IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Appellant, vs. LAS VEGAS REVIEW-JOURNAL, INC., Respondent.	SUPREME COURT CASE NO.: 82229 DISTRICT COURT CASE NO.: A-17-758501-W

RESPONDENT'S RESPONSE TO APPELLANT'S EMERGENCY MOTION FOR RELIEF UNDER NRAP 27(E)

Respondent Las Vegas Review-Journal, Inc. (the "Review-Journal"), by and through its counsel of record, hereby responds to the Clark County Office of the Coroner/Medical Examiner's Emergency Motion for Relief Under NRAP 27(e) filed on December 17, 2020. This Response is supported by the following memorandum of points and authorities.

DATED this the 24th day of December, 2020.

/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
Counsel for Respondent, Las Vegas Review-Journal, Inc.

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 evaluation possible disqualification or recusal.

Respondent 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 the 24th day of December, 2020.

/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
Counsel for Respondent, Las Vegas Review-Journal, Inc.

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I. INTRODUCTION

This action under the Nevada Public Records Act ("NPRA") involves a years-long effort by the *Las Vegas Review-Journal*'s[1] investigative team to obtain access to public records in the custody of the Clark County Office of the Coroner/Medical Examiner ("Coroner"). the Review-Journal has sought juvenile autopsy reports to assist in an important investigation into Clark County Protective Services. Despite years of delay, the Coroner asks this Court to further delay access and issue a stay.

While the Coroner wants to delay access, juvenile autopsy reports can reveal devastating problems and spur reform of agencies tasked with protecting vulnerable children. Correlating autopsy reports with other records, investigative reporting in the *Miami Herald* examined deaths of children and revealed that "[t]he children were not just casualties of bad parenting, but of a deliberate shift in … child welfare policy." [2] Similar reporting in Denver led to reform.[3]

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[1] Las Vegas Review-Journal, Inc. ("Review-Journal") publishes the *Las Vegas Review-Journal* newspaper.

[2] Arol Marin Miller & Audra D.S. Burch, *Innocents Lost*, MIAMI HERALD, *available at* https://media.miamiherald.com/static/media/projects/2014/innocents-lost/ (last accessed December 21, 2020).

[3] Christopher N. Osher, *Colorado announces sweeping reform to child welfare system*, DENVER POST, February 6, 2013, attached as **Addendum A**; also *available at* https://perma.cc/DN9F-SAGX (last accessed December 24, 2020).

Granting the Coroner's request for a stay would harm the public interest and cause irreparable harm to the Review-Journal and the public because it will further hinder similar efforts to prevent the deaths of children in Clark County.[4] To minimize this reality, the Coroner glibly asserts that the Review-Journal will not suffer any harm. (Mot., pp. 7-8.) The Coroner is perversely using its success in delaying this matter for so long as a reason to continue to delay its duty to provide public records. What the Coroner ignores is that every day that goes by without access to the requested records is another day the public is deprived of information about the agencies designed to protect vulnerable children and deprived of the opportunity to advocate for reforms that could save children's lives. Delay also harms the Review-Journal by interfering with its rights under the NPRA and the First Amendment to access public records to assess performance of governmental entities and report on its findings. Considering these harms and evaluating whether a stay promotes the public interests are central to evaluating whether to grant a stay.

In contrast to the obvious harm a stay would cause, the Coroner implicitly concedes it faces no harm if the stay is denied. Instead, the Coroner speculatively

[4] To evaluate whether the Coroner has met its burden, this Court must consider (1) whether the object of the appeal will be defeated if the stay is denied; (2) whether appellant will suffer irreparable or serious injury if the stay is denied; (3) whether respondent will suffer irreparable or serious injury if the stay is granted; and (4) whether appellant is likely to prevail on the merits in the appeal. Nev. R. App. P. 8(c). This Court should also consider "where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

argues dissemination of the autopsy reports could lead to an unwarranted invasion of someone else's privacy. (Mot., p. 7.) However, this Court specifically remanded this matter so ***the district court*** could determine whether the Review-Journal's need for access merited production of the records despite any involved privacy interests. The district court properly applied the balancing test and found the Review-Journal established that the need for access overcame the generalized privacy interests asserted by the Coroner. Thus, there is no unwarranted privacy invasion.

This Court also considers the appellant's likelihood of success on the merits. Here, this factor also weighs heavily against a stay. The Coroner is not likely to prevail on appeal because the issue it intends to present on appeal—namely, "whether autopsy reports may be produced in a redacted form"[5] has already been answered by this Court. The only appellate question is whether the district court abused its discretion in evaluating the facts and finding that the Review-Journal met its burden. The Coroner asserts the district court found it "waived" its ability to assert privileges (Mot., p. 9). This assertion is incorrect. The district court carefully applied the balancing test and found the Review-Journal met its burden. Nevertheless, the district court considered giving the Coroner another opportunity to re-argue the issue, **even though the *CCSD* test did not require it**. When the Coroner made clear it would use such an opportunity to simply continue to categorically assert

[5] (Mot., p. 8.)

information it deemed unrelated to the cause of death was beyond the reach of the NPRA, the district court ruled against the Coroner. The ruling is not error.

Indeed, the Coroner concedes it is unlikely to prevail on the merit and instead asserts it raises a significant legal issue on appeal, relying on the *Hansen* likelihood of success formulation. (Mot., p. 8 (citing *Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 658, 6 P.3d 982. 987 (2000)). However, this case does not present a substantial legal question because this Court has already resolved the applicable balancing test. Moreover, given the irreparable harm to the public and the Review-Journal, the Coroner cannot show that "the balance of equities weighs heavily in favor of granting the stay." *Hansen*, 116 Nev. at 659, 6 P.3d at 987.

With regard to the last factor—whether denying a stay will defeat the object of the appeal—this matter it is capable of repetition yet evading review and thus justiciable because the Review-Journal will seek access to reports for other years. Moreover, a stay is not automatic even where the object of an appeal will be defeated. *See, e.g.*, *Las Vegas Metro. Police Dep't v. Am. Broad. Co., Inc.*, Nevada Supreme Court Case No. 75518, Doc. No 18-16064 (denying motion for stay pending appeal of order directing Las Vegas Metropolitan Police Department to release public records pertaining to 1 October).) Here, the other factors vastly favor denying a stay. This Court has already resolved the governing legal framework. The district court properly applied the *CCSD* test, and the very public interests that will

be advanced by access will be gravely harmed by further delays.

The Court should see the Coroner's motion and appeal for exactly what they are an effort to delay production of the reports.[6] Delay is not a cognizable appellate goal. *Cf.* Nev. R. App. P. 38(b). Thus, the Court should deny the Coroner's motion.

II. PROCEDURAL HISTORY

On April 13, 2017, well over three and a half years ago, the Review-Journal sent the Coroner an NPRA request seeking all autopsy reports conducted on anyone under the age of 18 beginning in 2012. *Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 136 Nev. 44, 46, 458 P.3d 1048, 1051 (2020) ("*Coroner*"). In litigation, the Coroner then asserted many categorical claims against access that were rejected by the district court and this Court. *Id.* at 45-46, 1050-51. This Court then announced that its newly-adopted *CCSD* balancing test[7] provided the legal framework that governs this case. *Id*. The matter was remanded for the district court to determine whether the Review-Journal established access was likely to advance significant interests. *Id.* at 58, 1059.

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[6] In denying the Coroner's motion for a stay, the district court keenly observed that the Coroner's "motivation and goal all along has been to delay and deny." (**Addendum B**, p. 14:24-25; *see also* **Addendum C**, ¶ 69.)

[7] *Clark Cty. Sch. Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 708, 429 P.3d 313, 320 (2018).

On remand, the Review-Journal met its burden. The Coroner ignored the Review-Journal's showing, refusing to abandon its categorical approach it.[8] After full briefing and a hearing, the district court applied the *CCSD* test and found the interest advanced by the Coroner was vastly outweighed by multiple significant public interests likely advanced by access, such as ascertaining whether the reports document evidence of prior physical abuse that was unchecked by government agencies charged with the responsibility of investigating child abuse. (Mot. Exh. 1at ¶¶ 39-53.)[9] The court specifically found that information unrelated to the cause of death was likely to advance these significant public interests. (*Id.* at ¶ 57.)

The district court determined the Review-Journal met its shifted burden but nevertheless expressed a willingness to give the Coroner another bite at the apple: the opportunity to provide proposed redactions *in camera* (Mot. Exh. 1 at ¶ 63; *see also* **Addendum D**, pp. 14:20-23, 17:23-18:13). However, it became clear that such an effort would be fruitless when the Coroner indicated it would redact "anything that's not related to the cause and manner of death." . (**Addendum D**, pp. 24:24-25:4; *see also* Exh. 1, ¶ 63.) In short, the district court did not ignore any evidence

[8] On remand, the Coroner had every opportunity to explain why specific information merited protection despite the interests advanced by access but failed to do anything other than categorically contend that there was no interest in access and that, in each and every case, it was entitled to redact the records as it saw fit.

[9] The district court also found that access was likely to advance other significant interests, such as checking whether the Coroner properly determined the cause of death. (*Id.*at ¶ 54.)

or find that any arguments the Coroner made were "waived."

III. LEGAL ARGUMENT

A. Legal Standard for a Motion to Stay

A stay is not automatic. Instead, "[a] decision to grant a stay of an order pending appeal always involves an exercise of judicial discretion and is dependent upon the circumstances of the particular case." 5 Am. Jur. 2d Appellate Review § 397 (applying the federal analogue to NRAP 8). "A stay is an intrusion into the ordinary processes of … judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result …." *Id.* The Coroner has the heavy burden of "showing that circumstances justify exercise of the court's discretion, and that the injury is not remote or speculative but actual and imminent."[10] *Id.* To evaluate whether the Coroner has met its burden, this Court is to consider whether the parties face irreparable harm, whether appellant is likely to prevail, and whether the purpose of an appeal will be defeated Nev. R. App. P. 8(c). Courts also consider "where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (citations omitted); *accord Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas*

[10] This Court recently recognized that, particularly where an appeal can be expedited, a stay or injunction pending appeal will not be granted—even when some portions of the appeal will be defeated—where the likelihood of success is low due to a failure to come forward with evidentiary support. *Kraus v. Cegavske*, No. 82018, 2020 WL 6483971, at *1 (Nev. Nov. 3, 2020).

Review-Journal, 134 Nev. 174, 179, 415 P.3d 16, 20 n.1 (2018) (Cherry, J., concurring in part). *Hansen v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000) provides an alternative formulation for the likelihood of success factor, but it is still just one of several factors. Under that formulation, the movant must show it presents a substantial case on the merits by establishing a serious legal question is involved and the balance of equities weighs heavily in favor of the stay. *Hansen*, 116 Nev. at 659, 6 P.3d at 987. Here, none of the factors weighs in favor of a stay and the Coroner's motion should be denied.

B. The Review-Journal and the Public Face Irreparable Harm.

1. A Stay Will Harm the Public.

According to the Coroner, because the Review-Journal in 2017 requested records dating back to 2012, "this matter is not urgent;" specifically, the Coroner reasons that if access to the autopsy reports from the prior years was urgent, "the [Review-Journal] would not have waited so long to make its request." *(Id.*) The claim is baseless. The NPRA is premised on the need for prompt access public records once requested, and there is no suggestion a request is not urgent if the requestor could have previously made it. In the case of investigative journalism, reporters often realize the necessity of reporting on important issues (such as the unnatural deaths of children who were under the supervision of child protective services), and seek to investigate and report on trends, possible causes and solutions.

