary use" of personnel or technology to produce copies of records responsive to a public records request. Nev. Rev. Stat. § 239.055(1). Henderson's Public Records Policy, however, requires requesters to pay a fee of up to $83.15 per hour just to find responsive records and review them for privilege.

39. Henderson either does not understand its obligations to comply with the law or it is intentionally disregarding the plain terms of the NPRA to discourage reporters from accessing public records.

40. Henderson is legally obligated to undertake a search and review of responsive —free of charge—when it receives an NPRA request. It also has the burden of establishing confidentiality, and is required to provide specific notice of any confidentiality claims within five days. Yet it has demanded payment for staff time and attempted to condition its compliance with NPRA on payment of an exorbitant sum.

41. Henderson is demanding payment not for providing copies, but simply for locating documents responsive to a request—*and then for having its attorneys determine whether documents should be withheld.* Not only is this interpretation belied by the plain terms of the NPRA[1], requiring a requester to pay a public entity's attorneys to withhold documents would be an absurd result. *See S. Nevada Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (noting that courts must "interpret provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of those statutes and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent") (quotation omitted); *see also Cal. Commercial Enters. v. Amedeo Vegas I, Inc.*, 119 Nev. 143, 145, 67 P.3d 328, 330 (2003) ("When a statute is not ambiguous, this court has consistently held that we are not empowered to construe the statute beyond its plain meaning, unless the law as stated would

[1] *See Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) ("It is a fundamental canon of statutory construction" that, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.") (quotation omitted).

MCLETCHIE SHELL
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

yield an absurd result.")

WHEREFORE, the Petitioner prays for the following relief:

1. That the court handle this matter on an expedited basis as mandated by NRS 239.011;

2. Injunctive relief ordering Defendant City of Henderson to immediately make available complete copies of all records requested;

3. Reasonable costs and attorney's fees; and

4. Any further relief the Court deems appropriate.

DATED this the 29th day of November, 2016.

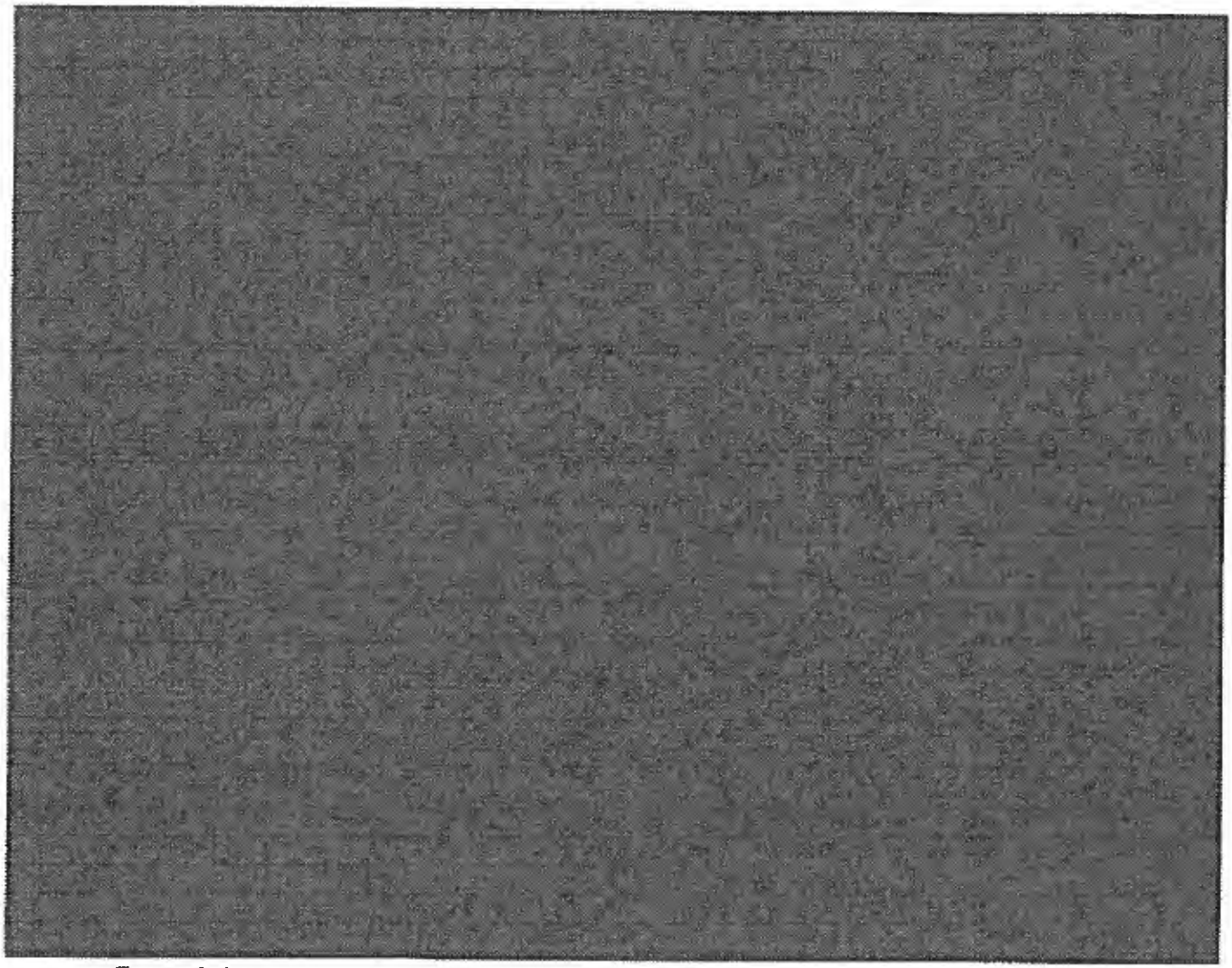
Respectfully submitted,

By: _____

Margaret A. McLetchie, Nevada Bar No. 10931
Alina M. Shell, Nevada Bar No. 11711
MCLETCHIE SHELL LLC
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
(702) 728-5300
maggie@nvlitigation.com
Counsel for Petitioners

MCLETCHIE SHELL LLC
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

EXHIBIT 1



---------- Forwarded message ----------
From: **Natalie Bruzda** <nbruzda@reviewjournal.com>
Date: Tue, Oct 4, 2016 at 11:06 AM
Subject: Communications Department public records request
To: Laura Fucci <Laura.Fucci@cityofhenderson.com>, Javier.Trujillo@cityofhenderson.com

Dear Ms. Fucci and Mr. Trujillo,

Attached to this email is a public records request. I also submitted the request through the Contact Henderson feature on the city's website.

Thank you.

Sincerely,

--
Natalie Bruzda
Las Vegas Review-Journal
702-477-3897
@nataliebruzda

—
Natalie Bruzda
Las Vegas Review-Journal
702-477-3897
@nataliebruzda

Via Email

Oct. 4, 2016

Laura Fucci, Chief Information Officer
Henderson City Hall
240 Water St. MSC 123
P.O. Box 95050
Henderson, NV 89009-5050
Office Fax: 702-267-4301
E-Mail: Laura.Fucci@cityofhenderson.com

Javier Trujillo, Director of Intergovernmental Relations
Henderson City Hall
P.O. Box 95050
Henderson, NV 89009-5050
Office Fax: 702-267-2081
E-Mail: Javier.Trujillo@cityofhenderson.com

Dear Ms. Fucci and Mr. Trujillo,

Pursuant to Nevada's Public Records Act (Nevada Revised Statutes § 239.010 et. seq.) and on behalf of the Las Vegas Review-Journal, we hereby request the Communications Department documents listed below.

Documents requested:

- All emails to or from City of Henderson Communications Department personnel, Council members, or the Mayor that contain the words "Trosper Communications," "Elizabeth Trosper," or "crisis communications;"
- All emails pertaining to or discussing work performed by Elizabeth Trosper or Trosper Communications on behalf of the City of Henderson;
- All documents pertaining to or discussing contracts, agreements, or possible contracts, with Elizabeth Trosper or Trosper Communication; and
- All documents pertaining to or discussing the terms under which Elizabeth Trosper or Trosper Communications provided, provide, or will provide services to the City of Henderson.

Date limitations:

For all documents requested, please limit your searches for responsive documents from January 1, 2016 to the present.

///
///
///

Further instructions:

Please provide copies of all responsive records. For electronic records, please provide the records in their original electronic form attached to an email, or downloaded to an electronic medium. We are happy to provide the electronic medium and to pick up the records. For hard copy records, please feel free to attach copies to an email as a .pdf, or we are happy to pick up copies. We will also gladly take information as it becomes available; please do not wait to fill the entire request, but send each part or contact us as it becomes available.

If you intend to charge any fees for obtaining copies of these records, please contact us immediately (no later than 5 days from today) if the cost will exceed $50. In any case, we would like to request a waiver of any fees for copies because this is a media request, and the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of the operation of the Communications Department and Intergovernmental Relations.

If you deny access to any of the records requested in whole or in part, please explain your basis for doing so in writing within five (5) days, citing the specific statutory provision or other legal authority you rely upon to deny access. NRS § 239.011(1)(d). Please err on the side of fully providing records. Nevada's Public Records Act requires that its terms be construed liberally and mandates that any exception be construed narrowly. NRS § 239.001(2), (3). Please also redact or separate out the information that you contend is confidential rather than withholding records in their entirety, as required by Nev. Rev. Stat. § 239.010(3).

Again, please cite the statutory provision you rely upon to redact or withhold part of a record. Please also keep in mind that the responding governmental entity has the burden of showing that the record is confidential. NRS § 239.0113; *see also DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) ("The public official or agency bears the burden of establishing the existence of privilege based upon confidentiality. It is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly.")

Please provide the records or a response within five (5) business days pursuant to Nev. Rev. Stat. §239.0107. Again, please email your response to nbruzda@reviewjournal.com and tspousta@reviewjournal.com rather than U.S. Mail so we can review as quickly as possible.

Thank you in advance for your cooperation with my request. Please contact us with any questions whatsoever. In addition to email, you can reach Natalie by phone at 702-477-3897.

Sincerely,

Natalie Bruzda
Reporter

Tom Spousta
Assistant City Editor

EXHIBIT 2

LAS VEGAS REVIEW-JOURNAL

Natalie Bruzda <nbruzda@reviewjournal.com>

Public Records Request regarding Trosper Communications

Brian Reeve <Brian.Reeve@cityofhenderson.com> Tue, Oct 11, 2016 at 5:10 PM
To: "nbruzda@reviewjournal.com" <nbruzda@reviewjournal.com>, "tspousta@reviewjournal.com" <tspousta@reviewjournal.com>
Cc: Javier Trujillo <Javier.Trujillo@cityofhenderson.com>, David Cherry <David.Cherry@cityofhenderson.com>, Kristina Gilmore <Kristina.Gilmore@cityofhenderson.com>

Dear Ms. Bruzda and Mr. Spousta,

I'm writing in response to your public records request to the City of Henderson dated October 4, 2016 regarding Elizabeth Trosper and Trosper Communications. We are the in process of searching for and gathering responsive e-mails and other documents. Due to the high number of potentially responsive documents that meet your search criteria (we have approximately 5,566 emails alone) and the time required to review them for privilege and confidentiality, we estimate that your request will be completed in three weeks from the date we commence our review.

The documents you have requested will require extraordinary research and use of City personnel. Accordingly, pursuant to NRS 239.052, NRS 239.055, and Henderson Municipal Code 2.47.085, we estimate that the total fee to complete your request will be $5,787.89. This is calculated by averaging the actual hourly rate of the two Assistant City Attorneys who will be undertaking the review of potentially responsive documents ($77.99) and multiplying that rate by the total number of hours it is estimated it will take to review the emails and other documents (approximately 5,566 emails divided by 75 emails per hour equals 74.21 hours). Under the City's Public Records Policy, a fifty percent deposit of fees is required before we can start our review. Therefore, please submit a check payable to the City of Henderson in the amount of $2,893.94. Once the City receives the deposit, we will begin processing your request. When your request is completed, we will notify you and, once the remained of the fee is received, the records and any privilege log will be released to you.

Please let me know if you have any questions or would like to discuss your request further.

Regards.

Brian R. Reeve

Assistant City Attorney

702.267.1385

EXHIBIT 3

City of Henderson
Public Records Policy

I. Purpose.

The City of Henderson recognizes that Nevada Public Records Law (NRS 239.010-239.055) gives members of the public and media the right to inspect and copy certain public records maintained by the City.[1] The City also recognizes that certain records maintained by the City are exempt from public disclosure, or that disclosure may require balancing the right of the public to access the records against individual privacy rights, governmental interests, confidentiality issues and attorney/client privilege. Additionally, when the City receives a request to inspect or copy public records, costs are incurred by the City in responding to the request. The purpose of this Public Records Policy is (a) to establish an orderly and consistent procedure for receiving and responding to public records requests from the public and media; (b) to establish the basis for a fee schedule designed to reimburse the City for the actual costs incurred in responding to public records requests; and (c) to inform citizens and members of the media of the procedures and guidelines that apply to public records requests.

[1] The City is required to respond to public requests by Nevada Public Records Law. The Federal "Freedom of Information Act" (FOIA) does not apply to requests for the City's public records. FOIA only applies to requests for public records maintained by the federal government.

II. Definitions.

Nevada Public Records law defines a public record as:

"A record of a local governmental entity that is created, received or kept in the performance of a duty and paid for with public money." (NAC 239.091)

A record may be handwritten, typed, photocopied, printed, or microfilmed, and exist in an electronic form such as e-mail or a word processing document, or other types of electronic recordings.

III. Policy.

It is the policy of the City to respond in an orderly, consistent and reasonable manner in accordance with the Nevada Public Records Law to requests to inspect or receive copies of public records maintained by the City. The City must respond to the request within five (5) business days. This response must be one of the following: (a) providing the record for inspection or copying; (b) provide in writing the name and address of the government entity, if known, should the City not have legal custody of the record; (c) the date at which time the record will be available for inspection or copying; or (d) reason for denial of the request. Factors that may delay production of records include: the size and complexity of the request, available staff time and resources, and whether legal counsel needs to be consulted prior to disclosing the requested records.

Some public records requests are requests for information that would actually require the creation of a new public record. Public bodies are not obligated under Nevada's Public Records Law to create new public records where none exists in order to respond to requests for information. Although a public body may, if it chooses, create a new record to provide information, the public body does not have to create a new record and only has a duty to allow the inspection and copying of an existing public record.

A person may request a copy of a public record in any medium in which the public record is readily available. An officer, employee or agent of the City who has legal custody or control of a public record shall not refuse to provide a copy of that public record in a readily available medium because the officer, employee or agent has already prepared or would prefer to provide the copy in a different medium.

IV. Procedure.

With the exception of records listed in section VI, the following procedures must be followed in submitting and responding to requests to inspect or receive copies of public records maintained by the City:

A. Records Requests by general public. Public records requests may be made via Contact Henderson. Click on Contact Henderson via the City of Henderson webpage (www.cityofhenderson.com) then select "Records Requests" and the appropriate category; then click "Next". Follow the subsequent steps to submit your case. If you are unsure which category to select, please choose "Other." Submitting your request in writing helps to reduce confusion about the information being requested and effectively communicating your request will help ensure a timely response. Requests should identify as specifically as possible the type of record(s), subject matter, approximate date(s), and the desired method of delivery (email, hardcopies, etc.). Additionally, public records requests may be made by calling the City Clerk's Office at (702) 267-1419, or by writing or visiting the City Clerk's Office at City Hall, 240 Water St., Henderson, Nevada.

   Records Requests by media. Public records requests from members of the media may be made via Contact Henderson. Click on Contact Henderson via the City of Henderson webpage (www.cityofhenderson.com) then select "Records Requests" and click on the "Media" category; then click "Next". Follow the subsequent steps to submit your case. Submitting your request in writing helps to reduce confusion about the information being requested and effectively communicating your request will help ensure a timely response. Requests should identify as specifically as possible the type of record(s), subject matter, approximate date(s), and the desired method of delivery (email, hardcopies, etc.). Additionally, public records requests may be made by calling the office of Communications and Council Support at (702) 267-2020.

B. Processing a Public Records Request. Upon receipt of a public records request:
   a. Staff shall determine resources required to provide all requested records and prepare an estimate of fees if applicable. Staff shall contact the requestor through the Contact Henderson system prior to five (5) business days. If applicable, the estimate of fees must be provided to the requestor at this time. Depending on the scope and magnitude of the records request, a 50 percent deposit of fees prior to the start of research may be required. If a deposit is required or an estimate of fees is provided, staff shall wait for

requestor approval of the fee estimate prior to continuing work. The remainder of fees must be paid before records are delivered. Throughout the process of completing the request and prior to resolving the case, staff shall note all relevant communications with the requestor in the Contact Henderson case.

b. If staff are unable to provide the records within five days, staff shall provide the requestor with notice of one of the following:
    i. If the department does not have legal custody or control of the requested record, staff shall communicate to the requestor the name and address of the governmental entity that has legal custody or control of the record, if known.
    ii. If the record has been destroyed, staff shall communicate so to the requestor and cite approved records retention schedule.
    iii. If the department is unable to make the record available by the end of the fifth business day after receiving the request, staff shall specify to the requestor a date and time the record will be available.
    iv. If the record is confidential, and access is denied, staff shall communicate this to the requestor and cite the specific statute or other legal authority that declares the record to be confidential.

V. Fees (HMC 2.47.0825).

The fees for responding to a public records request will be those established in the fee schedule adopted by the City which is in effect at the time the request is submitted. The fees will be reasonably calculated to reimburse the City for its actual costs in making the records available and may include:

A. Charges for the time spent, in excess of thirty (30) minutes, by City staff or any City contractor to locate the requested public records, to review the records in order to determine whether any requested records are exempt from disclosure, to segregate exempt records, to supervise the requestor's inspection of original documents, to copy records, to certify records as true copies and to send records by special or overnight methods such as express mail or overnight delivery.
B. A per page charge for photocopies of requested records.
C. A per item charge for providing CDs, audiotapes, or other electronic copies of requested records.

The current fee schedule is located on the City's website at http://www.cityofhenderson.com/docs/default-source/city-clerk-docs/city-wide-public-records-and-document-services-general-fee-table08-14.pdf?sfvrsn=2

Staff will prepare an estimate of the charges that will be incurred to respond to a public records request. Prepayment of the estimated charges or a 50 percent deposit may be required. Unless otherwise prohibited by law, the City may, at the City's discretion, furnish copies of requested records without charge or at a reduced fee if the City determines that the waiver or reduction of fees is in the public interest.

VI. Public Records Exempt from Disclosure.

There are types of public records that are exempt from disclosure. A few specific exemptions worth special notice are as follows:

A. **Personal Identifying Information – NRS 239B.030(5a).** Each governmental agency shall ensure that any personal information contained in a document that has been recorded, filed or otherwise submitted to the governmental agency, which the governmental agency continues to hold, is maintained in a confidential manner if the personal information is required to be included in the document pursuant to a specific state or federal law, for the administration of a public program or for an application for a federal or state grant.

B. **Bids and Proposals under Negotiation or Evaluation – NRS 332.061(2).** Bids which contain a provision that requires negotiation or evaluation may not be disclosed until the bid is recommended for award of a contract. Upon award of the contract, all of the bids, successful or not, with the exception of proprietary/confidential information, are public record and copies shall be made available upon request.

C. **Bids and Proposals Containing Proprietary Information – NRS 332.061(1).** Proprietary information does not constitute public information and is confidential.

D. **Recreation Program Registration – NRS 239.0105.** Records of recreational facility/activity registration where the name, address, and telephone number of the applicant are collected are confidential.

E. **Emergency Action Plans and Infrastructure Records – NRS 239C.210(2).** Records detailing the City's Emergency Response Plans and critical infrastructure are confidential.

F. **Employee Personnel and Medical Records –HIPAA 45 CFR Part 160 and Part 164.** All employee personnel and medical records are confidential.

G. **Databases Containing Electronic Mail Addresses or Telephone Numbers – NRS 239B.040.** Electronic mail addresses and/or telephone numbers collected for the purpose of or in the course of communicating with the city may be maintained in a database. This database is confidential in its entirety, is not public record, and it must not be disclosed in its entirety as a single unit; however, the individual electronic mail address or telephone number of a person is not confidential and may be disclosed individually.

H. **Medical Records – Health Insurance Portability and Accountability Act (HIPAA 45 CFR Part 160 and Part 164).** Medical records collected during medical transports may only be disclosed to the patient or as authorized by the patient.

I. **Attorney/Client Privileged Records –RPC 1.6.** A lawyer shall not reveal information relating to representation of a client.

J. **Restricted Documents – NRS 239C.220.** Blueprints or plans of schools, places of worship, airports other than an international airport, gaming establishments, governmental buildings or any other building or facility which is likely to be targeted for a terrorist attack are considered

"Restricted Documents." The City also classifies Civil Improvement Plans as restricted documents. These plans can only be inspected after supplying: (a) name; (b) a copy of a driver's license or other photographic identification that is issued by a governmental entity; (c) the name of employer, if any; (d) citizenship; and (e) a statement of the purpose for the inspection.

Individuals must meet one of the following criteria to receive a copy of a restricted document: upon the lawful order of a court of competent jurisdiction; as is reasonably necessary in the case of an act of terrorism or other related emergency; to protect the rights and obligations of a governmental entity or the public; upon the request of a reporter or editorial employee who is employed by or affiliated with a newspaper, press association or commercially operated and federally licensed radio or television station and who uses the restricted document in the course of such employment or affiliation; or upon the request of a registered architect, licensed contractor or a designated employee of any such architect or contractor who uses the restricted document in his or her professional capacity.

K. **Records Detailing Investigations or Relating to Litigation or Potential Litigation –Donrey v. Bradshaw.** Records involving criminal investigations, litigation or potential litigation are considered confidential.

L. **Local Ethics Committee Opinions – NRS 281A.350.** Each request for an opinion submitted to a specialized or local ethics committee, each hearing held to obtain information on which to base an opinion, all deliberations relating to an opinion, each opinion rendered by a committee and any motion relating to the opinion are confidential unless:
   a. The public officer or employee acts in contravention of the opinion; or
   b. The requester discloses the content of the opinion.

M. **Economic Development Initial Contact and Research Records (NRS 268.910)** An organization for economic development formed by one or more cities shall, at the request of a client, keep confidential any record or other document in its possession concerning the initial contact with and research and planning for that client. If such a request is made, the executive head of the organization shall attach to the file containing the record or document a certificate signed by the executive head stating that a request for confidentiality was made by the client and showing the date of the request.
   Except as otherwise provided in NRS 239.0115, records and documents that are confidential pursuant to the above 1 remain confidential until the client:
   a. Initiates any process regarding the location of his or her business in a city that formed the organization for economic development which is within the jurisdiction of a governmental entity other than the organization for economic development; or
   b. Decides to locate his or her business in a city that formed the organization for economic development.

VII. Copyrighted Material.

If the City maintains public records containing copyrighted material, the City will permit the person making the request to inspect the copyrighted material, and may allow limited copying of such material if allowed under Federal copyright law. The City may require written consent from the copyright holder or an opinion from the person's legal counsel before allowing copying of such materials.

EXHIBIT E

EXHIBIT E

Doc #	Email senders and recipients	Description	Basis for Redaction/Non-Production	Authority	Redaction
3		Internal report containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services and/or containing legal advice	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction
181	Kristina Gilmore (attorney) and Laura Kopanski (paralegal) and/or Bud Cranor (PIO/Council Support Services) and/or Luke Fritz (Finance)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
184	Kristina Gilmore (attorney) and Laura Kopanski (paralegal) and/or Bud Cranor (PIO/Council Support Services) and/or Luke Fritz (Finance)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction
191	Kristina Gilmore (attorney) and Laura Kopanski (paralegal) and/or Bud Cranor (PIO/Council Support Services) and/or Luke Fritz (Finance)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
193		Draft Trosper contract containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
195	Kristina Gilmore (attorney) and Laura Kopanski (paralegal) and/or Bud Cranor (PIO/Council Support Services) and/or Luke Fritz (Finance)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction
199	Kristina Gilmore (attorney) and Laura Kopanski (paralegal) and/or Bud Cranor (PIO/Council Support Services) and/or Luke Fritz (Finance)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
226	Kristina Gilmore (attorney) and/or Bud Cranor (PIO/Council Support Services) and/or Luke Fritz (Finance)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
227	Kristina Gilmore (attorney) and/or Bud Cranor (PIO/Council Support Services) and/or Luke Fritz (Finance)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
233	Kristina Gilmore (attorney) and/or Bud Cranor (PIO/Council Support Services) and/or Luke Fritz (Finance)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
234	Kristina Gilmore (attorney) and/or Bud Cranor (PIO/Council Support Services) and/or Luke Fritz (Finance)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
237	Kristina Gilmore (attorney) and/or Bud Cranor (PIO/Council Support Services) and/or Luke Fritz (Finance)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
238	Kristina Gilmore (attorney) and/or Bud Cranor (PIO/Council Support Services) and/or Luke Fritz (Finance)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	

Doc #	Email senders and recipients	Description	Basis for Redaction/Non-Production	Authority	Redaction
244	Kristina Gilmore (attorney) and/or Bud Cranor (PIO/Council Support Services) and/or Luke Fritz (Finance)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
245	Kristina Gilmore (attorney) and/or Bud Cranor (PIO/Council Support Services) and/or Luke Fritz (Finance)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
246	Kristina Gilmore (attorney) and/or Bud Cranor (PIO/Council Support Services) and/or Luke Fritz (Finance)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
249	Kristina Gilmore (attorney) and/or Bud Cranor (PIO/Council Support Services) and/or Luke Fritz (Finance)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
251	Kristina Gilmore (attorney) and/or Bud Cranor (PIO/Council Support Services) and/or Luke Fritz (Finance)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
252	Kristina Gilmore (attorney) and/or Bud Cranor (PIO/Council Support Services) and/or Luke Fritz (Finance)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
267	Kristina Gilmore (attorney) and/or Bud Cranor (PIO/Council Support Services) and/or Luke Fritz (Finance)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
647		Employer Identification Number for tax return, possible SS#	Confidential personal information - Employer Identification Number	Donrey of Nevada, Inc. v. Bradshaw, 106 Nev. 630 (1990)	Redaction
669		Employer Identification Number for tax return, possible SS#	Confidential personal information - Employer Identification Number	Donrey of Nevada, Inc. v. Bradshaw, 106 Nev. 630 (1990)	Redaction
1362	David Cherry (PIO) Liz Trosper (agent), Robert Murnane (City Manager, Javier Trujillo (Public Affairs)	Electronic correspondence containing mental impressions and strategy of City management regarding preparation of public statement and comments on draft statement	Deliberative Process Privilege	DR Partners v. Board of County Com'rs of Clark County, 116 Nev. 616 (2000)	
1363	David Cherry (PIO) Liz Trosper (agent), Robert Murnane (City Manager, Javier Trujillo (Public Affairs)	Electronic correspondence containing mental impressions and strategy of City management regarding preparation of public statement and comments on draft statement	Deliberative Process Privilege	DR Partners v. Board of County Com'rs of Clark County, 116 Nev. 616 (2000)	
1364	David Cherry (PIO) Liz Trosper (agent), Robert Murnane (City Manager, Javier Trujillo (Public Affairs)	Electronic correspondence containing mental impressions and strategy of City management regarding preparation of public statement and comments on draft statement	Deliberative Process Privilege	DR Partners v. Board of County Com'rs of Clark County, 116 Nev. 616 (2000)	
1365	David Cherry (PIO) Liz Trosper (agent), Robert Murnane (City Manager, Javier Trujillo (Public Affairs)	Electronic correspondence containing mental impressions and strategy of City management regarding preparation of public statement and comments on draft statement	Deliberative Process Privilege	DR Partners v. Board of County Com'rs of Clark County, 116 Nev. 616 (2000)	
1366	David Cherry (PIO) Liz Trosper (agent), Robert Murnane (City Manager, Javier Trujillo (Public Affairs)	Electronic correspondence containing mental impressions and strategy of City management regarding preparation of public statement and comments on draft statement	Deliberative Process Privilege	DR Partners v. Board of County Com'rs of Clark County, 116 Nev. 616 (2000)	
1367	David Cherry (PIO) Liz Trosper (agent), Robert Murnane (City Manager, Javier Trujillo (Public Affairs)	Electronic correspondence containing mental impressions and strategy of City management regarding preparation of public statement and comments on draft statement	Deliberative Process Privilege	DR Partners v. Board of County Com'rs of Clark County, 116 Nev. 616 (2000)	

