IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S OPENING BRIEF

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

NRAP 26.1 DISCLOSURE

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

Appellant Las Vegas Review-Journal, Inc. is a Delaware corporation registered in the State of Nevada as a foreign corporation. Las Vegas Review-Journal, Inc. is a wholly owned subsidiary of News + Media Capital Group, LLC, a Delaware limited liability company. No publicly held corporation owns ten percent or more of the stock of Las Vegas Review-Journal, Inc. or News + Media Capital Group, LLC.

The law firm whose partners or associates have or are expected to appear for the Las Vegas Review-Journal, Inc. is MCLETCHIE LAW.

DATED this 14th day of January, 2021.

/s/ Margaret A. McLetchie

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

JURISDICTIONAL STATEMENT

The district court's August 4, 2020, order denying Las Vegas Review-Journal, Inc.'s ("Review-Journal") motion for attorney's fees and costs is a final order in the underlying action (XI JA1600-07[1]), as defined by Nevada Rule of Appellate Procedure 3A(b)(1). The Review-Journal filed a timely notice of appeal on September 3, 2020. *See* NRAP 4(a)(1) (providing that a notice of appeal in a civil case must be filed no later than 30 days after entry of a written judgment or order). Accordingly, this Court has jurisdiction over this matter.

ROUTING STATEMENT

This case is presumptively retained by the Supreme Court because it is not a matter which would be presumptively assigned to the Court of Appeals under NRAP 17(b). Moreover, this Court should retain jurisdiction over this appeal pursuant to NRAP 17(a)(11) and (12) because it raises a question of both first impression and statewide importance about a prevailing requester's entitlement to reasonable attorney's fees and costs under the Nevada Public Records Act and how to apply the adoption of the catalyst theory in *Las Vegas Metro. Police Dep't v. Ctr. for Investigative Reporting, Inc.*, 136 Nev. 122, 460 P.3d 952 (2020).

/ / /

[1] For the Court's ease of reference, citations to the Joint Appendix ("JA") cite to both volume and page number. Hence, "IX JA1600-07" refers to Volume IX of the Joint Appendix at pages 1600 through 1607.

ISSUE PRESENTED FOR REVIEW

Whether the district court erred in denying the Review-Journal's motion for reasonable attorney's fees and costs in a public records matter in which the Review-Journal established a causal nexus between its litigation to obtain access to public records and the City of Henderson's decisions to (1) produce copies of thousands of pages of requested records at no cost after refusing to even process the records request without payment of a fee to conduct a privilege review, and (2) produce copies of documents it had previously withheld pursuant to the deliberative process privilege after reversal and remand by this Court for a determination of whether Henderson had satisfied its burden of establishing that its interests in nondisclosure outweighed the public's interest in access.

I. STATEMENT OF THE CASE

The Review-Journal appeals the district court's denial of attorneys' fees that, based on this Court's "catalyst theory," the Review-Journal is entitled to recoup. As a broad overview of the facts of this case demonstrate, this is a classic case of the catalyst theory. The Review-Journal requested records from Henderson. Henderson refused to provide them unless the Review-Journal paid fees for the records. The Review-Journal explained it thought the fees were illegal. City of Henderson ("Henderson") stood by its decision, so the Review-Journal filed suit. After the lawsuit was filed, Henderson also asserted some of the records would not be

produced even if the fees were paid based on asserted privileges. At a hearing, Henderson changed its position and provided most of the records without charging the fees the demand for which precipitated the litigation. That was the first time the litigation was the catalyst. The district court then ruled the privileges applied and the remaining records could be withheld. The Review-Journal appealed, and this Court reversed as to one of the privilege claims and remanded the case, requiring Henderson to overcome a burden to establish whether it could rely on the privilege. On remand, in reaction to this Court's ruling, Henderson changed its position on the privilege issue and provided the records—the second catalyst. As a result of the litigation, Henderson changed its position first on fees then on one of the privileges, and the Review-Journal achieved what it sought in filing the case. This is the classic case of the catalyst theory.

Taking a step back with more detail, the instant appeal seeks review of an order entered by the district court denying the Review-Journal's motion for attorney fees and costs in a petition brought pursuant to the Nevada Public Records Act ("NPRA"), Nev. Rev. Stat. § 239.011. The Review-Journal sought judicial intervention in this case on November 29, 2016, after the City of Henderson ("Henderson") refused an October 4, 2016, public records request. The request sought disclosure of public records pertaining to Henderson's retention of a public relations/communications professional and firm that also worked on many

Henderson officials' campaigns. Henderson refused to provide the records unless the Review-Journal agreed to pay it $5,787.89 for the supposed "extraordinary use" of Henderson personnel and resources in producing the requested records.

Fifteen days after the Review-Journal petitioned the district court, Henderson permitted the Review-Journal to conduct an in-person inspection of some of the records while the litigation was pending. (II JA0241.) Afterwards, the Review-Journal reiterated its request for copies of the records. However, Henderson continued to refuse to provide the records without being paid the exorbitant sums. (II JA0365.) In addition, for the first time, Henderson took the further position that some of the records would never be provided or even made available for inspection based on Henderson's claim it could keep those records confidential based on the deliberative process privilege and attorney-client privilege. (I JA0069-0074.) The litigation, therefore, continued.

At a subsequent hearing on the Petition, after inquiries from the court pressing Henderson on some of the issues, Henderson changed its position and agreed to provide the Review-Journal copies of some of the records. Henderson continued to refuse to provide the records it claimed were subject to the deliberative process privilege and the attorney-client privilege.

After the hearing, the district court entered an order that, among other things, made two rulings relevant to this appeal. First, the district court denied the Review-

Journal's request for access to the documents withheld on the basis of the deliberative process privilege and attorney-client/work product privilege. Next, because the other documents had by this time been produced without charge as a result of Henderson's change in position during the court hearing, the district court denied as moot the request for copies of those remaining documents. (III JA0446-451.)

The Review-Journal appealed, among other things, the district court's ruling that the deliberative process privilege and attorney-client privilege applied to the some of the documents and appealed the district court's decision that Henderson's decision during the litigation to provide the records to the Review-Journal without charge mooted the Review-Journal's Petition to the extent it related to those provided records. This Court resolved the appeal in an unpublished disposition, reversing the district court's denial of the Review-Journal's petition in part and finding the district court had failed to consider whether Henderson had proven by a preponderance of the evidence that documents it had withheld based on the deliberative process privilege were subject to withholding. *Review-Journal v. City of Henderson*, 441 P.3d 546, 2019 WL 2252868 at *4 (Nev., May 24, 2019).