The Review-Journal is investigating issues of significant importance to the public: the functioning of the Coroner's office and, more importantly, the deaths of vulnerable children. To do that, the Review-Journal needs to correlate information generated by different governmental entities vested with the responsibility of ensuring child safety, as well as agencies like the Coroner tasked with investigating deaths. The information could be crucial to understanding whether agencies charged with protecting children have properly discharged their duties.

The Coroner's efforts to prevent access to these records has delayed the benefits transparency and oversight has on the lives of Nevada's vulnerable children. There is no better example of the positive effects of access than the "Failed to Death" investigative series run by the *Denver Post* and Denver news station KUSA. The reporting on the deaths of 72 children identified numerous problems in Colorado's child welfare system, including overburdened caseworkers failing to investigate abuse allegations or conducting incomplete and inadequate investigations.[11] That reporting in turn lead to reform that saved children from abuse, neglect, and death.[12]

The Coroner asks the Court to focus on the putative lack of harm a stay on the Review-Journal. The Review-Journal would be harmed, as detailed blow. More

[11] *See generally* "Failed to Death" series, available online at https://www.denverpost.com/tag/failed-to-death-series/ (last accessed December 24, 2020).

[12] *See supra* at n. 3.

importantly, a stay would harm the public to which the Coroner is responsible. Each day that goes by without access to the requested records is another day where the actions of governmental entities like state and county child protective services will be hidden from scrutiny and is another day where children will continue to suffer—and perhaps even die—in a system that may be in dire need of reform.

2. A Stay Will Harm the Review-Journal's Right of Access.

The Review-Journal will also suffer harm if the stay is granted. The NPRA and the First Amendment guarantee the public, including the Review-Journal, swift access to as much information as possible about the operation of government. 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's mandates are consistent with the First Amendment right of prompt access to information to shed light on newsworthy events. "[T]he public interest in obtaining news is an interest in obtaining ***contemporaneous news***." *Courthouse News Services v. Planet*, 947 F.3d 581, 594 (9th Cir. 2020) (emphasis added) (citation omitted); *see also Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) ("each passing day may constitute a separate and cognizable

infringement of the First Amendment," which is irreparable"). The nearly four-year delay in this case is irreconcilable with the NPRA and the First Amendment.

C. The Coroner's Harms Are Speculative, and Do Not Support a Stay.

In contrast to the real harms to the Review-Journal and public, the Coroner fails to articulate any harm. Instead, the Coroner provides only speculation that third parties might be harmed without a stay. The ***mere possibility*** of irreparable injury is not sufficient to warrant a stay. *Nken v. Holder*, 556 U.S. 418, 435 (2009) (citation omitted); *accord Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020).[13] The Coroner has never presented any concrete, identifiable harm that outweighs the specific need for the information established by the Review-Journal and that will occur if the reports are released unredacted.

D. The Coroner Has Not Demonstrated a Likelihood of Success.

While the Coroner contends the legal issue at hand "is whether autopsy reports may be produced in a redacted form" (Motion, p. 8), this Court has already resolved the overarching legal questions related to that issue. In the Coroner's prior appeal, this Court rejected the Coroner's arguments that juvenile autopsy reports are categorically exempt from the NPRA and established the legal framework applicable

[13] This parallels this Court's mandate that a governmental entity "cannot meet its burden by voicing non-particularized hypothetical concerns". *DR Partners v. Bd. of County Comm'rs of Clark County*, 116 Nev. 616, 628, 6 P.3d 465, 472–73 (2000) (citation omitted).

to this case. The district court properly applied that framework to the arguments and evidence presented on remand.[14] The Review-Journal met its burden and the Coroner effectively refused the district court's offer of a further opportunity to establish why the balancing test might still favor secrecy. In light of this procedural posture, the Coroner cannot establish likelihood of success or even the more forgiving standard of a substantial legal question where the equities heavily favor a stay.[15]

1. The Decision Will Be Evaluated for Abuse of Discretion.

Where a governmental entity establishes that a nontrivial privacy interest is at stake, the burden shifts to the requester to show that "the public interest sought to be advanced is a significant one and that the information is likely to advance that interest." *CCSD*, 134 Nev. at 707-08, 429 P.3d at 320 (internal quotations omitted). The Court remanded this matter to the district court "to determine, under the [*CCSD*]

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[14] The Coroner also baldly asserts the district court did not properly apply the *CCSD* test because it allegedly "balanced the Coroner's established non-trivial privacy interests against the public's interest in access to autopsy reports, generally" when it should have conducted the balancing test in the reverse order. (Mot., p. 9 (citing Exh. 1, ¶¶ 42-46).) This assertion verges on being nonsensical. As the district court's detailed order makes plain, the district court assessed the multiple significant public interests the Review-Journal presented on remand (Mot. Exh. 1, ¶¶ 40-49), and then balanced those multiple significant public interests against the privacy assertions proffered by the Coroner. (*Id.*, ¶ 57 (citing p. 22:6-9 of the transcript appended here as **Addendum D**); *see also id.* at ¶ 63-65.) Thus, the district court correctly conducted the *CCSD* test.

[15] *See* Mot, pp. 8-9 (arguing instead that the case presents a substantial legal question, while ignoring the balance of equities, as the Coroner has consistently done throughout this matter).

test, what information should be redacted as private medical or health-related information." *Id.* at 58, 1059. Thus, this Court left it to the sound discretion of the district court to balance the interests and evaluate the evidence.

The district court then made a factual determination that the Review-Journal met its burden under the *CCSD* test, which is subject to abuse of discretion review. Nevertheless, the district court gratuitously offered the Coroner the opportunity for a further *in camera* review, but abandoned that approach when the Coroner made clear such an endeavor would be fruitless because the Coroner refused to do anything other than assert it was entitled to redact all information "unrelated" to the cause of death. (Mot. Exh. 1, ¶ 63.) In short, the district court found the Review-Journal met its burden, but gave the Coroner another chance to provide more specific bases to support withholding information, which the Coroner effectively declined.

In NPRA cases, while questions of statutory construction are reviewed *de novo*, a "district court's decision to grant or deny a writ petition is reviewed by this court under an abuse of discretion standard." *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003) (internal quotation marks and citations omitted). More broadly, a district court's balancing of harms is reviewed for abuse of discretion. *See, e.g.*, *Univ. & Cmty. Coll. Sys. of Nevada v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004) (holding that a court's decision to grant or deny a preliminary injunction—which requires balancing harms—"will

not be disturbed absent an abuse of discretion").

2. The Coroner Is Unlikely to Prevail.

Regardless of the standard of review, the Coroner has failed to establish a likelihood of success in this matter. In its Motion, the Coroner asserts the district court "concluded that the Coroner waived its ability to assert any privileges as to any reports not attached to the initial filing because redactions had not yet been made." (Mot., p. 2.) This is a distortion of the district court's order. In fact, the Review-Journal established multiple significant public interests that will be furthered by access to the records and has thus met its obligations under the *CCSD* test. And the Court found that access to the records would help further the Review-Journal's investigation[16] and further the significant interests of accountability of the abuse and neglect system[17]. In addition, the district court found the public is entitled to probe the Coroner's determinations, which it cannot do if the Coroner excludes such information. (Mot. Exh. 1, ¶ 56.)

Even in the face of this showing and the fact that the district court found the Review-Journal met its burden, the Coroner hung its hat on its prior generalized

[16] (*See, e.g.,* **Addendum D,** p. 14:10-15 ("the cross-pollination of information, for example with juvenile autopsies and the effectiveness of Child Protective Services and other governmental entities that are asked to investigate allegations of child abuse is inescapable in terms of the interrelationship and how the information from one can provide information that helps to assess the efficiency of the other").

[17] (*Id.*, pp. 5:11-24, 13:15-14:4; *see also* Mot. Exh. 1, ¶¶ 48-49, 53, 63.)

assertions and, even after the district court offered the Coroner yet another chance to present argument and evidence, the Coroner essentially refused the opportunity to get a second bite at the apple.)[18] Instead, it steadfastly asserted that it would simply redact all information it deemed "unrelated" to the cause and manner of death—again, even after the district court offered to conduct an *in camera* review. (**Addendum D**, pp. 24:24-25:4.) At that point, the district court did end the inquiry.

Thus, the district followed this Court's instructions and required the Review-Journal satisfy the shifted burden under the *CCSD* test. The Review-Journal met its burden, and the district court so found. As result, there is no basis to overturn the decision. The fact that the district still considered giving the Coroner a gratuitous opportunity to present yet further argument even though the Coroner never presented any evidence to explain or justify its position does not change the analysis.[19]

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[18]It is notable that, at the October 29, 2020, hearing, the Coroner stated it had only redacted the three sample autopsy reports it provided to the Review-Journal pre-litigation and had performed redactions to the balance of the approximately 680 autopsy reports and 150 external examinations. (**Addendum D**, p. 23:8-14.) Because it had never reviewed or performed redactions to the withheld reports, the Coroner never made the required record-by-record determination of whether those reports contain specific information that merits protection. (Mot. Exh. 1, ¶ 61.) This calls into question its arguments in the prior appeal and whether it was entitled to shift the burden to the Review-Journal.

[19] As the district court observed, the Coroner's unilateral determination of what is and is not "related" to the cause of death would lead to the withholding of critical information that is in fact could be relevant to the cause of death and whether autopsies were properly performed (**Addendum B**, p. 9:3-16; *see also* **Addendum C**, ¶ 62), in addition to the relevance to the history of abuse.

The district court's determination was premised on the fact that the Review-Journal had met its burden to outweigh the privacy interests as articulated by the Coroner, and the Coroner's decision to rely on its generalized privacy assertions and circular position that it can redact all information it believes is unrelated to the cause and manner of death (Mot. Exh. 1, ¶ 65) and refusal to do anything else. While the district court used the word "waiver" in its decision not to give the Coroner an opportunity the Coroner indicated it would not take advantage of, the Court never found that any arguments the Coroner actually made were waived. (*See id.* at ¶ 66.)

Accordingly, contrary to the Coroner's assertions[20], the district court's finding does not conflict with this Court's decision in *Republican Attorneys Gen. Ass'n v. Las Vegas Metro. Police Dep't*, 136 Nev. 28, 458 P.3d 328 (2020) ("*RAGA*"). There, the Republican Attorneys General Association filed a petition under the NPRA seeking records regarding the arrest of several juveniles and the interactions between then-State Senator Aaron Ford and Las Vegas Metropolitan Police Department ("Metro") officers. *RAGA*, 458 P.3d at 330. Metro refused to provide the records but failed to identify in its initial denial any statutory or legal authority to justify its denial as required by Nev. Rev. Stat. § 239.0107(1)(d). *Id.* RAGA argued Metro had waived the opportunity to raise any basis for denying a records request not contained in the initial response. This Court allowed waiver of a statutory basis for denial for

[20] (Mot., p. 9, n.26.)

noncompliance with the NPRA's response requirement could "undermine[] the NPRA's expressly listed exceptions for confidential information." *RAGA*, 136 Nev. at 32, 458 P.3d at 332. Numerous factors in *RAGA* are not present here. Most importantly, the district court did not refuse to consider any legal basis proffered by the Coroner, so there is no waiver issue. Moreover, unlike in RAGA, there are no "expressly listed exceptions" here rendering the records confidential. *Id.*

Nothing in this Court's decision prior to remand required the district court to give the Coroner another opportunity to overcome the Review-Journal's showing Nonetheless, the district court considered doing so, and only decided not to when the Coroner made clear its intent to refuse to make any specific showing.