Doc #	Email senders and recipients	Description	Basis for Redaction/Non-Production	Authority	Redaction
1807	Kristina Gilmore (attorney), Brian Reeve (attorney) David Cherry (PIO), Javier Trujillo (Public Affairs)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction
1808	Kristina Gilmore (attorney), Brian Reeve (attorney) David Cherry (PIO), Javier Trujillo (Public Affairs)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction
1809	Kristina Gilmore (attorney), Brian Reeve (attorney) David Cherry (PIO), Javier Trujillo (Public Affairs)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction
2485	Josh Reid (attorney) and Gerri Schroeder (Council)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction
2487	Josh Reid (attorney) and Gerri Schroeder (Council)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction
2491	Josh Reid (attorney) and Gerri Schroeder (Council)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re HAD	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction
3352		Internal report containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction
3862	David Cherry (PIO) Liz Trosper (agent), Robert Murnane (City Manager, Javier Trujillo (Public Affairs)	Electronic correspondence containing mental impressions and strategy of City management regarding preparation of public statement and comments on draft statement	Deliberative Process Privilege	DR Partners v. Board of County Com'rs of Clark County, 116 Nev. 616 (2000)	
3864	David Cherry (PIO) Liz Trosper (agent), Robert Murnane (City Manager, Javier Trujillo (Public Affairs)	Electronic correspondence containing mental impressions and strategy of City management regarding preparation of public statement and comments on draft statement	Deliberative Process Privilege	DR Partners v. Board of County Com'rs of Clark County, 116 Nev. 616 (2000)	
3866	David Cherry (PIO) Liz Trosper (agent), Robert Murnane (City Manager, Javier Trujillo (Public Affairs)	Electronic correspondence containing mental impressions and strategy of City management regarding preparation of public statement and comments on draft statement	Deliberative Process Privilege	DR Partners v. Board of County Com'rs of Clark County, 116 Nev. 616 (2000)	
4016	Kristina Gilmore (attorney), Brian Reeve (attorney) David Cherry (PIO), Javier Trujillo (Public Affairs)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
4056	Kristina Gilmore (attorney), Brian Reeve (attorney) David Cherry (PIO), Javier Trujillo (Public Affairs)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
4057	Kristina Gilmore (attorney), Brian Reeve (attorney) David Cherry (PIO), Javier Trujillo (Public Affairs)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
4058	Kristina Gilmore (attorney), Brian Reeve (attorney) David Cherry (PIO), Javier Trujillo (Public Affairs)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
4078	Kristina Gilmore (attorney), Brian Reeve (attorney) David Cherry (PIO), Javier Trujillo (Public Affairs)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
4083	Kristina Gilmore (attorney), Brian Reeve (attorney) David Cherry (PIO), Javier Trujillo (Public Affairs)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
4084	Kristina Gilmore (attorney), Brian Reeve (attorney) David Cherry (PIO), Javier Trujillo (Public Affairs)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	

Doc #	Email senders and recipients	Description	Basis for Redaction/Non-Production	Authority	Redaction
4090	Kristina Gilmore (attorney), Brian Reeve (attorney) David Cherry (PIO), Javier Trujillo (Public Affairs)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
4091	Kristina Gilmore (attorney), Brian Reeve (attorney) David Cherry (PIO), Javier Trujillo (Public Affairs)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
4092	Kristina Gilmore (attorney), Brian Reeve (attorney) David Cherry (PIO), Javier Trujillo (Public Affairs)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
4093	Kristina Gilmore (attorney), Brian Reeve (attorney) David Cherry (PIO), Javier Trujillo (Public Affairs)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
4094	Kristina Gilmore (attorney), Brian Reeve (attorney) David Cherry (PIO), Javier Trujillo (Public Affairs)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
4095	Kristina Gilmore (attorney), Brian Reeve (attorney) David Cherry (PIO), Javier Trujillo (Public Affairs)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
4944	Kathy Blaha (PIO), Joanne Wershba (City staff), Ray Everhart (City staff)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction
4954	Kathy Blaha (PIO), Joanne Wershba (City staff), Ray Everhart (City staff)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction
4955	Kathy Blaha (PIO), Joanne Wershba (City staff), Ray Everhart (City staff)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction
5249		Internal report containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction
5253		Internal report containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction
5695		Internal report containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction
6759		Internal status report prepared by attorney containing legal thoughts, impressions, and advice concerning legal matters	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
6882	Kristina Gilmore (attorney), Josh Reid (attorney), Cheryl Navitskis (City Attorney Staff)	Electronic correspondence containing internal status report prepared by attorney containing legal thoughts, impressions, and advice concerning legal matters	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
6883		Internal status report prepared by attorney containing legal thoughts, impressions, and advice concerning legal matters	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
6958	Kristina Gilmore (attorney), Josh Reid (attorney), Cheryl Navitskis (City Attorney Staff)	Electronic correspondence containing internal status report prepared by attorney containing legal thoughts, impressions, and advice concerning legal matters	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
6959		Internal status report prepared by attorney containing legal thoughts, impressions, and advice concerning legal matters	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
6978	Kristina Gilmore (attorney) and/or Bud Cranor (PIO/Council Support Services)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	

Doc #	Email senders and recipients	Description	Basis for Redaction/Non-Production	Authority	Redaction
7009	Kristina Gilmore (attorney), Laura Kopanski (paralegal) and/or Luke Fritz (Finance)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction
7019	Kristina Gilmore (attorney) and/or Bud Cranor (PIO/Council Support Services)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
7059	Kristina Gilmore (attorney) and/or Bud Cranor (PIO/Council Support Services)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
7127	Kristina Gilmore (attorney) and/or Bud Cranor (PIO/Council Support Services)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
7199	Kristina Gilmore (attorney) and/or Bud Cranor (PIO/Council Support Services)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
7406		Internal status report prepared by attorney containing legal thoughts, impressions, and advice concerning legal matters	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
7496	Karina Milana (Public relations) and Kristina Gilmore (attorney)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
7507	Kristina Gilmore (attorney) and/or Bud Cranor (PIO/Council Support Services) and/or Luke Fritz (Finance)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract terms	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
7509	Karina Milana (Public relations) and Kristina Gilmore (attorney)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
7631	Karina Milana (Public relations) and attorney	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
7636	Karina Milana (Public relations),Kristina Gilmore (attorney) and Laura Kopanski (paralegal)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
7676		Correspondence between employee and supervisor relating to personal medical information of employee	Confidential personal medical information	Donrey of Nevada, Inc. v. Bradshaw, 106 Nev. 630 (1990)	
7678		Correspondence between employee and supervisor relating to personal medical information of employee	Confidential personal medical information	Donrey of Nevada, Inc. v. Bradshaw, 106 Nev. 630 (1990)	Redaction
7698	Karina Milana (Public relations) and Kristina Gilmore (attorney)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
7703	Karina Milana (Public relations) and Kristina Gilmore (attorney)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
7717	Laura Shearin (City Manager's Office), Jennifer Fennema (Human Resources)	Electronic correspondence containing mental impressions and strategy of City management regarding changes to organizational structure within the City Manager's Office	Deliberative Process Privilege	DR Partners v. Board of County Com'rs of Clark County, 116 Nev. 616 (2000)	

Doc #	Email senders and recipients	Description	Basis for Redaction/Non-Production	Authority	Redaction
7718		Draft document reflecting deliberations, thoughts, and impressions concerning changes to organizational structure within the City Manager's Office	Deliberative Process Privilege	DR Partners v. Board of County Com'rs of Clark County, 116 Nev. 616 (2000)	
12153	Cheryl Navitskis (City Attorney staff) and Josh Reid (attorney)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
12154	Cheryl Navitskis (City Attorney staff) and Josh Reid (attorney)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
12156	Cheryl Navitskis (City Attorney staff) and Josh Reid (attorney)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re Trosper contract	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
12184	Michael Naseem (City Attorney staff) and Josh Reid (attorney)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re LVRJ Trosper records request	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
12185	Michael Naseem (City Attorney staff) and Josh Reid (attorney)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re LVRJ Trosper records request	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
12189	Michael Naseem (City Attorney staff) and Josh Reid (attorney)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re LVRJ Trosper records request	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	
12328	Sally Galati (attorney) and Rory Robinson (attorney)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction
13422	Kim Becker (PIO), David Cherry (PIO), Javier Trujillo (Public Relations), Coery Clark (Parks and Recreation)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re presentation on fuel indexing	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction
13423	Kim Becker (PIO), David Cherry (PIO), Javier Trujillo (Public Relations), Coery Clark (Parks and Recreation), Shari Ferguson (Parks and Recreation), Adam Blackmore (Parks and Recreation)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re presentation on fuel indexing	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction
13425	Kim Becker (PIO), David Cherry (PIO), Javier Trujillo (Public Relations), Coery Clark (Parks and Recreation)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re presentation on fuel indexing	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction
13428	Kim Becker (PIO), David Cherry (PIO), Javier Trujillo (Public Relations), Coery Clark (Parks and Recreation), Shari Ferguson (Parks and Recreation), Adam Blackmore (Parks and Recreation)	Electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional legal services re presentation on fuel indexing	Attorney Client Privilege/Work Product Doctrine	NRS 49.095	Redaction

EXHIBIT F

EXHIBIT F

PET
MARGARET A. MCLETCHIE, Nevada Bar No. 10931
ALINA M. SHELL, Nevada Bar No. 11711
MCLETCHIE SHELL LLC
701 East Bridger Avenue, Suite. 520
Las Vegas, NV 89101
Telephone: (702)-728-5300
Email: alina@nvlitigation.com
Counsel for Petitioner

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL,

Petitioner,

vs.

CITY OF HENDERSON,

Respondent.

Case No.: A-16-747289-W

Dept. No.: XVIII

AMENDED PUBLIC RECORDS ACT APPLICATION PURSUANT TO NRS § 239.001/ PETITION FOR WRIT OF MANDAMUS/ APPLICATION FOR DECLARATORY AND INJUNCTIVE RELIEF

EXPEDITED MATTER PURSUANT TO NEV. REV. STAT. § 239.011

COMES NOW Petitioner the Las Vegas Review-Journal (the "Review-Journal"), by and through its undersigned counsel, and hereby brings this Amended Application Pursuant to Nev. Rev. Stat. § 239.011, Petition for Writ of Mandamus, and Application for Declaratory and Injunctive Relief ("Amended Petition"), ordering the City of Henderson to provide Petitioner access to public records, and providing for declaratory and injunctive relief. Petitioner also requests an award for all fees and costs associated with its efforts to obtain withheld and/or improperly redacted public records as provided for by Nev. Rev. Stat. § 239.011(2). Further, the Review-Journal respectfully asks that this matter be expedited pursuant to Nev. Rev. Stat. § 239.011(2).

///

///

Petitioner hereby alleges as follows:

NATURE OF ACTION

1. Petitioner brings this application for relief with regards to Henderson's failure to comply with Nevada's Public Records Act pursuant to Nev. Rev. Stat. § 239.011. *See also Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 884, 266 P.3d 623, 630, n.4 (2011).

2. Petitioner also brings this application for declaratory relief pursuant to Nev. Rev. Stat. § 30.30, § 30.070, and § 30.100.

3. Petitioner also requests injunctive relief pursuant to Nev. Rev. Stat. § 33.010.

4. The Review Journal's application to this court is the proper means to secure Henderson's compliance with the Nevada Public Records Act. *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 884, 266 P.3d 623, 630 n.4 (2011); *see also DR Partners v. Bd. Of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) (citing *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990)) (a writ of mandamus is the appropriate procedural mechanism through which to compel compliance with a request issued pursuant to the NPRA); *see also* Nev. Rev. Stat. § 34.160, § 34.170.

5. Petitioner is entitled to an expedited hearing on this matter pursuant to Nev. Rev. Stat. § 239.011, which mandates that "the court shall give this matter priority over other civil matters to which priority is not given by other statutes."

PARTIES

6. Petitioner, the Review-Journal, a daily newspaper, is the largest newspaper in Nevada. It is based at 1111 W. Bonanza Road, Las Vegas, Nevada 89125.

7. Respondent City of Henderson ("Henderson") is an incorporated city in the County of Clark, Nevada. Henderson is subject to the Nevada State Public Records Act pursuant to Nev. Rev. Stat. § 239.005(b).

///

///

MCLETCHIE SHELL
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

JURISDICTION AND VENUE

8. This Court has jurisdiction pursuant to Nev. Rev. Stat. § 239.011, as the court of Clark County where all relevant public records sought are held.

9. Venue is proper in the Eighth Judicial District Court of Nevada pursuant to Nev. Rev. Stat. § 239.011. All parties and all relevant actions to this matter were and are in Clark County, Nevada.

10. This court also has jurisdiction and the power to issue declaratory relief pursuant to Nev. Rev. Stat. § 30.030, which provides in pertinent part that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed…"

STANDING

11. Petitioner has standing to pursue this expedited action pursuant to Nev. Rev. Stat. § 239.010 because public records it has requested from Henderson have been unjustifiably withheld and Henderson is improperly attempting to charge fees for the collection and review of potentially responsive documents, which is not permitted by law.

FACTS

12. On or around October 4, 2016, the Las Vegas Review-Journal sent Henderson a request pursuant to the Nevada Public Records Act, Nev. Rev. Stat. § 239.001 *et seq.* (the "NPRA") seeking certain documents dated from January 1, 2016 pertaining to Trosper Communications and its principal, Elizabeth Trosper (the "Request"). A true and correct copy of the Request is attached as Exhibit 1. The request was directed to Henderson's Chief Information Officer and the Director of Intergovernmental Relations. (*See* Exh. 1.)

13. Trosper Communications is a communications firm that has a contract with the City of Henderson and also has assisted with the campaigns of elected officials in Henderson.

14. On October 11, 2016, Henderson provided a partial response ("Response"), a true and correct copy of which is attached as Exhibit 2.

15. This Response fails to provide timely notice regarding any specific

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

confidentiality or privilege claim that would limit Henderson in producing (or otherwise making available) all responsive documents.

16. Instead, in its Response, Henderson indicated that it was "in process of searching for and gathering responsive e-mails and other documents," but that "[d]ue to the high number of potentially responsive documents that meet your search criteria (we have approximately 5,566 emails alone) and the time required to review them for privilege and confidentiality, we estimate that your request will be completed in three weeks from the date we commence our review." (Exh. 2.)

17. In addition to stating that it would need additional time, Henderson demanded payment of almost $6,000.00 to continue its review. It explained the basis of the demand as follows:

> The documents you have requested will require extraordinary research and use of City personnel. Accordingly, pursuant to NRS 239.052, NRS 239.055, and Henderson Municipal Code 2.47.085, **we estimate that the total fee to complete your request will be $5,787.89.** This is calculated by averaging the actual **hourly rate of the two Assistant City Attorneys** who will be undertaking the review of potentially responsive documents ($77.99) and multiplying that rate by the total number of hours it is estimated it will take to **review the emails and other documents** (approximately 5,566 emails divided by 75 emails per hour equals 74.21 hours).

(Exh. 2 (emphasis added).)

18. Thus, Henderson has improperly demanded that the Review-Journal pay its assistant city attorneys to review documents to determine whether they could even be released. The Response made clear that Henderson would not continue searching for responsive documents and reviewing them for privilege without payment, and demanded a "deposit" of $2,893.94, explaining that this was its policy:

> Under the City's Public Records Policy, a fifty percent deposit of fees is required before we can start our review. Therefore, please submit a check payable to the City of Henderson in the amount of $2,893.94. **Once the City receives the deposit, we will begin processing your request.**

(*Id.* (emphasis added).)

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

19. A copy of Henderson's Public Records Policy (the "Policy"), available online through Henderson's official city website, is attached as Exhibit 3. Part V of that policy, Henderson charges fees for any time spent in excess of thirty minutes "by City staff or any City contractor" to review the requested records "in order to determine whether any requested records are exempt from disclosure, to segregate exempt records, to supervise the requestor's inspection of original documents, to copy records, to certify records as true copes and to send records by special or overnight methods such as express mail or overnight delivery." (Exh. 3 at p. 3.)

20. Henderson informed the Review-Journal that it would not release any records until the total final fee was paid. The Response also states:

> When your request is completed, we will notify you and, once the remained [sic] of the fee is received, the records and any privilege log will be released to you.

(*Id.*)

21. Even if the NPRA allowed for fees in this case, which it does not, the fee calculation used by Henderson is inconsistent with the statute on which it relies, which caps fees at fifty (50) cents a page. *See* Nev. Rev. Stat. § 239.055(1).

22. The Review-Journal is in an untenable position. Henderson has demanded a huge sum just to meaningfully respond to the Request, and has made clear that it may not even provide the Review-Journal with the documents it was seeking. Thus, Henderson has demanded Review-Journal to pay for review of documents it may never receive, without even knowing the extent to which Henderson would fulfill its request and actually comply with the NPRA.

23. Henderson's practice of charging impermissible fees deters NPRA requests from Review-Journal reporters.

24. On November 29, 2016, after an informal effort to resolve this dispute with Henderson failed, the Review-Journal initiated this action and filed a Petition for Writ of Mandamus with this Court.

MCLETCHIE SHELL
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

25. Subsequently, counsel for the Review-Journal and attorneys from the City Attorneys' Office conferred extensively regarding the Review-Journal's NPRA request.

26. On December 20, 2016, Henderson provided the Review-Journal with an initial log of documents it was redacting or withholding. (A true and correct copy attached as Exh. 4.)

27. Henderson also agreed to make the requested documents available for inspection free of charge. The subsequent inspection by Review-Journal reporter Natalie Bruzda took place on over the course of several days.

28. After requests from the undersigned, Henderson provided an additional privilege log on January 9, 2017. (A true and correct copy attached as Exh. 5) In that log, Henderson provided a description of the documents being withheld or redacted, and the putative basis authority for withholding or redaction. (*Id.*) The log also indicated who sent and received the emails responsive to the NPRA request, but in instances where the sender or recipient was a city attorney or legal staff, the log did not identify the attorney or staff person. (*Id.*)

29. Undersigned counsel for the Review-Journal, after reviewing the privilege log provided on January 9, 2017, asked Henderson to revise its log to include the names of the attorneys and legal staff, and to also include the identities of all recipients of the communications.

30. On January 10, 2017, Henderson provided the Review-Journal with a revised privilege log (the "Revised Log", a true and correct copy attached as Exh. 6), as well as a number of redacted documents corresponding to the log (True and correct copies attached as Exh. 7). In the Revised Log, Henderson included a description of the senders and recipients of withheld or redacted documents. As discussed below, however, Henderson's stated reasons for withholding or redacting the documents requested by the Review-Journal are insufficient or inappropriate.

///

MCLETCHIE SHELL
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

LEGAL AUTHORITY

General

31. The NPRA reflects that records of governmental entities belong to the public in Nevada. Nev. Rev. Stat. § 239.010(1) mandates that, unless a record is confidential, "all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person, and may be fully copied..." The NPRA reflects specific legislative findings and declarations that "[its purpose is to foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law" and that it provisions "must be construed liberally to carry out this important purpose."

Fees

32. The NPRA does not allow for fees to be charged for a governmental entity's privilege review.

33. The only fees permitted are set forth in Nev. Rev. Stat. § 239.052 and Nev. Rev. Stat. § 239.055(1).

34. Nev. Rev. Stat. § 239.052(1) provides that "a governmental entity may charge a fee for providing a **copy** of a public record." (Emphasis added.)

35. Nev. Rev. Stat. § 239.055(1), the provision Henderson is relying on for its demand for fees, does allow for fees for "extraordinary use, but it limits its application to extraordinary circumstances and caps fees at 50 cents per page." It provides that "... if a request for a copy of a public record would require a governmental entity to make extraordinary use of its personnel or technological resources, the governmental entity may, in addition to any other fee authorized pursuant to this chapter, **charge a fee not to exceed 50 cents per page** for such extraordinary use...."

36. Interpreting Nev. Rev. Stat. § 239.055 to limit public access by requiring requesters to pay public entities for undertaking a review for responsive documents and confidentiality would be inconsistent with the plain terms of the statute and with the mandate to interpret the NPRA broadly.

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

37. Further, allowing a public entity to charge a requester for legal fees associated with reviewing for confidentiality is impermissible because "[t]he public official or agency bears the burden of establishing the existence of privilege based upon confidentiality." *DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000).

38. Even if Respondent could, as it has asserted, charge for its privilege review as "extraordinary use," such fees would be capped at 50 cents per page. Nev. Rev. Stat. § 239.055(1).

39. Henderson Municipal Code 2.47.085 indicates that if a public records request requires "extraordinary use of personnel or technology," Henderson charges $19.38 to $83.15 per hour (charged at the actual hourly rate of the position(s) required to conduct research. *See* HMC § 2.47.085. This conflicts with the NPRA's provision that a governmental entity may only "charge a fee not to exceed 50 cents per page" for "extraordinary use of its personnel or technological resources." Nev. Rev. Stat. § 239.055(1)).

Claims of Confidentiality; Burden to Establish Confidentiality

40. The Supreme Court of Nevada has repeatedly held that a court considering a claim of confidentiality regarding a public records request starts from "...the presumption that all government-generated records are open to disclosure." *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011); *see also Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 234 P.3d 922 (2010); *DR Partners v. Board of County Comm'rs*, 116 Nev. 616, 6 P.3d 465 (2000). The Supreme Court of Nevada has further held that when refusing access to public records on the basis of claimed confidentiality, a government entity bears the burden of proving "...that its interest in nondisclosure clearly outweighs the public's interest in access," and that the "...state entity cannot meet this burden with a non-particularized showing, or by expressing a hypothetical concern." *Reno Newspapers, Inc. v. Gibbons,* 127 Nev. 873, 880 266 P.3d 623, 628.

41. The NPRA provides that a governmental entity must provide timely

MCLETCHIE SHELL
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

and specific notice if it is denying a request because the entity determines the documents sought are confidential. Nev. Rev. Stat. § 239.0107(1)(d) states that, within five (5) business days of receiving a request,

> [i]f the governmental entity must deny the person's request because the public book or record, or a part thereof, is confidential, provide to the person, in writing: (1) Notice of that fact; and (2) A citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential.

42. In *Reno Newspapers, Inc. v. Gibbons*, the Nevada Supreme Court held that a *Vaughn* index is not required when the party that requested the documents has enough information to fully argue for the inclusion of documents. 127 Nev. 873, 881-82 (Nev. 2011). The Nevada Supreme Court has also held that if a party has enough facts to present "a full legal argument," a *Vaughn* index is not needed. *Reno Newspapers*, 127 Nev. at 882. It is important to note that a *Vaughn* index is not required in every NPRA case. *Id.* However, the Nevada Supreme Court held that a party requesting documents under NPRA is entitled to a log, unless the state entity demonstrates that the requesting party has enough facts to argue the claims of confidentiality. *Id.* at 883. A log provided by a state entity should contain a general factual description of each record and a specific explanation for nondisclosure. *Id.* In a footnote, the Nevada Supreme Court notes that a log should provide as much detail as possible, without compromising the alleged secrecy of the documents. *Id.* at n. 3. Finally, attaching a string cite to a boilerplate denial is not sufficient under the NPRA. *Id.* at 885.

CLAIM FOR RELIEF: DECLARATORY AND INJUNCTIVE RELIEF

43. Petitioner re-alleges and incorporates by reference each and every allegation contained in paragraphs 1-42 with the same force and effect as if fully set forth herein.

44. Respondent has violated the letter and the spirit of Nev. Rev. Stat. § 239.010 by refusing to even determine whether responsive documents exist and whether they are confidential unless the Las Vegas Review-Journal tenders an exorbitant sum.

MCLETCHIE SHELL
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

45. The NPRA does not permit the fees Henderson is demanding.

46. The NPRA permits governmental entities to charge a fee of up to 50 cents per page for "extraordinary use" of personnel or technology to produce copies of records responsive to a public records request. Nev. Rev. Stat. § 239.055(1). Henderson's Public Records Policy, however, requires requesters to pay a fee of up to $83.15 per hour just to find responsive records and review them for privilege.

47. Henderson either does not understand its obligations to comply with the law or it is intentionally disregarding the plain terms of the NPRA to discourage reporters from accessing public records.

48. Henderson is legally obligated to undertake a search and review of responsive —free of charge—when it receives an NPRA request. It also has the burden of establishing confidentiality, and is required to provide specific notice of any confidentiality claims within five days. Yet it has demanded payment for staff time and attempted to condition its compliance with NPRA on payment of an exorbitant sum.

49. Henderson demands payment not for providing copies, but simply for locating documents responsive to a request—*and then for having its attorneys determine whether documents should be withheld.* Not only is this interpretation belied by the plain terms of the NPRA[1], requiring a requester to pay a public entity's attorneys to withhold documents would be an absurd result. *See S. Nevada Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (noting that courts must "interpret provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of those statutes and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent") (quotation omitted); *see also Cal. Commercial Enters. v. Amedeo Vegas I, Inc.*, 119 Nev. 143, 145, 67 P.3d 328, 330 (2003) ("When a statute is not ambiguous, this court has consistently held that we are not empowered to construe the statute beyond its plain meaning, unless the law as stated would yield an absurd result.")

[1] *See Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) ("It is a fundamental canon of statutory construction" that, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.") (quotation omitted).

50. Declaratory relief is appropriate to address, *inter alia*, the rights of the parties and the validity of Henderson Municipal Code 2.47.085 and the Policy. Nev. Rev. Stat. § 30.030.; *see also* Nev. Rev. Stat. § 30.040; Nev. Rev. Stat. § 30.070, and Nev. Rev. Stat. § 30.100.

51. Nev. Rev. Stat. § 33.010 also authorizes this Court to grant injunctive relief under the following circumstances, which are present in this case:

> When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually; 2. When it shall appear by the complaint or affidavit that the commission or continuance of some act, during the litigation, would produce great or irreparable injury to the plaintiff, and 3. When it shall appear, during the litigation, that the defendant is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual.

CLAIM FOR RELIEF: WRIT OF MANDAMUS

52. Petitioner re-alleges and incorporates by reference each and every allegation contained in paragraphs 1-51 with the same force and effect as if fully set forth herein.