Once this case had been remanded by this Court with an order that would require Henderson to provide evidence and meet its burden on the deliberative process privilege, on July 24, 2019, Henderson changed its position related to the

deliberative process privilege and provided the Review-Journal the public records Henderson had withheld pursuant to the privilege. (V JA0750.)

The Review-Journal then moved the district court for an award of its reasonable attorney's fees and costs pursuant to Nev. Rev. Stat. § 239.011(2) and the "catalyst theory" this Court adopted in *Las Vegas Metro. Police Dep't v. Ctr. for Investigative Reporting, Inc.*, 136 Nev. 122, 460 P.3d 952 (2020) ("*CIR*"). (V JA0731-960; VI JA1126-48.) The Review-Journal asserted that although the district court had denied its petition as moot, the Review-Journal had nevertheless prevailed for the purposes of a fee award under Nev. Rev. Stat. § 239.011(2) because its petition had caused Henderson to substantially change its behavior in the manner sought by the Review-Journal in the litigation by (1) disclosing copies of some of the requested records to the Review-Journal without charging a fee for "extraordinary use" of Henderson personnel and resources only after the hearing on the Review-Journal's petition, and (2) disclosing copies of the documents Henderson had withheld pursuant to the deliberative process privilege only after this Court reversed the district court's finding and remanded the case with the requirement that Henderson overcome a burden of establishing the records were subject to the privilege.

The district court conducted a hearing on attorneys' fees and costs on June 18, 2020. (VIII JA1572-99.) On August 4, 2020, the district court entered a decision and

order denying the Review-Journal's request for fees and costs. (IX JA1600-07.) The district court committed reversible error in several ways. First, as set forth below, the district court improperly limited its analysis to the 11 documents Henderson disclosed after remand. (IX JA1605.) Second, the district court's decision lacked specific factual findings as the case law requires in a "catalyst theory" analysis. Third, the district court failed to conduct a meaningful analysis of the catalyst theory factors set forth in *Las Vegas Metro. Police Dep't v. Ctr. for Investigative Reporting, Inc.*, 136 Nev. 122, 460 P.3d 952 (2020). As part of its failure to conduct a meaningful analysis, the district court (a) ignored the undisputed facts that demonstrate the Review-Journal prevailed in its goal of obtaining access to public records; and (b) erred as a matter of law when it concluded the litigation did not cause Henderson to change its position and provide the records, particularly in light of Henderson's admission that it provided some of the records simply to avoid continuing the litigation.

Had the district court conducted the inquiry required by *CIR* and the cases that underpin it, the court would have determined that the Review-Journal was indeed a prevailing party, and therefore entitled to an award of its reasonable attorney's fees and costs. This Court should do what the district court failed to do: apply the undisputed facts to the legal framework set forth in *CIR* and find that the Review-Journal is entitled to an award of its reasonable fees and costs in this matter.

II. STATEMENT OF FACTS

A. Henderson Denies the Review-Journal's Request for Access to Public Records.

On October 4, 2016, the Review-Journal sent Henderson a request pursuant to the NPRA seeking certain documents dated from January 1, 2016, forward pertaining to Trosper Communications and its principal, Elizabeth Trosper. (I JA0012-15.) Trosper Communications is a communications firm that had a contract with the City of Henderson and had assisted with the campaigns of elected officials in Henderson prior to obtaining the contract with the City. (I JA0014.)

Henderson did not provide the requested records. Instead, on October 11, 2016, Henderson indicated that it was "in [the] process of searching for and gathering responsive e-mails and other documents," but estimated it would take approximately three weeks to fulfill the request. (I JA0017.) Importantly, Henderson stated it intended to withhold the documents until the Review-Journal paid $5,787.89 for what Henderson claimed was the "extraordinary use" of Henderson personnel to "review and read" the requested records, citing Nev. Rev. Stat. § 239.055, Henderson Municipal Code 2.47.085, and Henderson's Public Records Policy. (*Id.*; *see also* I JA0019-23.) Henderson also stated that pursuant to its Public Records Policy it would not continue searching for responsive documents and reviewing them for privilege unless the Review-Journal paid a "deposit" of $2,893.94." (I JA0017.)

B. The Review-Journal Attempts to Resolve the Matter with Henderson, But When No Resolution Is Possible, the Review-Journal Petitions the District Court.

After receiving the money-demand email from Henderson, counsel for the Review-Journal contacted a deputy City Attorney regarding the Review-Journal's concerns with Henderson's demand for fees just to search for and review the requested records. (II JA0302-03; II JA0325-26.) On November 29, 2016, after nearly two months of efforts to resolve this dispute failed, the Review-Journal was forced to petition the district court to obtain access to the requested records without having to pay the fees demanded by Henderson. (I JA0001-0023.)[2]

On December 20, 2016, Henderson produced a privilege log of withheld records (I JA0058-0060), and subsequently produced revised versions of the privilege log after the Review-Journal requested additional information. (*See generally* I JA0062-0074.) In the logs, for the first time, Henderson refused on various claimed privilege grounds to produce some of the records even if the Review-Journal agreed to pay the demanded fees. The Review-Journal then amended its petition to not only challenge the illegal fees, but to challenge the claimed privileges, as well. (*See generally* I JA0030-0168.) In the amended petition,

[2] The Review-Journal also sought declaratory and injunctive relief to address the rights of the parties and the applicability of Henderson's Municipal Code and Public Records Policy. (*See generally id.*)

the Review-Journal again asked the district court to order Henderson to "immediately make available complete copies of all records requested." (I JA0041.) Henderson continued to withhold the records.

C. The Review-Journal Requested Copies of the Requested Records After Henderson Agreed to In-Person Inspection.

After the Review-Journal filed suit, counsel for the Review-Journal met and conferred with Henderson City Attorneys. The parties each continued to take the positions on the issues they had taken prior to and thus far in the litigation, but Henderson changed its pre-litigation position, entering into an interim agreement with the Review-Journal to allow a Review-Journal reporter to inspect the records while litigation was pending. (II JA0241; I JA0027.)