3. The Coroner Does Not Present a Substantial Case.

The likelihood of success factor can be satisfied if the proponent of a stay "present[s] a substantial case on the merits when a serious legal question is involved and show[s] that the balance of equities weighs heavily in favor of granting the stay." *Hansen,* 116 Nev. 650, 659, 6 P.3d 982. 987. Even if the Coroner could establish a serious legal question it still cannot establish the balance of the equities weighs heavily in favor of a stay, so it cannot succeed. However, even more fundamentally, there is no serious legal question. Contrary to the Coroner's contention, there is no dispute regarding "whether autopsy reports may be produced in a redacted form." (Mot., p. 8:25-26.) This Court already determined autopsy reports are subject to the

NPRA.[21] Thus, the only question on remand was a factual one: whether the Review-Journal could meet its burden of establishing that its need for access outweighed the nontrivial privacy interests.

On remand, the district court applied the balancing test properly and its decision, which will be reviewed by this Court for an abuse of discretion, cannot be said to raise any serious legal question. Even if there were a legal question, the Coroner misapplies the *Hansen* test. In addition to requiring the existence of a serious legal question, *Hansen* requires that "the balance of equities weighs ***heavily*** in favor of granting the stay." *Hansen*, 116 Nev. at 659, 6 P.3d at 987 (emphasis added). Here, the balance of equities weighs heavily ***against*** a stay. The Coroner has not established irreparable harm and the equities do not favor the Coroner where it expressly refused the opportunity to cease relying on its categorical approach. In contrast, the Review-Journal and the public face irreparable harm and the public interest heavily weighs against a stay.

E. No Stay Is Warranted, Even the Appeal's Purpose Is Defeated.

The Coroner asserts disclosure of the reports prior to resolution of its appeal

[21] *See, e.g., Coroner,* 136 Nev. at 54, 458 P.3d. at 1056 (the Coroner "may not rely on NRS 432B.407(6) to withhold juvenile autopsy reports or claim that such reports are categorically exempt from disclosure by virtue of a confidentiality"); *id.* at 54, 1057 (neither HIPAA nor Nev. Rev. Stat. § 629.031 "justify categorically withholding juvenile autopsy reports in their entirety").

would "undermine the Coroner's argument and render the appeal moot." (Mot., p. 7.) However, the claim at issue in this matter falls within the "capable-of-repetition-yet-evading-review" exception to the mootness doctrine, which applies when the duration of a challenged action is "relatively short" and there is a "likelihood that a similar issue will arise in the future." *Personhood Nevada v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (quotation omitted).

As the largest news media entity in Nevada, the Review-Journal routinely requests public records from governmental entities, including records pertaining to unnatural deaths.[22] Additionally, while the Review-Journal's original records request sought juvenile autopsy reports from 2012 through April 13, 2017, the Review-Journal will likely seek similar reports for subsequent years. The Coroner is deeply entrenched in its position regarding what information it believes it can redact from the requested records, *i.e.*, its categorical approach to withholding information in autopsy reports. It is therefore highly likely the Review-Journal or another requester will request autopsy records in the future and be required to seek judicial intervention again. Thus, even assuming the object of the Coroner's appeal would otherwise be mooted in the absence of a stay, this matter still falls within the capable-

[22] For example, the Review-Journal was required to seek judicial intervention in *Las Vegas Review-Journal v. Clark Country Office of the Coroner/Medical Examiner*, Eighth Judicial Dist. Ct. Case No. A-17-764842-W, after the Coroner refused to disclose autopsy records for the suspect and redacted victims' reports in the October 1, 2017, mass shooting.

of-repetition-yet-evading-review exception to the mootness doctrine.

Even if it that were not the case, the mere fact that this factor may weigh in favor a stay does not suffice to satisfy the Coroner's burden under NRAP 8(c). In this case, the other factors all weigh heavily against a stay.

IV. CONCLUSION

The Court should reject the Coroner's motion for a stay pending appeal for what it is—an attempt to further delay production of the records it has withheld since April 2017 and a refusal to accept that the NPRA does not allow it to categorically withhold whole categories of information contained in autopsy reports. The Coroner has failed to establish that it will suffer irreparable harm absent a stay pending appeal and has not established a likelihood of success on appeal. In contrast, the continued withholding of the autopsy reports has caused and will continue to cause irreparable harm to the Review-Journal and, more importantly, the public. Accordingly, this Court should deny the Coroner's request for a stay.

DATED this the 24th day of December, 2020.

/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
Counsel for Respondent, Las Vegas Review-Journal, Inc.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONDENT'S RESPONSE TO APPELLANT'S EMERGENCY MOTION FOR RELIEF UNDER NRAP 27(E) was filed electronically with the Nevada Supreme Court on the 24th day of December, 2020. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Steven B. Wolfson and Laura Rehfeldt
Clark County District Attorney's Office

Craig R. Anderson and Jackie Nichols
Marquis Aurbach Coffing

Counsel for Appellant,
Clark County Office of the Coroner/Medical Examiner

/s/ Pharan Burchfield
Employee of McLetchie Law

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Addendum	**Description**
A	Denver Post Article
B	December 10, 2020 Hearing Transcript
C	December 23, 2020 Order Denying Stay
D	October 29, 2020 Hearing Transcript

ADDENDUM A

NEWS

Colorado announces sweeping reforms to child welfare system

By **CHRISTOPHER N. OSHER** | cosher@denverpost.com, **JORDAN STEFFEN** | jsteffen@denverpost.com and **JENNIFER BROWN** | jbrown@denverpost.com | The Denver Post

PUBLISHED: February 6, 2013 at 7:12 a.m. | UPDATED: April 30, 2016 at 1:12 a.m.

Gov. John Hickenlooper on Wednesday revealed sweeping reforms to the state's child welfare system, including a multipart plan that will create a statewide hotline for reporting child abuse and neglect, new training on how to assess those reports, and a study of workloads and caseloads of child protection workers.

The plan also will steer resources to troubled families before actual abuse and neglect occur by delivering services through nurses, parenting classes and additional resources.

"We want to make sure that we keep kids healthy and safe and that we stabilize families because we know that stable families are the best launching pads there are for kids to have successful lives," Hickenlooper said at a news conference inside the state Capitol.

Hickenlooper will ask the legislature to dedicate $20 million to the reforms for the next fiscal year, nearly a third of which will come from recent reductions in the number of children incarcerated by the juvenile system. Much of the rest will come from increased tax revenues due to an improved economic climate, officials said.

The state projects that an additional $8 million annually will be available over the next five years because of a waiver from the federal government that allows the state more flexibility in how it spends child protection money.

"We want to ensure that every child in the state has well-trained, well-prepared caseworkers and supervisors with the right tools to ensure their safety," said Reggie Bicha, the executive director of the Colorado Department of Human Services.

Call for answers

The reforms follow an eight-day series published by The Denver Post in cooperation with 9News in November. The series found that 72 of the 175 children who have died of abuse and neglect in Colorado in the past six years had families or caregivers known to child protection workers. Since the launch of the series, an additional 17 children died of abuse or neglect in Colorado. Two of them were known to child protection workers.

The Post found that child protection workers did not follow state policy and regulations more than half the time when they tried to protect children who eventually died. Following the series, both the public and lawmakers demanded explanations for those children's deaths and improvements in how a child's case is handled.

State Sen. Jeanne Nicholson, D-Black Hawk, who is one of several lawmakers working with the Department of Human Services and counties to draft legislation, read the stories of more than 50 of the children included in the series, she said.

"We're all sad and appalled by this information," she said. "We may not be able to prevent every child death by abuse, but that doesn't mean we shouldn't try."

Hickenlooper announced a five-point improvement plan almost a year ago. On Wednesday, Hickenlooper, joined by Bicha and state lawmakers, announced a new wave of reforms for child welfare.

"I think we have been making progress with our most vulnerable children," Hickenlooper said. "We recognize this isn't just government's job. It is a goal of healthy families and healthy communities."

Bicha explained that the additional improvements will be focused on the "front end" of the child welfare system and will target prevention efforts, how child abuse and neglect are reported, and how those reports are assessed.

"Children should not have to experience abuse and neglect before we provide them and their families the services they need," Bicha said. "That's why we are investing in services that will assist families before they become a part of the child welfare system."

A public awareness campaign will launch in addition to the hotline, which will provide one number for people to call if they have a concern or report of child abuse.

Help for caseworkers

The state will offer new training programs for hotline and child protection workers to ensure that reports contain all necessary information and are shared and assessed properly, Bicha said.

New training programs will help hotline workers and child protection workers properly assess reports of child abuse in making decisions about their care and create more consistent practices across county departments.

In the past, protocols for when to launch an investigation were made on a county-by-county basis, allowing for wide variations. The reforms call for consistent criteria to be given to the people making those decisions.

The plan also includes measures to finance purchasing new smartphones and computer tablets so child protection workers can finish reports while they are outside the office — when, for example, they are waiting to make a court appearance.

The Post investigation also revealed that the state lacked the ability to track caseworkers' workloads.

A group of lawmakers expects to deliver a letter to the state auditor as early as next week, requesting a study of the workloads and caseloads carried by child protection workers, Nicholson said. The reform initiative will make available money for the state auditor to contract with an outside consultant to conduct the caseload and workload study, Bicha said. Such studies have been recommended numerous times in the past by child advocates. In the past, state officials have opted not to pay for one.

Summit County Commissioner Thomas Davidson, president of Colorado Counties Inc., a lobbying group for county officials, and Donna Rohde, director of Otero County's Department of Human Services and the president of the Colorado Human Services Directors Association, gave a joint interview with Bicha after Wednesday's news conference.

"You bet it makes a difference in terms of productivity," Davidson said of the plans for providing smartphones and computer tablets to caseworkers. He also praised plans for additional resources for county officials to offer services to families before abuse occurs.

The plan also includes training for "mandatory reporters," such as doctors or school teachers, who are required by law to report suspected abuse and neglect. The new training will better explain what happens when a report is made and what factors are considered when deciding whether to remove a child from the home.

The state will also work to improve on transparency by building a website where the public can see how county child welfare departments are faring at protecting children.

In addition, the state also will make available more money for core service programming, which delivers services aimed at allowing families to remain intact and preventing a child from getting placed into foster care.

AUDIT

The Denver Post investigation revealed the state lacked the ability to track workloads, how many caseworkers were on staff and whether they were disciplined for policy violations. The state plans to hire a consultant to study the workloads and caseloads within the department.

HOTLINE

A statewide, toll-free hotline will be set up to take reports of suspected child abuse and neglect. The state will launch new training programs for hotline and child protection workers to ensure that reports contain all necessary information and are shared and assessed properly.

MONEY

$20 million in state funds this year and $8 million in federal money each of the next five years will go to improve child abuse prevention programs and training. The federal funding comes through a waiver in how Colorado uses money that had been tied to spending on foster care.

TECH

Smartphone and tablet technology will be utilized so caseworkers can do paperwork remotely, between visiting homes of children. Caseworkers say they work 60-hour weeks and spend additional hours at home at night filling out paperwork in the state computer system.

PROGRAMS

The state will make available more money for services aimed at allowing families to remain intact. Other prevention money will deliver services through nurses, parenting classes and other resources — with the goal of reducing child abuse by 50 percent in seven years.

TAGS: **FAILED TO DEATH**, **SPECIAL REPORTS**

Christopher N. Osher | Investigative Reporter — The Denver Post
Christopher N. Osher is a former Denver Post reporter.

cosher@denverpost.com

Jordan Steffen | Former Legal Affairs Reporter
Jordan Steffen was a reporter for The Denver Post. She left the organization in June 2016.

jsteffen@denverpost.com

Follow Jordan Steffen @jsteffenDP

Jennifer Brown | Investigative Reporter — The Denver Post
Jennifer Brown is a former Denver Post reporter. She left in 2018.

jbrown@denverpost.com

Follow Jennifer Brown @jbrownDPost

ADDENDUM B

Electronically Filed
12/15/2020 8:43 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Plaintiff, vs. CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Defendant.	CASE#: A-17-758501-W DEPT. XXIV

BEFORE THE HONORABLE JIM CROCKETT, DISTRICT COURT JUDGE

THURSDAY, DECEMBER 10, 2020

RECORDER'S TRANSCRIPT OF VIDEO CONFERENCE HEARING
RESPONDENT CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER'S MOTION TO STAY ON AN ORDER SHORTENING TIME AND LAS VEGAS REVIEW-JOURNAL'S MOTION FOR AN ORDER TO SHOW CAUSE ON AN ORDER SHORTENING TIME

APPEARANCES (VIA BLUEJEANS):

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

For the Defendant: JACQUELINE NICHOLS, ESQ.