53. A writ of mandamus is necessary to compel Respondent's compliance with the NPRA. Henderson is continuing to refuse to make documents available for either inspection or copying without having met its burden under the NPRA. The Review-Journal should be provided with the records it has requested regarding Trosper Communications pursuant to the NPRA. The records sought are subject to disclosure, and Respondent has not met its burden of establishing otherwise. The Revised Log does not satisfy Respondent's burden

54. Thus, a writ of mandate should issue requiring Henderson to make the documents available in their entirety and without redactions (other than documents which have been redacted to protect personal information, which the Review-Journal does not object to). *See Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990)) (a

MCLETCHIE SHELL
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

writ of mandamus is the appropriate procedural remedy to compel compliance with the NPRA); *see also* Nev. Rev. Stat. § 34.160, § 34.170.

WHEREFORE, the Petitioner prays for the following relief:

1. That the court handle this matter on an expedited basis as mandated by NRS 239.011;

2. That this court issue a writ of mandamus requiring that Defendant City of Henderson immediately make available complete copies of all records requested but previously withheld and/or redacted (other than documents that were redacted to protect personal identifiers);

3. Injunctive relief prohibiting Defendant City of Henderson from applying the provisions contained in Henderson Municipal Code 2.47.085 and the Policy to demand or charge fees in excess of those permitted by the NPRA;

4. Declaratory relief stating that Henderson Municipal Code 2.47.085 and the Policy are invalid to the extent they provide for fees in excess of those permitted by the NPRA;

///

///

///

///

///

///

///

///

///

///

///

///

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

5. Declaratory relief limiting Henderson to charging fees for "extraordinary fees, in those circumstances that permit it, to fifty cents per page and limiting Henderson from demanding fees for attorney review.

6. Reasonable costs and attorney's fees; and

7. Any further relief the Court deems appropriate.

DATED this the 8th day of February, 2017.

Respectfully submitted,

By: _____

Margaret A. McLetchie, Nevada Bar No. 10931
Alina M. Shell, Nevada Bar No. 11711
MCLETCHIE SHELL LLC
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
(702) 728-5300
maggie@nvlitigation.com
Counsel for Petitioner

MCLETCHIE SHELL
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

MCLETCHIE SHELL
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

CERTIFICATE OF SERVICE

Pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, I hereby certify that on this 8th day of February, 2017, I did cause a true copy of the foregoing AMENDED PUBLIC RECORDS ACT APPLICATION PURSUANT TO NRS § 239.001/ PETITION FOR WRIT OF MANDAMUS/ APPLICATION FOR DECLARATORY AND INJUNCTIVE RELIEF EXPEDITED MATTER PURSUANT TO NEV. REV. STAT. § 239.011 in *Las Vegas Review-Journal. v. City of Henderson.,* Clark County District Court Case No. A-16-747289-W, to be served electronically using the Wiznet Electronic Service system, to all parties with an email address on record.

Pursuant to NRCP 5(b)(2)(B) I hereby further certify that on the 8th day of February, 2017, I mailed a true and correct copy of the foregoing AMENDED PUBLIC RECORDS ACT APPLICATION PURSUANT TO NRS § 239.001/ PETITION FOR WRIT OF MANDAMUS/ APPLICATION FOR DECLARATORY AND INJUNCTIVE RELIEF EXPEDITED MATTER PURSUANT TO NEV. REV. STAT. § 239.011 by depositing the same in the United States mail, first-class postage pre-paid, to the following:

Josh M. Reid, City Attorney
Brandon P. Kemble, Asst. City Attorney
Brian R. Reeve, Asst. City Attorney
CITY OF HENDERSON'S ATTORNEY OFFICE
240 Water Street, MSC 144
Henderson, NV 89015
Counsel for Respondent, City of Henderson

An Employee of MCLETCHIE SHELL LLC

EXHIBIT G

EXHIBIT G

Electronically Filed
04/05/2017 12:01:02 PM

RTRAN

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Plaintiff, vs. CITY OF HENDERSON, Defendant.	CASE NO. A-16-747289-W DEPT. XVIII

BEFORE THE HONORABLE J. CHARLES THOMPSON, DISTRICT COURT JUDGE

THURSDAY, MARCH 30, 2017

TRANSCRIPT OF PROCEEDINGS RE:

PETITION FOR WRIT OF MANDAMUS

APPEARANCES:

For the Plaintiff: ALINA SHELL, ESQ.,
MARGARET A. McLETCHIE, ESQ.

For the Defendant: DENNIS L. KENNEDY, ESQ.,
JOSH M. REID, ESQ.,
BRIAN R. REEVE, ESQ.

RECORDED BY: JENNIFER P. GEROLD, COURT RECORDER

LAS VEGAS, NEVADA; THURSDAY, MARCH 30, 2017

[Proceeding commenced at 8:57 a.m.]

THE COURT: Page five, the Las Vegas Review-Journal versus Henderson. Okay. Counsel, for the record.

MS. SHELL: Good morning, Your Honor. Alina Shell and Margaret McLetchie on behalf of the Review-Journal.

MS. McLETCHIE: Good morning, Your Honor.

MR. KENNEDY: And for the Defendant, City of Henderson, Dennis Kennedy along with City Attorney Josh Reid and Assistant City Attorney Brian Reeve.

MR. REEVE: Good morning, Your Honor.

THE COURT: Okay. This is the Review-Journal's petition.

MS. SHELL: Yes, Your Honor. Thank you. In its opposition to our memorandum, Your Honor, the City of Henderson has thrown up a lot of red herrings that it hopes Your Honor might catch onto, but really what is important in this case and what is central to this Court's consideration is the Nevada Public Records Act and what -- and the intent of the Nevada Public Records Act. And that is to ensure that the public has easy access to government records.

What we have here is an issue where the City of Henderson has enacted an ordinance and is trying to enforce an ordinance against the Review-Journal that is at conflict with the NPRA. Specifically, the NPRA provides that, as I said, the public should have easy access to records. And that the -- that to the extent

that there's -- are any charges that attach to a request for records, those charges only attach to providing copies or to extraordinary use in providing those copies.

What we have here is not a charge that the City wants to offer up for providing copies. What they are trying to charge the Review-Journal for is a privilege review. And that, Your Honor, is at odds with the -- with the NPRA. It's not the -- and the reason that it's at odds with the NPRA, Your Honor, is because it's not the public's job to pay for a municipality like the City of Henderson to conduct a privilege review.

Now, one of the issues that the -- that the City of Henderson has presented is that this is a moot issue. Now, granted, we have -- as we've acknowledged in our papers and as discussed at length in the response by the City of Henderson, we put forth this public records request. When we received the notice from the City of Henderson that it wanted to charge these -- the Review-Journal almost $6,000, not even to provide copies of the documents, but just to tell us whether they would even provide the documents for the copies.

Ms. McLetchie, my law partner who is sitting with me at counsel table, called the City of Henderson and attempted to work this out. We attempted to come to an arrangement. We attempted to ask them to reconsider the ordinance in the policy that they have in place that is -- that they're relying on to charge this frankly serious fee just to get copies of records. Just to -- not even to

get the copies, just to tell us if they'll give us the copies.

When Ms. McLetchie spoke to the City of Henderson, they made their position very clear, and indeed as indicated in Exhibit D to the City's response, they said, we believe that this policy is proper, but it said the City is interested in having the Courts provide clarity to the meaning and application of NRS 239.005 as clear and concise guidance on these provisions would greatly benefit both local governments.

So although we tried to work this out, once it became clear that they're -- that the City of Henderson was not going to rescind its policy and was not going to rescind its request for this fee to conduct a privilege review, this litigation was started.

After we started the litigation, Henderson and Ms. McLetchie -- Ms. McLetchie had several phone calls -- I wasn't on the calls, but I got to hear quite a few of them where she was speaking sometimes to two or three attorneys at once trying to resolve this. Eventually in December, they permitted our clients, the reporter, to review the documents. They've never provided copies. I mean, this is part of the --

THE COURT: Did you ask for copies?

MS. SHELL: We have asked for copies and we've asked --

THE COURT: Even copies of the ones that are not -- that they claim privilege or have redacted some of them.

MS. SHELL: Correct.

THE COURT: And I think it's your Exhibit 7 to your petition; is that right?

MS. SHELL: That includes some documents that they provided, Your Honor.

THE COURT: I think your Exhibit 7 is the ones that we are primarily in dispute; is that right?

MS. SHELL: I'm sorry, Your Honor. What was that?

THE COURT: Your Exhibit 7 to --

MS. SHELL: Yes --

THE COURT: -- those are the ones that you -- that are primarily in dispute at this point; is that right?

MS. SHELL: That is part of the issue. There are still copies that we've -- our reporter has reviewed some copies.

Now, they provided these -- Exhibit 7 were provided so that we can review and assess the redactions that Henderson had done.

THE COURT: All right. But --

MS. SHELL: So there are still copies of documents.

THE COURT: But when your reporter went to the City and reviewed them I guess online; is that right? Some computer or something?

MS. SHELL: They had made a computer available specifically for just the review.

THE COURT: And did your reporter ask for copies of any of the documents your reporter saw?

MS. SHELL: She did not because we still had this issue -- or Ms. McLetchie may have an answer to that.

THE COURT: I think that they'll give those to you or I thought that they would have.

MR. KENNEDY: Just for the record, that's correct. No copies were requested or made.

THE COURT: Okay.

MS. McLETCHIE: Your Honor, if I may so just to clarify what we originally requested you have two rights under the Nevada Public Records Act. You can request copies or you can request an in-person inspection. We requested copies. What Mr. Reid offered and what I accepted as an interim solution while this Court was resolving issues, was to allow an in-person inspection.

Now, whether or not they would have made one or two copies available at that inspection is frankly not -- is frankly not the point, Your Honor. The point is that we wanted copies and they said in order --

THE COURT: Do you still want the copies?

MS. McLETCHIE: We would still have -- we would still like, without the exorbitant charge, a USB drive with the documents requested, yes, Your Honor.

THE COURT: If you wanted copies and they gave -- there's 69,000 pages according to what I read.

MR. KENNEDY: Right.

THE COURT: If you want 69,000 pages, I guess they can run

that off.

MS. McLETCHIE: Well, Your Honor, the usual practice --

THE COURT: Do you want that?

MS. McLETCHIE: Your Honor, at this point -- at this point we don't need 69,000 pages printed out, but what -- what my reporter wanted originally rather than have to go and spend almost a week, I think, at Henderson's office and to review under difficult circumstances, what we had asked for was the right to inspect --

THE COURT: But you still want the copies?

MS. McLETCHIE: -- copies. We -- we that issue isn't moot, Your Honor, because we requested copies. The usual --

THE COURT: So you still want the copies?

MS. McLETCHIE: Your Honor, what -- what usually the practice is, so I'm clear, is what the usual practice is is that they give us a USB drive rather than allow -- rather than require us to come in person and then everybody can avoid the expense of copies.

THE COURT: I'm a very old Judge. A USB drive?

MS. McLETCHIE: I'm sorry, Your Honor.

MS. SHELL: It's like a little stick that you put in the computer that's like --

THE COURT: Okay. I know what an email is, but I'm --

MS. McLETCHIE: It's a -- it's a --

MS. SHELL: It's a portable storage device.

MS. McLETCHIE: -- essentially instead of the old floppy drives that we've had --

THE COURT: Okay.

MS. SHELL: -- or CDs --

THE COURT: It's the stick you stick in the computer?

MS. McLETCHIE: Correct, Your Honor.

THE COURT: Okay.

MS. McLETCHIE: And it's an easy way for us to solve some of the logistical issues of providing copies, but from our position --

THE COURT: Are you -- are you willing to give them a USB drive with all the documents?

MR. KENNEDY: Sure.

THE COURT: Okay. Well does that resolve --

MS. SHELL: It does not, Your Honor, and here's why it doesn't.

THE COURT: Okay.

MS. SHELL: Because we still have this ordinance in place in Henderson that is directly at odds with the NPRA. And, you know, it's -- it's a bit of an old chestnut, but there is this rule of construction called Dillon's Rule which says that when a legislature evidences an intent to regulate a particular area of law that you can't have a municipality, have a law that's at conflict with the legislature's intent.

THE COURT: If they're willing to give you what you requested on a drive rather than printing the paper, maybe we don't need to get to the constitutionality of their rules. I mean, if they're willing to give it to you that would resolve the case wouldn't it?

MS. SHELL: It would only revolve it with regards to this particular issue --

THE COURT: Well, that's what we're worried about.

MS. SHELL: -- but this is -- this is something that is capable of repetition and that is another issue that we have in this matter. Is that this is --

THE COURT: Well, up until this case what I read was that you guys had been cooperating and getting things back and forth -- or at least getting things to the RJ when they requested it.

MS. SHELL: I don't think that there is -- this is not -- this is not an issue, Your Honor, respectfully, where simply because you have a pattern and practice of everything being okay most of the time and then you have like this one incident that --

THE COURT: I'm just worried about this case. If they're willing to give you the documents, I think that that ought to solve it.

MS. SHELL: I understand your -- what you're saying, Your Honor, but again our concern is that this will be an impediment in future cases not just for the RJ.

THE COURT: Well, let's worry about the future cases when we get there. That's for maybe a younger Judge.

MS. SHELL: Well, Your Honor, we are -- we are concerned that this is something that is capable of repetition. And there's no indication that they're going to rescind a policy which is at odds with the NPRA.

THE COURT: I was -- I was led to believe that our hearing today was to argue over the redacted documents that you have in -- that you attached to your petition.

MS. SHELL: Yes, we also have issues with the redactions, Your Honor. And I won't -- I think I went through in detail in my reply some of my issues with the redactions and the withholdings.

But, the thing to remember in NPRA cases dealing with the Public Records Act is that the burden -- there's a presumption. We start with a presumption under the law that records are public and that they should be easily accessible. And that's a presumption that can only be overcome by the government entity who wants to withhold the documents. And they have to prove that by the preponderance of the evidence.

And what we have here is an issue where in certain instances -- and I would direct Your Honor's attention to the most recent log, the third privilege log that was produced by the by the City and that would be at --

THE COURT: That's your Exhibit 6.

MS. SHELL: It's actually, I was looking at the Exhibit H to the -- I think it is our Exhibit 6, but it's also Exhibit H to the City's response. And what we have here --

MR. KENNEDY: That is the most recent --

THE COURT: It's the same one. I've got it here.

MS. SHELL: Correct. It is the third privilege log. And we have dozens of documents here where the -- there's a few different

categories, one of them is attorney-client privilege.

THE COURT: Right.

MS. SHELL: There are dozens of documents here where the City has asserted they can't release the -- they won't release them because of attorney-client privilege. However --

THE COURT: There's also the liberty of processed privilege a confidential personal information which I guess would contain social security numbers and things like that.

MS. SHELL: And, Your Honor, we don't contest that last category. When it comes to personal identifying information, we agree that those redactions are appropriate. Our concern comes more with the assertions of attorney-client privilege, deliberative process privilege, and, I believe, that -- yeah, those were the two main categories of documents that were withheld.

Now when it comes to attorney-client privilege as I said in our papers, attorney-client privilege needs to be construed narrowly because it can be an impediment to open access to documents and that's what the Supreme Court said in the *Whitehead* case.

And the other thing that has been said by the Supreme Court is you can't just -- this is a law in some ways like discovery issue. You can't just put forth a boilerplate assertion of privileged documents without providing more detail so that the person requesting the document can assess whether that is an appropriate withholding or redaction.

And what we have here with their third privilege log, when you have these assertions of attorney-client privilege, it's very generalized language that makes it impossible for the Review-Journal to discern what exactly the nature of the attorney-client privilege is.

You have dozens of them where it's just electronic correspondence containing communication between attorney and staff made for the purposes of facilitating legal -- the rendition of professional legal services to the Trosper contract terms.

I mean, it's so vague that it's essentially meaningless to me. Like, every time I wrote that I didn't understand what that meant. And that's part of the problem we don't know what those documents are. If -- if --

THE COURT: What is the Trosper contract?

MS. SHELL: Your Honor, Trosper Communications was a communications firm that had contracted for a period of time with the City of Henderson to provide different services like public relation services.

THE COURT: Did they have a contract?

MS. SHELL: As far as I know, they had a contract.

THE COURT: Well, the contract itself should be available to you.

MR. KENNEDY: Correct. It's public record.

MS. SHELL: And that, Your Honor, there was actually one other --

THE COURT: I guess, if there was negotiations involving that contract and -- and staff was discussing what to offer or what to agree to or how much to pay or something like that that probably would be -- between the attorneys and the staff that would probably be something that would be privileged, but there's an awful lot of those same things, I agree with you.

MS. SHELL: Yes, Your Honor. I mean, to the extent that there may be those documents. Those may be properly withheld, but it's impossible to discern from their log what those documents are and what they actually talk about. The actually -- and, Your Honor, I actually --

THE COURT: How do I -- how do I resolve this?

MS. SHELL: I think the way to revolve it, Your Honor, is to take the documents in camera and review them to see if they had been properly withheld.

THE COURT: Well, they offered to give them to me in camera. I was really excited about reading a couple hundred documents.

MR. KENNEDY: I'm sure -- I'm sure that you were.

MS. SHELL: Well, yeah, and Ms. McLetchie also pointed out another thing would be, and it's actually what I put in the reply, is that we need a better log so that we can assess the privilege because they're asserting the privilege. It's their burden to prove it. We can't tell if they're meeting their burden.

THE COURT: And that's true. I agree. They have to make a demonstration and --

MS. SHELL: They also asserted deliberative privilege process, Your Honor, as to a lot of the same documents, so. I just -- I had only mentioned two categories.

THE COURT: I guess that deliberative privilege exception is where you've got staff members discussing how they're going to present something or give it to the commissioners to decide; is that right?

MS. SHELL: Right. And that's not what the deliberative process privilege is meant to encompass, Your Honor. And as I pointed out, indeed, in one of the cases that is actually sighted in Henderson's moving papers, the deliberative process privilege is meant to apply to communications and records that deal with significant policy judgments.

And there's no evidence when you look where they've asserted, the -- you'll forgive me, Your Honor, as I flip back and forth between these things -- the deliberative process privilege one of the documents that they cite is electronic correspondence containing mental impressions and strategy of city management regarding preparation of public statement and comments on draft statement. A public statement isn't a significant policy judgment issue.

THE COURT: I guess it depends about what the statement is.

MS. SHELL: Well, and it's impossible -- frankly, Your Honor, it's impossible to discern from the log what that policy statement is.

THE COURT: I must confess I had not heard about the deliberative privilege previously, so I wasn't very familiar with it.

MS. SHELL: Your Honor, just -- and as another alternative to in camera review, that -- your Court -- the Court could find that they haven't met their burden and just direct the City of Henderson to produce the records.

THE COURT: Okay.

MS. SHELL: All right. Your Honor, thank you.

THE COURT: Thank you.

MR. KENNEDY: Your Honor, with respect to the first issue and that is the inspection and production of the documents. We produced almost 70,000 pages. Nobody asked for a single copy of anything and as we told the Court this morning, we're willing to provide those.

THE COURT: Okay. Well, I guess they want them.

MR. KENNEDY: Well, okay. They didn't have to sue us to get them.

THE COURT: We'll -- I'll accept that as a stipulation that you will provide it within five days.

MR. KENNEDY: Yes. We will.

THE COURT: All right. Thank you. That will resolve that issue.

MR. KENNEDY: Secondly, the Court is correct. With respect to the argument about can you or can't you charge a fee, what can the

fee be, and all of that, we're just -- we're going to produce these. That's really not an issue before the Court.

THE COURT: Well, at one time it was. You did request money for privilege review. I don't know that the statute says you're entitled to money for privilege review. Now, if it's an extraordinary request, maybe that's part of it, but I -- that's arguable either way.

MR. KENNEDY: It is arguable either way. Just -- the Court doesn't have to decide it. The last issue is on the -- the privilege law.

THE COURT: The privilege.

MR. KENNEDY: Okay. And the Nevada Supreme Court has dealt with this. In the context of the Public Records Act in *Reno Newspaper versus Gibbons* one of the questions before the Supreme Court was, what do you have to put in this privilege log? Because the statute says if -- you'll say we can't produce it, we give you the reasons why, and cite the statute. That's -- that's what the Public Records Act says. And the Nevada Supreme Court said, well, exactly what do you have to tell the other party?

And the question involved the legendary Vaughn Index. It's a federal case and it says under the Federal Act here's what you have to do. The Supreme Court said, well, you don't have to do a Vaughn Index 'cause every case is different. The Supreme Court said, in order to -- and I'm reading out of the *Gibbons* case, in order to preserve a fair adversarial environment, the log should

contain, at a minimum, a general factual description of each record withheld and a specific explanation for nondisclosure. So describe the document and tell us why you're not disclosing it.

So in our Exhibit H, what we did was we described the document, by document number and a description of it, and then -- and, you know, who wrote it, who sent it, that, and then cited whatever the -- whatever the reason for withholding was; either attorney-client communication or the deliberative privilege. And so that's what we did and that -- that satisfies the test in *Gibbons*.

Now, in the next paragraph the Supreme Court in *Gibbons* -- and this is at -- it's 127 Nevada Advance Opinion 79, I just have the cite to the Pacific page it's at 884. The Supreme Court said, and if that's not sufficient -- what is it, describe it, and tell us why you're withholding it, Supreme Court said, if that's not enough in order for a decision to be made, the Supreme Court says, to the delight of trial Judges everywhere, in other words an in camera review may be used to supplement a log, but it may not be used as a substitute where a log is necessary. Which means provide the log. If that's not good enough, then in camera review.

That's why we said in your response, we'll provide them to the Court in camera. And that's what *Gibbons* says. If you look at the log and you say, fine, I know what the document is, I know what the privilege is, but I've got to look at it, then in camera review --

THE COURT: My concern is that you have repeated kind of a boilerplate explanation. It's fairly detailed, but it's still a boilerplate explanation for an awful lot of documents.

MR. KENNEDY: Yeah. It is. And you know -- you know, Your Honor, what the response to that is? It is in footnote three in that *Gibbons* opinion, footnote three the Supreme Court addresses that issue. And it says, you know what, you can't ask for too much because if you give a little bit more, you're going to waive the privilege.

And in footnote three, the Court says we understand that problem. And so here's why we're deciding the case the way we do. And in -- in footnote three they cite a couple cases which -- which hold that which say you don't -- you don't have to go so far as to endanger the privilege. So that's what we did. Said here's the document attorney-client or deliberative and as the Supreme Court said in *Gibbons*, we'll give them to the Court in camera if that's necessary.

And so what we did was really strictly complied with the Public Records Act as the Supreme Court interpreted it in *Gibbons*. As I said, much to the delight of trial Judges everywhere, but that is -- that is what the Supreme Court said so that's why we did what we did.

And those are -- those are all the points I want to make. Okay. Thank you.

MS. SHELL: Thank you, Your Honor, I just have a couple of

brief points. The first thing that I would to say is Mr. Kennedy said we didn't have to sue to get these records. Clearly we did because this is the first time we've been given an -- they've told us they're going to give us a USB drive so obviously we did have to bring this case to the Court.

THE COURT: That's done.

MS. SHELL: Yeah. And, Your Honor, in terms of the privilege log, there's actually on the next page of the *Gibbons* opinion so that would be the Pacific Reporter on page 885, what *Gibbons* says, and I think it echoes what Your Honor's concerns were, we cannot conclude that merely pinning a string of citations to a boilerplate declaration of confidentiality satisfies the State's prelitigation obligation under NRS 239.0107 to cite specific authority that makes the public book or record a part or a part thereof confidential.

And in fact, I actually believe, Your Honor, although it's been an hour or two since I read the *Gibbons* opinion, that in *Gibbons* the Supreme Court actually told the State to go and revise its privilege log to provide more information. And we're in the same situation here where we don't have sufficient --

THE COURT: Well, 'cause I didn't go back and read the *Gibbons* case. I know that you both referenced it, but I didn't go back and read it. What was the explanation offered in the *Gibbons* case that was insufficient?

MS. SHELL: I believe those -- some of those fell under -- and forgive me, Your Honor, this was in the *Gibbons* case, the Reno

Newspapers had asked for emails between then Governor Jim Gibbons and a series of individuals. And there were I believe -- I believe, gosh, Maggie, do you remember?

THE COURT: I mean --

MS. SHELL: I don't recall the nature --

THE COURT: Was it as detailed as these explanations here?

MR. KENNEDY: No.

THE COURT: -- that electronic correspondence containing communication between attorney and staff made for the purpose of facilitating the rendition of professional services re Trosper contract terms.

MR. KENNEDY: Right.

MS. SHELL: Your Honor, I --

THE COURT: It's fairly detailed. I mean, if it's true it would be a --

MS. McLETCHIE: Your Honor, if I recall and, I don't -- unfortunately, we don't have the case in front of us, but if I recall, the issue that they came up with is the same issue that we had here in that regardless of whether it took the form of a log or a declaration, the issue was that it was just boilerplate and there is the balancing act that Mr. Kennedy mentioned, but you still have to provide -- and this is what the *Gibbons* Court said, you still have to provide enough information so that the other side can ascertain whether or not the privilege is properly being brought.

THE COURT: If -- if you're --

MS. McLETCHIE: And both we and Your Honor had some confusion --

THE COURT: If these statements are accurate, I would think that the privilege is -- I mean, the privilege is validly claimed. Now, if you claim that the privilege isn't accurate, then I have to look at it to see if it's accurate.

MS. McLETCHIE: We have to -- I'm sorry, go ahead, Ms. Shell.

MS. SHELL: It's impossible because it is when you look at when they say facilitating the rendition of professional legal services, that is -- we just can't tell. I mean frankly it's just -- it's difficult to discern because that is taken directly from the statute. That's not actually a descriptor. So that's why we can't tell if the privilege is being properly asserted and that's why --

THE COURT: Well, the only way to know is to look at the document.

MS. SHELL: That's correct, Your Honor.

THE COURT: You want me to do that?

MS. SHELL: I believe we would, Your Honor.

MS. McLETCHIE: We would also ask that the log also be updated so that they better describe the documents so we can match up just provide enough information to us to see --

THE COURT: The documents are copied in this Exhibit 7 aren't they?

MS. McLETCHIE: Some of them are, Your Honor. They both

withheld documents and they redacted documents. So there's some that were provided and there are some that were withheld in their entirety, but we need more of an explanation --

THE COURT: Well, I looked up, for example, the very first one which was log number three, it's so small I can't read it.

MS. McLETCHIE: Your Honor, we need more information --

THE COURT: Maybe it's my poor eyes, but I --

MS. SHELL: Yeah.

MS. McLETCHIE: -- about either the nature of what was redacted or the nature of the document that was withheld so that we can tell at least whether or not the privilege applies.

THE COURT: Okay.

MS. SHELL: And unless Your Honor has any further questions?

THE COURT: Anything further?

MR. KENNEDY: I can answer your question about *Gibbons*.

THE COURT: Okay. What did they -- what were they?

MR. KENNEDY: In *Gibbons*, they didn't give a log. They just gave a statement. This is at --

THE COURT: What was the statement?

MR. KENNEDY: -- 876 in the Pacific third cite. The State informed the RGJ, the Reno Gazette Journal, that all of the requested emails were confidential because they were either privileged or not considered public records. The Review-Journal repeated its request for a log containing a description of each individual email so it could assess whether to challenge the

State's classification. No log in that case, so.

THE COURT: So they didn't have the statement that you have given here?

MR. KENNEDY: That is correct.

THE COURT: Okay.

MR. KENNEDY: That is correct. And that was, of course, that was the problem. You just --

THE COURT: Well, unless there's some indication that they -- that the City has misrepresented what these are, I think this is an adequate description of the privilege.