After the in-person inspection, Counsel for the Review-Journal asked for electronic copies of the limited records reviewed. (II JA0365.) Henderson refused this request. (*Id.*)

D. Henderson Finally Provides Some of the Requested Copies Records at the Hearing on the Amended Petition.

The district court conducted a hearing on the Review-Journal's amended petition on March 30, 2017. (Minutes and transcript of 3/30/17 hearing.) During the hearing, which took place four months after the Review-Journal filed its Petition and nearly six months after the Review-Journal requested the records, counsel for Henderson changed its position and agreed to the Review-Journal's demand for

access to many of the requested documents without charge after it became plain that the district court intended to order Henderson to do so. (III JA0426-28.) 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." (II JA0444.) Subsequently, on May 15, 2017, the district court entered an order finding that Henderson's privilege log was sufficient and denying the amended petition as moot even though the court ordered the most significant relief sought: access to the records. (III JA0446-51.)

E. The Review-Journal Sought Attorney's Fees.

Because it obtained access to records as a result of the litigation it initiated, the Review-Journal filed a motion on June 1, 2017, pursuant to Nev. Rev. Stat. § 239.011(2) seeking an award of $30,931.50 in attorney's fees and $902.84 in costs. (III JA0452-0523.) The district court conducted an initial hearing on that motion on August 3, 2017, at the end of which the court asked the parties to return a week later for its decision. (IV JA0657-0682.) At the subsequent August 10, 2017, hearing, the district court found that the Review-Journal was a prevailing party because it had obtained copies of most of the requested records. (IV JA0688.) The district court stated it had considered the *Brunzell*[3] factors and arguments Henderson had made

[3] *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

regarding a reduced award for the work performed by Review-Journal counsel and had determined the Review-Journal was entitled all its costs, but only $9,010.00 of the $30,931.50 requested attorney's fees. (IV JA0689-0690.)

F. Appellate Proceedings

The Review-Journal appealed the district court's technical denial of the Amended Petition as moot, including the issue of mootness as it applied to the records finally produced and the district court's ruling that the asserted privileges applied to some of the documents being sought. (*See* Nevada Supreme Court Case No. 73287 ("Petition Appeal").). In addition, each party appealed the district court's award of attorney's fees (Case No. 75407 ("Fees Appeal").)

In the Petition Appeal, on May 24, 2019, this Court issued an unpublished disposition affirming in part and reversing in part the district court's denial of the Review-Journal's amended petition. *See Las Vegas Review-Journal v. City of Henderson*, 441 P.3d 546, 2019 WL 2252868 (Nev. 2019) (unpublished). Of relevance to this appeal, the Court agreed with the Review-Journal's assertion that the district court had failed to consider whether Henderson had proved by a preponderance of evidence that a number of documents it had declined to disclose were properly withheld pursuant to the deliberative process privilege and thus "that its interest in nondisclosure clearly outweighs the public's interest in access." This Court therefore reversed and remanded the matter to the district court to conduct that

inquiry with the burden placed on Henderson. *Henderson*, 2019 WL 2252868 at *4 (quotation omitted).

In the Fees Appeal, this Court entered another unpublished decision reversing the district court's partial award of attorney's fees to the Review-Journal on October 17, 2019. *See City of Henderson v. Las Vegas Review-Journal*, 450 P.3d 387, 2019 WL 5290874 (Nev. 2019) (unpublished) (*Henderson II*). Central to that reversal was the Court's finding in the Petition Appeal that the district court had abused its discretion in failing to conduct the appropriate analysis regarding the documents Henderson had withheld pursuant to the deliberative process privilege. *Henderson II*, 2019 WL 5290874 at *2. Because the Court remanded the case for further proceedings, the Court concluded the Review-Journal could not "be a 'prevailing party,'" yet, not because the Review-Journal had not prevailed on significant issues (and obtained most of the records it sought), but because the litigation was still ongoing. *Id.* ("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.") (citations omitted).

G. Post-Appeal, Henderson Discloses Records Previously Withheld Pursuant to the Deliberative Process Privilege.

On July 24, 2019, two months after the Supreme Court issued its opinion in the Petition Appeal and over two and a half years after the Review-Journal first filed this suit, Henderson provided the documents that it had withheld based on the

deliberative process privilege. (V JA0750.) At that point, the Review-Journal prevailed in obtaining the last documents at issue in its litigation against Henderson. In its subsequent opposition to the Review-Journal's request for fees and costs, Henderson admitted it provided the documents because of the litigation. (JA1372 ("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 documents).)

H. The Review-Journal's Post-Remand Motion for Attorney's Fees and Costs.

On December 12, 2019, the district court conducted a status check following this Court's remand. (IV JA0729-30.) During that status check, the Review-Journal stated that it would be seeking its reasonable attorney's fees and costs now that Henderson had disclosed the remaining documents the Review-Journal was entitled to. (*Id.*) The Review-Journal submitted its post-remand motion for attorney's fees and costs on February 6, 2020. (V JA0731-0960.) Henderson filed a response in opposition to that motion on February 27, 2020. (VI JA0961-0979.)

Prior to the Review-Journal filing its reply, this Court entered an opinion on April 2, 2020, in *Las Vegas Metro. Police Dep't v. Ctr. for Investigative Reporting, Inc.*, 136 Nev. 122, 460 P.3d 952 (2020). In that case, this Court adopted the "catalyst theory", holding that a requester "prevails" for the purposes of the NPRA even when

the governmental entity voluntarily produces the sought-after records "when the requester can demonstrate a causal nexus between the litigation and the voluntary disclosure or change in position by the Government." *CIR*, 136 Nev. at 158, 460 P.3d at 957 (quotation omitted).

In light of this new guidance from this Court, the Review-Journal filed an amended motion for attorney's fees and costs on May 11, 2020. (VI JA 1126-48.) Henderson filed an opposition to the amended motion for attorney's fees on June 1, 2020. (VIII JA1363-1393.) The Review-Journal filed a reply in support of its amended attorney's fees motion on June 15, 2020. (VIII JA1549-71.) The district court conducted a hearing on the Review-Journal's amended motion for attorney's fees and costs on June 18, 2020. (VIII JA1572-1599.)