APPEARANCES (continued):

Also Appearing: BENJAMIN WHITMAN, ESQ.
GENERAL COUNSEL
(LAS VEGAS REVIEW-JOURNAL)

RECORDED BY: NANCY MALDONADO, COURT RECORDER

INDEX

Las Vegas, Nevada, Thursday, December 10, 2020

[Case called at 10:43 a.m.]

THE COURT RECORDER: Page 7, A758501, Las Vegas Review-Journal versus Clark County Office of the Coroner/Medical Examiner.

MS. MCLETCHIE: Good morning, Your Honor, Maggie McLetchie here for the Las Vegas Review-Journal. On the phone, I also have my co-counsel Alina Shell and Mr. Lipman, in-house general counsel for the Las Vegas Review-Journal.

THE COURT: Okay, thank you, good morning.

MS. MCLETCHIE: Good morning.

MS. NICHOLS: Good morning, Jackie [phonetic] Nichols on behalf of the Coroner.

THE COURT: Good morning. Okay, I have some lengthy notes I want to review with counsel, so that you have the benefit of, or detriment as the case may be, of what my thoughts are.

We have two items on. One is the Clark County Coroner's Motion for Stay on an Order Shortening Time.

And the other is Petitioner Las Vegas Review-Journal's Motion for an Order to Show Cause on an Order Shortening Time.

On Clark County's Motion for Stay, I reviewed the motion that was filed November 20th, 2020; the Review-Journal's Opposition filed November 30th, 2020; and the Coroner's Reply filed December 2nd, 2020. And then, there was a -- yeah, so that took care of all that.

From page 4 of the Coroner's Motion for Stay, it says the Court remanded -- the Supreme Court remanded the matter back to the District Court for the Las Vegas Review-Journal to demonstrate that the information sought, i.e. the personal health and medical information unrelated to the cause and manner of death, advanced a significant public interest.

And I would take issue with the way that was phrased. It's the personal health and medical information which the Coroner's Office has claimed is unrelated to the cause and manner of death.

And I was instructed to balance the competing interests of the Coroner's claim that there was personal health and medical information that was unrelated to the cause and manner of death against the significant public interest being advanced by the Las Vegas Review-Journal.

In this case, I think that something that needs to be ruminated on is that significant public interest that the Review-Journal seeks to advance here.

What we're talking about is collection of data involving the death -- deaths of children and evidence of prior or longstanding physical abuse, serious injury, torture, and then of course, ultimately, the cause of death as ascertained by the Coroner's Office.

And in doing so, the goal here is all of us who work for the government, regardless of which branch or agency we're employed by, we're servants of the public.

It's something that we see is forgotten very often, but it

shouldn't be, because we do serve to meet the demands of the citizens who are governed and to meet the needs of the citizens. And the citizens of the State have untrusted us with the responsibility of doing what we were hired to do.

So one of the primary focuses that I see in terms of the significant public interest is if you have two parallel tracks of information, for example, a history of reports and complaints to an agency that is charged with the responsibility of enforcing laws that protect children from abuse and torture, and ultimately homicide, and on another parallel track, you have information being gathered by the Coroner's Office where children's autopsies are being performed and medical findings are being developed to find out the child's medical history and ultimately the immediate cause of death.

And if this information is correlated, it could be very beneficial in trying to understand whether or not the agencies that are charged with the responsibility of protecting children from abuse and neglect have in fact been acting reasonably in discharging their duties. Not flawlessly or infallibly, but reasonably.

And if autopsy records and investigations and examinations reveal that a child died with the immediate cause of death being trauma that resulted in death, but they find as they always document and record prior evidence of old traumatic injuries and scarring and broken bones and evidence of serious injury or torture, and that information is correlated with dates and times where enforcement agencies went out to investigate a complaint, if the enforcement agency took no action, that

information becomes very relevant because it is corroborative of the complaint that wasn't pursued or wasn't enforced.

And there are -- the county estimates that there are 600 to 700 approximately autopsy reports that we're talking about. They only provided three sample reports when the case went up to the -- when the case was heard here when the case went up to the Nevada Supreme Court.

And in those three sample reports, the Coroner's Office said there's, you know, health related information that's not related to the cause of death and we claim that it's private.

The Supreme Court said that that category of information is a legitimate category to claim privacy about, but it wasn't a pass on producing the requested information.

It simply then shifted the burden to look at prong number 2. And that is to assess the significant public interest that's being argued by the Review-Journal.

So the Coroner in its brief acknowledged that it has withheld 600 to 700 autopsy reports on the grounds that they contained confidential, medical, or personal information. It had never actually reviewed or claimed privilege for any of those reports, though.

So it sat on 6- to 700 or more autopsy reports since this matter first came in in the year 2017. And then and in 2018 and 2019 up to the current date, the Coroner's Office sat on their hands and did nothing to claim privilege or review of those reports, instead, standing behind the boilerplate assertion as to the three sample reports that were provided

earlier.

At the transcript on the hearing in this case, page 23, lines 4 through 14, Ms. Nichols says, Your Honor, this is going to be an approximation in terms of the number of reports. I don't have the exact number, but I believe it's based off of their request and their time period. It's 6- to 700 juvenile autopsy reports.

And the Court said okay, okay. And have you previously made redactions on these 6- to 700 autopsy reports that were requested?

Ms. Nichols answered, no, Your Honor.

The Court said you haven't?

Ms. Nichols responded we have not. We did the sample that we initially provided them before the lawsuit.

So the Coroner's Office has never, even to this current date, ever addressed anything but the three sample reports because it made no redactions anywhere else and claimed no confidentiality or privilege, nor did they specifically identify any information they claimed to be protected from disclosure.

The unmistakable impression created by the Coroner's Office is that they are not about protecting nontrivial privacy interests. Instead, everything they've done, beginning with the original unsustainable objections to produce any information and continuing through to today demonstrates that the Coroner's Office is bound and determined to circumvent and avoid the clear letter and spirit of the Nevada Public Records Act by stonewalling, obfuscating, and frivolously offering up

entirely trivial, generic, and categorical claims of privacy without making even the slightest effort to particularize a nontrivial privacy interest.

The Coroner's Office insists upon unilaterally making its own determinations regarding relevancy, i.e. whether the requested information is relevant to cause of death.

For example, if there's evidence of prior physical abuse, prior life-threatening or otherwise serious injuries, that appear to have been intentionally inflicted upon the minor, that is relevant to the cause of death and the preventability of the death, demonstrating that the cause of death was likely wrongful cause of death. Also, evidence of criminality and unlawful homicide resulting from serial physical abuse and injury.

Evidence of scarring, heel fractures, and other evidence of trauma cannot be categorically excluded on the basis of a unilateral determination by the Coroner that it was not the immediate cause of death.

The primary purpose of seeking these records is to determine whether or not the child's body contained historical evidence of serial or prior abuse leading up to the child's ultimate demise, particularly when the immediate cause of death was said to be traumatic.

The Coroner's Office does not seem to want to acknowledge or follow the Nevada Public Records Act. Instead, it keeps repeating the phrase "the autopsy reports contain personal health and medical information that involve a nontrivial privacy interest".

That is boilerplate generic language. And the Coroner's Office

has failed to demonstrate in this balancing of the significant public interest being advanced by the Petitioner exactly what that means to counterbalance the Petitioner's request for this information.

And they only make this claim as to the three sample autopsy reports that they actually claimed to have reviewed. They have never made the claim, that claim, as to the remaining 6- to 700 approximately autopsy reports based upon the -- and while the Supreme Court accepted this statement as warranting further consideration by the District Court, at this juncture, having looked at this and balanced the interests involved, we know that the phrase actually has no meaning in the context of the very significant public interest being advanced by the Petitioner to ascertain whether or not autopsy reports document evidence of prior physical abuse that was unchecked by sister government agencies charged with the responsibility of investigating claims of child abuse.

When balancing the generalized assertion of the very significant interest being advanced by the Petitioner Las Vegas Review-Journal and the vague generic assertion that "the autopsy reports contain personal health and medical information that involved a nontrivial privacy interest", without more, the choice to require disclosure is not just highly persuasive. It is compelling.

This, coupled with the fact that in all the years this has been going on, the Coroner's Office has made no effort to particularize its objection as to the remaining 6- to 700 records that lie gathering dust, figuratively speaking, in the archives when the information contained in

them could have been and still needs to be put to use to help save the lives of children in the future.

Why the Coroner's Office does not link arms with the Review-Journal and provide the public records freely and voluntarily is truly unimaginable.

Put another way, even though the Coroner's Office is no -- under no obligation to prevent the death of children, it has the ability to assist in that goal.

Wouldn't it want to? Rather than proactively assisting or even just passively participating in the efforts to assemble information that could in the future be instrumental in protecting children and preventing them from being tortured, abused, and murdered in the future, the Coroner's Office has dragged its heels and been brought before the Court kicking and screaming over objections that are frivolous, featherweight, and fallacious.

Given the very significant interests being advanced and the complete absence of any actual particularized interest being articulated, the Coroner's actions with regard to the production of these records borders on the scandalous and impertinent.

It must be kept in mind that the Supreme Court said the Court should weigh and balance the Coroner's Office claim of particularized interest in privacy.

That's simply a category. The Court finds that the claim turns out to be devoid of any evidence that it actually exists. So the claim may be legally cognizable, but like any legally cognizable claim, it must be

established to be true by admissible evidence. And the Coroner's Office has consistently declined to do that.

If instead, the Court were left to weigh or balance the Coroner's claim of privacy without further articulation, specification, and proof, there is no metric or means to compare it with the clearly articulated and clearly understood significant interests being advanced by the Petitioner Journal -- Review-Journal.

The result would be that there would always be this multi-phased, multi-tiered, multi-step process in which the public agency just resists and puts the requesting citizen in the position of jumping through hoops, manufactured one after the other by the public agency.

Can anyone really imagine a more blatant and flagrant attempt to obstruct and frustrate the declared legislative purpose of the Nevada Public Records Act?

From the Supreme Court case of Reno Newspapers versus Jim Gibbons, 127 Nev. Adv. Opinion 79 of page 5, the Supreme Court said the legislature has declared that the purpose of the NPRA is to further the democratic ideal of an accountable government by ensuring that public records are broadly accessible.

How many more children will be tortured, abused, and murdered while the Coroner's Office conceals evidence which is sought to be analyzed by those whose mission is to investigate whether or not the government agencies charged with the responsibility of protecting children and reporting evidence of abuse are actually doing their jobs?

Is there anyone who wouldn't want to know the answer to that

question? Are our government agencies supported by taxpayer dollars and entrusted by the public to be accountable and responsible to perform certain specific tasks doing what they're supposed to do?

If not, why not? And what can be done to improve the actions of the public agencies who are not acting responsibility -- responsibly? These are entirely valid inquiries, because the citizens have an absolute right to demand and insist that public servants serve the public. They have no other purpose. And they are certainly not being paid to serve their own interests.