MS. McLETCHIE: Your Honor, if I may, I think the whether it was -- whether it's on a log and separated out by document or whether it's in a declaration as it was in the *Gibbons* case, we have the same problem because we don't have enough information to ascertain whether or not the privilege is properly brought.

We're not supposed to be in a situation where we're supposed to assume that they're properly bringing the privilege and that we somehow have to figure out which we can't do without more information.

THE COURT: If this is all the *Gibbons* case requires, I think they've satisfied it.

MS. McLETCHIE: They don't just require a log, they require enough information so that we can ascertain whether or not the privilege is properly being brought and that's --

THE COURT: I think this is enough information.

MS. McLETCHIE: Your Honor, I respectfully disagree. And if I may raise just one last issue with regard to the declaratory relief and the injunctive relief. I do just want to make one last pitch. I've heard Your Honor's position, but my -- my view is that they shouldn't -- the public's entitled to clarity.

There's an ordinance and there's a policy in Henderson right now that is at odds with the NPRA for two reasons. Both because they're applying it to allow for fees for things like privilege review and because the figure, the per page number is higher --

THE COURT: They're not arguing for any more money. They're not going to -- they're not going to ask you for any money.

MS. McLETCHIE: Then I would ask that they -- that they voluntarily rescind that policy.

THE COURT: Well, that's -- we'll worry about it at the next case. But, they're going to give you a stick -- what do you call it?

MS. SHELL: A USB drive, Your Honor.

THE COURT: USB drive with the 69,000 pages on it and I'm going to deny the rest of the petition.

MR. KENNEDY: Very good.

THE COURT: I need an order to that effect.

MR. KENNEDY: I will prepare the order and run it by counsel.

THE COURT: Send it by counsel.

MS. McLETCHIE: Thank you, Your Honor.

MR. KENNEDY: Surely.

THE COURT: Have a good day.

[Proceedings concluded at 9:29 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Jennifer P. Gerold
Court Recorder/Transcriber

EXHIBIT H

EXHIBIT H

ORIGINAL

Electronically Filed
5/12/2017 2:54 PM
Steven D. Grierson
CLERK OF THE COURT

ORDR
JOSH M. REID, City Attorney
Nevada Bar No. 7497
CITY OF HENDERSON
240 Water Street, MSC 144
Henderson, Nevada 89015
Telephone: 702.267.1200
Facsimile: 702.267.1201
Josh.Reid@cityofhenderson.com

DENNIS L. KENNEDY
Nevada Bar No. 1462
BAILEY ❖ KENNEDY
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148-1302
Telephone: 702.562.8820
Facsimile: 702.562.8821
DKennedy@BaileyKennedy.com

Attorneys for Respondent
CITY OF HENDERSON

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL,

Petitioner,

vs.

CITY OF HENDERSON,

Respondent.

Case No. A-16-747289-W
Dept. No. XVIII

ORDER

The Amended Public Records Act Application/Petition for Writ of Mandamus/Application for Declaratory Relief (the "Petition") of Petitioner Las Vegas Review Journal (the 'LVRJ") came on for hearing at 9:00 a.m. on March 30, 2017 on expedited basis pursuant to NRS 239.011; the LVRJ was represented by Alina Shell and Margaret A. McLetchie; Respondent City of Henderson (the "City") was represented by Dennis L. Kennedy of Bailey ❖ Kennedy, City Attorney Josh M. Reid and Assistant City Attorney Brian R. Reeve; the Court having read the pleadings and memoranda filed by the parties, having considered the evidence presented and having heard the argument of counsel, hereby ORDERS AS FOLLOWS:

1. The Petition presents three principal issues: (i) preparation and access to public records; (ii) assessing costs and charging fees for copying and preparing public records; and (iii) withholding and redacting certain records.

2. Preparation and Access to Records. In response to the LVRJ's public record request, the City performed a search that returned 9,621 electronic files consisting of 69,979 pages of documents. Except for the items identified on the City's withholding log (discussed in paragraph 4, below), all such files and documents (the "Prepared Documents") were prepared by the City, and LVRJ had access to and inspected the Prepared Documents prior to the hearing. Following its inspection, LVRJ made no request for copies of the Prepared Documents; however, following LVRJ's counsel's representations at the hearing that it also wanted electronic copies of the Prepared Documents, the City agreed to provide electronic copies of the Prepared Documents. The City has complied with its obligations under the Nevada Public Records Act (the "NPRA").

3. Costs and Fees. The City has provided the Prepared Documents without charging costs or fees to the LVRJ. Therefore, LVRJ's claims regarding the propriety of charging such costs and fees are moot, and the Court does not decide them.

4. Withheld Documents. The sole issue decided by the Court concerns certain documents the City withheld and/or redacted (the "Withheld Documents") on the grounds of attorney-client or deliberative process privilege. The operative privilege log (the "Privilege Log") was attached as Exhibit "H" to the City's Response to the Petition. The Court finds the Privilege Log to be timely, sufficient and in compliance with the requirements of the NPRA, and therefore DENIES the LVRJ's Amended Petition concerning the Withheld Documents.

///

///

///

///

///

///

///

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

5. CONCLUSION. Based on the foregoing, LVRJ's request for a writ of mandamus, injunctive relief, and declaratory relief, and any remaining request for relief in the Amended Petition is hereby DENIED.

DATED this ____ day of April, 2017.

Submitted by:

BAILEY ❖ KENNEDY

By: _____
DENNIS L. KENNEDY

and

JOSH M. REID, City Attorney
CITY OF HENDERSON

Attorneys for Respondent
CITY OF HENDERSON

Approved as to Form and Content:

MCLETCHIE SHELL LLC

By: _____
ALINA SHELL
MARGARET A. MCLETCHIE

Attorneys for Petitioner
LAS VEGAS REVIEW JOURNAL

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

EXHIBIT I

EXHIBIT I

DISTRICT COURT

CIVIL DIVISION

LAS VEGAS REVIEW-JOURNAL,

Plaintiff,

vs.

CITY OF HENDERSON,

Defendant.

CASE NO: A-16-747289-W
DEPT NO: 18

Motion for Attorneys Fees and Costs

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MARK B. BAILUS

Thursday, August 3, 2017
10:01 a.m.

Job No. 409053
Reported by: Andrea Martin, CSR, RPR, NV CCR 887
Certified Realtime Reporter (NCRA)

DISTRICT COURT

CIVIL DIVISION

LAS VEGAS REVIEW-JOURNAL,

Plaintiff,

vs.

CITY OF HENDERSON,

Defendant.

CASE NO: A-16-747289-W
DEPT NO: 18

Motion for Attorneys Fees and Costs

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HELD BEFORE THE HONORABLE MARK B. BAILUS, in the Civil Division of the District Court, Department 18, Phoenix Building, Courtroom 110, 330 South Third Street, Las Vegas, Nevada, beginning at 10:01 a.m., and ending at 10:27 a.m., on Thursday, August 3, 2017, before Andrea N. Martin, Certified Realtime Reporter, Nevada Certified Shorthand Reporter No. 887.

Job No. 409053

Reported by: Andrea Martin, CSR, RPR, NV CCR 887
Certified Realtime Reporter (NCRA)

APPEARANCES:

For Plaintiff, Las Vegas Review-Journal:

McLETCHIE SHELL, LLC
BY: ALINA M. SHELL, ESQ.
701 East Bridger Avenue, Suite 520
Las Vegas, Nevada 89101
TEL: (702) 728-5300
FAX: (702) 425-8220
E-mail: alina@nvlitigation.com

For Defendant, City of Henderson:

BAILEY KENNEDY, LLP
BY: DENNIS L. KENNEDY, ESQ.
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148
TEL: (702) 562-8820
FAX: (702) 562-8821
E-mail: DKennedy@baileykennedy.com

CITY OF HENDERSON
CITY ATTORNEY'S OFFICE
BY: BRIAN R. REEVE, ESQ.
BY: JOSH M. REID, ESQ.
ASSISTANT CITY ATTORNEY
240 Water Street
Post Office Box 95050 MSC 144
Henderson, Nevada 89009-5050
TEL: (702) 267-1231
FAX: (702) 267-1201
E-mail: Brian.Reeve@cityofhenderson.com:

Las Vegas, Nevada; Thursday, August 3, 2017

10:01 a.m.

-oOo-

THE COURT: Las Vegas Review-Journal vs. City of Henderson, Case No. A-16-747289-W.

Counsel, state your appearances for the record.

MS. SHELL: Good morning, Your Honor. Alina Shell on behalf of the Review-Journal.

MR. KENNEDY: And for the City of Henderson, Dennis Kennedy, along with City Attorney Josh Reid and Assistant City Attorney Brian Reeve.

THE COURT: Thank you, Counsel.

I would advise counsel, since I was not the presiding judge over the hearing in this matter, nor did I render the order that is the subject of your motion, I did pull the original petition, the amended petition, and I reviewed the order. I, further, reviewed all the exhibits submitted to me in this case, and I've read the transcripts of the hearing.

I will tell you, reading a cold record, Judge Thompson must have mellowed in his old age, because it seemed so much like he was conducting a kumbaya session; can't we just all get along.

I will also advise counsel I reviewed NRS 18.010, and various cases cited the annotation.

Is counsel ready to proceed?

MS. SHELL: I am, Your Honor.

THE COURT: Explain to me, Counsel, why you are the prevailing party. I would note in your briefing, I believe, you cited to the Valley Electric Association case.

MS. SHELL: That's right.

THE COURT: And in that case, it does state the party can prevail under NRS 18.010, quote, if it succeeds on any significant issue in litigation which achieves some of the benefit as sought in bringing suit.

There is a later case, Golightly & Vannah v. TJ Allen, which somewhat says the same thing but slightly different. It says a prevailing party must -- let me read the first sentence.

It states, in dictum, "This decision turns on the definition of 'prevailing party' as used in NRS 18.020(3) and NRS 18.050. A prevailing party must win on at least one of its claims. In Close, this court held that a party prevailed when it won on the mechanic's lien claim but had its damages reduced significantly by the adverse party's

counterclaim. Although Isbell received net damages significantly less than the award on its successful claim, it nonetheless prevailed."

So there seems to be some terminology differences in the case when the case talks about prevailing on a claim, which obviously is usually interpreted as a cause of action. Where the earlier case, Valley Electric, does say "a significant issue," the operative word being "significant."

So, again, Counsel, I'll ask my question: Why are you the prevailing party? It does not appear that you prevailed on any claim, and what you did prevail on appears to be a result of some type of agreement brokered by Judge Thompson.

MS. SHELL: Your Honor, respectfully, while 18.011 is instructive, we're here under the Nevada Public Records Act, and I think that's really the starting point for this Court's analysis, is that, under NRS 239.011, a party is entitled to compensation for the costs of litigation brought to seek compliance with the NPRA, the Nevada Public Records Act. And that's exactly what happened here.

The R-J requested copies of documents. The City of Henderson refused to produce those copies absent a rather exorbitant fee just for

conducting a privilege review to determine if they'd even give us the documents without redaction or to the extent that redactions would exist.

The only reason we ever got copies of the records is because we had to bring suit.

I appreciate your analysis of the kumbaya moment we had in the last hearing back in March in this case, but what happened is we had requested copies of these documents again, and they said, "No, not without paying this fee."

After we had filed suit and after the City attorney, Mr. Reeve, actually said, "Well, we really welcome the Court to address these issues that you're raising," we brokered an agreement where we would be entitled to just inspect the records in the interim, while the Court was sorting out the issues about the propriety of the fee demand that Henderson had put forth; but even then the ultimate goal of the Review-Journal has always been, and always was, to get copies of the records that we had requested.

And when we finally -- so we did this -- we made the initial records request in October, and we get all the way into March 30th, when finally Judge Thompson said, "Well, will you give them copies of the records," when they had previously

denied them to us and said, "Yeah, we can give them to them on a USB drive," and that's what happened.

THE COURT: He knew about the USB drive. He sat as an old judge for --

MS. SHELL: It required a little bit of explanation, but we got there eventually with Judge Thompson, an understanding of what that was.

THE COURT: I shouldn't say that. I presumed he would know.

MS. SHELL: That was a significant part of the transcript, was explaining that.

But the nub of the dispute was we wanted copies of these records, and as I point out in my briefing, what Judge Thompson said was, "Well, we'll get the copies, and I'm denying the rest of the petition."

And while that didn't get captured in the end order that was entered by the Court, the bottom line is the significant issue in this case, the nub of the dispute was we wanted copies, and we ultimately prevailed and got the copies that we had wanted since October.

THE COURT: Actually, Counsel, your argument, though -- it didn't seem like you were happy just getting copies of -- you know, earlier,

Judge Thompson said, "When you sent your reporter out there, did you ask for any copies?"

Apparently, you didn't ask for any copies. That's how the UBS issue came up, and that's how Judge Thompson was asking would you be satisfied if you just got the copies; and, quite frankly, the way the cold record reads is you weren't that happy about the judge not deciding the rest of the issues, and, you know, Judge Thompson's response was, "That's for another case."

MS. SHELL: Yes, your Honor.

THE COURT: So, again, you know, did you prevail on a significant issue? That's what I'm -- you know, I'm looking at. I mean, I'm giving you the benefit of the doubt. Doesn't have to be a claim, even though the later case talks about a claim, but did you prevail on a significant issue. That's really what I'm focusing on, and then if you did prevail on a significant issue, then I have to do -- used to call them Beattie factors, but now I guess they're called Brunzell factors.

Again, I have to determine the reasonableness, and I think you referenced the Lonestar, things of that nature. But before I even get there, I have to make a determination if you're

the prevailing party.

MS. SHELL: Yes, your Honor.

And just as a minor correction to the record, and it is something I pointed out in my reply brief, once we had brokered this sort of interim agreement for inspection, while the Court was sorting out the fees request issue, Ms. McLetchie e-mailed -- and I don't recall off the top of my head, Your Honor. If you'll give me just a moment.

She e-mailed on December 21st of 2016 to one of the City -- one of the many City attorneys, I should say, who have been working on this case, to say, you know, "This laptop is slow. Can we just get the copies on a CD so we can review the copies back at Review-Journal offices?" And again Henderson said "No."

So I have to admit I was a little surprised and, I think, irked that their position in their opposition to our motion for attorneys' fees was, "Well, we never knew they wanted copies," when, indeed, the whole dispute was about copies of the records.

And, Your Honor, to address your other question, the issues pertaining to Henderson's

public records policy and also to the fee dispute are important issues, but they really all sprang -- they are all spokes on a hub, and the hub is the NPRA in getting public records. And so in that sense, yes, we are -- we did prevail on a significant issue because we got what we wanted in the end.

THE COURT: How much, I wonder -- I remember it was around $5,000 that they wanted to charge you for the -- I believe one of the parties referred to it as paralegals reviewing and redacting, making sure there wasn't any, I assume, privileged information in any of the documents. That's what they wanted to charge you for?

MS. SHELL: Yes, your Honor: It was just shy of $6,000.

As I pointed out in my brief, in our motion for attorneys' fees, they amended -- demanded an initial deposit of just 20 -- just over -- I should say just under $2,900, and then $2,900 at the end; so you are look at about $5,800, which was, in our view, in excess of what was permitted under the NPRA, and we also thought that their policy was at odds with the grander scheme of the NPRA and its purpose of getting easy, swift, and, you know,

inexpensive access to public records.

THE COURT: Anything further, Counsel?

MS. SHELL: Your Honor, I think that it's important because the City brought this up to address their claim that the Review-Journal has to prove bad faith on the part of the City of Henderson in order to obtain an award of attorneys' fees, and I won't belabor what I put -- already put forth in our briefing, but the bottom line is despite what Henderson may want you to believe, there is a distinction between attorneys' fees and compensation for the costs of litigation and damages as punitive -- you know, damages to say, "City, don't violate the NPRA anymore."

And what 239.011 contemplates is only that you get compensated for the costs of bringing the litigation. There's no requirement in this, the statute, that you have to demonstrate bad faith. The only time that you have to demonstrate bad faith is if you are bringing -- or you are seeking damages against a public officer or an employer of a public officer, and that's not what happened here.

I would have -- my firm and the Review-Journal wasn't suing Mr. Reeve. We weren't suing any of the other City attorneys that weren't

complying with the NPRA. We were suing a governmental entity. We brought suit under 239.011, and so we're entitled to the costs that we incurred in having to bring the litigation.

And that's my final point, Your Honor.

THE COURT: Thank you, Counsel.

MS. SHELL: Thank you.

THE COURT: Counsel, my question to you is: Why aren't they the prevailing party? They were able to prevail on a significant issue, and they didn't have to pay you $5,800. I mean, they got it for free, and ultimately isn't that a significant issue that they prevailed on?

MR. KENNEDY: The answer to that is no. The issues that were decided by the Court -- the Court said, "Look, the costs and fee issue is moot," because what happened is the demand for the public records was made. There were 69,900 pages, and the City said, "Do you really want to deal with almost 70,000 pages here? Why don't you come to the City and look at the records, because we know that the vast majority of these you're not going to want to see, are going to be of no interest to you, because the search terms you gave us are way too broad."

Now, we said, "If you do want all of

those, there is a cost associated with it, and -- but why don't you come look before we go any further.

And that's what the R-J did. Its reporter came out there and spent all or parts of three days looking through the documents, and then said, "We don't want any copies of them."

And we said, "Okay. That's fine. You don't have to pay us any money; you don't want any copies."

Then they pursue the petition for a writ of mandamus under the public records act, and so when we come to court in front of Judge Thompson, what we said was, you know, "They're here, saying, 'We demand these records,' and we said, 'Well, you've already seen them. You looked through them at the City, and you didn't ask for any copies.'"

And Judge Thompson, as you know from the transcript, said to them, "You didn't ask for any copies."

"No, but we're here, by God, demanding that they produce these records under the public records act."

And I think what Judge Thompson did -- it's fair to say that he said, "They already did,"

and he asked four times, "Do you want copies of these now? Because they've been produced, and you didn't ask for anything."

And finally the R-J said, "Yeah, we'd like copies."

And he said to me, "Will you give them copies on a thumb drive?"

We said, "Sure, we will."

And he said, "Well, then isn't that it for this case?"

They said, "Well, we want to deal with the issues of costs for reviewing everything."

And the City said, "Look, you didn't ask for anything in the first instance. Now you say, 'Give us a thumb drive.' Here you go, and there are no costs and there are no fees associated with that."

And then there was an argument over the documents withheld for privilege, and Judge Thompson said, "Look, the privilege log is adequate and sufficient, and I'm not going to give you" -- "I'm not going to go behind that."

So when you look at the order that was entered by Judge Thompson, the Review-Journal lost on every issue that was decided. The judge said,

"There are a couple that I'm not going to decide because they're moot," and that's the fees-and-cost issue. They didn't prevail on that. In fact, the City never sent them a bill for that.

THE COURT: But isn't the standard, Counsel -- and this seems to be the Plaintiff's argument, is "We didn't have to win on all claims. All we have to show, at least under NRS 18.010," even though I understand the issue is also making the argument on the other statute -- but "All we have to show is that we prevailed on a significant issue."

Wasn't this a significant issue, that she got these records with -- and there was -- I mean, her argument seems to be the fact that you wanted to charge the $2,900 and an additional $2,900 for -- I assume it's like paralegal work to go through and redact everything and this and that.

MR. KENNEDY: That's fair, yes.

THE COURT: And that was unacceptable to her, and the fact that you agreed to it -- and I haven't researched this in a long time, but I -- and the case doesn't really address it, but the fact -- you're right. The order itself is -- would seem to indicate otherwise, but her argument is: "At the

end of the day, we prevailed on a significant issue; we got the records, and we didn't have to pay for them."

MR. KENNEDY: Well, that's the argument. But they got the records because, if you look at Judge Thompson's order, Judge Thompson says the City complied with its obligations under the statute, and that's how they got them. They asked for them, and we said, "Please come and inspect them and just tell us what you want."

THE COURT: They didn't ask for an inspection. They asked for the records. They said, "We want the records."

The way I read the statute, they could either ask for an inspection or they could ask for copies. They asked for copies. The City wanted to charge them some fees to do this because -- and rightfully so. The same concern about certain privileges, confidential information, things of that nature, and they wanted the fees to be paid by the Review-Journal. And counsel's argument is: "But for us filing this petition, we wouldn't have got them without having to pay the fees; if we hadn't have filed this petition, we still would have got them, but impermissibly in that we would have had to

pay the fees."

MR. KENNEDY: But that's not what happened. I know that's the argument. That's the argument they made, and they lost that argument when they made it the first time, because what happened is they filed -- they filed a petition, and what the City said -- first off, the City responded within five days and said, "We're putting together the records but," you know, "we have go through them. There's almost 70,000 pages."

The Review-Journal then files the petition and said, "You're wrongfully withholding them."

Well, that wasn't the case. The City had the right to respond and say, we have to review them, and that's the reason that Judge Thompson said there was compliance with the law, because what the City said after it assembled the records, was, "Why don't you come look at them?" Okay? They looked at them and said, "We don't want any copies."

Judge Thompson, looking at that, said, "Well, the City complied with the law. You didn't have to file the action to get access to the records." The City, within five days, said, "Let us put them together and review them for privilege, and then you can look at them."

And what happened? The R-J comes out to the City, looks at the records, and says, "We don't want any of them."

So did they have to file the action to do that? No, they didn't. And that's why they lost. That's just Judge Thompson's order says, "Based on the events that transpired, the City complied with the law," and the argument here is, "Well, we had to sue them to get access to the records."

The answer to that is: No, you didn't. You got access to them, regardless of whether you filed the action or not, and the judge said the City acted properly, complied with the law, and produced the records, and what happened was the City didn't withhold them and say, "We" -- "you're not going to get them unless you make these payments." The City said, "Come out here and look, because we're quite sure you're not going to" -- "you're not going to want all of these." In fact, they asked for zero.

And in the kumbaya moment, after the judge said to them four times, "Do you really want copies of these," they finally said, "Well, yeah. Give them to us on a thumb drive."

And we said, "We're happy to do that," and that was that.

And the judge said, "Look, the City's complied with the law." And looking at the order, it is very clear the R-J prevailed on nothing. The petition for the writ of mandamus -- dismissed in its entirety. They're not the prevailing party.

THE COURT: I did have a question in the briefing. I thought the briefing was excellent. I mean, obviously, you both are excellent attorneys in making argument. You're making my decision tougher, I will tell you.

But it seems, in the briefing, the City seems to acknowledge that if I were to determine that the Review-Journal was the prevailing party, I have the discretion to -- as to the amount. In other words, they're asking for $30,000. I think you went down from, like, around $8,900, and then you went down to around $1,200 or $1,500.

MR. KENNEDY: $1,500, I think.

THE COURT: Something like that. So it looked like there was a sliding scale; is that correct?

MR. KENNEDY: Yeah, that's what we assumed. We said, "If you find that they're the prevailing party, which they're not -- okay? -- but if you were to find that they were, you don't get

what you ask for. You get the reasonable fees. And in this case I think we said they were $1,500 max, but we don't think they get anything.

THE COURT: Counsel, rebuttal?

MS. SHELL: Your Honor, just a couple of points, and obviously just to address Mr. Kennedy's last point, we don't believe that any reduction is appropriate.

I will note that in one of the footnotes to their opposition, Henderson took issue with the fact we had charged attorneys' fees for sending a public records request, trying to find out the amount of public moneys that were spent paying Bailey Kennedy to defend this case.

We're willing, in the spirit of compromise, to waive those fees, and although I think it's appropriate, particularly given, you know, that we knew this fees dispute was going to come up eventually, so we were entitled to know what Mr. Kennedy's firm was being paid in order to calculate our own reasonable attorney fee in this case.

I believe we're entitled to compensation for that, but I'm willing to give that up. I'm also willing to give up the 2.4 hours that our law clerk

spent conducting review of their privilege log and the case law relevant to the privileges that they asserted. It's a difference about five -- I did the math this morning. And forgive me; there's a reason I'm a lawyer. The -- they're disputing about $530 in fees relative to that, and I'd be willing to knock that off of my bill.

THE COURT: And just so you know, I did review your bill. I went through it and, again, I will note what you're waiving.

MS. SHELL: Thank you, Your Honor.

To address the more important issues, though, I feel as though opposing counsel may also be reading a cold record and coming at this from a view that -- I feel like perhaps we weren't in the same case.

I think that it's very important to keep in mind one of the principal canons of statutory construction, and that is that each word in the statute is to be given meaning, and if you don't give meaning to one word, you're undermining the structure of the statute itself. And as Your Honor pointed out, throughout the NPRA there's a distinction between inspection and copying the records.

We've always wanted copies of the records. That was the first request.

THE COURT: I think the point Mr. Kennedy was making, and it's actually well taken because it's reflected in the transcripts, is when your reporter did go out there and had the opportunity to request copies, none were requested, so you had an opportunity -- if I'm understanding his argument, you had your opportunity to get the copies without paying for it, and you didn't make your request, so his argument is you wouldn't have got them anyway. You would then have to proceed forward on the litigation.

MR. KENNEDY: That's right.

MS. SHELL: Thank you, Counsel.

Your Honor, quite frankly, that's not -- I just disagree with his interpretation of the record. The reason that we did not request copies is because of the existence of this ongoing dispute.

I really -- I don't think that Henderson should be allowed to do a bait-and-switch in negotiations. And, quite frankly, part of the reasons that the costs did run so high is because, in spite of the fact that the NPRA has no meet-and-confer requirement in it, Ms. McLetchie had

multiple phone calls with multiple attorneys from the City attorneys' office to try and resolve this dispute, and when that didn't work, that's when we filed the litigation.

But, again, the reason we didn't request for copies at the time of the inspection is because the inspection was an interim step. There was still this live issue that was going on.

And, Your Honor, I have no further points, unless you have further questions.

THE COURT: No, I don't.

Counsel, any surrebuttal?

MR. KENNEDY: Submit it, Your Honor.

THE COURT: You made my decision-making hard -- you both did an excellent job -- so I am going to take it under advisement. Is a week -- you don't all have to come back. I'm just going to make a decision, not doing further argument.

Can you come back in a week, or is two weeks more convenient?

MR. KENNEDY: Whatever the Court needs, we'll be here.

MS. SHELL: Your Honor, if I may just look at my calendar real briefly?

THE COURT: Sure.

MS. SHELL: I can't remember if I have a hearing in a week.

Your Honor, we can come back in a week, yes.

THE COURT: Counsel?

MR. KENNEDY: Fine.

THE COURT: I'll continue this matter one week. I'll take it under submission and render my decision at that time.

THE CLERK: August 10th, 9 a.m.

THE COURT: Thank you, Counsel.

(Proceedings concluded at 10:27 a.m.)

-oOo-

STATE OF NEVADA)
COUNTY OF CLARK)

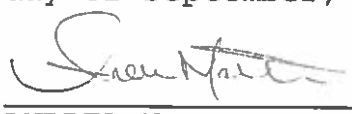
CERTIFICATE OF REPORTER

I, Andrea N. Martin, a Certified Shorthand Reporter of the State of Nevada, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses, prior to testifying, were duly administered an oath; that a record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; that the foregoing transcript is a complete, true, and accurate transcription of said shorthand notes;

I further certify that I am neither financially interested in the action nor a relative or employee of any attorney or party to this action.

IN WITNESS WHEREOF, I have hereunto set my hand in my office in the County of Clark, State of Nevada, this 11th day of September, 2018.