On August 4, 2020, the district court entered an order denying the Review-Journal's motion. (IX JA1600-07.) Pursuant to this Court's decision in *CIR*, the district court was required to consider "(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," (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 governmental agency of its grievances and giving the agency an opportunity to supply the records within a reasonable time. *CIR*, 136 Nev. at 127-28, 460 P.3d at 957 (citations omitted).

In its order, the district court stated that, because this Court had determined that the Review-Journal "has not succeeded on any of the issues that it raised" in its underlying action, it was limiting its analysis of the *CIR* factors to the 11 deliberative process privilege documents Henderson disclosed following remand from this Court. (IX JA1604) (quoting *City of Henderson v. Las Vegas Review-Journal*, 450 P.3d 387, 2019 WL 5290874, *2 (Nev. 2019)).

The district court conducted a deficient factual analysis, ignoring some of the factors almost entirely. In addition, the few facts the district court did find supported the Review-Journal's right to attorney's fees as a matter of law. With respect to the first factor—the timing of the release of the documents withheld based on the claim of deliberative process privilege[4] —the district court found that Henderson did not release the records until approximately two and a half years after the Review-Journal filed its petition. (IX JA1605.)

As to the second factor—what triggered the documents release—the district court made no specific finding, noting only that the parties had asserted divergent views regarding the triggering event. However, the Review-Journal maintained that its petition was the catalyst for Henderson's disclosure of the withheld records, and

[4] Again, the district court refused to also consider the previous production of records, though the Review-Journal is entitled to fees based solely on the facts regarding the 11 deliberative process records, and it would be entitled fees solely based on the first batch of records produced and based on all of them together.

Henderson's supposedly "divergent view" was its admission that the disclosure of the 11 deliberative process privilege documents was borne of "the desire to avoid any further costly litigation." (IX JA1605.)

With respect to the third factor—whether the requester was entitled to the documents at an earlier time—the district court again made no actual findings, instead noting that Henderson disclosed the documents before the district court had the opportunity to assay Henderson's privilege assertions on remand. (IX JA1605-06.) The district court did note, however, that the Review-Journal "ultimately was successful in securing" the documents withheld pursuant to the deliberative process privilege. (IX JA1606.)

With regard to the analysis of the fourth *CIR* factor—whether the litigation was frivolous, unreasonable, or groundless—the district court properly found that the Review-Journal's action was not frivolous. The district court stated that this Court

> had two opportunities to declare whether either the LVRJ's request or HENDERSON's reason for non-disclosure was frivolous, unreasonable, or groundless. It chose not to do so, declaring only that the LVRJ has not succeeded on any of the issues it raised, but that there remained a balancing test to be performed on the 11 [deliberative process privilege] documents. Again, this test was never performed thus, never a determination relative to the 11 [deliberative process privilege] documents

/ / /

/ / /

(IX JA1606 (capitalization in original).)[5] Thus, the district court found the litigation was not frivolous, unreasonable, or groundless.

Finally, with regard to the fifth *CIR* factor—which required the district court to consider whether the Review-Journal reasonably attempted to settle its dispute prior to filing its petition—the district court merely noted that "it appears in this case that HENDERSON made more efforts to settle than the Las Vegas Metropolitan Police Department did in *CIR*" without providing specific findings as to what those "efforts" were, when they occurred, whether they made the Review-Journal's pursuit of the records unreasonable, what distinguished them from the efforts by the police department in *CIR*, or why that matters. (IX JA1606.) The Review-Journal tried to resolve its disputes with Henderson prior to filing suit, and only sought judicial intervention after those efforts failed. (II JA032-0303; II JA0325-26.) After the Review-Journal filed its petition, the Henderson City Attorney stated that the City welcomed court intervention to "provide clarity to the meaning and application of NRS 239.055." (II JA0351.) Thus, Henderson had no interest prior to the filing of the petition in resolving the parties' disputes without litigation.

/ / /

[5] As a result of the Supreme Court order, Henderson voluntarily produced the deliberative process privilege records, and it was unnecessary for the district court to apply the balancing test on remand.

The district court then ruled—without any specific factual findings—that Henderson's response to the Review-Journal's records request was "considerably different and distinguishable" from Metro's response in *CIR*, and that the Review-Journal was "not the prevailing party for the purposes of being awarded its requested attorney's fees and costs pursuant to NRS § 239.011(2)." (IX JA1606.) This appeal follows.

III. STANDARD OF REVIEW

Generally, this Court "review[s] decisions awarding or denying attorney fees for 'a manifest abuse of discretion.'" *Thomas v. City of North Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006) (quotation omitted). "But when the attorney fees matter implicates questions of law, the proper review is de novo." *Id.*; *see also Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd.*, 124 Nev. 1206, 1215, 197 P.3d 1051, 1057(2008) (explaining that while awards of attorney fees are generally reviewed for abuse of discretion, "when issues raised on appeal involve purely legal questions, we review those issue de novo."). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

/ / /

/ / /

/ / /

IV. ARGUMENT

A. The Newly Adopted Catalyst Theory

Pursuant to Nev. Rev. Stat. § 239.011(2), if a requester prevails in a public records action, the requester is entitled to recover its reasonable costs and attorney's fees from the governmental entity that has custody or control over the records at issue. Like the other provisions of the NPRA, this fees provision must be "construed liberally" to further access to public records. Nev. Rev. Stat. § 239.00(1)-(2); *accord Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 878, 266 P.3d 623, 626 (2011).

Under this Court's catalyst theory, a requester "prevails" for the purposes of a public record action "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 Dep't v. Ctr. for Investigative Reporting, Inc.*, 136 Nev. 122, 128, 460 P.3d 952, 957 (2020) (citation omitted). This is so even absent a district court order compelling production of the withheld records if the requester can demonstrate "a causal nexus between the litigation and the voluntary disclosure or change in position by the Government." *Id.* (quotation omitted).