With regard to the Review-Journal's Motion for an Order to Show Cause, because the Motion for Stay was filed 10 days before the due date for the disclosure, this may militate against a finding of contempt predicated on nonperformance on November 30th.

But given the Court's analysis of the Coroner's Office conduct in this case, it may provide motivation for production of the records now. After all, the Coroner's Office has completely failed to provide any information to balance out, let alone outweigh, the significant interests that had been advanced by the Petitioner. So there is really no harm to the Coroner's Office.

And the delay of waiting for the Coroner's Office to take an appeal or pursue a writ just adds to the already inexplicable delay that has taken place. These records are easily digitally replicated in a matter of minutes.

So those are my thoughts with regard to Clark County's Coroner's Motion for Stay, which I'm inclined to deny for the reasons

expressed. And those are my thoughts regarding the Review-Journal's Motion for an Order to Show Cause.

I'm happy to hear from both counsel. And since I'm inclined to rule against the County on the Motion for Stay, let me hear, Ms. Nichols from you first?

MS. NICHOLS: Your Honor, I don't have anything additional to say, other than what was already in the briefing.

THE COURT: Okay. Ms. McLetchie, anything to say on the Motion for Stay?

MS. MCLETCHIE: Only very briefly, Your Honor. I also think because the [indiscernible] did not actually consider this matter and at its last meeting and because the notice of the appeal has been issued, I also just think addition -- in addition to the reason that the Court gave, there's also no basis for a stay because NRCP 52(c) merely provides -- permits the Court to issue a stay of an injunction pending appeal, but there is no appeal pending. It says while an appeal is pending. Obviously notice of appeal has to be filed in order for [indiscernible] pending.

THE COURT: I agree. And in terms of analyzing those factors, even though the appeal hasn't been filed yet, looking at the factors whether the object of the appeal or re-petition will be defeated if the stay or injunction is denied for the reasons I expressed, I don't believe that that is a relevant consideration because I believe that the Coroner's Office -- their motivation and goal all along has been to delay and deny.

And I don't see any significant harm at all to disclosure of the information. And I certainly don't think that the purpose of the appeal would be defeated.

Second, the County would suffer no irreparable or serious injury if the stay is denied.

Third, I do think that the Petitioner would suffer serious injury if the stay was granted, because it would further delay their acquisition of the information that forms the basis and gives them the impetus for their investigation.

And fourth, whether or not the Petitioner is likely to prevail on the merits on the appeal, I don't think they are likely to prevail, otherwise I wouldn't have ruled the way that I did.

So Ms. McLetchie, I'm going to ask you to prepare the order denying the Clark County Coroner's Motion for Stay.

Now with regard to the Motion for Order to Show Cause, since I'm inclined to deny that at this time, based upon the fact that the Motion for Stay was filed 10 days before the due date for performance, is there anything you wish to address on that, Ms. McLetchie?

MS. MCLETCHIE: The only -- I understand the Court's position. The only points I would make, Your Honor, is that the mere filing of a motion to stay does not give license to disregard the order.

I also think that they could have sought Clark County approval more quickly. But again, just filing a motion to stay does not automatically give a temporary stay.

I also think their argument in their Opposition for Order to

Show Cause yesterday regarding NRCP 62(a)(1) is without any moment, because that the automatic stay provisions there govern when a judgment creditor can begin executing a money judgment.

And there's an entirely separate provision, 62(a)(2), that explicitly provides that there is no automatic stay of an injunction. So I would just briefly make those points, Your Honor.

THE COURT: I agree. It's not like a motion for protective order on a deposition or something. But nevertheless, rather than to find them in contempt for failure to produce documents on November 30th, when they clearly were launching their objections and concerns with the Court when they filed their Motion for Stay, I'm inclined to deny the Motion for an Order to Show Cause.

Hopefully, the denial of the Motion for Stay will result in these materials being produced forthwith. And so toward that end, originally, there was an order to produce the materials by November 30th.

So I will extend the deadline to December 30th, which I think is more than ample time for the Coroner to produce this information, particularly if they're doing so digitally by recording it on digital media and disclosing it in that fashion.

All right, anything else?

MS. MCLETCHIE: Your Honor, I would just point out that since they are not required to make redactions, I would argue that they can produce these documents much more quickly than that since they're being produced without the extensive redactions that they had urged the Court permit them to make. And so, I would -- I'd ask that they'd

produce them earlier than that date.

THE COURT: Well, they are to be produced unredacted, absolutely. I'm just trying to give them time that enables them to obtain what they need to do. And I think December 30th is a reasonable deadline. That should be --

MS. MCLETCHIE: May I ask --

THE COURT: Yes?

MS. MCLETCHIE: I'm sorry, I'm sorry, Your Honor. I was just going to ask that they be required to produce them on a rolling basis. They often take the position that they can wait to make everything available until it's all ready. And I would just ask that they produce the records on a rolling basis.

THE COURT: Okay, I don't know why, but your sound is coming a little bit muddy. Tell me what kind of media you're asking them to be -- to produce it on?

MS. MCLETCHIE: I apologize, Your Honor, I wasn't specifying a particular media. I was just asking that rather than wait to the last possible minute till December 30th, and until all the records are available, I would just ask that they be ordered to provide them as expeditiously as possible no later than December 30th and that they produce records on a rolling basis, rather than waiting till they're all ready to produce any records.

THE COURT: Well, I'm not going to do that. I do want them to produce them as expeditiously as possible, but not a rolling basis.

I don't think that's going to make any significant difference

when you're talking about copying even as many autopsy reports as we're talking about, 600 or 700 or more. Digitally copying just doesn't take that much time.

So the unredacted autopsy reports all of them, whatever their number, are to be produced no later than December 30th of 2020. That needs to be included in the order denying the Motion for Stay.

And Ms. Nichols, I'm going to ask you to prepare the order denying the Motion for an Order to Show Cause. I need both of those within two weeks in accordance with EDCR 7.21.

I prefer that you get them to me before December 17th, so that I can file them, sign them and file them before the Court goes dark on December 18th. Okay, thank you.

MS. NICHOLS: Yes.

MS. MCLETCHIE: Thank you, very much, Your Honor.

[Proceedings concluded at 11:12 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.

Chris Hwang
Transcriber

ADDENDUM C

ORDR
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
Counsel for Petitioner, Las Vegas Review-Journal

DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL,

Petitioner,

vs.

CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER,

Respondent.

Case No.: A-17-758501-W
Dept. No.: XXIV

ORDER DENYING RESPONDENT CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER'S MOTION TO STAY ON ORDER SHORTENING TIME

The Clark County Office of the Coroner/Medical Examiner's Motion to Stay on Order Shortening Time having come on for hearing on December 10, 2020, the Honorable Jim Crockett presiding, Respondent the Clark County Office of the Coroner/Medical Examiner (the "Coroner") appearing by and through its counsel, Jackie V. Nichols, and Petitioner the Las Vegas Review-Journal (the "Review-Journal") appearing by and through its counsel, Margaret A. McLetchie and Alina M. Shell, and the Court having read and considered all of the papers and pleadings on file and being fully advised, and good cause appearing therefor, the Court hereby makes the following findings of fact and conclusions of law:

/ / /

/ / /

I.

PROCEDURAL HISTORY AND FINDINGS OF FACT

1. On April 13, 2017, the Review-Journal sent the Coroner a request (the "Request") pursuant to the Nevada Public Records Act, Nev. Rev. Stat. § 239.001 *et seq.* (the "NPRA") seeking all autopsy reports of all autopsies conducted on anyone under the age of 18 from 2012 through the date of the Request.

2. The Coroner responded to the Request on April 13, 2017, refusing to produce any of the requested autopsy reports, stating nothing more than it was "not able to provide autopsy reports."

3. On July 11, 2017, the Coroner informed the Review-Journal that it had begun compiling and redacting autopsy reports in response to the records request, and provided sample files of three redacted autopsy reports from child deaths that were not handled by a child death review team as an example of the redactions the Coroner intended to make to all the requested reports. The Coroner also provided the Review-Journal with a spreadsheet identifying juvenile deaths that occurred in Clark County from January 2012 to the date of the request which included each decedent's name, age, race, and gender, as well as the cause, manner, and location of death.

4. The sample files were heavily redacted.

5. The Review-Journal filed its Petition on July 17, 2017.

6. After full briefing by the parties, this Court conducted a hearing on the Review-Journal's Petition on September 28, 2017, and granted the Review-Journal's Petition in its entirety.

7. The Court entered a written order granting the Review-Journal's Petition and ordering the Coroner to produce the requested autopsy reports on November 19, 2017.

8. The Coroner filed a notice of appeal on November 28, 2017.

9. The Supreme Court issued a decision on February 27, 2020. *See Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 136 Nev. 44, 458 P.3d 1048 (2020).

10. In its opinion, the Supreme Court rejected the Coroner's broad interpretation of Nev. Rev. Stat. § 432B.407(6), holding that the statute "applies exclusively to a CDR 'team,' not to the broad categories of individual public agencies that may be part of a CDR team" such as the Coroner. *Coroner*, 136 Nev. at 51, 458 P.3d at 1055. Under a narrow construction of this statute as mandated by Nev. Rev. Stat. § 239.001(3), the Court found that "only a CDR team may invoke the confidentiality privilege to withhold information in response to a public records request, and NRS 432B.407(6) makes confidential only information or records 'acquired by' the CDR team." *Id.* at 50-51, 1055.

11. The Supreme Court further found that the statutory scheme of NRS Chapter 432B "reflects a clear legislative intent to make certain information concerning child fatalities publicly available." *Id.* at 52, 1055; *see also id.* at 52-53, 1055-56 (discussing legislative history of Chapter 432B).

12. After considering the statutory scheme and legislative history of Chapter 432B, the Supreme Court found that "the public policy interest in disseminating information pertaining to child abuse and fatalities is significant." *Id.* at 57, 1059.

13. However, the Supreme Court found that the Coroner had articulated a nontrivial privacy interest that could be at stake for some information contained in the records, and remanded the matter to this Court to apply the two-part balancing test adopted in *Clark Cty. School Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 429 P.3d 313 (2018) ("*CCSD*") to determine what information in the autopsy reports must be disclosed under the NPRA and what information should be redacted. *Coroner*, 136 Nev. at 58, 458 P.3d at 1059.

14. This Court conducted a hearing on the parties' briefs on remand on October 29, 2020.

15. At the October 29, 2020, hearing on remand, the Coroner stated that it had only redacted the three sample autopsy reports it provided to the Review-Journal pre-litigation and had not reviewed or performed redactions to the balance of the approximately 680 autopsy reports and 150 external examinations. (Recorder's Transcript of October 29, 2020, Hearing ("Transcript"), p. 23:8-14 (on file with this Court).)

16. On November 20, 2020, this Court entered a written Order finding that the Review-Journal had established access to unredacted juvenile autopsy reports furthers multiple significant public interests, and that those multiple significant public interests outweigh the nontrivial privacy concerns articulated by the Coroner. The Court furthered directed the Coroner to produce unredacted copies of the requested juvenile autopsy reports by not later than November 30, 2020.

17. On November 20, 2020, the Coroner filed a Motion to Stay on an Order Shortening Time.

18. The Review-Journal filed an Opposition to the Coroner's Motion on November 30, 2020.

19. The Coroner filed a Reply on December 7, 2020.

20. This Court conducted a hearing on the Coroner's Motion on December 10, 2020.

21. As of December 10, 2020, the Coroner had not filed a notice of appeal.

II.