ANDREA N. MARTIN, CRR, CCR NO. 887

EXHIBIT J

EXHIBIT J

ORDR
JOSH M. REID, City Attorney
Nevada Bar No. 7497
CITY OF HENDERSON
240 Water Street, MSC 144
Henderson, Nevada 89015
Telephone: 702.267.1200
Facsimile: 702.267.1201
Josh.Reid@cityofhenderson.com

DENNIS L. KENNEDY
Nevada Bar No. 1462
BAILEY❖KENNEDY
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148-1302
Telephone: 702.562.8820
Facsimile: 702.562.8821
DKennedy@BaileyKennedy.com

Attorneys for Respondent
CITY OF HENDERSON

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL,

Petitioner,

vs.

CITY OF HENDERSON,

Respondent.

Case No. A-16-747289-W
Dept. No. XVIII

ORDER

The Motion for Attorney's Fees and Costs of Petitioner Las Vegas Review Journal (the "Review-Journal") came on for hearing at 9:00 a.m. on August 3, 2017, and for an additional hearing on August 10, 2017, the Honorable Mark B. Bailus presiding, the Review-Journal appearing by and through its counsel, Alina M. Shell, and Respondent City of Henderson ("Henderson"), appearing by and through Dennis L. Kennedy of Bailey Kennedy, City Attorney Josh M. Reid and Assistant City Attorney Brian R. Reeve, and the Court having read and considered all of the papers and pleadings on file, and having heard the argument of counsel, hereby makes the following findings of fact and conclusions of law:

1. On June 1, 2017, the Review-Journal filed a Motion for Attorney's Fees and Costs pursuant to Nev. Rev. Stat. § 239.011(2). In total, the Review-Journal requested $30,931.50 in attorney's fees, and $902.84 in costs.

2. In its Motion and supporting exhibits the Review-Journal requested compensation at the following rates for the work performed by its attorneys and support staff:

Attorney/Biller	Hours	Billing Rate	Total Billed
Margaret A. McLetchie	38.20	$450.00	$16,434.00
Alina M. Shell	37.60	$300.00	$11,280.00
Gabriel Czop	15.70	$125.00	$1,962.50
Pharan Burchfield	5.80	$100.00	$580.00

3. Henderson filed an Opposition to the Review-Journal's Motion on July 10, 2017, and the Review-Journal filed a Reply on July 27, 2017.

4. In its Opposition, Henderson asserted the Review-Journal was not the prevailing party in this matter, and even if it was, requested this Court reduce any award of fees and costs to compensate the Review-Journal for only the work its attorneys performed on the original NPRS petition. Henderson also disputed various line items contained in the Review-Journal's attorneys' bills. Henderson did not, however, dispute the billing rates for the Review-Journal's attorneys or their support staff.

5. Henderson also asserted that pursuant to Nev. Rev. Stat. § 239.012—a provision of the NPRA which provides immunity from damages for public officials who act in good faith in disclosing or refusing to disclose information—the Review-Journal had to establish Henderson acted in bad faith in refusing to disclose the requested records to obtain attorney's fees and costs.

6. This Court conducted a hearing on the Review-Journal's Motion for Attorney's Fees and Costs on August 3, 2017. After hearing argument from counsel, the Court took the matter under consideration, and conducted an additional hearing on August 10, 2017.

///

///

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

ORDER

7. Recovery of attorney's fees as a cost of litigation is permissible by agreement, statute, or rule. *See Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 956, 35 P.3d 964, 969 (2001).

8. Recovery of attorney's fees is authorized by the NPRA, which provides in pertinent part that "...[i]f the requester prevails [on a petition for public records], 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." Nev. Rev. Stat. § 239.011(2).

9. The Nevada Supreme Court has explained that "...by its plain meaning, [the NPRA] grants a requester who prevails in NPRA litigation the right to recover attorney fees and costs, without regard to whether the requester is to bear the costs of production." *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 615 (2015), *reh'g denied* (May 29, 2015), *reconsideration en banc denied* (July 6, 2015).

10. A party "prevails" for the purposes of Nev. Rev. Stat. § 239.011(2) if "it succeeds *on any significant issue* in litigation which achieves some of the benefit it sought in bringing suit." *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) (emphasis added) (internal quotations omitted); *accord Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 615.

11. To be a prevailing party, a party need not succeed on every issue. *See Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983); *accord Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 615.

12. In Nevada, "the method upon which a reasonable fee is determined is subject to the discretion of the court," which "is tempered only by reason and fairness." *Shuette v. Beazer Homes Holding Corp.*, 121 Nev. 837, 864, 124 P.3d 530, 548-49 (2005). "[I]in determining the amount of fees to award, the court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount, including those based on a 'lodestar' amount or a contingency fee." *Id.*

13. "Whichever method is chosen as a starting point, however, the court must continue its analysis by considering the requested amount in light of the factors" announced by the Nevada

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

Supreme Court in *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 455 P.2d 31 (1969). *Id.* at 865. Pursuant to *Brunzell*, a court must consider four elements in determining the reasonable value of attorneys' services:

> (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.

Brunzell, 85 Nev. at 349, 455 P.2d at 33 (citation omitted); *accord Shuette v. Beazer Homes Holding Corp.*, 121 Nev. 837, 864-65, 124 P.3d 530, 548-49 (2005).

14. Although the Review-Journal did not prevail on the claims for relief set forth in its Amended Petition, the Court finds the Review-Journal is nevertheless a prevailing party because it was able to obtain copies of the records it requested after initiating this action.

15. Thus, the Court finds that the Review-Journal is the prevailing party in this matter as to its request for the records and therefore is entitled to attorney's fees and costs.

16. Having reviewed the papers and pleadings filed herein, including the documentation provided by the Review-Journal regarding the work performed by its counsel and support staff, and having considered the *Brunzell* factors, the Court finds the Review-Journal is entitled to an award of attorney's fees in the amount of $9,010.00, based on the hourly rates set forth on its Motion for Attorney's Fees and Costs, and the work performed in this matter.

///

///

///

///

///

///

///

///

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

17. The Court further finds the Review-Journal is entitled to $902.84 in costs, resulting in a total award of $9,912.84.

IT IS SO ORDERED this 8 day of FEBRUARY, 2018.

HONORABLE MARK B. BAILUS
DISTRICT COURT JUDGE

Submitted by:

BAILEY ❖ KENNEDY

By _____
Dennis L. Kennedy, Nevada Bar No. 1462
Sarah P. Harmon, Nevada Bar No. 8106
Kelly B. Stout, Nevada Bar No. 12105
and
Josh M. Reid, Nevada Bar No. 7497
Brandon P. Kemble, Nevada Bar No. 11175
Brian R. Reeve, Nevada Bar No. 10197
CITY OF HENDERSON'S ATTORNEY OFFICE

Counsel for Respondent, City of Henderson

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

EXHIBIT K

EXHIBIT K

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF HENDERSON,
Appellant/Cross-Respondent,
vs.
LAS VEGAS REVIEW-JOURNAL,
Respondent/Cross-Appellant.

No. 75407

FILED

OCT 17 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL

This is an appeal and cross-appeal from a district court order awarding attorney fees in an action to compel the production of records pursuant to the Nevada Public Records Act. Eighth Judicial District Court, Clark County; Mark B. Bailus, Judge.

The Las Vegas Review-Journal (LVRJ) submitted a public records request to the City of Henderson (City) pursuant to the Nevada Public Records Act (NPRA). After estimating that the request implicated approximately 70,000 documents, the City informed the LVRJ that it needed several weeks to review the documents and redact any confidential or privileged information contained therein. The City also informed the LVRJ that it would be responsible for paying certain costs that the City would incur in reviewing and redacting the requested documents. The LVRJ subsequently filed a petition in district court to compel the City to produce the requested records. The district court denied the petition and the LVRJ appealed. This court, in an unpublished order, affirmed in part and reversed in part the district court's order, instructing the district court to conduct further analysis on remand. *Las Vegas Review-Journal v. City*

of Henderson, Docket No. 73287 (Order Affirming in Part, Reversing in Part, and Remanding, May 24, 2019).

Before the NPRA action was addressed by this court, the LVRJ moved for attorney fees, which the district court granted in part, concluding that the LVRJ had prevailed in its action to obtain access to records from the City but awarding less than the amount LVRJ requested. The City timely appealed, arguing that the LVRJ did not prevail in its public records action, and the LVRJ cross-appealed, arguing that the district court's partial award of attorney fees was an abuse of discretion.

We conclude that the district court erred in concluding that, despite failing on the claims for relief as set forth in its writ petition, the LVRJ nevertheless prevailed in its public records action and was entitled to attorney fees under the NPRA. Accordingly, we reverse the district court's partial award of attorney fees to the LVRJ.

While we generally review an award of attorney fees for an abuse of discretion, "when a party's eligibility for a fee award is a matter of statutory interpretation, . . . a question of law is presented" warranting de novo review. *In re Estate and Living Tr. of Miller*, 125 Nev. 550, 552-53, 216 P.3d 239, 241 (2009). The district court based its conclusion that the LVRJ was eligible for attorney fees on its interpretation of the NPRA, specifically whether the LVRJ was eligible for attorney fees as a prevailing party for purposes of NRS 239.011(2).[1] The district court based its

[1]The Legislature recently amended NRS 239.011. The effective date for those amendments is October 1, 2019, and thus they do not apply to the disposition here. S.B. 287, 80th Leg. (Nev. 2019).

conclusion on the NPRA's statutory language and this court's caselaw interpreting the NPRA. Accordingly, "we review the district court's interpretation of caselaw and statutory language de novo." *Las Vegas Metro. Police Dept. v. Blackjack Bonding, Inc.*, 131 Nev. 80, 85 343 P.3d 608, 612 (2015).

When a party requests access to a public record pursuant to the NPRA and the governmental entity denies the request, the requester may seek a court order permitting the requester to inspect or requiring the governmental entity to provide a copy of the public record. NRS 239.011(1). "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 [public record]." NRS 239.011(2). To qualify as a prevailing party in a public records action, the requester must "succeed[ ] on *any significant issue* in litigation which achieves some of the benefit it sought in bringing suit." *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 90, 343 P.3d 608, 615 (2015) (quoting *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005)). While a records requester "need not succeed on every issue" to prevail, *id.* at 90, 343 P.3d at 615, this court has "consistently held that a party cannot be a 'prevailing party' where the action has not proceeded to judgment." *Dimick v. Dimick*, 112 Nev. 402, 404, 915 P.2d 254, 256 (1996).

Here, as the district court recognized in its order, the LVRJ has not succeeded on any of the issues that it raised in filing the underlying action. The LVRJ's amended petition, filed after the City permitted the LVRJ to inspect responsive records over the course of several days at no

charge to the LVRJ, sought the following: (1) complete copies of all records that the City withheld and/or redacted as privileged, (2) injunctive relief prohibiting the City from enforcing its public records fee policies, (3) declaratory relief invalidating those municipal policies, and (4) declaratory relief limiting any fees for public records to no more than 50 cents per page. As discussed further below, the LVRJ has failed on each of these objectives, with the exception of one, which, according to the record before us, has not yet proceeded to judgment.

First, as to the LVRJ's request for copies of records that the City withheld based on attorney-client privilege and work-product privilege, the district court summarily denied the LVRJ's request for relief, finding that the privilege log provided to the LVRJ was timely, sufficient, and compliant with the NPRA. We affirmed the district court's order as to records identified in the City's privilege log as confidential and protected by attorney-client privilege and work-product privilege. *Las Vegas Review-Journal v. City of Henderson*, Docket. No. 73287 (Order Affirming in Part, Reversing in Part, and Remanding, May 24, 2019).

The LVRJ also failed on its declaratory and injunctive relief claims, which the LVRJ asserted in an attempt to invalidate the City's policies relating to the fees it assessed for processing records requests. The district court determined that the LVRJ's claims seeking invalidation of the City's fee policies were moot, and explicitly declined to decide those issues as raised in the LVRJ's amended petition. On appeal, we affirmed the district court's conclusion, holding that "[t]he issue of [the City's] fee became moot once [the City] provided the records to LVRJ free of charge," and rejecting the LVRJ's argument that the City's fee policy represented a harm

that is "capable of repetition, yet evading review." *Id.*

While we agreed with the LVRJ's argument that the district court failed to "consider the difference between documents redacted or withheld pursuant to . . . attorney-client privilege and those redacted or withheld pursuant to . . . deliberative process privilege," *id.*, the LVRJ cannot be a "prevailing party" as to that issue before the action has proceeded to a final judgment. *Dimick*, 112 Nev. at 404, 915 P.2d at 256. We reversed and remanded for the district court to analyze whether requested documents were properly withheld as confidential pursuant to the deliberative process privilege. We did not order the production of those records or copies of those records, as the LVRJ requested in its petition. We instructed the district court to conduct further analysis and determine whether, and to what extent, those records were properly withheld. The ultimate determination of the district court on that issue is not in the record before us. Because the sole remaining issue that the LVRJ raised in its underlying action has not yet proceeded to a final judgment, we conclude that the LVRJ is not a prevailing party. *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) ("[A] final judgment is one that disposes of all the issues presented in the case, and leaves nothing for future consideration of the court, except for post-judgment issues such as attorney's fees and costs.").[2]

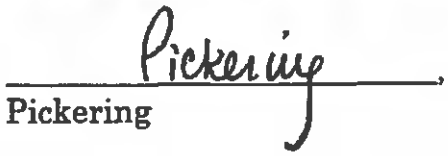
---

[2]Because we conclude that the LVRJ did not prevail in its underlying public records action and is not entitled to attorney fees, we need not address the LVRJ's cross-appeal argument that the district court erred in awarding a reduced amount of attorney fees and costs.

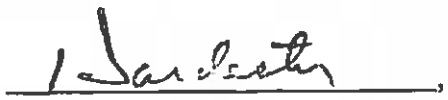
Accordingly, we

ORDER the judgment of the district court REVERSED.

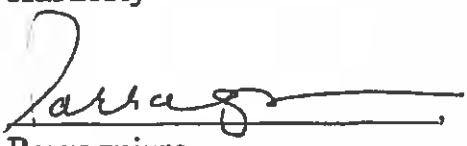
_____, C.J.
Gibbons



_____, J.
Pickering



_____, J.
Hardesty



_____, J.
Parraguirre

_____, J.
Stiglich

_____, J.
Cadish

_____, J.
Silver

cc: Hon. Mark B. Bailus, District Judge
Israel Kunin, Settlement Judge
Henderson City Attorney
Bailey Kennedy
McLetchie Law
Eighth District Court Clerk

EXHIBIT L

EXHIBIT L

REGISTER OF ACTIONS
CASE NO. A-16-747289-W

Las Vegas Review-Journal, Plaintiff(s) vs. Henderson City of, Defendant(s)

Case Type:	**Writ of Mandamus**
Date Filed:	**11/29/2016**
Location:	**Department 8**
Cross-Reference Case Number:	**A747289**
Supreme Court No.:	**73287** **75407**

PARTY INFORMATION

Defendant	**Henderson City of**	**Lead Attorneys** **Brian R. Reeve** *Retained* 702-784-5219(W)
Plaintiff	**Las Vegas Review-Journal**	**Margaret A. McLetchie** *Retained* 702-728-5300(W)

EVENTS & ORDERS OF THE COURT

12/12/2019 **Status Check** (9:00 AM) (Judicial Officer Atkin, Trevor)
Order Setting Further Proceedings RE: Supreme Court Order

Minutes
12/12/2019 9:00 AM
- COURT NOTED, this matter has been remanded back to District Court. Ms. Shell stated the Supreme Court had sent this matter back to the District Court to reconsider the deliberative process issue with regard to some of the withheld documents. Since the Supreme Court issued the remittitur, the City of Henderson has provided us with the documents they had withheld pursuant to the deliberative process privilege. Ms. Shell stated she has spoken with Mr. Kennedy and they would like to have a scheduled set on Attorney s Fees. Ms. Shell further stated there were two Appeals going on which one was the substantive case and the one pertaining to the award of Fees. The Supreme Court reversed the Order granting Plaintiff Fees stating that Plaintiffs hadn't prevailed, now that Plaintiffs have received the process privilege documents Plaintiff are a prevailing party and entitled to do briefing on Attorney Fees. Mr. Kennedy stated Plaintiffs are not a prevailing party. Further, out of 70,000 pages the City of Henderson prevailed on almost all of them except for a small number of documents that had been withheld on deliberative privilege. Mr. Kennedy further stated Defendants will be filing a Motion for Summary Judgment because there are no issues left. COURT ORDERED, Parties are to put together Proposed Briefing Schedule and send over to Chambers, will sign it and will insert a date for hearing.

Parties Present
Return to Register of Actions

EXHIBIT M

EXHIBIT M

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 Water Street
P.O. Box 95050 MSC 144
Henderson, NV 89009-5050
Tel. 702-267-1200
Fax 702-267-1201

JOSH M. REID, CITY ATTORNEY

VIA U.S. Mail and Email

December 5, 2016

Maggie McLetchie
McLetchie Shell LLC
701 East Bridger Avenue, Suite 520
Las Vegas, Nevada 80101

Re: Las Vegas Review-Journal's October 4, 2016 Records Request

Dear Maggie:

I hope that you had a great Thanksgiving holiday. This letter relates to a public records request made by your client, Las Vegas Review-Journal ("LVRJ"), on October 4, 2016, regarding Trosper Communications and Elizabeth Trosper. The City of Henderson ("City") provided its initial response to LVRJ's request in writing within the five-day time-frame required by NRS 239.0107 on October 11, 2016. In its initial response, the City informed LVRJ that it had found approximately 5,566 emails matching the search terms set forth in LVRJ's request. These 5,566 emails contained nearly 10,000 individual electronic files. In light of the large universe of documents created by LVRJ's search terms and the City's responsibility to safeguard confidential information, the City determined that it would take approximately 80 hours for City staff to review the electronic files to remove or redact any confidential files or information. Accordingly, pursuant to NRS 239.055, the City's October 11 response contained an estimate of the cost for the "extraordinary use" of City personnel in the amount of $5,787.89 to prepare LVRJ's record request.

On October 12, 2016, you contacted Assistant City Attorney Brian Reeve ("Mr. Reeve") to discuss the City's response. As you know, when there is a records request for electronic files the initial cost estimate that must be provided within five days can often be larger than the City's actual cost incurred due a number of factors common with collecting large numbers of electronic documents (e.g. duplicate emails, imprecise search terms). In the past, the City has always worked with LVRJ to modify the scope of an electronic document search by using agreed-upon search terms, or other methods, to reduce the time and cost of producing large numbers of electronic documents.

During your October 12 discussion with Mr. Reeve, you were informed that the City was in the process of removing duplicate emails from the universe of documents using its document

management system and that the estimated cost to produce the documents would likely decrease once this process was complete. The conversation concluded with you stating that you would speak with your client and get back to the City by October 17, 2016. After your call, the City looked at various ways to reduce the time and expense of producing the requested documents. Mr. Reeve was prepared to discuss these options with you, but you never called back. Therefore, I requested that Mr. Reeve call your law office to continue the dialogue with you. Mr. Reeve contacted your office on October 25, 2016 and he was informed by your assistant that you were out of town until November 4, 2016. Mr. Reeve left a message with your assistant asking for a return call once you returned to the office. As of the date of this letter, we have still not heard back from you.

Accordingly, I was surprised to find out through a news article on Wednesday November 29, 2016, that you had filed suit against the City stating that we had refused to provide LVRJ with the requested records. This is simply not true. The lawsuit is also disappointing given our past history of working together to resolve these types of requests and your (or LVRJ's) decision not to do so in this instance. The records responsive to LVRJ's October 4, 2016 records request have already been reviewed and are ready to be transmitted to LVRJ upon payment of the required fees. Had you simply called the City on October 17, or returned Mr. Reeve's October 25 phone call, you could have saved your client, and now the court, both time and resources. This type of dialogue is contemplated under NRS 239.0107(c)(1), which sets forth that the requestor may inquire regarding the request if a public book or record has not been provided.

Over the past two years, the City Attorney's Office has invested significant time and money on acquiring new electronic document review software and has hired IT staff to make the production of electronic records for public records requests and electronic discovery in litigation less costly and more efficient. As you know, LVRJ made another public records request at the same time as the one now in dispute, and those records were provided to your client quickly and without complaint. The issue with this particular request is that it resulted in an estimated 69,979 pages (if printed) and 9,621 individual electronic files. Even with our new document review software, which can remove duplicate emails (of which we only found roughly 300), it still required over 70 hours for employees to review the responsive documents pursuant to your request.

While it is LVRJ's right to request and obtain public records from the City, I am fairly certain that the overwhelming majority of the estimated 69,979 pages of responsive documents are not of any interest to LVRJ (at least to the question of Trosper Communication's contract and public relations work for the City). Had you communicated with the City, you would have learned that many of the responsive documents relate to Liz Trosper's service on the Henderson Development Authority Board and the Henderson Strong Advisory Committee. I suspect these emails are not of interest to LVRJ. As we have done in the past, we could have allowed your client to inspect some of these types of documents in order to remove certain categories of documents, thus reducing the time and expense of the records request for both the City and LVRJ.

Based upon LVRJ's account of this public records request in its news articles, and your Complaint served upon the City yesterday, there does seem to be a genuine dispute between

the City and LVRJ with regard to the definition and application of the "extraordinary use of personnel" fee provisions in NRS 239.055. The City and LVRJ have been able to resolve issues relating to the cost of producing public records in the past, which has resulted in the LVRJ paying a minimal amount for public records over the past two years. The City has always been cautious in charging fees for the "extraordinary use of personnel" relating to public records requests. Our City records indicate that LVRJ has made 46 separate public records requests to the City since 2015, and LVRJ has paid the City a total of **$241.11** in fees for these record requests.

City employees spent 72 hours processing LVRJ's public records request. The breakdown of the employee time spent on this request is outlined below.

Attorney Review of 9,621 electronic files for confidentiality:	68 hours
Senior Legal Information Systems Analyst review of electronic files (preparation of documents for review and production and the de-duplication of documents):	4 hours

Pursuant to Henderson Municipal Code 2.47.085 and NRS 239.055, the City's fee for the "Extraordinary Use of Personnel or Technology" is comprised of the employee(s)' actual hourly rate to review and produce the requested documents or $0.50 page, whichever is less. The average hourly rate for the attorneys who performed the review was $77.99 per hour, and the hourly rate for the Senior Legal Information Systems Analyst is $44.81. Accordingly, the City's actual cost for your client's records request is **$5,482.56** (($77.99 x 68 = $5,303.32) + ($44.81 x 4 = $179.24)), and per our City-wide fee schedule for public records this is the amount that your client would have to pay to receive the records in electronic format.[1]

The City understands that the fees authorized by NRS 239.055, which allows local governments to charge the costs that they actually incur for the extraordinary use of their personnel or technological resources, "must be reasonable." While it may not resolve the difference of opinion between the City and your client regarding the meaning of NRS 239.055, the City is willing (and was willing back in October) to provide the requested records at the lowest hourly rate of the employees who reviewed the requested documents. This would put the fee for production of your client's records request at **$3,226.32.**

Please let me know how LVRJ wishes to proceed with the records that have been prepared for it. If LVRJ would rather resolve the matter through your recently filed litigation, then the City will respond appropriately. The City is interested in having the courts provide clarity to the meaning and application of NRS 239.055, as clear and concise guidance on these provisions would greatly benefit both local governments and the public. With that said, **the City is not**

[1] The requested records comprise approximately 69,979 printed pages (this is an estimate from the document management software), which at $.50 per page would cost your client roughly $34,989.50. While I am fairly certain that your client is not interested in printed copies of these records, the City will comply with that request if made.

interested in litigation as a method of preventing the disclosure of the requested documents. In fact, the City is amenable to working with you and the court on a mechanism to provide LVRJ the requested documents while the court entertains our arguments on the fee issue.

In addition to working through litigation to get the courts to provide clear guidance on the issue of public records fees, the City would also like to offer to work with LVRJ on a legislative solution in the upcoming 2017 Legislative Session. While attorneys may benefit by the lack of clarity in the statute, I believe that a legislative solution presented jointly by media organizations and local governments would be welcomed by the Legislature, and would benefit both our clients and the public.

Best wishes,

Josh M. Reid
City Attorney

Cc: Robert Murnane, City Manager

EXHIBIT N

EXHIBIT N

DECLARATION OF BRIAN R. REEVE IN SUPPORT OF CITY OF HENDERSON'S OPPOSITION TO PETITIONER LAS VEGAS REVIEW-JOURNAL'S MOTION FOR ATTORNEY'S FEES AND COSTS

BRIAN R. REEVE, Assistant City Attorney for Respondent City of Henderson (the "City"), hereby declares that the following is true and correct under the penalties of perjury:

1. I make this Declaration in support of the City's Opposition to Petitioner Las Vegas Review-Journal's ("LVRJ") Amended Motion for Attorney's Fees and Costs.

2. I have personal knowledge of the facts set forth herein.

3. I am over the age of eighteen years and am mentally competent.

4. On May 24, 2019, roughly two-and-a-half years after LVRJ filed its public records act Petition, the Nevada Supreme Court issued an opinion in which it affirmed the District Court's order in the City's favor in all respects, except for one. That one issue pertained to whether 11 documents identified on the City's privilege log were properly withheld under the deliberative process privilege ("DPP Documents"). The Supreme Court remanded the case back to the District Court to perform the common law balancing test with respect to these documents.

5. After the City learned that it had prevailed on all the key issues in the Petition Appeal, and that the only remaining substantive issue in the case pertained to the confidentiality of the 11 DPP Documents, it determined that continued litigation over 11 documents was not worth the additional time, effort and expense.

6. On June 10, 2019, I sent an email to LVRJ's counsel stating that it did not make sense to continue expending significant time and resources litigating about 11 documents. My email, a true and correct copy of which is attached to this Declaration, expressed interest in resolving the case by voluntarily giving LVRJ access to the 11 DPP documents.

7. The City's decision to voluntarily disclose the DPP Documents took the following into consideration:

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET
HENDERSON, NV 89015

a. The case had been remanded to a District Court department with a new judge who was unfamiliar the case. The Honorable Judge Thompson ruled on the Amended Petition and the Honorable Judge Bailus ruled on LVRJ's Motion for Attorney's Fees and Costs. The City did not want to spend more time and resources briefing and arguing before a third judge who was unacquainted with the facts, procedural history and issues in the case.

b. The City had already spent over $80,000 on outside counsel fees over a two-and-a-half year period litigating this case, including two separate appeals. The City itself had also expended significant amounts of time working with outside counsel. The City did not want to continue spending money and time litigating this case.

c. With all of the key issues having been resolved in the City's favor on appeal, there was little to be gained by continuing to litigate over 11 documents when the universe of documents that was originally at issue comprised over 9,000 documents totaling nearly 70,000 pages. At this point, the litigation had become a nuisance for the City and resource drain on the City.

8. Accordingly, in July 2019, the City voluntarily disclosed copies of the 11 DPP documents to LVRJ to avoid further litigation.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 1st day of June, 2020.