In *CIR*, the Center for Investigative Reporting submitted a records request to the Las Vegas Metropolitan Police Department ("Metro") seeking records related to the 1996 murder of rap artist Tupac Shakur. *CIR*, 136 Nev. at 123, 460 P.3d at 954. Metro initially ignored CIR's request for approximately three months. *Id*. When

Metro did eventually respond to the request, it produced only a single, two-page police report, and refused to disclose any additional records. *Id.* CIR then filed a petition for a writ of mandamus seeking to inspect or copy all records in Metro's custody or control that pertained to Tupac Shakur's murder. *Id.* at 124, 955. During a hearing on the petition, the district court indicated its inclination to find that Metro had not yet met its burden of demonstrating that the requested investigative files were confidential and presented Metro with two options: produce the requested records with redaction or participate in an *in camera* evidentiary hearing. *Id.* Metro opted for the latter. *Id.* Prior to the *in camera* hearing, however, CIR and Metro reached an agreement whereby Metro would produce portions of the record, as well as an index identifying and describing any withheld or redacted records. *Id.* Pursuant to the agreement, the parties additionally agreed that CIR could reserve the right to seek an award of fees and costs pursuant to Nev. Rev. Stat. § 239.011(2). *Id.* at 124-125, 955. Over the next three months, Metro provided CIR with numerous documents related to Tupac Shakur's murder. *Id.*

In its decision in *CIR*, this Court held 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." *CIR*, 136 Nev. at 128, 460 P.3d at 957 (quotation omitted). In so holding, this Court noted that

several other state courts with attorney's fees provisions similar to Nev. Rev. Stat. § 239.011(2) have "rejected the stringent requirement that public records requesters must obtain an order on the merits to prevail for the purposes of an attorney fees award." *Id.* at 127, 956 (compiling cases). In particular, the Court pointed to the analysis of the New Jersey Supreme Court in *Mason v. City of Hoboken*, 196 N.J. 51, 951 A.2d 1017 (2008). In that case, the New Jersey Supreme Court found there was a strong policy reason for allowing an attorney's fees award under the catalyst theory: the potential for government abuse because 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." *Id.* at 127, 957 (quoting *Mason*, 951 A.2d at 1031). The Court found that this public policy rationale was particularly persuasive, and "supports utilizing the catalyst theory to determine whether a requester has prevailed in an NPRA lawsuit." *Id*. Moreover, this Court further held that the catalyst theory "promotes the Legislature's intent behind the NPRA—public access to information." *Id.* at 127-28, 957 (citing Nev. Rev. Stat. § 239.001).

In assessing whether a requester "prevailed" under the catalyst theory, this Court held that district courts must consider five factors: "(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 governmental agency of its grievances and giving the agency an opportunity to supply the records within a reasonable time." *Id.* 128, 957-58 (internal quotations and citations omitted).

B. The Court Failed to Correctly Apply the *CIR* Factors.

In *CIR*, this Court made clear that, because of the specific language used by the Legislature in adopting Nev. Rev. Stat. § 239.011(2), a request "prevails" in a records request matter even where, like here, it does not obtain a judicial decision on the merits, so long as the requester can demonstrate that its public records suit caused the governmental entity to change its behavior in the manner sought by the requester. *CIR*, 136 Nev. at 127-28, 460 P.3d at 956-57.

As the Court explained, there is a strong policy reason for the Legislature's use of the broad term "prevails" in Nev. Rev. Stat. § 239.011(2): avoiding "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." *Id.* at 127, 957 (quotation omitted). Thus, the district court's failure to consider the Review-Journal's success in forcing Henderson to change its position and provide previously withheld records not only was an abuse of

discretion—it was also contrary to the intent of Nev. Rev. Stat. § 239.011(2).

The district court abused its discretion in denying the Review-Journal's motion for attorney's fees and costs. First, the district court improperly limited its *CIR* analysis to the 11 documents Henderson disclosed after remand. The district court refused to consider that the Review-Journal's litigation had also caused Henderson to provide the Review-Journal with copies of many records and abandoned the "extraordinary use" fees demand that prompted the litigation.

Second, the district court failed to properly apply the *CIR* factors to the undisputed facts of this case. With respect to the first *CIR* factor, which requires courts to consider "when the documents were released," *CIR* 136 Nev. at 128, 460 P.3d at 957, the district court failed to consider that Henderson changed position and provided the Review-Journal access to the records on two separate occasions without charging the exorbitant fee after the Review-Journal initiated litigation. With respect to the second *CIR* factor, which requires courts to assess "what actually triggered the documents' release," *id.*, the district court failed to consider that the litigation was the triggering event that caused Henderson to change its position not once, but twice. Prior to the initiation of this litigation, Henderson was steadfast in its position that it could charge the Review-Journal nearly $6,000.00 just to conduct a privilege review of the requested records. It was only after the Review-Journal filed suit that Henderson agreed to provide the documents on two occasions without payment of

such a usurious fee.

As to the third factor, which required the district court to assess whether the Review-Journal was entitled to the documents at an earlier time, *id.*, the district court failed to consider that there was no dispute that the requested records are public records. Instead, the dispute between the parties was about whether Henderson was entitled to charge the Review-Journal for access to those public records. *See, e.g.*, *City of Henderson v. Las Vegas Review-Journal*, 450 P.3d 387, 2019 WL 5290874 (Nev. 2019) (outlining claims for relief in amended petition).

Finally, with respect to the fifth *CIR* factor, which required the district court to assess whether the Review-Journal "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.* at 128, 957-58, the district tersely concluded that "Henderson made more efforts to settle" this matter than the Las Vegas Metropolitan Police Department did in *CIR* but made no specific findings as to what those additional efforts were. (IX JA1606.) In fact, the record reflects that Henderson made no effort to settle, instead remaining so entrenched in its position that it told the Review-Journal it welcomed court intervention to "provide clarity to the meaning and application of NRS 239.055." (II JA0351.)

Had the district court conducted the inquiry required by *CIR* and properly

applied its factors, the court would have determined that the Review-Journal was indeed a prevailing party, and therefore entitled to an award of its reasonable attorney's fees and costs. Therefore, this Court should reverse the district's court's order denying fees costs and remand the case for an award of the Review-Journal's reasonable fees and costs.

1. The District Court Erred By Declining to Consider That the Litigation Caused Henderson to Provide Copies of Many of the Records Without Charge.

The district court's application of the *CIR* factors was flawed from the outset because the district court improperly limited its analysis to the deliberative process privilege documents Henderson voluntarily disclosed following this Court's remand (although, obtaining those documents alone would be sufficient to entitle the Review-Journal to fees). In its order denying the Review-Journal's request for its reasonable attorney's fees and costs, the district court stated that it was "limit[ing] its *CIR* analysis to the 11 documents" Henderson had released following remand. (IX JA1605.)