CONCLUSIONS OF LAW

A. The Legal Standard for a Motion to Stay

22. The Court must consider four factors in deciding whether to issue a stay pending appeal: (1) "whether the object of the appeal will be defeated if the stay is denied;" (2) "whether appellant will suffer irreparable or serious injury if the stay is denied;" (3) "whether respondent will suffer irreparable or serious injury if the stay is granted;" and (4) "whether appellant is likely to prevail on the merits in the appeal." Nev. R. App. P. 8(c); *accord Hansen v. Eighth Judicial Dist. Court ex rel. Cty. Of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000). In addition, the Court must consider "where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (citations omitted).

23. The Nevada Supreme Court has "not indicated that any one factor carries more weight than the others," instead recognizing "that if one or two more factors are especially strong, they may counterbalance other weak factors." *Mikohn Gaming Corp. v.*

McCrea, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004) (citation omitted).

24. Here, no stay is appropriate because, even as of the hearing on the Motion to Stay, the Coroner had not filed a notice of appeal. Without an appeal pending, no stay can be issued.

25. Further, after considering the four factors set forth in NRAP 8(c) and the public interest, the Court the Coroner has not established that a stay is warranted.

B. The Irreparable Harm a Stay Would Inflict on the Public Weighs Against a Stay.

26. In deciding whether to issue a stay in this matter, this Court must consider "whether respondent will suffer irreparable or serious injury if the stay is granted." NRAP 8(c).

27. Additionally, the Court should consider in deciding whether a stay is warranted is where the public interest in access lies. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

28. In considering the public interest in access to this information, it must be first be recognized that public servants like the Coroner serve to meet the needs and demands of the citizens of Nevada, and that the citizens of Nevada have entrusted public servants with the responsibility of promoting and defending the interests of the citizenry.

29. At issue here is the collection of data involving the deaths of children and evidence of prior or longstanding physical abuse, serious injury, torture, and ultimately, the cause of death as ascertained by the Coroner.

30. One of the primary significant public interests likely to be advanced by access to the records here is the importance of being able to correlate information generated by different governmental agencies vested with the responsibility of ensuring the safety of children.

31. With regard to juvenile autopsy reports, there may be a history of reports and complaints to an agency that is charged with the responsibility of enforcing laws that protect children from abuse and torture, and ultimately homicide. Meanwhile, on another parallel track, there may be information being gathered by the Coroner's Office where

children's autopsies are being performed and medical findings are being developed to find out the child's medical history and ultimately the immediate cause of death.

32. If this information is correlated, it could be very beneficial in trying to understand whether the agencies charged with the responsibility of protecting children from abuse and neglect have in fact been acting reasonably in discharging their duties.

33. Further, if the Coroner's examination and investigation reveal that a child died with the immediate cause of death being trauma that resulted in death and that there was evidence of old traumatic injuries or abuse and that information is correlated with the dates and times where law enforcement agencies went out to investigate a complaint but ultimately took no action, that information is relevant because it is corroborative of the complaint that was not pursued.

34. This Court, having reviewed this matter extensively and having balanced the interests involved, finds that the Coroner's generalized assertion of the "personal health and medical information that involve a nontrivial personal privacy interest" is vastly outweighed by the very significant public interest being advanced by the Review-Journal to ascertain whether the autopsy reports document evidence of prior physical abuse that was unchecked by sister government agencies charged with the responsibility of investigating claims of child abuse and that the information sought is likely to advance that interest. Indeed, the Review-Journal has made a very compelling case on remand that also establish that significant harms to the public and the Review-Journal would occur if a stay were issued.

35. Keeping these records confidential hinders efforts to prevent the deaths of children. Even though the Corner has no obligation to prevent the death of children, it has the ability to assist in that goal. Thus, the fact that the Coroner is unwilling to provide the records is truly unimaginable. Rather than assisting—either actively or passively—in the efforts to assemble information that could in the future be instrumental in protecting children and protecting them from being tortured, abused, and murdered in the future, the Coroner has dragged its heels and been brought before the Court kicking and screaming over objections that are frivolous, featherweight, and fallacious.

36. Given the very significant interests being advanced and the absence of any particularized interest being articulated, the Coroner's actions with regard to the production of these records borders on the scandalous and impertinent and delay would hinder the public interest.

37. The Coroner's assertion that the autopsy reports contain information which implicates a nontrivial privacy interest is a legally cognizable claim—indeed, the Supreme Court has held precisely that. *Coroner*, 136 Nev. at 55, 458 P.3d at 1057. But like any legally cognizable claim, it must be established to be true by admissible evidence. *See, e.g.*, Nev. Rev. Stat. § 239.0113(2) (placing the burden on a withholding entity to establish "by a preponderance ***of the evidence***" that a public record or part thereof is confidential) (emphasis added); *see also Reno Newspapers, Inc. v. Sheriff*, 126 Nev. 211, 219, 234 P.3d 922, 927 (2010) (rejecting a sheriff's claims of confidentiality where he "provided no evidence to support his argument" that access to records related to concealed firearms permits would increase crime or risk of harm to the permit holder or the public). The Coroner has consistently declined to do that.

38. Additional delay in producing the records would further frustrate the declared legislative purpose of the NPRA: to foster democratic principles by providing members of the public with access to public records to the extent permitted by law, Nev. Rev. Stat. § 239.001(1); *accord Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 877–78, 266 P.3d 623, 626 (2011) ("The Legislature has declared that the purpose of the NPRA is to further the democratic ideal of an accountable government by ensuring that public records are broadly accessible.").

39. The Court is hard-pressed to imagine a more blatant and flagrant attempt to obstruct and frustrate the legislative purpose of the NPRA than evidenced by the Coroner in this case.

40. The public has an undeniably significant interest in preventing the abuse, torture, or murder of children. The public also has an undeniably significant interest in understanding whether the government agencies charged with the responsibility of protecting

children and reporting evidence of abuse are actually doing their jobs or, if they are not, why not and what can be done to improve those agencies. Thus, in addition to the fact that the Review-Journal would face irreparable harm from delay, the public interest would be thwarted by a stay.

41. In short, the harm the Review-Journal faces and the public interest in access to the juvenile autopsy reports the Coroner has withheld for over three years weighs against entering a stay in this matter.

C. The Coroner's Speculations Regarding Harm Do Not Merit a Stay.

42. Another factor this Court must consider in determining whether a stay is warranted is "whether appellant will suffer irreparable or serious injury if the stay is denied." NRAP 8(c).

43. In its request for a stay, the only "irreparable harm" the Coroner articulates is that information it has unilaterally deemed "unrelated" to the cause or manner of death could be open to public inspection.

44. As the United States Supreme Court has cautioned, the mere possibility of irreparable injury is insufficient to warrant a stay. *Nken v. Holder*, 556 U.S. 418, 435 (2009) (citing *Winter v. Natural Res. Def. Council Inc.*, 555 U.S. 7, 22 (2008)).

45. Similarly, in the context of the NPRA, the Nevada Supreme Court has held that a state entity cannot overcome the presumption of access "with a nonparticularized showing . . . or by expressing hypothetical concerns." *Gibbons*, 127 Nev. at 880, 266 P.3d at 628 (citations omitted).

46. The Coroner has failed to present evidence of the alleged harm that would be caused by dissemination of the information contained in the juvenile autopsy report. The Coroner has rested its argument on its broad and generalized assertion that the records contain "personal health and medical information that involve a nontrivial personal privacy interest" that should be withheld from public scrutiny, but made no effort to identify a concrete, identifiable harm that outweighs the specific need for access the Review-Journal has articulated.

47. Moreover, by the Coroner's own admission, it has not even reviewed the withheld 600 to 700 juvenile autopsy reports to determine what information contained within each of those reports constitutes "personal health and medical information that involve a nontrivial personal privacy interest" which merits protect.

48. Thus, the Coroner has failed to establish that it or the public will suffer irreparable harm in the absence of a stay.

49. As discussed above, in contrast, the public interest not only weighs in favor of immediate disclosure, but the Review-Journal and the public will suffer irreparable harm if disclosure is further delayed.

D. The Coroner Has Failed to Demonstrate A Likelihood of Success on the Merits.

50. NRAP 8(c) also requires the Court to assess "whether appellant is likely to prevail on the merits in the appeal."

51. Although a movant does not always have to show a probability of success on the merits, a movant must "present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Hansen v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (citing *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir.1981).

52. While the Coroner contends that the legal issue at hand "is whether autopsy reports are confidential or subject to disclosure under Nevada Public Records Law" (Motion, p. 8:15-26), the Nevada Supreme Court has already resolved the overarching legal questions at hand in the *Coroner* decision and remanded for the application of the balancing test. Thus, there is no substantial legal question presented by the appeal.

53. Further, this Court applied the balancing test and the Coroner is unlikely to prevail on appeal. On remand, consistent with the Supreme Court's direction, this Court has carefully conducted the second prong of the analysis required by *CCSD*, 134 Nev. 700, 429 P.3d 313, to allow the parties to address whether the Review-Journal's interests in access outweigh the Coroner's nontrivial privacy concerns and found that the Review-Journal met its burden.

54. While the Supreme Court did ultimately agree that autopsy reports implicated nontrivial personal privacy interests that may warrant redaction, it did not give the Coroner a pass on producing the autopsy reports or hold that the Coroner could categorically withhold the reports or any portion thereof. Instead, the Supreme Court found that, because the Coroner had established that the information implicated personal privacy interests, the burden had shifted to the Review-Journal to establish that the public interest it seeks to advance is a significant one and that the information sought is likely to advance that interest. *Clark County Office of the Coroner/Medical Examiner v. Las Vegas Review-Journal*, 136 Nev. 44, 58, 458 P.3d 1048, 1059 (2020) ("*Coroner*").

55. The Review-Journal established that there are multiple significant public interests which militate in favor of disclosure and that would be specifically advanced by access to the information sought.

56. The Coroner, on the other hand, failed for years to assert anything other than the generalized nontrivial privacy interest that this Court, following the Supreme Court's instructions on remand, found were drastically outweighed by the Review-Journal's significant interests in the specific information sought in this case. The Coroner estimates that there are approximately 600 to 700 reports that are responsive to the Review-Journal's request. In responding to the Review-Journal's request, the Coroner produced three sample autopsy reports; these were the only reports the Coroner has produced to date. In those three sample reports, the Coroner asserted that it had redacted health and personal information not related to the cause of death, asserting that the information was entitled to blanket, categorical protection. In its Motion for Stay, the Coroner acknowledged that it has withheld the aforementioned 600 to 700 juvenile autopsy reports on the grounds that they contained confidential, medical, or personal information, but had never actually reviewed any of those reports for the privileged information the Coroner alleges they contain. The Coroner sat on these hundreds of reports when this matter first came before the Court in 2017. And then in 2018, 2019, and all the way through the current date, the Coroner sat on its hands and did nothing to review or claim privilege as to any of those reports, instead standing behind the

boilerplate assertions as to the three sample reports that were provided to the Review-Journal prior to the initiation of this matter.

57. Thus, even to this current date, the Coroner has never addressed anything but the three sample autopsy reports because it made no redactions to the withheld autopsy reports, it has made no specific claims of privilege with respect to those reports, and it has not specifically identified any information contained within those reports it believes should be protected from disclosure.

58. Moreover, even after the Review-Journal met its burden on remand, the Coroner effectively refused the Court's offer of a further opportunity to establish *in camera* why the balancing test might still favor secrecy by continuing to assert a right to categorically withhold information it determined was unrelated to the cause of death, ignoring that the Court had held that the Review-Journal had already met its burden of establishing that the interests it sought to advance are significant and that the information sought—including the information deemed unrelated to the cause of death by the Coroner— such as observations and medical history that is likely to advance those interests.

59. In light of this procedural posture, the Coroner cannot establish a likelihood of success on its claims or even the more forgiving standard of a substantial legal question where the relative harms favor a stay.