By _____
BRIAN R. REEVE
Assistant City Attorney
Nevada Bar No. 10197
240 Water Street, MSC 144
Henderson, NV 89015

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 S. WATER STREET
HENDERSON, NV 89015

Brian Reeve

From: Brian Reeve
Sent: Monday, June 10, 2019 9:16 AM
To: maggie; Alina
Cc: Brandon Kemble; Dennis Kennedy
Subject: LVRJ v. City of Henderson - compromise discussions - NRS 48.105 [COHCAO-LEGAL.FID55938]

Good morning Maggie and Alina,

In light of the Nevada Supreme Court's recent order affirming in part, reversing in part, and remanding, I'd like to know if the Review-Journal has any interest in discussing settlement. As you know, the City asserted the deliberative process privilege with respect to only 11 documents. Nine of the documents pertained to the mental impressions and strategy of city management regarding a draft public statement and the other two documents pertained to proposed changes to the organizational structure within the City Manager's office. I'm guessing these documents have lost their newsworthiness to your client and, given the passage of time, the City may be willing to give your client access to the documents as part of a resolution. I don't have authority to officially make this offer, but I wanted to gauge your client's interest.

It doesn't make a lot of sense to us to spend the time and resources educating a third district court judge about this case and proceeding with a hearing about the deliberative process balancing test for 11 documents. We are also open to resolving the fee appeal to put this entire case to rest. Please let me know your thoughts.

Regards,

Brian R. Reeve
Assistant City Attorney
240 Water Street, PO Box 95050, MSC 144, Henderson NV 89009-5050
702-267-1385 | Fax: 702-267-1201 | Brian.Reeve@cityofhenderson.com
Assistant: 702-267-1231 or Cheryl Boyd at Cheryl.Boyd@cityofhenderson.com
Office Hours: Monday - Thursday 7:30a.m. to 5:30p.m.

EXHIBIT O

EXHIBIT O

SAO
MARGARET A. MCLETCHIE, Nevada Bar No. 10931
ALINA M. SHELL, Nevada Bar No. 11711
MCLETCHIE LAW
701 E. Bridger Avenue, Suite 520
Las Vegas, NV 89101
Telephone: (702) 728-5300; Fax: (702) 425-8220
Email: maggie@nvlitigation.com
Attorneys for Petitioner Las Vegas Review-Journal

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

HEARING DATE(S) ENTERED IN ODYSSEY

LAS VEGAS REVIEW-JOURNAL,

Petitioner,

vs.

CITY OF HENDERSON,

Respondent.

Case No.: A-16-747289-W

Dept. No.: VIII

STIPULATION AND ORDER TO EXTEND THE DEADLINE TO FILE THE REPLY TO OPPOSITION TO MOTION FOR ATTORNEY FEES AND COSTS

Current Hearing Date: March 19, 2020
New Hearing Date: 4/2/20
Hearing Time: 9:00 a.m.

Petitioner Las Vegas Review-Journal ("LVRJ") and Respondent City of Henderson ("Respondent") agree and stipulate to a fourteen (14) day extension for the LVRJ to file its Reply to Respondent's Opposition to Motion for Attorney's Fees and Costs up to and including March 26, 2020. The Reply is current due on March 12, 2020.

This request for an extension of time is made in good faith, and is not sought for any improper purpose or delay. This is the first request for an extension in this matter.

Counsel for the LVRJ has deadlines in other matters which have interfered with the preparation of the Reply. In particular, undersigned counsel is participating in *In Re D.O.T. Litigation* (Consolidated Case No. A-19-787004-B). The court presiding over *In Re: D.O.T. Litigation* has set a discovery deadline of March 13, 2020, and scheduled trial for April 20, 2020. The demands of completing discovery in this multi-party consolidated case in advance of trial has interfered with counsel's ability complete the reply in this matter.

The parties also agree and stipulate to the rescheduling of the hearing current set on March 19, 2020 to a date convenient to this Court after March 26, 2020.

DATED this 11 day of March, 2020.

CITY OF HENDERSON'S ATTORNEY OFFICE

By: _____
Nicholas G. Vaskov, NBN 8298
Brian Reeve, NBN 10197
240 Water Street, MSC 144
Henderson, Nevada 89015
Attorneys for Respondent, City of Henderson

DATED this 11 day of March, 2020.

MCLETCHIE LAW

By: _____
Margaret A. McLetchie, NBN 10931
Alina M. Shell, NBN 11711
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
Attorneys for Petitioner, Las Vegas Review-Journal

ORDER

IT IS SO ORDERED that the Las Vegas Review-Journal shall have up to and including March 26, 2020 to file its Reply to Respondent's Opposition to Motion for Attorney's Fees and Costs.

IT IS SO FURTHER ORDERED that the hearing on the Motion for Attorney's Fees and Costs currently set for March 19, 2020 shall be vacated and rescheduled to April 2 (a date after March 26, 2020) at 9:00 a.m./p.m in the above-captioned courtroom.

March 12, 2020
Date

_____
DISTRICT COURT JUDGE
TREVOR L. ATKIN

Prepared and submitted by:

_____
Margaret A. McLetchie, Nevada Bar No. 10931
Alina M. Shell, Nevada Bar No. 11711
MCLETCHIE LAW
Attorneys for Petitioner, Las Vegas Review-Journal

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

EXHIBIT P

EXHIBIT P

SAO
MARGARET A. MCLETCHIE, Nevada Bar No. 10931
ALINA M. SHELL, Nevada Bar No. 11711
MCLETCHIE LAW
701 E. Bridger Avenue, Suite 520
Las Vegas, NV 89101
Telephone: (702) 728-5300; Fax: (702) 425-8220
Email: maggie@nvlitigation.com
Attorneys for Petitioner Las Vegas Review-Journal

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CITY OF HENDERSON, Respondent.	Case No.: A-16-747289-W Dept. No.: VIII **STIPULATION AND ORDER TO EXTEND THE DEADLINE TO FILE THE REPLY TO OPPOSITION TO MOTION FOR ATTORNEY FEES AND COSTS** **Current Hearing Date:** April 2, 2020 **New Hearing Date:** April 30, 2020 **Hearing Time:** 9:00 a.m.

Petitioner Las Vegas Review-Journal ("LVRJ") and Respondent City of Henderson ("Respondent") agree and stipulate to a thirty (30) day extension for the LVRJ to file its Reply to Respondent's Opposition to Motion for Attorney's Fees and Costs up to and including April 27, 2020. The Reply is currently due on March 25, 2020.

This request for an extension of time is made in good faith, and is not sought for any improper purpose or delay. This is the third request for an extension in this matter.

Counsel for the LVRJ has deadlines in other matters which have interfered with the preparation of the Reply. In particular, undersigned counsel is participating in *In Re D.O.T. Litigation* (Consolidated Case No. A-19-787004-B). The demands of completing discovery in this multi-party consolidated case in advance of trial has interfered with counsel's ability to complete the reply in this matter. Additionally, the undersigned counsel has a reply brief due on March 25, 2020 in *GreenMart of Nevada NLV, LLC et al v. Serenity Wellness Center,*

LLC, et al., Nevada Supreme Court Case No. 79668.

Moreover, in light of the ongoing COVID-19 pandemic, the undersigned began transitioning to remote work. The logistical issues attendant with transitioning her firm's operations have interfered with the completion of the reply.

The parties also agree and stipulate to the rescheduling of the hearing currently set on April 2, 2020 to a date convenient to this Court after April 27, 2020.

DATED this 23 day of March, 2020.

CITY OF HENDERSON'S ATTORNEY OFFICE

By: _____

Nicholas G. Vaskov, NBN 8298
Brian Reeve, NBN 10197
240 Water Street, MSC 144
Henderson, Nevada 89015
Attorneys for Respondent, City of Henderson

DATED this 23rd day of March, 2020.

MCLETCHIE LAW

By: _____

Margaret A. McLetchie, NBN 10931
Alina M. Shell, NBN 11711
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
Attorneys for Petitioner, Las Vegas Review-Journal

ORDER

IT IS SO ORDERED that the Las Vegas Review-Journal shall have up to and including April 27, 2020 to file its Reply to Respondent's Opposition to Motion for Attorney's Fees and Costs.

IT IS SO FURTHER ORDERED that the hearing on the Motion for Attorney's Fees and Costs currently set for April 2, 2020 shall be vacated and rescheduled to April 30, 2020 (a date after April 27 2020) at 9:00 a.m./p.m in the above-captioned courtroom.

March 24, 2020
Date

DISTRICT COURT JUDGE
Trevor L. Atkin

TS

Prepared and submitted by:

Margaret A. McLetchie, Nevada Bar No. 10931
Alina M. Shell, Nevada Bar No. 11711
MCLETCHIE LAW
Attorneys for Petitioner, Las Vegas Review-Journal

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.MCLETCHIELAW.COM

RIS
MARGARET A. MCLETCHIE, Nevada Bar No. 10931
ALINA M. SHELL, Nevada Bar No. 11711
MCLETCHIE LAW
701 E. Bridger Avenue, Suite 520
Las Vegas, NV 89101
Telephone: (702) 728-5300; Fax: (702) 425-8220
Email: maggie@nvlitigation.com
Attorneys for Petitioner Las Vegas Review-Journal

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CITY OF HENDERSON, Respondent.	Case No.: A-16-747289-W Dept. No.: VIII **REPLY IN SUPPORT OF PETITIONER LAS VEGAS REVIEW-JOURNAL'S MOTION FOR ATTORNEY'S FEES AND COSTS** **Hearing Date:** June 18, 2020 **Hearing Time:** 9:00 a.m.

Petitioner the Las Vegas Review-Journal (the "Review-Journal"), by and through its counsel of record, hereby submits this Reply in support of its Motion for Attorney's Fees and Costs. This Reply is supported by the attached memorandum of points and authorities, any attached exhibits, the papers and pleading on file in this matter, and any oral argument the Court may permit at the hearing of this Motion.

DATED this 15th day of June, 2020.

/s/ Margaret A. McLetchie
MARGARET A. MCLETCHIE, Nevada Bar No. 10931
ALINA M. SHELL, Nevada Bar No. 11711
MCLETCHIE LAW
Attorneys for Petitioner Las Vegas Review-Journal

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

When the Review-Journal requested the records at issue in this case on October 4, 2016, Henderson demanded a deposit of $2,893.04—half of the $5,787.89 total fee it demanded—just to search for responsive records and review them for privileged information. (Exh. 2 to November 29, 2016, Petition ("Petition").) Although Henderson attempts to evade this in its Opposition[1], the fact of the matter is that Henderson's demand for almost $6,000.00 to search for and review records for privilege (i.e., look for reasons to not disclose the requested records) operated as a *de facto* denial of the Review-Journal's request. After the Review-Journal was unable to obtain the requested records without having to pay Henderson's usurious search fee, the Review-Journal filed its Petition with this Court to challenge Henderson's illegal fee schedule.

Despite the fact that Henderson indicated to the Review-Journal that it welcomed litigation over the fee schedule[2], Henderson argues throughout its Response that the Review-Journal acted in bad faith or unnecessarily in bringing suit. Henderson also complains that the Review-Journal did not return a single phone call. (Opposition, p. 4:17-21.) Henderson complains that the Review-Journal was satisfied when it was allowed to inspect—but not have copies—of the public records it requested. (Opposition, p. 5:18-19.) All of these complaints are inaccurate, and ultimately are little more than a distraction from the issue before the Court: the Review-Journal's entitlement to its reasonable costs and attorney's fees.

When it does finally address the issue of fees and costs, Henderson misconstrues the record and the case law. Henderson argues that the Review-Journal is not the prevailing party in this matter because Henderson voluntarily provided copies of the requested records. However, under the recently-adopted "catalyst theory," the Review-Journal is entitled to

[1] *See, e.g.*, Opposition, pp. 11:27-12:6).

[2] (Exh. 12 to March 23, 2017, Reply to Henderson's Response to Amended Public Records Petition at p. 3 of December 5, 2016 letter.)

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

compensation for all of the work its attorneys performed because, even in the absence of a written order granting its Amended Petition, the litigation caused Henderson to substantially change its behavior and produce the requested records without charge. *Las Vegas Metro. Police Dep't v. Ctr. for Investigative Reporting, Inc.*, 136 Nev. Adv. Op. 15, 460 P.3d 952, 957 (2020) (holding that "a requester is entitled to attorney fees and costs under NRS 239.011(2) absent a district court order compelling production when the requester can demonstrate a causal nexus between the litigation and the voluntary disclosure or change in position by the Government") (quotation omitted). Failing to compensate the Review-Journal in full would run contrary to the letter and purpose of the NPRA.

In an attempt to avoid the catalyst theory, Henderson whitewashes over the salient facts regarding the timing and reasons for its production of the records. Henderson produced records on two separate occasions. Henderson finally produced the first set of records only after the Review-Journal initiated the instant matter, and even then only after direct questioning from the Court about whether Henderson would provide the Review-Journal with a USB drive with the requested records. (Transcript of March 30, 2017, Hearing, p. 8:8-10.) Henderson mischaracterizes the Court's statements at the hearing on the Petition directing Henderson to provide a USB containing many of the responsive records. It argues that the written Order in this matter demonstrates that the Review-Journal lost on all of its claims, but ignores the fact that the Order specifically states that Henderson had finally done exactly what the Review-Journal had sought since the Review-Journal first made its request: provide copies of the records at no cost.[3]

The second set of records was provided only after Henderson changed course following remand from the Nevada Supreme Court and provided documents it had previously withheld pursuant to a claim of deliberative process privilege. (*See*, *e.g.*, Opposition, pp. 2:24-3:6, 17:10-18:24.) Because the Review-Journal's litigation was the catalyst for Henderson's decisions to finally provide the public documents sought in this case, the

[3] *See* May 12, 2017, Order, p. 2:13-14 ("The City has provided the Prepared Documents without charging costs or fees to the LVRJ.")

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

Review-Journal is entitled to its attorney's fees, and nothing in the Supreme Court's remand undercuts this conclusion. Henderson inaccurately portrays the Supreme Court's order of reversal. The Supreme Court did not hold, as Henderson claims, that the Review-Journal is not a prevailing party, full stop. Rather, it found that the Review-Journal was not yet a prevailing party because the Court had not yet entered a final judgment. *City of Henderson v. Las Vegas Review-Journal*, 450 P.3d 387, 2019 WL 5290874, *2 (Nev. 2019). Thus, the law of the case doctrine simply does not apply here.

Contrary to Henderson's claims, the Review-Journal prevailed on the central, substantial issue in this case: obtaining copies of public records. In order to obtain that result, the Review-Journal was required to expend energy and resources on lengthy phone calls with Henderson attorneys, sending multiple emails requesting information about documents Henderson was withholding, reviewing and analyzing multiple privilege logs, and, of course, litigating this matter both before this Court and the Nevada Supreme Court.

II. REPLY TO HENDERSON'S STATEMENT OF FACTS

A. Reply to Henderson's Statement of Facts Regarding the Review-Journal's Pre-Litigation and Litigation Actions.

As it has done multiple times in this litigation[4], Henderson relies on irrelevant and misstated facts to argue that the Review-Journal's decision to seek judicial intervention was somehow made in bad faith. (Opposition, pp. 4:21-6:3.) Even though Henderson's misstated facts are irrelevant, it is important to note the extent to which Henderson portrays them incorrectly.

As discussed in the Reply to Henderson' March 8, 2017, Response, counsel for the Review-Journal spoke to a deputy City Attorney regarding the Review-Journal's concerns with Henderson's position. (March 23, 2017, Reply, pp. 6:16-7:2.) When it became clear that the parties would not be able to resolve their disputes, the Review-Journal initiated the instant suit, something it was plainly entitled to do pursuant to Nev. Rev. Stat. § 239.011.

[4] (*See, e.g.*, March 8, 2017, Response to Opening Brief, pp. 5:1-8:1; July 10, 2017, Opposition to Motion for Attorney's Fees and Costs, pp. 4:17-6:22.)

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

There is no meet and confer requirement in the NPRA. Indeed, requiring parties to meet and confer regarding access to public records would be contrary to the explicit purpose of the Act: facilitating prompt access to public records.[5] The legislative interest in swift disclosure is also woven throughout the NPRA. For example, Nev. Rev. Stat. § 239.0107(1) mandates that, by not later than the end of the fifth business day after receiving a records request, a governmental entity must either (1) make the records available; (2) if they entity does not have custody of the requested records, notify the requester of that fact and direct them to the appropriate government entity; (3) if the records are not available by the end of the fifth business day, provide notice of that fact and a date when the records will be available; or (4) if the records or any part of the records are confidential, provide the requester with notice of that fact and a citation to the statute or law making the records confidential. Nev. Rev. Stat. § 239.0107(1)(a)-(d).

In addition to this timely notification and disclosure scheme, the NPRA specifically provides for expedited court consideration of a governmental entity's denial of a records request. See Nev. Rev. Stat. § 239.011(2) (mandating that a court give an application for public records "priority over other civil matters").) The NPRA is designed to provide quick access to withheld public records, not to reward non-compliance, hiding of information, and delay. There was no requirement that the Review-Journal waste time and resources trying to resolve its disagreements with Henderson once it became clear that the parties were entrenched in their respective positions.

Moreover, Henderson's complaints about the "premature" nature of the Review-Journal's litigation are difficult to reconcile with the fact that, after the Review-Journal filed its Petition, then-Henderson City Attorney Josh Reid stated in a December 5, 2016, letter to the Review-Journal that the City was "interested in having the courts provide clarity to the

[5] The Nevada Legislature, in recognition of the importance of enabling the public to obtain public records quickly, recently amended the "Legislative findings" portion of the Act to emphasize that the purpose of the NPRA is to "foster democratic principles by providing members of the public with ***prompt*** access to inspect, copy or receive a copy of public books and records to the extent permitted by law." Nev. Rev. Stat. § 239.010(1) (emphasis added).

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

meaning and application" of Nev. Rev. Stat. § 239.055. (Exh. 12 to March 23, 2017, Reply to Henderson's Response to Amended Public Records Petition at p. 3 of December 5, 2016, letter.)

Henderson also asserts—as it has on at least two other occasions in this litigation[6]—that counsel for the Review-Journal did not respond to Henderson's request to contact them regarding a third privilege log that Henderson produced during litigation. (Opposition, pp. 5:26-6:3.) As with its other complaints, this one has no merit. As the fact that there have been three versions of the log reflects, the parties discussed the log and the appropriateness of withholding documents in this case at great length. (*See* McLetchie Decl. in Support of Reply to March 8, 2017 Response, ¶ 22.)

Additionally, Henderson insinuates that the Review-Journal's filing of an Amended Petition in this matter was evidence of bad faith or an unwillingness to resolve disputes with Henderson. Again, however, the facts of this case show that is not true. On January 9, 2017, counsel for the parties had yet another phone conference regarding the records. (*See* Exh. 20 to March 23, 2017, Reply, p. 1.) Counsel's email memorializing that conversation makes plain that Henderson knew the Review-Journal might amend its petition because of ongoing disputes:

> To briefly recap our call re Trosper, you are doing the first draft of a stipulation on the litigation schedule after confirming with [Mr. Reid]. What we discussed: ***the RJ will have 2 weeks to either amend the petition or let you know that we aren't amending***. [Henderson's] response is then due two weeks from that date. We can also use the two weeks to discuss possible settlement option.

(*Id.*) (emphasis added). Contrary to Henderson's unsupported allegations, the Review-Journal was not acting in bad faith, as the parties specifically discussed a possible briefing schedule that contemplated the Review-Journal filing an Amended Petition. In any event, there is no requirement in the NPRA that the Review-Journal meet and confer with

[6] (*See* March 8, 2017, Response, p. 7:22-28; July 10, 2017, Opposition to Motion for Attorney's Fees and Costs, p. 6:12-22.)

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

Henderson prior to filing or amending a petition, so it would not have mattered if the Review-Journal had not given Henderson advance notice it was considering amending its Petition.

Henderson also complains it permitted the Review-Journal to inspect (but not copy) the requested records, but the Review-Journal allegedly never requested copies of the inspected documents. (Opposition, p. 13:1-9.) Notably, however, Henderson only permitted the Review-Journal to inspect the records after the Review-Journal filed this lawsuit. Moreover, Henderson's rendition of what happened leading up to, during and after the inspection yet again distorts the facts in this case.

First, Henderson ignores that the Review-Journal requested an electronic copy of the records during its reporter's inspection. On December 21, 2016, counsel for the Review-Journal sent Henderson an email noting that the laptop Henderson had put the documents on was slow, and suggested that the reporter "could also just pick up a CD and review from the [Review-Journal] offices." (Exh. 16 to March 23, 2017 Reply, p. 1.) Henderson rejected that suggestion. (*Id.*) Second, as discussed at the March 30, 2017, hearing before this Court, the NPRA provides for two different forms of access to public records: inspection and copying. *See, e.g.,* Nev. Rev. Stat. § 239.001(1) (providing members of the public "with access to inspect and copy public books and records to the extent permitted by law"); Nev. Rev. Stat. § 239.0107(1) (mandating that governmental entity respond within five business days to a "written or oral request from a person to inspect, copy or receive a copy of the public book or record); Nev. Rev. Stat. § 239.011(1) (providing that if "request for inspection, copying or copies 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").

Henderson also cherry-picks through the transcript from the March 30, 2017, hearing on the Review-Journal's Amended Petition to assert the Review-Journal "conceded" it had not asked for copies of the records. (Opposition, pp. 6:15-7:2.) However, the Review-Journal made plain at the hearing that it did not request copies because the parties had still not resolved one of the issues in this case—Henderson's demand for almost $6,000.00 in

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

"extraordinary use" fees. As counsel for Review-Journal explained at the March 30 hearing:

> MS. MCLETCHIE: . . . We requested copies. What Mr. Reid offered and what I accepted as an interim solution while this Court was resolving issues, was to allow an in-person inspection. Now, whether or not they would have made one or two copies available at that inspection is frankly not -- is frankly not the point, Your Honor. ***The point is that we wanted copies*** . . .

(March 30, 2017, Hearing Transcript, p. 6:8-16) (emphasis added). When the Court asked if the Review-Journal wanted copies of the requested records, counsel specifically stated "we would still like, ***without the exorbitant charge***, a USB drive with the documents requested, yes, Your Honor." (*Id.*, p. 6:19-21) (emphasis added). At the conclusion of the hearing, the Court directed Henderson to do exactly that, and then noted that it would be denying "the rest of the petition." (*Id.*, p. 24:15-20.)

B. Response to Henderson's Statement of Facts About its Post-Remand Conduct.

After the Nevada Supreme Court issued its opinion in Nevada Supreme Court Case No. 73287 (the "Petition Appeal"), Henderson voluntarily provided the documents it had withheld pursuant to the deliberative process privilege (the "DPP Documents"). Henderson enumerates the factors it considered in deciding to disclose the records. (Opposition, p. 10:9-26.) While it attempts to evade this fact, the factors Henderson considered all centered on a central question: did it want to continue fighting the litigation the Review-Journal filed to obtain access to the records? When Henderson answered that question in the negative, it changed its prior position and produced the records to the Review-Journal. This is the *sine qua non* of the catalyst theory: the Review-Journal's "public records suit cause[d] the governmental agency to substantially change its behavior in the manner sought by the requester." *Las Vegas Metro. Police Department v. Center for Investigative Reporting, Inc.*, 136 Nev. Adv. Op. 15, 460 P.3d 952, 957 (2020). Thus, the Review-Journal prevailed in this matter and is entitled to recoup its reasonable attorney's fees and costs.

/ / /

/ / /

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

III. ARGUMENT

A. The Court Should Enter Judgment Finding That the Review-Journal is a Prevailing Party in This Action.

In remanding this matter, the Nevada Supreme Court noted that the Review-Journal was not a "prevailing party" because the action had "not yet proceeded to a final judgment." *City of Henderson v. Las Vegas Review-Journal*, 450 P.3d 387, 2019 WL 5290874 at *3 (Nev. 2019). The solution to this procedural deficit is simple: this Court should enter a final judgment in this matter. Part of that judgment should be a holding that the Review-Journal is a prevailing party in this case because it achieved a significant objective of the litigation: access to the records it requested without paying Henderson's exorbitant and unreasonable fee to just search for and redact responsive records.

B. The Law of Case Doctrine Does Not Bar a Finding That the Review-Journal is a Prevailing Party or an Award of Fees Under the Catalyst Theory.

Under the catalyst theory recently adopted by the Nevada Supreme Court, a requester "prevails" for the purposes of a public record action even absent a district court order compelling production of the withheld records "when its public records suit causes the governmental agency to substantially change its behavior in the manner sought by the requester." *Las Vegas Metro. Police Department v. Center for Investigative Reporting, Inc.*, 136 Nev. Adv. Op. 15, 460 P.3d 952, 957 (2020) ("*CIR*"). The Supreme Court instructed the requester is the prevailing party, so long as the requester can demonstrate "a causal nexus between the litigation and the voluntary disclosure or change in position by the Government." *Id.* (quotation omitted). This is precisely what happened here: the Review-Journal petitioned the Court after Henderson refused to disclose public records without payment of a nearly $6,000.00 fee, and the Review-Journal was ultimately successful because Henderson eventually changed its behavior in response to the litigation and produced many of the requested records without charging the exorbitant fee.

Henderson attempts to avoid this conclusion by making a legally untenable argument: that the Court should apply the law of the case doctrine, and decline any

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

consideration of the catalyst theory. (Opposition, pp. 15:2-17:9.) As an initial matter, it is important to set out the contours of the law of the case doctrine. The "[l]aw of the case is a jurisprudential doctrine under which an appellate court does not reconsider matters resolved on a prior appeal." *Snow-Erlin v. United States*, 470 F.3d 804, 807 (9th Cir. 2006) (quotation omitted). The doctrine "is designed to ensure judicial consistency and to prevent the reconsideration, during the course of a single continuous lawsuit, of those decisions which are intended to put a particular matter to rest." *United States v. Real Prop. Located at Incline Vill.*, 976 F. Supp. 1327, 1353 (D. Nev. 1997) (citing *Pit River Home and Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1097 (9th Cir. 1994)). For the law of the case doctrine to apply, a reviewing court "must actually have decided the matter, explicitly or by necessary implication, in [a] previous disposition." *Id.* (citing *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir.1990)).

Henderson presents three reasons why it believes the law of the case doctrine should apply, but each reason can be easily dismissed. First, Henderson asserts that the law of the case doctrine should apply because the Supreme Court allegedly reversed this Court's prior order granting the Review-Journal some of its previously-requested fees and held that the Review-Journal "did not succeed[] on any of the issues that it raised in filing the underlying action." (Opposition, p. 16:1-6[7].) This is a gross oversimplification of the Supreme Court's decision. As the Supreme Court explained, it found that the Review-Journal was not a prevailing party because "the sole remaining issue that the LVRJ raised in its underlying action [regarding the DPP Documents] has not yet proceeded to a final judgment." *City of Henderson v. Las Vegas Review-Journal*, 450 P.3d 387 (Nev. 2019). Further, the Supreme Court acknowledged that—consistent with its later decision in *CIR*— a prevailing party in a public records action need not succeed on every issue, or even most of the issues; instead, the requester must "succeed[ ] on *any significant issue* in litigation which achieves some of the benefit it sought in bringing suit." *Henderson*, 2019 WL 5290874 at *2 (quotation

[7] Quoting *City of Henderson v. Las Vegas Review-Journal*, 450 P.3d 387, 2019 WL 5290874 at *2 (Nev. 2019).

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

omitted; emphasis in original). The Supreme Court's opinion did not directly address whether the Court correctly determined that the Review-Journal had prevailed in this matter; instead, it based its reversal on the absence of a final judgment. Thus, the law of the case doctrine does not apply.