The district court's decision to not consider Henderson's prior disclosure of records to the Review-Journal was premised on a misapprehension of this Court's decision in the Fees Appeal. The district court stated that this Court held that "with exception of the 11 documents withheld" by Henderson pursuant to the deliberative process privilege, the "... the LVRJ has not succeeded on any of the issues that it

raised in filing the underlying action." (*Id.* (quoting *City of Henderson v. Las Vegas Review-Journal*, 450 P.3d 387, 2019 WL 5290874, *2 (Nev. 2019)). As noted in the Court's decision, the Review-Journal did not get the specific relief it sought in the amended petition. *Henderson*, 450 P.3d 387, 2019 WL 5290874 at *2. As this Court's decision in *CIR* makes plain, even in the absence of an order granting the Review-Journal relief, the Review-Journal is still entitled to an award of fees and costs because its suit caused Henderson to change position and allow access to the requested records prior to either the Petition Appeal or the Fees Appeal by producing thousands of pages of documents on a USB drive after being directed to do so by the district court. Accordingly, the district court's failure to consider this prior change in position by Henderson in analyzing the *CIR* factors was an abuse of discretion.

2. Henderson Produced Public Records Without Charging its Disputed Fees After the Review-Journal Petitioned the District Court.

The first factor of the CIR analysis required the district court to consider when the governmental entity release the disputed documents. *CIR*, 136 Nev. at 128, 460 P.3d at 957. Had the district court properly assessed the full record of this case, it would have found that Henderson produced public records on two separate occasions after the Review-Journal petitioned the district court. 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. (I JA0012-15.) 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 29, 2016 (I JA0001-0023.)

When the matter finally came before the district court for argument on the Review-Journal's amended petition, Henderson finally agreed to provide the Review-Journal a USB drive with copies of most of the requested documents without charging the Review-Journal any portion of the nearly $6,000.00 "extraordinary use" fee it had been demanding. (II JA0428-30.) This was the first instance in which the litigation caused Henderson to substantially change its behavior in the manner sought by the Review-Journal.[6]

Years later, on July 24, 2019, following the resolution of the Petition Appeal by this Court, Henderson provided the documents it had withheld pursuant to its assertion they were subject to a deliberative process privilege. (V JA0750.) Yet again, in making this disclosure of public records to the Review-Journal, Henderson made no effort to charge any portion of the fee it had insisted it was entitled to before and during the litigation. This was the second instance in which the litigation caused Henderson to substantially change its behavior in the manner sought by the Review-Journal.

[6] Henderson also retreated from its insistence that the Review-Journal could not access the requested records without paying for a privilege review when it agreed to allow the Review-Journal to inspect the records in person without charge.

Thus, even in the absence of a written order granting its amended petition, the Review-Journal "prevailed" under the catalyst theory because public records suit caused Henderson "to substantially change its behavior"—namely, the litigation caused Henderson to provide the requested public records on two distinct occasions without charging the usurious fee it had previously demanded. *CIR*, 136 Nev. at 128, 460 P.3d at 957. Accordingly, the district court erred in failing to consider Henderson's release of most of the requested records, which took place only after litigation was commenced at a hearing during the first stage of the litigation.

3. The Litigation Triggered Henderson's Decision to Release the Requested Public Records.

The second *CIR* factor requires court to consider "what actually triggered the documents' release." *CIR*, 136 Nev. at 128, 460 P.3d at 957. Under the catalyst theory, there must "be a causal nexus between the litigation and the voluntary disclosure or change in position by the Government." *First Amendment Coal. v. United States Dep't of Justice*, 878 F.3d 1119, 1128 (9th Cir. 2017); *see also CIR*, 136 Nev. at 128 n.5, 460 P.3d at 957-58 ("A requester seeking fees under NRS 239.011(2) has the burden of proving that the commencement of the litigation caused the disclosure.") (citation omitted). To establish such a causal nexus, a requester must "present 'convincing evidence' that the filing of the action 'had a substantial causative effect on the delivery of the information.'" *Id.* (quoting *Church of Scientology of California v. U.S. Postal Serv.*, 700 F.2d 486, 489 (9th Cir. 1983)). A

plaintiff will be considered a "successful party" where an important right is vindicated "by activating defendants to modify their behavior." *Westside Cmty. for Indep. Living, Inc. v. Obledo*, 33 Cal. 3d 348, 353, 657 P.2d 365, 367 (1983); *accord Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 567, 101 P.3d 140, 148 (2004), *as modified* (Jan. 12, 2005).

The district court did not make any specific findings as to this factor. Instead of making specific findings of fact as to what triggered Henderson to switch course and provide the records without charging a fee, the district court merely recapitulated the parties' respective positions on the triggering event that led to Henderson's disclosure. (IX JA1605.) Yet again, this was an abuse of discretion. Had the district court actually conducted the analysis required by *CIR* and reviewed the facts surrounding Henderson's disclosures of the requested records, it would have rightly concluded that there was convincing evidence that the Review-Journal's litigation was the triggering event which led to Henderson's change in position.

As noted above, one of the Review-Journal's primary claims for relief centered on Henderson's demand for nearly $6,000.00 in fees just to review the requested records for privilege. (I JA0017.) After the parties were unable to resolve their disagreement over Henderson's demand for fees, the Review-Journal filed its petition. Shortly afterwards, on December 5, 2016, then-City Attorney Josh Reid stated in a December 5, 2016, letter to the Review-Journal that Henderson was

"interested in having the courts provide clarity to the meaning and application" of Nev. Rev. Stat. § 239.055, the NPRA's then-extant "extraordinary use" provision. (II JA0351.) Mr. Reid's letter also made plain that 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. (II JA0350-51.) Thus, Henderson's position was clear: it was never going to produce the records without improperly charging the Review-Journal.

The litigation, however, triggered Henderson to change its behavior. During the March 30, 2017, hearing on the Review-Journal's amended petition, Henderson changed course and agreed to provide the Review-Journal with a thumb drive with copies of the requested documents after the district court directed Henderson to provide the USB drive at the hearing. (III JA0444.) Had the Review-Journal not filed suit, there is no indication Henderson would have changed its position and released the records to the Review-Journal without charging the exorbitant fee it had so steadfastly asserted it was entitled to.