60. The unmistakable impression created by the Coroner is that it is not truly acting to protect nontrivial privacy interests. Instead, everything the Coroner has done—beginning with the original unsustainable, categorical objections to produce any information and continuing through to today—demonstrates that the Coroner is bound and determined to circumvent and avoid the clear letter and spirit of the Nevada Public Records Act by stonewalling, obfuscating, and frivolously offering up entirely trivial, generic, and categorical claims of privacy without making even the slightest effort to particularize a nontrivial personal privacy interest.

61. The Coroner does not seem to want to acknowledge or follow the NPRA. Instead, it keeps repeating the phrase "the autopsy reports contain personal health and

medical information that involve a nontrivial personal privacy interest." This is boilerplate language, and the Coroner has failed to demonstrate on remand what exactly that boilerplate language means, or how it counterbalances the significant public interests the Review-Journal seeks to advance through access. Instead, the Coroner insists upon unilaterally making its own determinations regarding relevancy, *i.e.*, whether the requested information is relevant to the cause or manner of death, ignoring that the Court specifically determined that the Review-Journal met its burden on remand.

62. Under the Coroner's broad and nonparticularized approach, it would be able to withhold information that is clearly relevant to whether a deceased child was a victim of longstanding abuse or neglect. For example, if there is evidence of prior physical abuse or evidence of prior life-threatening or otherwise serious injuries that appear to have been intentionally inflicted upon the minor, that is relevant to the cause of death and the preventability of that death that the Coroner would be able to withhold. But this sort of information cannot be categorically excluded from disclosure on the basis of a unilateral determination by the Coroner that it was not related to the cause or manner of death.

63. If the Court were left to weigh the Coroner's claims of privacy without further articulation, specification, and proof, there is no metric or means to balance those claims with the clearly articulated and clearly understood significant interests being advanced by the Review-Journal. The result would be that there would always be this multi-phased, multi-tiered, multi-step process in which the public agency just resists and puts the requesting citizen in the position of jumping through hoops, manufactured one after the other by the public agency.

64. When balancing the significant interests being advanced by the Review-Journal against the vague generic assertion that "the autopsy reports contain personal health and medical information that involved a nontrivial privacy interest" without more, the choice to require disclosure is not just highly persuasive, it is compelling.

65. Thus, the Coroner has not established either a likelihood of success on the merits or a substantial legal question.

E. The Object of the Appeal

66. The final factor this Court must consider is "whether the object of the appeal will be defeated if the stay is denied." NRAP 8(c).

67. Even if it would defeat the purpose of an appeal, a stay is not automatic. Instead, "[a] decision to grant a stay of an order pending appeal always involves an exercise of judicial discretion and is dependent upon the circumstances of the particular case." *See* 5 Am. Jur. 2d Appellate Review § 397 (applying the federal analogue to NRAP 8 (footnotes omitted).

68. In addressing this prong of NRAP 8(c), the Coroner asserts that disclosure of the reports as ordered by the Court prior to any appeal would "undermine the Coroner's argument and render the appeal moot." (Motion, p. 7:20-21.)

69. The Coroner's goal in seeking a stay—as has been its goal throughout this case—is to delay and deny access to the requested juvenile autopsy reports. Thus, the factor that applies to stays regarding defeating the purpose of the appeal does not weigh in favor of an appeal.

70. Further, even setting aside that issue, the purpose on appeal would not be defeated. The Coroner did not meet its burden of establishing that the appeal would not be moot because the claims at issue in this matter fall within the "capable-of-repetition-yet-evading-review" exception to the mootness doctrine, which applies when the duration of a challenged action is "relatively short" and there is a "likelihood that a similar issue will arise in the future." *Personhood Nevada v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (quotation omitted); *see also Binegar v. Eighth Judicial Dist. Court In & For Cty. of Clark*, 112 Nev. 544, 548, 915 P.2d 889, 892 (1996) (providing that the matter must "present[] a situation whereby an important question of law could not be decided because of its timing"). For example, while the Review-Journal's original records request sought juvenile autopsy reports from 2012 through April 13, 2017, the Review-Journal would likely seek similar reports for subsequent years.

71. The issues the Coroner intends to present on appeal are extremely likely to

arise in the future. The Review-Journal, as the largest media entity in Nevada, routinely requests records from governmental entities, including records pertaining to unnatural deaths. For example, shortly after the initiation of the instant action, the Review-Journal petitioned the district court for relief when the Coroner refused to disclose autopsy reports for the victims and suspect in the October 1, 2017 mass shooting at the Route 91 Harvest music festival on some of the same rejected grounds it relied on in this matter.

72. Moreover, as evidenced at the October 29, 2020, hearing before this Court, the Coroner is deeply entrenched in its position regarding what information it believes it can redact from the requested records, *i.e.*, its categorical approach to withholding information in autopsy reports.

73. It is therefore highly likely that the Review-Journal or another requester will request autopsy records in the future and be required to seek judicial intervention when the Coroner once again refuses to disclose them or asserts that it can redact large swathes of information it has unilaterally deemed as "unrelated" to the cause and manner of death.

74. Thus, this matter falls within the capable-of-repetition-yet-evading-review exception to the mootness doctrine. Accordingly, this factor does not weigh in favor of a stay.

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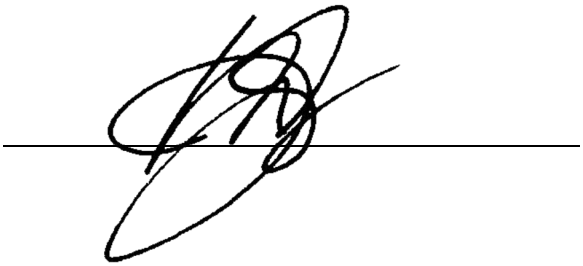
ORDER

Based on the foregoing findings of fact and conclusions of law, the Court hereby ORDERS as follows:

IT IS HEREBY ORDERED that the Coroner's Motion for Stay on Order Shortening Time is DENIED.

Dated this 23rd day of December, 2020



CC9 016 2DD4 6CB9
Jim Crockett
District Court Judge

Respectfully submitted,

/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
Counsel for Petitioner, Las Vegas Review-Journal, Inc.

MCLETCHIE LAW

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Las Vegas Review-Journal, Plaintiff(s) vs. Clark County Office of the Coroner/ Medical Examiner, Defendant(s)	CASE NO: A-17-758501-W DEPT. NO. Department 24

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Krista Busch	kbusch@maclaw.com
Alina Shell	alina@nvlitigation.com
Margaret McLetchie	maggie@nvlitigation.com
Jackie Nichols	jnichols@maclaw.com
Leah Dell	ldell@maclaw.com
Sherri Mong	smong@maclaw.com
Craig Anderson	canderson@maclaw.com
LAURA Rehfeldt	laura.rehfeldt@clarkcountyda.com
Shannon Fagin	shannon.fagin@clarkcountyda.com

ADDENDUM D

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Plaintiff, vs. CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Defendant.	CASE#: A-17-758501-W DEPT. XXIV

BEFORE THE HONORABLE JIM CROCKETT, DISTRICT COURT JUDGE

THURSDAY, OCTOBER 29, 2020

RECORDER'S TRANSCRIPT OF VIDEO CONFERENCE HEARING
REGARDING BRIEFS ON REMAND

APPEARANCES (VIA BLUEJEANS):

For the Plaintiff:	MARGARET A. MCLETCHIE, ESQ. ALINA SHELL, ESQ.
For the Defendant:	JACQUELINE NICHOLS, ESQ.
Also Appearing:	BENJAMIN LIPMAN, ESQ. ART CAIN, REPORTER

RECORDED BY: NANCY MALDONADO, COURT RECORDER

INDEX

Las Vegas, Nevada, Thursday, October 29, 2020

[Case called at 9:31 a.m.]

THE COURT RECORDER: Page 7, A758501, Las Vegas Review Journal versus Clark County Office of the Coroner/Medical Examiner.

MS. MCLETCHIE: Good morning, Your Honor, Maggie McLetchie for the Las Vegas Review Journal, Inc., bar number 10931. On the telephone I have with me Benjamin Lipman, the general counsel for the Las Vegas Review Journal, as well as Art Cain [phonetic], a reporter for the Las Vegas Review Journal, and my co-counsel Ms. Alina Shell.

THE COURT: All right. Good morning.

MS. NICHOLS: Good morning, Your Honor, Jackie Nichols here on behalf of the Clark County Coroner's Office.

THE COURT: Okay. I think I'm hearing a young, future member of the bar on the phone somewhere. Okay. So --

MS. NICHOLS: Somebody's not on mute, Your Honor.

THE COURT: -- so these -- this matter's on for hearing on the briefs that were filed after remand. If you would, please, mute your microphones because we're getting feedback, just kind of an echo effect. I can hear my voice being repeated and that could be distracting.

THE COURT RECORDER: Judge --

THE COURT: So I've read the briefs and re-read the Supreme Court's opinion. And the issue was originally the Plaintiff

sought unredacted juvenile autopsy reports from the Clark County Coroner's Office for investigative reasons and in accordance with the law that allows obtaining that kind of information as public information.

The case went up to the Supreme Court. And the Supreme Court issued an opinion. And the bottom line is that there is a balancing test to be applied.

And the Supreme Court has remanded it with instructions for me to apply this balancing test with regard to what's called a non-trivial privacy interest, which would be the justification offered by the Coroner's Office for redacting or excluding information and whether or not that non-trivial privacy interest is outweighed by the significant public interest that is advanced by in this case the Review Journal.

The problem I see is, I mean, it's not a problem. It's just something that's going to require a lot of time and effort on the part of everybody.

In order for counsel for the Las Vegas Review Journal to see whether or not the claimed non-trivial privacy interest is something that's counterbalanced or they contend it is, they would need to have it articulated what the non-trivial interest is.

For example, there were references to three autopsy reports that was made in the briefs. One of them that was particularly horrific to read about had to do with the remains of a three-year old child that was discovered in a duffel bag.

The child was deceased and had had horrific, brutal physical injuries inflicted upon the child. I don't remember the child's gender.

And there were redactions made in the records supplied by the Coroner's Office on that, but not with any explanation, as I understand it, as to why that information was excluded.

Of course, it's hard to imagine something that wouldn't be relevant to cause of death, or evidence of previous child abuse injuries, or the possible aging of previous injuries.

And I don't mean where somebody can say that something happened on a particular day, but they can say whether or not there's evidence of healing fractures or bone callus, suggesting that the fracture happened a considerable length of time before.

And then correlating that information with complaints that were rendered to Child Protective Services, for example, to find out whether or not they adequately investigated and addressed concerns that were being expressed.

There definitely is a significant public interest that exists in knowing whether or not complaints of child abuse are being adequately addressed.

So that deaths and/or future child abuse can be prevented through the lawful efforts of government agencies that are entrusted with performing that service.

The members of the public trust and -- have confidence in or want to have confidence in the work being done by enforcement and investigative agencies that are designed to prevent serious injury and death. So it's a very significant interest.

But in my review of this, in the Supreme Court's opinion

regarding this balancing test, I have no problems applying the balancing test of course.

But I think it would require an evidentiary hearing on every juvenile autopsy record, where there are redactions that are not explained at all, okay, because presumptively, if there's no reason given for them, the presumption would be that the redactions are improper and would have to be removed, that that information would have to be provided.

On the other hand, wherever there are redactions and there is a reason offered for them that the Coroner's Office says is a non-trivial privacy interest, then the burden then shifts and we have to have the Review Journal provide proof there is a significant public interest that outweighs that non-trivial privacy interest.

So in the category of those that are redactions without explanation, I think the presumption is that those redactions are invalid and have to be removed. And the redactions have to be ablated.