Second, and relatedly, Henderson asserts that the Review-Journal has not argued that the Supreme Court's decision in the Fees Appeal was "clearly erroneous and would work a manifest injustice." (Opposition, p. 16:15-20.) However, this argument is premised on Henderson's incorrect assumption that the Supreme Court's decision in the Fees Appeal addressed the propriety of the application of the catalyst theory. It did not. Instead, as noted above, the Supreme Court's reversal of the Court's prior fees award was premised on a procedural deficit—not on the propriety of the catalyst theory. Thus, this argument is without merit.

Finally, Henderson asserts that the Court should apply the law of the case doctrine rather than the catalyst theory because, but for the need for a stipulated-to extension of the Review-Journal's deadline for filing a reply brief, this matter would allegedly have already been decided in Henderson's favor. (Opposition, pp. 16:21-17:9.) According to Henderson, awarding the Review-Journal its reasonable costs and attorney's fees "would essentially punish the City for granting [the Review-Journal's] requested extension of time." (Opposition, p. 17:9.) Henderson cites no case law for this argument; thus, the Court can dismiss this argument out of hand. *Cf. Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (declining to consider issues unsupported by "relevant authority and cogent argument").

Setting aside the unsupported nature of Henderson's "it's not fair" argument, as stated in the March 29, 2020, Stipulation Henderson now complains of, the parties agreed that the extension of time was necessary to accommodate counsel's obligations in other matters and logistical difficulties related to the need to transition to remote work during the COVID-19 pandemic (March 29, 2020, Stipulation, pp. 1:23-2:4), and that the extension was made "in good faith, and is not sought for any improper purpose or delay." (*Id.*, p. 1:21-22.)

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

For Henderson to now assert that there is something untoward about the stipulation that it agreed to or the fact that the law changed while that stipulation is pending is unfounded, and, quite frankly, unprofessional. As the Nevada Supreme Court recently reiterated, "[s]tipulations are of an inestimable value in the administration of justice, and valid stipulations are controlling and conclusive and both trial and appellate courts are bound to enforce them." *Clark Cty. Office of the Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 459 P.3d 880 (Nev. 2020) (quoting *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1118, 197 P.3d 1032, 1042 (2008)). Here, Henderson stipulated to extend the deadline for filing the instant Reply, and cannot argue now that the Court should rule differently simply because it might have achieved a different outcome if it had not so stipulated.

The true injustice would have been if this case had been decided against the Review-Journal even though the Review-Journal is the prevailing party simply because the case had been resolved prior to the Supreme Court's explication of the catalyst theory. Luckily, the parties and this Court have the benefit of the Nevada Supreme Court's *CIR* holding.

C. The Catalyst Theory Applies Here Because Henderson Changed Its Behavior By Producing Records at No Cost.

Under the Supreme Court's decision in *CIR*, this Court must consider three factors when assessing whether a requester "prevailed" under the catalyst theory: "(1) when the documents were released, (2) what actually triggered the documents' release, and (3) whether [the requester] was entitled to the documents at an earlier time." *Las Vegas Metro. Police Dep't v. Ctr. for Investigative Reporting, Inc.*, 136 Nev. Adv. Op. 15, 460 P.3d 952, 957 (2020) (quotations omitted). Additionally, the Supreme Court required district courts to determine (1) whether the litigation was frivolous, unreasonable, or groundless, and (2) whether the requester reasonably attempted to settle the matter short of litigation by notifying the governmental agency of its grievances and giving the agency an opportunity to supply the records within a reasonable time. *Id.* (citations omitted). Henderson asserts that each of

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

these factors weigh against a finding that the Review-Journal is a prevailing party. Henderson's assessment of each factor, however, is factually and/or legally inaccurate.

1. Henderson Produced Public Records After the Review-Journal Filed Its Petition.

The first factor of the *CIR* analysis requires the Court to consider when the governmental entity release the disputed documents. As discussed above, the Review-Journal initially requested public records from Henderson pertaining to public relations/communications firm Trosper Communications and its principal, Elizabeth Trosper, on October 4, 2016. (Exh. 1 to November 29, 2016, Petition.) When Henderson refused to disclose the records unless the Review-Journal paid a usurious "extraordinary use" fee, the Review-Journal filed its Petition on November 26, 2016, and subsequently amended that Petition on February 8, 2017. Not until this matter finally came before the Court for a hearing on March 30, 2017, did Henderson finally agree to provide the Review-Journal a USB drive with copies of the requested documents. (March 30, 2017, hearing transcript, p. 8:8-10.) This initial production did not occur until almost six months after the Review-Journal asked for the records and after four months of litigation. It was even later, following the resolution of the Petition Appeal in the Nevada Supreme Court, that Henderson finally provided additional documents it had withheld pursuant to its assertion they were subject to a deliberative process privilege.

In arguing against these facts and their plain import, Henderson again asserts that it did not deny the Review-Journal's public records request. (Opposition, pp. 18:26-19:1.) Again, Henderson's demand for almost $3,000.00 just to search for responsive records and review them for redaction was a *de facto* denial of the Review-Journal's records request. For the average requester—or even a large media entity like the Review-Journal—demanding usurious fees for a governmental entity just to look at the records and decide what (if any) it will disclose acts to discourage requesters from seeking public records, a result that is anathema to the purpose of the NPRA. Thus, the Review-Journal filed its Petition to seek the Court's intervention regarding Henderson's improper fee schedule so that it could get what

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

it was really entitled to: the requested records, without having to pay Henderson thousands of dollars for its privilege review. Henderson then changed course mid-hearing and agreed to provide a USB drive with many of the requested records ***free of charge***. But for the litigation, this would not have occurred. Thus, this factor weighs in the Review-Journal's favor.

2. The Litigation Triggered Henderson to Release the Records.

Under the second factor of the *CIR* analysis, the Court must consider what actually triggered the release of the records. As Henderson correctly notes, it is true that "the mere fact that information sought was not released until after the lawsuit was instituted is insufficient to establish that" the requester prevailed. *Las Vegas Metro. Police Dep't v. Ctr. for Investigative Reporting, Inc.*, 136 Nev. Adv. Op. 15, 460 P.3d 952, 957 (2020). Although Henderson argues against it mightily, the record is plain that but for the Review-Journal's Petition, Henderson would not have released any of the requested records.

Like a broken record, Henderson argues again that the Review-Journal's Petition was somehow improvidently filed because Henderson allegedly never denied the Review-Journal's records request. (Opposition, pp. 19:25-20:3.) Again, this is a revised version of the history of this matter. As illustrated in Mr. Reid's December 5, 2016, letter, Henderson was never going to produce the requested records to the Review-Journal without charging improper fees just to search for responsive records and conduct a privilege review. Specifically, Mr. Reid stated Henderson "looked at various ways to reduce the time and expense" of producing the requested records, but it remained steadfast in its position that it was entitled to fees for its search and privilege review. (Exh. M to Opposition, p. 2; *see also id.* at p. 3 (justifying the fees demand).) Thus, Henderson was never going to produce the records without improperly charging the Review-Journal.

Then, during the March 30, 2017, hearing on the Review-Journal's Amended Petition, Henderson agreed to provide the Review-Journal with a thumb drive with copies of the requested documents. (March 30, 2017, hearing transcript, p. 8:8-10.) Had the Review-Journal not filed suit, there is no indication Henderson would have changed its position and

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

unilaterally released the records to the Review-Journal.

As to the second disclosure following remand of the Petition Appeal, Henderson's own explanation of why it chose to disclose the DPP Documents (Opposition, p. 20:9-22) can be boiled down to a single concept: Henderson does not want to litigate this matter anymore. Thus, its second disclosure of records to the Review-Journal (again, at no cost) came directly as a result of the litigation, or more accurately, Henderson's desire to cease litigation. This factor therefore weighs in the Review-Journal's favor.

3. The Review-Journal Was Entitled to the Records at the Time of Its Records Request.

With respect to the third factor— whether the Review-Journal was entitled to the documents at an earlier time—the NPRA sets forth that documents that are not confidential are to be produced within five days (unless, for some reason, more time is needed). Henderson's unilateral disclosure of the records both at the March 30, 2017, hearing and following the Supreme Court's partial reversal demonstrates Henderson knew, and the law of course is clear, that the Review-Journal was entitled to the records when it first requested them, purported logistical difficulties with gathering the responsive records notwithstanding. Henderson asserts that the delay in production of the records was due to the Review-Journal's alleged "refusal to communicate with the City." (Opposition, p. 21:4-5.) Again, however, there is no requirement that the Review-Journal endlessly confer with Henderson regarding the records request when it was clear Henderson was entrenched in its position.

4. The Litigation Was Reasonable.

In addition to the three factors set forth above, the Court must also consider "whether the litigation was frivolous, unreasonable, or groundless." *CIR*, 460 P.3d at 957 (citation omitted). Henderson asserts that the litigation was unreasonable because it was unnecessary, the Review-Journal did not succeed on any issue, and the Review-Journal sought declaratory relief. None of these contentions is correct.

First, the litigation was necessary, the Review-Journal did gain access through litigation, and the Review-Journal overcome Henderson's deliberative process privilege on

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

appeal. Henderson—that the Review-Journal's suit was "unreasonable and groundless" because Henderson did not deny the request. (Opposition, p. 22:18-24.) Again, however, Henderson instance on holding the requested records for a $6,000.00 ransom was, in effect, a denial of the Review-Journal's request. Had the Review-Journal not filed suit, Henderson would not have dropped its ransom demand. Thus, far from being frivolous or unreasonable, the Review-Journal's suit was a reasonable effort to get access to the records.

Second, Henderson's assertion that the Review-Journal "did not succeed on ***any*** issue" decided by this Court or the Supreme Court is incorrect. (Opposition, p. 24:7-8.) In its May 24, 2019, unpublished decision on the Petition Appeal, the Supreme Court found that—as the Review-Journal had argued—the district court failed to consider whether Henderson proved by a preponderance of the evidence that Henderson's interest in nondisclosure of the DPP Documents clearly outweighed the public's right of access. *See Las Vegas Review-Journal v. City of Henderson*, 441 P.3d 546, 2019 WL 2252868 at *4 (Nev. 2019). The Nevada Supreme Court's finding in favor of the Review-Journal led directly to Henderson's subsequent disclosure of the DPP Documents. (*See. e.g.*, Opposition, p. 10:1-8 (stating that Henderson decided to turn over the DPP Documents after issuance of the Supreme Court's opinion).) Moreover, this argument by Henderson ignores the point of the catalyst theory, which is consider a party as a prevailing party if it obtains any significant goal of the litigation as a result of a change in position by the governmental entity. The only reason the Review-Journal did not obtain judgments ordering Henderson to produce the records is because Henderson changed its position and ceased demanding unlawful payment for the records. Since Henderson's change in position was a result of the litigation, the catalyst theory requires the award of attorney's fees.

Third, Henderson asserts the instant litigation was unreasonable because it asserts that the only remedies available to the Review-Journal are the ones set forth in Nev. Rev. Stat. § 239.011. (Opposition, pp. 22:13-18, 23:1-14.) While it changed course later, Henderson in fact agreed with the Review-Journal that the litigation was necessary to resolve the disputed concerning the interpretation of the NRPA. Further, Henderson conveniently

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

ignores the fact that the Court has discretion to grant declaratory relief pursuant to Nevada's Uniform Declaratory Judgment Act, Nev. Rev. Stat. §§ 30.010 to 30.060. Specifically, as discussed in the Review-Journal's February 8, 2017, Memorandum in support of its Amended Petition, Nev. Rev. Stat. § 30.040(1) provides that a "[a]ny person . . . whose rights, status, or other legal relations are affected by a . . . municipal ordinance . . . may have determined any question of construction or validity arising under the . . . ordinance, . . . and obtain a declaration of rights, status or other legal relations thereunder." (February 8, 2017, Memorandum, pp. 7:23-9:24.)[8]

Moreover, while Henderson dropped its illegal fee demand as a result of this litigation, the fees issue was properly raised by the Review-Journal. After the Court ruled on the Review-Journal's amended petition, the Nevada Supreme Court considered a similar issue regarding the permissible costs a governmental entity could charge a requester pursuant to the now-repealed extraordinary use provision. *See Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 136 Nev. 44, 458 P.3d 1048 (2020). In that case, the Clark County Coroner/Office of the Medical Examiner asserted that it was entitled to charge the Review-Journal $45.00 per hour pursuant to the now-repealed "extraordinary use" provision for reviewing and redacting juvenile autopsy reports. *Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 136 Nev. 44, 58, 458 P.3d 1048, 1059. The Supreme Court rejected this argument, holding that permitting the Coroner to charge an hourly fee for review and redaction under the "extraordinary use" provision "would be to

[8] Thus, although Nev. Rev. Stat. § 239.011 as was in effect at the time the Review-Journal filed its Petition outlines the remedies a requestor ***may*** seek for a governmental entity's refusal to produce public records, it does not limit this Court's discretion to grant supplemental declaratory relief. This contention is supported by the fact that, in amending the NPRA in 2019, the Nevada Legislature amended Nev. Rev. Stat. § 239.011 to clarify that "The rights and remedies recognized by [Nev. Rev. Stat. § 239.011] are in addition to any other rights or remedies that may exist in law or in equity." Nev. Rev. Stat. § 239.011(4). *See Pub. Employees' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 157, 179 P.3d 542, 554–55 (2008) ([W]hen a statute's doubtful interpretation is made clear through subsequent legislation, we may consider the subsequent legislation persuasive evidence of what the Legislature originally intended")) (citations omitted).

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

flatly ignore the plain language of NRS 239.055(1) explicitly limiting fees that may be assessed specifically for 'extraordinary use' of personnel." *Id.*, 144 Nev. at 59, 458 P.3d at 1060. Thus, Henderson's constrained interpretation of the remedies and relief a requester may seek in an NPRA action (and the issues that an NPRA requester can address in litigation) is flatly wrong.

In any case, it is irrelevant that the Review-Journal also sought declaratory relief. As set forth above, the whole point of the NPRA is to provide access to records. The NPRA also provides for court intervention to gain access to records. Here, it is only because the Review-Journal went to court that it was able to access records. Thus, the entitlement to fees is plain.

5. The Review-Journal Sufficiently Tried to Resolve Its Dispute with Henderson Before Filing Its Petition.

The final factor this Court must consider in determining whether the award the Review-Journal its reasonable attorney's fees and costs is "whether the requester reasonably attempted to settle the matter short of litigation by notifying the governmental agency of its grievances and giving the agency an opportunity to supply the records within a reasonable time." *CIR*, 460 P.3d at 957–58 (citation omitted). Henderson's argument on this point is its familiar old saw: the Review-Journal did not confer with Henderson about the dispute over the fees and production of the records as much as Henderson thinks it should have. (Opposition, pp. 24:25-25:9.) Again, once it became apparent that the Review-Journal and Henderson would not be able to agree to production of the records without the nearly $6,000.00 fee, the Review-Journal filed suit to obtain access to the records.

The Review-Journal's decision—to file suit rather than spin its wheels arguing with Henderson over its fee schedule—is also rooted in the NPRA and the First Amendment. As discussed in the Review-Journal's Amended Motion, the NPRA is intended to ensure swift access to governmental records to foster democratic principles. (Amended Motion, p. 13:6-10.) And as the United States Supreme Court has explained, quick access to public records is required by the First Amendment. *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

(1975) (holding that "each passing day may constitute a separate and cognizable infringement of the First Amendment" and that "any First Amendment infringement that occurs with each passing day is irreparable"). Thus, the Review-Journal's decision to file suit after Henderson denied its request and after the parties could not reconciled their disagreements was reasonable. Thus, the Review-Journal is entitled to a finding by this Court that it prevailed for the purposes of Nev. Rev. Stat. § 239.011(2) under the newly adopted catalyst theory.

Henderson dedicates a substantial portion of its argument regarding this factor to discussing the facts surrounding the records request at issue in *CIR*. (Opposition, pp. 25:11-26:21.) The actions of an unrelated media entity in an unrelated records request, however, are irrelevant to considering whether the Review-Journal's actions here were reasonable. As described in *CIR* and in Henderson's Opposition, CIR waited one month after submitting a records request to the Las Vegas Metropolitan Police Department to follow up with the Department about the request, and then waited twelve days to follow up a second time, and another three months to follow up a third time. *CIR*, 460 P.3d at 954. Nothing in the *CIR* opinion states that requesters should, like CIR, sit on their hands while waiting for a governmental entity to respond to a request. Indeed, to suggest so would conflict with the NPRA's principle goal of assuring prompt access to public records. Thus, the actions of CIR are irrelevant to determining whether the Review-Journal properly attempted to negotiate with Henderson (which it did) before seeking the Court's intervention.

D. The Review-Journal is Entitled to Its Reasonable Attorney's Fees on Appeal.

Henderson argues that the "propriety of the City's policy concerning fees, the mootness issues, the adequacy of the City's Initial Response, the timeliness of the City's privilege log and the contents of the privilege log with respect to documents withheld under the attorney-client privilege are completely separate from the only undecided issue of whether the documents Henderson designated as being subject to the deliberative process privilege (the "DPP Documents") were properly withheld under the separate common law

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

balancing test for the deliberative process privilege." (Opposition, pp. 28:27–29:4.) Contrary to Henderson's assertion, these issues were intertwined. For instance, the "mootness issues" were directly related to Henderson's voluntary disclosure of the DPP Documents. The adequacy of Henderson's initial response and privilege log pertained in part to the DPP Documents[9] and therefore are necessarily intertwined with Henderson's "voluntary" production of said documents.

Henderson's suggestion that the issues in this matter were not "overly complex or intricate requiring special knowledge or skill" (Opposition, p. 29:9-10) is likewise meritless. Interpretation of the NPRA—particularly before the passage of SB 287 in 2019 clarified the NPRA—is a complex and time-consuming process requiring large amounts of research, review, and nuanced advocacy. Even without conducting discovery or engaging in complex multi-party litigation, NPRA matters require specialized practice—that is why the NPRA contains a fee-shifting provision, to incentivize attorneys to fight for public records that an ordinary citizen would not be able to access on his or her own.

Henderson's suggestion that the Review-Journal's fees be reduced by almost 99.9% is an affront. Henderson argues that because the Review-Journal "only succeeded with respect to 0.12% of the total number of documents requested, it should only be awarded 0.12% of its fees and costs, *i.e.*, 0.12% x $125,327.50 = $150.39." (Opposition, pp. 29:27 - 30:2.) Henderson cites no authority for the proposition that attorney's fees should be reduced in line with the ratio of documents produced, because there is none.

This Court should decline to engage in Henderson's suggested calculus for multiple reasons. First, Henderson's proposed analysis does not make awards "commensurate with the level of 'success'" achieved in the case. (Opposition, p. 29:24-26.) This is because the analysis completely ignores the qualitative value of the documents produced. If a requester only obtains some sought-after documents, but those documents are high value and extremely important to the public interest, the requester should not be punished for successfully

[9] *Las Vegas Review-Journal v. City of Henderson*, 441 P.3d 546, 2019 WL 2252868, *3-4 (Nev. 2019) (analyzing the Review-Journal's claims regarding Henderson's privilege log).

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

navigating a haystack of irrelevant documents to find the proverbial "golden needle." Doing so would be severe departure from the statutory mandate that the provisions of the NPRA "be construed liberally" to carry out the purpose of fostering democratic principles via access to public records. Nev. Rev. Stat. § 239.001(1)-(2).

Second, lowering attorney's fees awards based on the ratio of documents obtained from a governmental entity to the number of responsive documents in the governmental entity's possession would create a perverse incentive for governmental entities to artificially inflate the number of documents responsive to a request which would, in turn, artificially reduce the fees awarded under the NPRA. This, of course, would simply make obtaining public records more difficult, time-consuming, and expensive for requesters and the courts. This Court should not read into the NPRA a fee-reducing mechanism that could be so easily abused to subvert the NPRA's overarching purpose of government transparency.

Finally, Henderson's pro-rated approach to awarding attorney's fees is contrary to the catalyst theory and the Nevada Supreme Court's recent decision in *CIR*. There, the Court made clear that a requester unqualifiedly "prevails" for the purposes of a fees award under Nev. Rev. Stat. § 239.011(2) when the requester's suit causes a governmental entity to "substantially change its behavior in the manner sought by the requester, ***even when the litigation does not result in a judicial decision on the merits.***" *CIR*, 460 P.3d at 957. Nothing in the *CIR* Court's adoption of the catalyst theory indicates that a court can or should reduce an award of fees and costs based on the number of documents a requester obtains. Indeed, allowing a court to lower an award based on the number of documents obtained is contrary to one of the specific policy reasons for adopting the catalyst theory cited by the *CIR* Court: "the potential for government abuse in that an agency otherwise could 'deny access, vigorously defend against a lawsuit, and then unilaterally disclose the documents sought at the eleventh hour to avoid the entry of a court order and the resulting award of attorney's fees.'" *CIR*, 460 P.3d at 957 (quoting *Mason v. City of Hoboken*, 196 N.J. 51, 951 A.2d 1017, 1031 (2008)). Here, Henderson is trying a variation of this scenario: it vigorously defended against the Review-Journal's lawsuit, then unilaterally disclosed previously withheld

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

records, and is now attempting to evade payment of attorney's fees and costs by asserting that the Review-Journal may have "prevailed," but that it did not "prevail" enough for a full award of its fees. This is contrary to the intent of the catalyst theory, and must be rejected out of hand.

IV. CONCLUSION

For these reasons, and for the reasons set forth in the Review-Journal's original June 1, 2017, Motion for Attorney's Fees and its supporting documentation, as well as the Review-Journal's May 11, 2020, Amended Motion for Attorney's Fees and its supporting documentation, the Review-Journal prevailed in this litigation pursuant to Nev. Rev. Stat. § 239.011(2) because it achieved a significant goal in this litigation: obtaining improperly withheld public records from the City of Henderson. Accordingly, the Review Journal is entitled to an award of its costs and reasonable attorney's fees.

DATED this 15th day of June, 2020.

/s/ Margaret A. McLetchie

MARGARET A. MCLETCHIE, Nevada Bar No. 10931
ALINA M. SHELL, Nevada Bar No. 11711
MCLETCHIE LAW
701 E. Bridger Avenue, Suite 520
Las Vegas, NV 89101
Telephone: (702) 728-5300; Fax (702) 728-5300
Email: maggie@nvlitigation.com
Attorneys for Petitioner Las Vegas Review-Journal

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

CERTIFICATE OF SERVICE

Pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, I hereby certify that on this 15th day of June, 2020, I did cause a true copy of the foregoing REPLY IN SUPPORT OF PETITIONER LAS VEGAS REVIEW-JOURNAL'S MOTION FOR ATTORNEY'S FEES AND COSTS in *Las Vegas Review-Journal v. City of Henderson,* Clark County District Court Case No. A-16-747289-W, to be served using the Odyssey E-File & Serve electronic court filing system, to all parties with an email address on record.

/s/ Pharan Burchfield
EMPLOYEE of McLetchie Law

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

A-16-747289-W Las Vegas Review-Journal, Plaintiff(s)
vs.
Henderson City of, Defendant(s)

June 18, 2020 09:01 AM Las Vegas Review Journal's Motion for Attorney's Fees and Costs

HEARD BY: Atkin, Trevor COURTROOM: Phoenix Building 11th Floor 110

COURT CLERK: Castle, Alan

RECORDER: Kirkpatrick, Jessica

REPORTER:

PARTIES PRESENT:

Alina Shell	**Attorney for Plaintiff**
Dennis L. Kennedy	**Attorney for Defendant**
Henderson City of	**Defendant**
Las Vegas Review-Journal	**Plaintiff**

JOURNAL ENTRIES

Following arguments of counsel MATTER TAKEN UNDER ADVISEMENT. Parties to be notified of decision by way of Minute Order or written decision.

Electronically Filed
11/30/2020 11:48 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Plaintiff, vs. CITY OF HENDERSON, Defendant,	CASE#: A-16-747289-W DEPT. VIII

BEFORE THE HONORABLE TREVOR L. ATKIN, DISTRICT COURT JUDGE

THURSDAY, JUNE 18, 2020

RECORDER'S TRANSCRIPT OF HEARING:
HEARING - RE: MOTION FOR ATTORNEY'S FEES

APPEARANCES: [All appearances via teleconference]

For the Plaintiff: ALINA SHELL, ESQ.

For the Defendant: DENNIS KENNEDY, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

Las Vegas, Nevada, Thursday, June 18, 2020

[Hearing began at 9:31 a.m.]

THE RECORDER: Page 3, A747289, Las Vegas Review Journal versus City of Henderson. We have Alina Shell and Dennis Kennedy.

THE COURT: All right. Good morning, counsel. This is -- every time I have my calendar there's always a favorite case. This is the favorite case of the day. It's rather unique. I've never ruled on this particular issue. And it's relatively straight forward, relatively I say.

I've of course read the *Center for Investigative Reporting* Inc. case from April of this year. It provides a very concise road map of what the Nevada Supreme Court says we should do in this case, and that is follow the catalyst theory in terms of how am I to determine who is the prevailing party. And it's kind of like art, there's no set answer. And it gives us some guidelines to follow or me. And the question becomes, did the request for records, under the Nevada Public Records Act, "substantially change its behavior"?

Okay. Well what does that mean? The Court cautions that the mere fact that the information sought was not released until after the lawsuit was instituted is insufficient to establish that the requestor prevailed. Okay, so that's in and of itself.

So, thankfully Justice Silver along with Justice Gibbons and Stiglich said there's three things, factors, that I am to consider, and I want you guys to address, when ruling on this. And it's actually five

things the way they did it. And they are one, when the documents were released, two what actually triggered the documents release, three whether the requestor was entitled to the documents at an earlier time.

And then it goes on to say, the District Court should also take into consideration whether the litigation was frivolous unreasonable or groundless, and finally, whether the requestor reasonably attempted to settle short of litigation. Okay, so that's all going to help me determine whether in this case the Las Vegas Review Journal caused the City of Henderson to substantially change its behavior such that it is the "prevailing party" and thus entitled to its request for $125,000 in fees.

Now the arguments are very well laid out, excellent briefing, as I might expect. I know it's the position of the Review Journal that well they turned over a lot more documents after we poked at them and asked for them. And then the City of Henderson points out, hey, they requested over 9,000 documents but as a way to just resolve it we gave them 11 more documents and did that voluntarily. Under this analysis the RJ was not the prevailing party and thus not entitled to their fees and costs.

So, with that T up, I'm sorry I spoke so long. But I just wanted you guys to be aware of the way I'm taking this in and evaluating it, where I'd like you to go. And if you think I've missed something, or hey, Atkin, you got this wrong, you forgot something, by all means let me know. So, I'm going to turn the mic over so to speak to Ms. Shell.

MS. SHELL: Thank you, Your Honor, Alina Shell on behalf of the Las Vegas Review Journal. And, Your Honor, as Your Honor stated,

in the *Center for Investigative Reporting* case the Supreme Court clarified that a requestor prevails for the purposes of a public records action if they succeed on any substantial in the litigation. And then as Your Honor said, it articulated in the test for counter reply the catalyst theory in a case like this where the RJ substantially prevailed in obtaining documents, but did not obtain an issue on the merits.

Now, Your Honor mentioned that you have not ruled on this case before. And so, I think it's helpful to just do a brief overview of what happened in the case.

THE COURT: All right.

MS. SHELL: So, in 2016, the Review Journal was looking into the potentially suspicious retention of Trosper Communications after its principle had worked on the campaigns of several Henderson elected officials. We made a records request to Henderson in October 2016, to records related to the retention of Trosper Communications. In response Henderson demanded $6,000 not to produce the documents themselves, but to conduct a review of the documents for privilege.