As to Henderson's disclosure of the deliberative process privilege documents following remand of the Petition Appeal, Henderson's own explanation of why it

chose to disclose the documents is an admission that the litigation triggered the release. Henderson stated, "[t]he City desired to stop spending money and time litigating this case." (VIII JA1372.) Thus, Henderson's post-remand disclosure of deliberative process privilege documents 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 favor of the conclusion that the Review-Journal prevailed in this matter under the catalyst theory. *Compare Mason*, 196 N.J. 51, 81, 951 A.2d 1017, 1034-35 (2008) ("Because Hoboken had agreed to plaintiff's request before she even filed suit, she cannot establish that her lawsuit entitles her to fees under the catalyst theory. Nothing in the record suggests that the final day of review would not have occurred absent plaintiff's lawsuit.")

4. The Review-Journal Was Entitled to the Records at the Time of Its Records Request.

The third *CIR* factor requires the courts to consider "whether [the Review-Journal] was entitled to the documents at an earlier time." *CIR*, 136 Nev. at 128, 460 P.3d at 957. Yet again, the district court did not actually consider and apply this factor to the facts of this case. Instead, as it did with the second *CIR* factor, it merely outlined the parties' respective interpretation of the facts relevant to this factor and made no findings of fact. (IX JA1605-06.)

Applying the facts of this case to the analysis as required by *CIR*, it is plain that the Review-Journal was entitled to the records at the time it requested them. In

responding to the Review-Journal's October 4, 2016, records request, Henderson did not assert that any of the requested records were not public records; rather, Henderson stated that it was "in the process of" searching for and gathering responsive records," and then made its outsized fees demand. (I JA0017.)

Thus, by its own response to the Review-Journal's records request, Henderson apparently believed that the Review-Journal was "entitled" to the records it had requested—subject of course to Henderson's insistence that the Review-Journal first pay it thousands of dollars to conduct a privilege review. Indeed, Henderson has maintained throughout this case that it did not deny the Review-Journal's records request. (*See, e.g.*, VIII JA1381 (stating that "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").) Henderson's argument necessarily ignores that demanding a requester pay thousands of dollars just for a governmental entity to decide whether or not it will disclose public records operates as a *de facto* denial because it creates a financial barrier to access that would chill a requester from pursuing their rights under the NPRA. But setting that disagreement aside, it is plain Henderson believed the requested records were public records which the Review-Journal was entitled to inspect and copy at the time it made its request.

5. The Litigation Was Reasonable.

CIR also required the district court to consider "whether the litigation was

frivolous, unreasonable, or groundless." *CIR*, 136 Nev. at 128, 460 P.3d at 957. The district court found this factor in favor of the Review-Journal, noting that in the prior two appeals, this Court "had two opportunities to declare whether either the LVRJ's request or HENDERSON's reason for nondisclosure was frivolous, unreasonable, or groundless. It chose not to do so, declaring only that the LVRJ has not succeeded on any of the issues it raised, but that there remained a balancing test to be performed on the 11 [deliberative process privilege] documents." (IX JA1606.) Thus, although the district court indicated it was deferring to this Court, it properly determined that the litigation here was not frivolous, unreasonable, or groundless.

The facts surrounding the litigation support this conclusion. As discussed above, the Review-Journal and Henderson disputed whether Henderson was entitled under the now-repealed "extraordinary use" provision of the NPRA (Nev. Rev. Stat. § 239.055). When attempts to resolve these disputes proved fruitless, the Review-Journal filed suit to seek judicial resolution. And Henderson even welcomed the district court's intervention, noting in a December 5, 2016, letter to counsel for the Review-Journal that "[t]he 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." (II JA0351.) Thus, at the outset of this litigation Henderson agreed that the Review-Journal's petition was not frivolous.

6. The Review-Journal Sufficiently Attempted to Resolve Its Dispute With Henderson Prior to Filing Suit.

Finally, *CIR* required the district court to consider "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*, 136 Nev. at 128, 460 P.3d at 957-58. Yet again, rather than making specific findings regarding this factor, the district court refrained from making any findings whatsoever and instead "defer[red] to the record created by the two prior district court and appellate court rulings relative to the parties' attempts to settle or resolve." (IX JA1606.) And yet again, this was error.

As a preliminary matter, it is important to note that this final factor of *CIR* is of the least probative value in NPRA matters, and thus should be accorded the least weight. As noted above, this Court's decision in *CIR* was premised on the decision of the New Jersey Supreme Court in *Mason v. City of Hoboken*, 196 N.J. 51, 951 A.2d 1017 (2008). *See CIR*, 136 Nev. at 127-28, 460 P.3d at 956-57. The *Mason* court noted in its opinion that New Jersey's Open Public Records Act ("OPRA") has built-in provisions which require requesters and governmental agencies to cooperate in certain instances, such as when a request "would substantially disrupt agency operations" or when a request will take longer than seven business days to fulfill. *See Mason*, 196 N.J. at 78, 951 A.2d at 1033 (citing N.J. Stat. Ann. § 47:1A-5). The NPRA does not contain similar requirements. Additionally, New Jersey's OPRA

created a Government Records Council, a body which permits requesters and the government to resolve disputes through informal mediation. *Id.* Again, the NPRA contains no such provision. Instead, the NPRA provides that, because access to governmental records furthers transparency and democracy, requesters may seek immediate (and expedited) court intervention. Nev. Rev. Stat. § 239.011(1) and (2).

This Court also relied on the California Supreme Court's decision in *Graham v. DaimlerChrysler Corp.* for the requirement that, in establishing entitlement to a fees award under the catalyst theory, the requester must demonstrate that it "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*, 136 Nev. at 128, 460 P.3d at 957-58 (citing *Graham*, 21 Cal.Rptr.3d 331, 101 P.3d at 154-55). This holding in *Graham* is predicated on a provision of the California Code of Civil Procedure pertaining to awards of attorney's fees in matters implicating important rights affecting the public interest. *See, e.g.*, Cal. Civ. Proc. Code § 1021.5. Under that provision, a litigant seeking an award of fees must establish "the necessity . . . of private enforcement" of the public interest. *Graham*, 21 Cal. Rptr. 3d at 349-50, 101 P.3d at 155 (quoting Cal. Civ. Proc. Code § 1021.5). The NPRA does not contain such a similar requirement, and instead provides that requesters may seek immediate expedited judicial intervention. Nev. Rev. Stat. § 239.011(2). Thus, while both

Mason and *Graham* are instructive, the Court should bear in mind these key differences between the NPRA, New Jersey's OPRA, and California's Code of Civil Procedure, and accord less weight to this factor.