And Your Honor, it should be obvious that a $6,000, fee just for reviewing records, not for producing them, just to look at them, was something that is far greater than any member of the public can afford to pay. So, after receiving that response, the Review Journal contacted the City Attorney's Office and explained its objection and grievances about the fee demand and gave Henderson the opportunity to change its behavior and provide the records at no cost.

After we spoke with Henderson it became clear the positions

of the parties were crystalized and that Henderson was not going to back off of its fee demand, we filed litigation to resolve not just the fees issues, but most importantly, to get access to records that we've requested without this exorbitant fee which Henderson had demanded.

Now, after litigation commenced, Henderson provided the records. I realize in my brief I talk about two productions, there were actually three productions of records made by Henderson as a result of the litigation.

Now the first happened in December in 2016 when Henderson agreed to allow the Review Journal to inspect the records onsite at no charge. I will note although, Henderson has made the argument that we've never -- we never asked for the copies of the records after that, we specifically requested, while the reporter was doing the review to have those records provided to us on a disc. So that was the first production.

The second production was after the March 30th 2017 hearing on the Review Journal's amended petition. During that hearing, and I would point Your Honor to the transcript of that hearing at page 16, the Court expressed some concern about whether -- he said this fee demand -- you're demanding a fee for a privilege review and I think that's a very hefty note to argue conditions. And after that, Henderson agreed to produce many documents on a USB drive to the Review Journal at no charge.

Then on the third occasion, after the Supreme Court remanded this case to the District Court for consideration of those

documents that were withheld pursuant to the deliberative process privilege, Henderson, as it says in its own opposition, decided we don't want to litigate this anymore and they turned over the documents.

So, as we sit here today or stand here, Henderson has disclosed all of the records. And in their brief, they talk about the 11 deliberative process privilege records, but that's just a small fraction of the thousands of pages of records that we received as a result of this litigation.

And, Your Honor, this is the catalyst theory at large. I will note, I -- that Henderson tries to argue against the application of the catalyst theory in a couple of different ways. The first thing that they argue is it's a law of the case doctrine bar the application of the catalyst theory. And that's just wrong, Your Honor.

Now what is the law of the case doctrine? That doctrine stands for the idea that an appellate court will not reconsider matters that it resolved in a prior appeal. In order for that to apply, the reviewing court actually has to have decided the matter in previous disposition explicitly.

So, the first argument that Henderson makes is the Supreme Court reversed the prior fee award and held that the Review Journal didn't succeed on the issue. And that, Your Honor, is a really constrained, meaning a liberal, reading of the Supreme Court's opinion.

Now again, in the petition appeal the Supreme Court reversed this Court's decision as to the deliberative process documents. And then in the fees appeal opinion it noted too that the -- it noted that there

was the remand and it vacated the awarded fees previously entered by the Court, not because it determined the Review Journal hadn't prevailed on any issues and had lost of all of its claims, but because there was this remand and because there hadn't been a final judgement entered by the Court. That it was a procedural reversal; it didn't get to the substance.

Now, the second argument being made about why this Court should apply the law of the case and ignore the catalyst theory is that the Review Journal hadn't argued that the Supreme Court decision in the fees appeal was clearly erroneous or a gross manifest injustice. But, Your Honor, we didn't need to mention that decision, because the reversal was not -- it was based solely on the procedural deficit and not on a substantive decision on the merits.

And then finally, I would note -- on the -- their argument for the law of the case. Henderson argues that would be unfair to them somehow to find the catalyst theory, because had the Court decided this matter before the *Center for Investigative Reporting* decision had come out, the Court would have decided in Henderson's favor. And, Your Honor, that was the right law before, the catalyst theory was the right law before; it was the right law now.

And if Henderson had prevailed -- if Your Honor had made a decision before the CIR opinion had come out, we wouldn't be back in front of you again after yet another round of appeals. So just in the interest of judicial efficiently and in the interest of stare decisis, it doesn't make sense to accept their invitation to ignore the Court's finding.

So, turning now to the factor, Your Honor, to the first factor you went over was, when were the documents released. Now as I discussed in my little overview of the case, the timeline of the facts in this case demonstrate the -- that the Review Journal is the prevailing party, because Henderson released the documents after litigation commenced and as a result of the litigation. And then they provided for inspection in December, they agreed to provide a USB drive in March. And then after the Supreme Court's reversal in the substantive petition appeal, provided the deliberative process documents.

Now, Henderson, they have argued that it never withheld the records. That's been their argument this -- they weren't withholding the records. But they were demanding, Your Honor, $6,000 just to look at the documents to determine whether they were going to give them to us. So, this was a de facto denial of our records request. They were essentially holding the records for ransom unless we paid this fee that no person can afford. So, the bottom line is the first factor, Your Honor, leads in our favor because these documents would not have been released to us without charge had we not filed suit.

So, the second factor is what triggered the litigation. And again, this is simply answered, the litigation triggered Henderson's change to its behavior and produce the records at no charge. So, Henderson is trying to get around this conclusion by arguing that yet again then they never withheld the records. But again, Your Honor, we -- this was regarding, Your Honor, that they demanded $6,000 just to look -- just to search and review the records.

THE COURT: And, Ms. Shell, your position is that is a "substantial change in its behavior"?

MS. SHELL: Yes, Your Honor. Providing the records at no charge after demanding thousands of dollars prior to litigation does constitute a substantial change.

And I would also point out, Your Honor, that their position that they never withheld the records is belied by the record of this case. Now just as an example, Exhibit 12 to our memorandum in support of our amended petition was a December 5th letter from -- December 5th, 2016 letter from the City Attorney Josh Reid. And Josh Reid -- Mr. Reid made clear in his letter that they were not going to produce the records without charge. They were not going to pull away from the fee. And so, once we've made that position clear, there was no -- nothing else for the Review Journal except to file suit.

And again, Your Honor, the -- when the litigation triggered the change in behavior, because after we filed suit in November of 2016 in December they agreed to free in-person inspection, and then in March 2017, and then again at the middle of last year they provided additional documents at no charge, which was a substantial change from their prior position that they needed thousands of dollars just to review for privilege.

So, the third factor is whether the RJ was entitled to the records at the time of the request. And I don't even think that Henderson could argue this factor weighs in our favor as well. These were public records pertaining to the use of government money to retain

an outside public relations firm. So, this was never -- there was never a question that these were public records. The question was -- did the RJ have to pay an exorbitant fee to get access to the records.

Henderson also asserts that, you know, that we didn't -- they didn't delay production because the RJ didn't communicate it within -- about the request. And they have repeated this [indiscernible] over and over again that somehow, we did not communicate with them prior to filing suit. And the record, Your Honor, belies that contention. We provided a notice of our grievance, of our disagreement with their fee request after we received their response. And then as Mr. Reid's December -- his letter reflects, Ms. McLetchie from the Review Journal spoke to Henderson City Attorneys on multiple occasions trying to work this issue out. And the letter reflects those conversations. It also reflects that after those conversations the positions reached were set in stone. Henderson demanded a fee. We said you can't charge us that fee, so we filed suit.

So, the third factor, Your Honor, is was the litigation reasonable. And again, the answer to this question is yes. So, the litigation was necessary because again, Your Honor, Henderson would not budge from its demand for thousands of dollars just to do the privilege review, not to produce, just to do the privilege review.

It is also reasonable, because despite what Henderson claims in its opposition, we actually did succeed on an appellate claim before the Supreme Court. Those claims regarding the deliberative process privilege documents. And so, Your Honor, despite Henderson's

arguments to the contrary, the declaratory relief from Henderson's fees policies is a proper form of relief the that RJ could always seek. This is a petition action and the NRS pertaining to petition actions allow you to seek all forms of relief available under the law. Courts take up issues on fee and public records fees.

And I would also note that in a fairly recent decision from the Supreme Court in *Clark County Office of the Coroner versus the Review Journa*l, the Supreme Court there actually addressed a very similar issue regarding whether a public entity, in that case the Coroner's Office, could charge an extraordinary use fee for the production -- for the redaction of records.

And I would just also note, Your Honor, we bring it -- litigation is also reasonable, because after the Review Journal filed litigation during the 2019 legislative session the Legislature actually repealed the statute that the extraordinary use statute, NRS 239.055 because of issues precisely like the one in this case where requesters were blocked from access to public records by unreasonable fee demands.

So, the finally factor, Your Honor, is whether Henderson -- I mean, I apologize, whether the Review Journal reasonably attempted to settle the matter before initiating litigation. And again, the answer to this is yes. And as I said before, Henderson repeatedly asserts that oh well the Review Journal didn't talk to us enough, or Ms. McLetchie didn't return a single phone call. So, the record really perfects that we attempted to resolve our grievance with Henderson prior to filing suit. We talked to them. We made our positions clear.

And, indeed, as I noted in my reply, in the December 5th letter from Mr. Reid, he actually welcomed the litigation to resolve these issues. So obviously, because we were -- each side is so entrenched in its position, there was no obligation for us to engage in further fruitless conversations.

We shouldn't -- and that's it for a number of reasons, Your Honor. First, I would point out that requiring the Review Journal to endlessly converse with a governmental entity about a fees dispute or a records dispute is contrary to the [indiscernible] purpose of the NPRA. The NPRA exists so that the public can have prompt access to records of governmental entities. So, it's a -- if that was not the case, Your Honor, the NRS 239.011, which is the statute that allows us to seek relief from the court, would put in like a predicate prior to filing suit is you have to like confer with the governmental entity ad nauseum. But it doesn't contain that.

And then also, the [indiscernible] itself in the *Center for Investigative Reporting* in that case the reporter -- the media entity there in the *Center for Investigative Reporting* waited for months before filing suit. But there's nothing in the opinion that says that that is a requirement, that we need to request, sit on our hands, request again, sit on our hands. Indeed, that would be contrary again to the purpose of NPRA, which is prompt access to records.

So, Your Honor, just in summation, we -- all of these four factors, all of the *CIR* factors clearly weigh in favor of the Review Journal. Had we not filed suit, had we not challenged their policy of

charging for just reviewing records, Review Journal never would have gotten what it wanted in this case, which was access to copies of the records. We received that. We may not have an order from the Court saying you were the winner. But the fact of the matter is we prevailed on a substantial issue, which was access to the records at no cost.

THE COURT: All right. Thank you, Ms. Shell.

Mr. Kennedy, thank you for patiently waiting. Here we have one set of facts and two diametrically opposed positions on was this a victory, versus just a moral victory and thus not a true prevailing party. So, Mr. Kennedy, I'm going to afford you the same opportunity I did Ms. Shell. Fire away.

MR. KENNEDY: Your Honor, thank you. And fortunately for the Court, the questions that the Court posed at the outset have all been answered. This case has been to the Nevada Supreme Court twice. And those questions have been resolved in favor of the City of Henderson by the Nevada Supreme Court. The two opinions from the Court one on the merits of the dispute and one on the fees, the partial fees that were awarded, put this Court in a perfect position to decide this issue now and deny this motion.

Briefly the history, the matter first came before the trial court when the department was vacant. Senior Judge Charles Thompson read the briefs, heard the arguments. We have attached as an exhibit the transcript. He, Judge Thompson, dismissed the case on its merits and that rendered several of the claims moot. But what happened in front of Judge Thompson was the Review Journal prevailed in the

entirety of the matter. And it was dismissed. It was appealed to the Supreme Court.

In the meantime, the Las Vegas Review Journal went back into District Court, now Judge Bailus had been appointed to the vacant seat. And they sought, the RJ did, attorney's fees. Despite the fact that the matter had been dismissed in its entirety, the RJ claimed that it was a prevailing party. Same arguments you've heard today.

Despite the result, we caused the records to be released; therefore we are a prevailing party. Judge Bailus agreed with that in part and awarded the RJ a part of its attorney's fees. And an appeal was -- appeal and cross-appeal was taken from that order. The City of Henderson's position was you lost on every issue; you cannot be a prevailing party.

Here's what the Supreme Court did in those two appeals. With respect to the merits, which essentially were the questions that the Court asked today, was access to the records denied? Was it unreasonably delayed, et cetera, et cetera? The Supreme Court came down squarely on the side of the City of Henderson. And law opposition starting at page 11, we set forth the contentions and then we cite the Court -- this Court to provisions and parts of the Supreme Court's opinion. Where the Supreme Court said unequivocally the City of Henderson's response complied with the plain language of 239.0107(c). And the City prevailed in its entirety in front of the Supreme Court with one exception. And it was not a victory for either party on the merits.

There were 70,000 pages that were produced. There were 11

redacted documents where the deliberative process privilege was claimed. And the Nevada Supreme Court, while upholding all the other privilege assertions that were made in those -- that was attorney-client privilege. The Supreme Court said with respect to these 11 redacted documents, because the deliberative process privilege is a common law privilege and not a statutory privilege, we are going to remand on 11 documents out of 70,000 pages. We're going to remand for an evidentiary hearing on whether or not those redactions are proper.

The Court then, in a separate opinion, took up Judge Bailus' award of attorney's fees. And the Nevada Supreme Court said we reverse that in its entirety. The Review Journal was not a prevailing party, was not a prevailing party and you can't award attorney's fees. Same argument that was made here today was made in that case. And the Supreme Court said look, you have lost on every issue. We're not ruling on the merits of the deliberative process claim. We're just sending it back.

So, at that point when the case came back to you, the Review Journal had lost on every single substantive issue that had been decided. The one issue that remained was with the 11 redacted documents that the deliberative process privilege had been claimed on.

As we say in our opposition, the City of Henderson said -- we looked at the documents. The privilege was properly asserted. The City said, well we don't want to continue to spend taxpayer money on these 11 redacted documents. They don't amount to anything. And they have nothing to do with this dispute. It just happens -- so happens that there

are parts of them that need to be redacted. We'll just give those to the Review Journal. And that's what we did.

Now the Review Journal comes back to this Court on the catalyst theory, by the way, the same theory that the Court rejected in Judge Bailus' award of attorney's fees. They come back and say well the City gave us 11 redacted documents out of a total of 70,000 pages that the Supreme Court already ruled on in favor of the City, therefore we are the prevailing party on the entirety of this litigation, despite having lost every claim we made in the complaint in the petition, which was dismissed with prejudice.

Well, Your Honor, that's where we are. Does the fact that the City said we'll just give you these 11 -- remove the redactions from these 11 documents because they're -- despite the fact that the privilege is properly asserted, they have nothing to do with this dispute. And the fact is they don't. These things came to other things entirely.

And now that the Review Journals says, well we've lost every issue. We haven't won this one, you just gave this to us to stop spending money. Now we get the entirety of the fees we've spent on everything, including all the claims that were dismissed and the attorney's fee argument, which the Supreme Court expressly rejected.

What we have said is under the catalyst theory, if it is applied here then here's what you've got. You've got 11 redacted documents out of 70,000 pages, which the City voluntarily gave up to try to stop the financial bleeding.

Now if you look at the *Center for Investigative Reporting* case,

the Supreme Court cites three or so of the landmark cases in this area. And what it says is, and I'm looking at page 10 of the advance opinion. The Supreme -- the Nevada Supreme Court quotes the language which says, now wait a minute. Just because somebody gives up some records doesn't mean that the receiving party has prevailed in the litigation. It says there are a lot of reasons why information might be released include -- and I'm quoting -- including reasons having nothing to do with the litigation.

And that's what happened here. This doesn't have anything to do with the litigation. The City said we don't want to continue spending money over 11 redactions that don't amount to anything after we have prevailed on every other substantive issue in the case. So, in conclusion, your questions of when were they released. The Supreme Court's ruled on that, said that timing of the release was proper.

What triggered it? Did the litigation trigger it? No, the City said we will release the documents but we have 70,000 pages we have to review them for privilege and for other types of personal information.

Were you entitled to them? Well here's what happened with respect to the entitlement. And the Supreme Court addresses this and Judge Thompson addressed it. When we put them on a computer, we invited the reporter to come to the City and we said look here they are. Just tell us what copies you want. And very tellingly, they didn't ask for a single copy.

And in front of Judge Johnson and we've quoted this and attached the transcript. Judge Thompson asked Mr. Shell and Ms.

McLetchie, is it true after reviewing those documents you didn't ask for a single copy? And they said that's correct. And then he looked at me and he said. Will you give them copies now? I said sure, we'll put them on a thumb drive and give them to them if they want them. But when they came and looked for them or looked at them, they said, no they didn't want a single copy for all of it.

Efforts to settle the matter, there were conversations that went back and forth during all of this and Josh Reid's letter is quoted or relied on. And Josh Reid just said finally; look, if you guys are going to force a resolution through the Court then fine, we're happy to have the court decide this. Guess what happened? The court did decide it. It decided it entirely in the City of Henderson's favor with the exception of remanding back the 11 redactions for an evidentiary hearing. And that issue never got decided because the City said here you can take these. We're not going to continue to spend taxpayer money fighting over these few redactions, consistent with the language that Nevada Supreme Court quotes in the *Center for Investigative Reporting*.

Bottom line, here, Your Honor, your questions are the right questions to ask. And if you look, as I'm sure you have, at the two opinions from the Nevada Supreme Court, the one on the merits and the one on the fees. These questions are all answered. And they are answered 100% on the side of the City of Henderson.

The complaint was dismissed on the merits. It was affirmed by the Supreme Court. The initial award of attorney's fees, under the same catalyst theory that Judge Bailus made, the Supreme Court flat

out reversed that and said the Review Journal is not the prevailing party. It did not prevail on a single claim; therefore it doesn't get attorney's fees.

Now we're back and the Review Journal is saying well, you know, they gave us these 11 -- they removed the redactions from 11 documents, therefore we're the prevailing party on everything. So --

THE COURT: All right. Mr. Kennedy, let me ask you this. Ms. Shell raises the point of, hey, initially the City of Henderson asked for $6,000 for the documents. Is it your position that issue was essentially resolved through a previous decision via Judge Thompson saying that was considered?

MR. KENNEDY: Yeah, that was in front of Judge Thompson. And what he said was, you know what, they asked for no copies of anything. And he said would you just -- if they want them now will you give them to them? And he said yeah --- we'll just give them to them. But the fact that we asked for the deposit was not improper. That deposit was permitted by the statute that was in effect at the time, the statute in the city ordinances. So there was nothing improper about that. But they didn't ask for a copy of anything. So, we said, okay, fine. Then if you don't -- if you didn't ask for anything, we're not going to charge you a fee for it.

And the Supreme Court -- that argument was made to the Supreme Court and the Supreme Court essentially said you -- they never made any finding that that was improper. In fact, it couldn't have been, because the statute permitted the request for a fee. It's just that

the way things worked out in this case, the fee wasn't charged. It -- nobody's behavior was changed at that point as a result of the litigation. The City never conceded that it couldn't charge the fee in this case. No copies of anything were requested. And the City said well fine if you don't want anything then I guess we're past that issue. So that behavior didn't get changed.

And by the way, the Supreme Court in its opinion doesn't fault the City for making that request initially at all. And that was an issue that was before the Supreme Court in the decision on the merits. That at this point is a complete non-issue, because the RJ raised that in the Supreme Court and they lost on it. So, to bring it up again here after the Supreme Court is ruled on the merits of the dispute, the RJ is just asking this Court to disregard the two opinions that the Supreme Court has issued on this matter, asking the Court to do something that the Supreme Court said couldn't be done.

And my suggestion is if they want to make that argument, in essence if they want to say well the Supreme Court was wrong, they should go back to Carson City and make that argument again. I don't think you come to this Court and say please disregard what the Supreme Court has already said on the merits of this case. This motion ought to be denied. The RJ has lost every one of these arguments --

THE COURT: All right.

MR. KENNEDY: -- and all they're doing is they're raising them again. The best we can do is to say well we got 11 documents where the redactions have been removed. And what we've said at the

very end of our opposition is, okay, then let's just do the calculation as to what part of your gross attorney's fees 11 documents represent and that number is about $150.

THE COURT: And your position --

MR. KENNEDY: So, if --

THE COURT: And your position to sum up therefore, is the City of Henderson did not, "substantially change its behavior from day one"?

MR. KENNEDY: That is right.

THE COURT: All right. Ms. Shell, if you could please limit your reply to the points raised by Mr. Kennedy, particularly this -- the $6,000 in costs that they walked away from demanding, and whether this City of Henderson truly substantially changed its behavior, and then finally, the import of the two previous Supreme Court rulings on this particular case.

MS. SHELL: Yes, thank you, Your Honor. And I'm going to start that in a slightly reverse order. I find it rather ironic that Mr. Kennedy accuses us of asking the Court to disregard the prior Supreme Court opinions in this matter, when in fact Mr. Kennedy's argument, quite frankly, disregards the Supreme Court opinions as well.

Turning first to the issue about the fees, now what the District Court said and what the Supreme Court said was that our legal challenges regarding the fees issue were mooted by Henderson's voluntary cessation of its demand for fees. That's -- that is what happened. And it says, in the opinion at page 1, it says the issue of

Henderson's fee became moot once Henderson provided the records to the Las Vegas Review Journal free of charge, which was quite frankly, Your Honor, a substantial change in behavior.

A couple other points I wanted to hit on. It's not just about 11 documents, Your Honor. Mr. Kennedy would have you walk away believing that all you we got out of this case was 11,000 documents. But that's not true. As Mr. Kennedy himself just said, in the end, the Review Journal received thousands of pages of documents and received thousands of pages of documents without having to pay to 6,000 -- nearly $6,000 fee that Henderson had demanded.

Bear with me for just one second, Your Honor. I want to make sure I address the three points that you had brought to my attention.

Now, again, Your Honor, if you listen to what Mr. Kennedy said during his arguments, he said oh no -- you asked him did the litigation trigger the release of the documents. He said no. But immediately prior to that, he said that Henderson decided to release the documents because they didn't want to pay any more taxpayer money litigating these issues. If the litigation did not -- cause a substantial change in behavior -- if that's not a perfect example of it, Your Honor, I don't know what is.

In -- and again, Your Honor, we have not lost on all of these issues. We have substantially prevailed because we achieved a substantial [indiscernible] in this litigation, which is access to records from the City of Henderson pertaining to its retention of an outside consultant. We got those documents.

And what *CIR* says is I don't need to get a judgment on the merits in my favor, Your Honor, to be a prevailing party. What I need to be a prevailing party is that I need to prevail on the substantial issue in the litigation and change the behavior of a governmental entity. And that's exactly what happened here. We wanted the documents without paying the fee. Henderson, in court, after we had briefed and argued these issues, agreed to provide the documents.

And another thing, Your Honor, I wanted to bring up one point. Now Mr. Kennedy and the City of Henderson has said we never asked for documents after we did the review. And that is just flatly wrong, Your Honor. And I would point Your Honor to Exhibit 16 to our reply in support of the petition. And that is an email from Ms. McLetchie to the City of Henderson saying, hey, can we get copies of those records? What did Henderson say? They said no, it has to be onsite. So, we have always wanted to copies of the records.

And indeed, in the -- and I urge Your Honor, to go back and look at the transcript from the March 30th hearing. I never said, nor did Ms. McLetchie, who was also at the hearing, neither of us said no we never wanted -- never asked for copies. As Ms. McLetchie explained, the inspection -- we did request copies. But the inspection was set up as an intercept while the litigation was ongoing. And I -- did I address your points, Your Honor or is there any other questions I can address for you?

THE COURT: No, yeah, one final one, Ms. Shell, and understanding of course, I'm looking at the *CIR* decision and it made a

point when it quoted the *Church of Scientology* case out of the Ninth Circuit, where it said the mere fact that the information sought was not released until after the lawsuit was instituted is insufficient evidence to establish that the requestor prevailed. So, just because they eventually produced them you would agree that is not enough, correct?

MS. SHELL: That would not be enough Your Honor, but that's not what happened here.

THE COURT: Okay. It's -- and then it goes on to say -- and then this our -- well this is more of the Ninth Circuit. There must be a causal nexus between the litigation and the voluntary disclosure. Now Mr. Kennedy is saying there is none. The voluntary disclosure was after these two appeals and there was only 11 documents left, and it was a judicial/economical decision to do so. How do you address that?

MS. SHELL: Well, in two ways, Your Honor. First I would point out yet again that this is not about 11 documents. And quite frankly, it wouldn't matter if it was 1 -- if it was 1 document. All -- we could have requested 1 documented and ended up receiving 1 document and we would still be a prevailing party. But in any event, Your Honor, it's about 70,000 pages of documents, as Mr. Kennedy himself pointed out.

Now in terms of causal connection, I think the record here makes it plain that that the litigation caused Henderson to change its position and start providing the documents. Again, they said -- the City of Henderson said in its December 5th, 2016 letter, we're not changing our position. Let's go to litigation. And then when we get into court and

we say yes, we've always wanted the documents, we've always wanted copies of the documents, the Court indicated well, you know, this position about whether you're entitled to fees for review is arguable and then Henderson just -- I say -- you know, it's hard for me to read people's minds but I think Henderson thought that their argument was not going their way and decided to produce -- provide these documents on a disc at no charge. So, the causal connection is there.

And then again, in terms of the deliberative process privilege they said there's a Supreme Court opinion that says these redactions may not have been proper and they decided when they don't want to litigate anymore so we're going to give you the documents. And if that's not because of the litigation, then I, quite frankly, don't know what is, Your Honor.

THE COURT: All right. And Ms. Shell, and I'm not tipping my hand. I'm taking this under advisement, because I want to go look at the transcript of the March 30 hearing and go look again at some of the prior decisions in this case from the Supreme Court. Which I've done before but I'm going to take a closer look at it.

But couldn't it be said, if I take the position -- if you take the position that once the lawsuit is filed any inch given by the government, they've -- the argument can be made, ah there's a causal connection. I filed the lawsuit and eventually at some point they gave me a document or 100 documents and thus the prevailing party. And to that extent, have the chilling effect of once litigation is filed you will have no -- there will be no quarter given. They'll hold onto that position until the bitter

end, because of arguments being made similar to that which is being made now is I filed a lawsuit, eventually they gave me some documents. That's the causal connection; I “prevail”.

MS. SHELL: Well, Your Honor, in all honesty Henderson didn’t give us an inch, they gave us a mile. Because they gave us -- the nut of the dispute, the center of the dispute was were they entitle to charge thousands of dollars for the privilege review. And as a result of the litigation, when they put their feet to the fire and tested them on that they ended up handing over the documents.

So, this is not -- but I understand what, Your Honor is saying. But this is not a case where were losing -- where *CIR* would be used as cudgel to punish a governmental entity who were giving up documents. It is compensating the Review Journal for all the efforts it had to go through to get those documents. And that’s the entire purpose of having a fees award in a public records case is to encourage compliance from governmental entities with the provisions of the NPRA.

THE COURT: Okay.

MS. SHELL: So, this is not be -- yeah.

THE COURT: So, but for the RJ's persistent efforts you wouldn’t have the records you have today? And it took 123,000 -- essentially $125,000 of barking up that tree for them to eventually give you what the RJ wanted from the very outset?

MS. SHELL: That's correct, Your Honor.

THE COURT: Okay. Understood. And so, with that I’m going to move on. I’m going to take it under advisement. Thank you, Ms.

Shell and thank you Mr. Kennedy for the briefing of this and the excellent argument. Thank you.

MS. SHELL: Thank you.

MR. KENNEDY: You bet, Your Honor.

[Hearing concluded at 10:22 a.m.]

* * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Jessica Kirkpatrick

Jessica Kirkpatrick
Court Recorder/Transcriber