In any event, in assessing this factor, the district court should have first considered the rights of access ensured by the NPRA. The NPRA is premised on the principle that access to government records furthers democratic principles. Nev. Rev. Stat. § 239.001(1). To foster democracy and increase governmental transparency, the NPRA requires that access to public records be swift; and NPRA matters must be expedited, not delayed. Nev. Rev. Stat. § 239.011(2). The NPRA also presumes that all governmental records must be open to the public at all times for inspection and copying unless specifically declared confidential by statute or law. Nev. Rev. Stat. § 239.010(1). Additionally, the presumptive significance of access is reflected by the NPRA's strict mandates about when and how a governmental entity must respond to a records request. *See* Nev. Rev. Stat. § 239.0107(1)(a)-(d).

Given that the NPRA is premised on the principle of increasing transparency by ensuring prompt access to public records, it is unsurprising that the NPRA does not require requesters to meet and confer with governmental entities prior to seeking judicial intervention to resolve a dispute regarding access. Nev. Rev. Stat. § 239.011(2) (providing an unqualified right to seek expedited judicial intervention). Nevertheless, despite the lack of any meet-and-confer requirement, the Review-

Journal made 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. Not until it became apparent that the parties were at an impasse, the Review-Journal petitioned the district court. Thus, the Review-Journal's decision to file suit seven weeks after Henderson denied its request and after the parties could not reconciled their disagreements was reasonable.

In its order, the district court opined that it "appears in this case that HENDERSON made more efforts to settle than the Las Vegas Metropolitan Police Department did in *CIR*." (IX JA1606.) The district court did not make any findings as to what those "efforts" were. Moreover, Henderson's "efforts" to settle (or more accurately, its refusal to settle) are quite similar to the police department's actions in *CIR*. There, the Center for Investigative Reporting submitted a records request to Metro seeking records related to the 1996 murder of rapper Tupac Shakur. *CIR*, 136 Nev. at 123, 460 P.3d at 954. 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*, 136 Nev. at 124, 460 P.3d at 954. When Metro finally did respond to CIR's request, it only produced a two-page police report, and failed to indicate whether there were additional responsive records. *Id.* When CIR contacted Metro to determine whether Metro had

withheld records, Metro responded that Tupac's murder was an "open active investigation," and the records CIR sought were therefore confidential and not subject to disclosure. *Id.* When CIR contacted Metro to dispute its assertion that the records were confidential, Metro "maintained the records were not subject to disclosure." *Id.* at 124, 955.

While Henderson may have responded to the Review-Journal's records request here much more quickly than Metro—*i.e.*, it complied with its obligation to respond to the Review-Journal's records request within five business days as required by Nev. Rev. Stat. § 239.0107(1)—in many respects Henderson's conduct here follows the same pattern as Metro's in *CIR*. After the Review-Journal made its records request, Henderson responded by asserting that it was entitled to charge the Review-Journal a fee of $77.99 per hour to conduct a privilege review of the requested records, and that it would not even begin to conduct that review unless the Review-Journal paid Henderson $2,893.94—approximately half of the overall $5,787.89 fee it asserted it was entitled to charge. (I JA0017.) The Review-Journal made repeated efforts to resolve its disputes with Henderson prior to filing suit. (II JA032-0303; II JA0325-26.) And after the Review-Journal filed its petition, Henderson maintained that it was entitled to charge a ransom for public records, and expressly stated that it welcomed court intervention to "provide clarity to the meaning and application of NRS 239.055." (II JA351.) This response makes clear

that Henderson had no interest in reaching an agreement.

Thus, while Henderson was not as dilatory in responding to the records request here as Metro was in *CIR*, the two entities were both so deeply entrenched in their positions that judicial intervention was the only reasonable mechanism for resolving the public records disputes. It therefore would have made little sense for the Review-Journal to continue debating the merits of Henderson's fee demand when it was apparent that Henderson would not retract its demand for fees. Moreover, expecting the Review-Journal to sit on its right to swift judicial intervention would run contrary to the NPRA's stated intent of facilitating swift access to public records. Accordingly, this factor, properly assessed, also weighed in favor awarding the Review-Journal its reasonable attorney's fees and costs as a prevailing party in this matter.

V. CONCLUSION

Although the Review-Journal did not obtain a written order in this matter granting the relief it sought, the Review-Journal is nevertheless a prevailing party under this Court's newly adopted catalyst theory because it achieved a significant goal in this litigation: obtaining improperly withheld public records from the City of Henderson. Specifically, as a result of the litigation, Henderson substantially changed its behavior and provided the Review-Journal access to the records (without charge) on two occasions: when it agreed at the March 30, 2017, hearing to provide

the Review-Journal with copies of some of the records; and when it provided the Review-Journal with documents it had withheld pursuant to the deliberative process privilege following this Court's remand. Had the district court conducted the proper analysis required by *CIR*, it would have determined that the *CIR* factors weigh strongly in favor of awarding the Review-Journal the reasonable attorney's fees and costs it incurred in achieving its goal of obtaining access. Accordingly, this Court should find that the Review-Journal is a prevailing party in this matter and reverse the district court's order denying the Review-Journal's motion for attorney's fees and costs.

DATED this 14th day of January, 2021.

/s/ Margaret A. McLetchie

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

CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28.2:

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because the APPELLANT'S OPENING BRIEF has been prepared in a proportionally spaced typeface (14-point Times New Roman font).

I further certify that this APPELLANT'S OPENING BRIEF complies with the type-volume limitation of NRAP 32(a)(7)(ii) because it contains 9,749 words.

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

/ / /

/ / /

/ / /

/ / /

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

DATED this 14th day of January, 2021.

/s/ Margaret A. McLetchie

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPELLANT'S OPENING BRIEF 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 E. Harmon, and Andrea M. Champion
BAILEY KENNEDY
8984 Spanish Ridge Avenue
Las Vegas, NV 89148

Counsel for Respondent City of Henderson

/s/ Pharan Burchfield
Employee of McLetchie Law