And as to any other redactions, if there is an explanation offered, we would have to then go in an evidentiary hearing to conduct a balancing to see whether or not the Court feels that the non-trivial privacy entry -- interest permits the redaction or if the Court feels that the attempted redaction must be overruled and reversed on the basis of a significant public interest.

That's my understanding of what is the result of the Supreme Court's opinion, but I'd like to hear from each of you, particularly if you have a differing view.

So Ms. McLetchie, first of all, let me hear from you?

MS. MCLETCHIE: Thank you, Your Honor. Maggie McLetchie for the record. So, Your Honor, the way I view the decision from the Supreme Court is that the Court found that there was, albeit a generalized one, a non-trivial privacy interest and that it remanded this matter, shifted the burden to the Las Vegas Review Journal to establish that there was a public interest at issue that was significant as the information sought would advance that interest.

It's my view that we have now met that burden. And the Coroner's opportunity, if they were going to rely on anything other than the generalized sorts of assertions that they made previously in the declaration of John Hedenberg [phonetic], their opportunity to do so, Your Honor, was in their opposition.

As the Court is well aware, this is consistent with the fact that they -- although the burden shifts to us, they also have significant burdens in public records cases and public records cases are supposed be expedited.

While the issue of what the Review Journal's interest in access was was not previously before this Court because in its decision, the Supreme Court was looking at the CCFD decision and the Cameranesi test, which it had not adopted until after this Court made its decision.

As the Court just recognized, the Nevada Supreme Court also found that there was at least one significant interest at stake.

And I want to point out that in our opening brief, we explained

that there's not just one interest, but multiple interests that access will advance.

Just generally, Your Honor, access to autopsy reports does vindicate the dead, it protects the living, and it serves as a check on government.

Here, there's two important interests at stake, the one the Court recognized, which is assessing whether the child abuse and neglect system is working and whether there have been deaths of vulnerable children that could have and should have been prevented.

While the Coroner minimizes those interests at stake, it was exploitative, and improperly relies on cases regarding death images to support its effort to overcome access.

Public policy strongly favors access for the reasons the Court articulated. We explained, consistent with the order from the Supreme Court on remand, what specific information we needed and why we needed direct access to the complete picture of all of these autopsy reports, Your Honor, both the cause of death information and other observations to assess performance of both the Coroner and the child -- the Coroner and the child and abuse neglect system.

The Coroner in response didn't come forward with any more specific arguments. And it's our view that now the balancing necessarily weighs in favor of disclosure.

And there would not be a reason for a further evidentiary hearing, because they haven't come forward and said we do have other specific information that would outweigh the significant interests and

access in that -- in this case.

They just haven't done that. Instead, they chose to stand on their legal arguments and the prior evidence, which was limited to the Hedenberg Declaration.

Here, I also want to point out that the Coroner repeatedly argues in their opposition that this isn't really about government oversight, because these records don't pertain to the Coroner's performance, but rather, the abuse and neglect system.

But first, FOIA is much more limited than the Public Records Act. And as the Supreme Court has made clear, when applying the CCSD or Cameranesi test, this Court still needs to work within the framework of the NPRA, which is not limited to records that may provide as a -- provide a check on government authority.

I do recognize, however, that in fact in the NPRA, it does recognize the general interest and access to any public record for the very reason it does promote transparency and democracy, but there's just no basis for the Coroner's position that the idea that the child and abuse system is a separate system unrelated to the Coroner's Office that it doesn't further access.

Similarly, Your Honor, I also want to point out that while we didn't previously brief this issue and we have now, there's also a separate interest in just making sure the Coroner gets it right.

And that, Your Honor, I think is why it's so important that we -- that we're not limited to information that's filtered by either attorneys for the Coroner's Office or unknown personnel for the

Coroner's Office. We're entitled to direct access consistent with the Public Records Act to be able to assess this information.

The spreadsheet is highly insufficient. It just shows name, age, sex, race, location, manner, and cause of death, very minimal information.

The Supreme Court has already resolved the question of whether they have to provide information about cases that were referred to the Child Act's review team.

The answer to that question is, yes, there is no privilege that applies there. They previously did provide some information, but again, only for cases that went to the CDR team.

With regard to the reports, and that's what we need access to, Your Honor, full access to the reports. They have redacted significant information.

And as the Court has already recognized, we have very little information. They have not come forward with evidence to support the bases for these redactions.

And this is factual information about not just the manner and cause of death, but also information that may not in the Coroner's view be related to the cause of death.

The Coroner repeatedly argues, look, we will -- we provided information that we think is related to the cause of death. But as I pointed out, sometimes coroner's offices get it wrong.

And the public is entitled to assess whether or not the Coroner did get it wrong and to look at further information, like the toxicology

information, like the full observations to assess that question.

Further, there may be information about abuse that's not directly related to the specific cause of death, but is relevant to the history with this child and the broader questions the Review Journal has raised about the abuse and neglect system, information like evidence of broken bones.

Their effort to distinguish the Dehan Hunt [phonetic] case, I think, is somewhat telling. They say, look, it was found that the abuse in that case was not substantiated.

But just like coroner's offices and other branches of government, sometimes, the abuse and neglect system gets it wrong and the public is entitled to assess whether or not there was a history of abuse that findings were made that were unsubstantiated that should have been substantiated, and whether these cases should have been looked at more closely.

Again, we should not be limited to redacted information, a spreadsheet, or information that the Coroner picks and choose that it thinks is relevant to our analyses. We are entitled to full access.

With regard to the balancing, I think the time to do the balancing is now, Your Honor. And I don't think that the Coroner has come forward with anything that merits an evidentiary hearing.

All that they've come forward with is that they've met their initial burden and they're standing by the prior evidence that they submitted, again, the declaration of John Hedenberg.

We've now answered the Supreme Court question -- the

Supreme Court's questions about what significant interests are at stake, not just the child and abuse and neglect questions, but also questions regarding the performance of the Coroner. And we've demonstrated how full access furthers those interests.

In contrast, the interests asserted by the Coroner are very generalized. They may cause access and disclosure of information may cause privacy concerns is what they assert.

In contrast, the very significant public interest at stake here outweighed those generalized concerns. The Coroner claims the Review Journal has no evidence and that -- but we cannot be required to prove what's in autopsy reports that we haven't seen.

Instead, the duty was on them in their answering brief on remand, Your Honor, to come forward with information outlaying why we should have access.

The cases the Coroner relies on with regard to the balancing test are all cases about the interests of surviving kin. They're all cases about death images that are or cases about death images that are just inapplicable here.

And I do want to point out, Your Honor, that in this, while kin do have this, the family does have a right, a statutory right, to access information about autopsy reports.

Here, we're talking about some cases in which there may not be anyone to stand up for these vulnerable children to get the autopsy reports to see if the Coroner got it wrong.

The family members may be the very people that are

implicated in the abuse. And so, there's no one to stand for these children other than the public. Public interest is great, Your Honor.

And that's my -- those are the points I want to make on the access issues. If the Court would like me to address the extraordinary use fees, I'm happy to do so as well.

THE COURT: No, we'll get to that in a minute.

MS. MCLETCHIE: Okay.

THE COURT: Let me hear from Ms. Nichols regarding the Coroner's position. And let me alert you to the fact that it appears that the Coroner's Office wants to also serve as the judicial decider of this by providing a spreadsheet and then redacted records.

And we're supposed to accept on face value their contention that that's everything that pertains to the cause of death. Anything we've redacted, you don't need to see.

And this is all about the value of transparency in our government and the value of public oversight. When a public servant, someone in government, is performing a task, and is continually aware of the fact that their actions or inactions are subject to public scrutiny that they are always being exposed to the risk of being evaluated, having performance evaluations conducted on their work, I think that serves a very significant public interest, because the job of those of us who work in government is to serve the public. That's the reason for our existence.

We've been entrusted with certain authority and certain responsibilities, certain abilities to conduct investigations and command

performances in productions of documents and materials and testimony under the color of law.

And the public not only trusts that we will do that properly, but has the right to expect that we will do it properly also.

And so, the problem I see with the Coroner's almost glib redactions is that it's as if the Coroner's Office doesn't accept the fact that they are a public servant, who the public has entrusted with the very important function and who the public has a right to know if those public servants are in fact doing their job.

And the cross-pollination of information, for example with juvenile autopsies and the effectiveness of Child Protective Services and other governmental entities that are asked to investigate allegations of child abuse is inescapable in terms of the interrelationship and how the information from one can provide information that helps to assess the efficiency of the other.

So I suppose rather than an evidentiary hearing, because I -- hearing Ms. McLetchie speak, I think I'm inclined to agree that to suggest that we would have to go through an evidentiary hearing at this point is -- I don't think that's correct timing-wise.

So there is a possibility that the Coroner's Office could submit for in camera review its positions for redactions. And I realize when I offer that up, that there are many, many records that would need to be reviewed.

But my concern is that I don't want to make a decision that forces the parties to unnecessarily go back to the Supreme Court for

further guidance, when I think all that needs to be accomplished can be accomplished at this level.

So, with that in mind, Ms. Nichols, what is your view on behalf of the Coroner's Office?

MS. NICHOLS: Well, Your Honor, I'd like to start with the Coroner's position of the Supreme Court opinion. So the Supreme Court said that the Coroner satisfied its obligation under the balancing test, demonstrating that a non-trivial privacy interest existed in these reports and that non-trivial privacy interest is the interest of the juveniles in relation to their personal health information that is not related to the cause and manner of death.

And so, what we're looking at here is --

THE COURT: Here's the problem.

MS. NICHOLS: -- if a --

THE COURT: Here's the problem. That sounds as if it's a unilateral determination being made by the Coroner, that the Coroner is saying we've redacted this. Nothing to see here regarding cause of death.

And that is a position that would defy scrutiny and oversight because any time the Coroner makes that assertion, that would be the end of the inquiry.

And that's why what Ms. McLetchie says is that they feel, the newspaper feels, that they have met their burden by showing multiple significant public interest, which outweigh, even if we assume that you have established a non-trivial privacy interest.

She says the burden has now shifted back to the Review Journal, which means it would go to another level of analysis or you would need to be able to articulate how that non-trivial interest, which the Supreme Court said was sufficiently shown, which then gives rise to the newspaper saying we have shown multiple reasons how there are multiple significant public interests which outweigh that, which I agree with. I agree that they have done that.

And that to me means that it is now the Coroner's Office to be able to then refute that that significant public interest outweighs the non-trivial privacy interest.

And, of course, you can't do that by standing on what you said before. You can only do that by standing on evidence and information that's presented after the Court finds, as it does, that the Review Journal has established multiple significant public interests that greatly outweigh the non-trivial privacy interest that the Supreme Court found in terms of the if the child's interest and privacy as to personal health information.

So go from there, please.

MS. NICHOLS: Okay, Your Honor, so then the next step, I think, would be based off of my understanding of the Court's position is the question becomes how can the Coroner basically justify its redactions in the personal health information, making sure that this personal health information does not in fact actually relate to the cause and manner of death?

And I think the only way to demonstrate that is what this Court suggested is submitting these autopsy reports, one, in an redacted

format to the Court and then in a redacted format with the Coroner's proposed redactions, explaining those redactions that they are personal health information and that they do not relate to the cause and manner of death.

THE COURT: Okay, I'm willing to do that.

MS. NICHOLS: And I think that -- I think that's the appropriate step to take in order for the Court to properly balance the interests that are at issue here.

Because I do understand the Review Journal's public interests. And I do think that they are valid interests, but they don't apply to every single juvenile autopsy report.

So in the sense that a juvenile was not abused and just had their appendix burst, there -- the fact that they have a blood disease that a blood disease, or they're anemic, or they have some other underlying health condition that did not result in the cause of death, I don't think that that serves any public interest.

THE COURT: Yeah, except keep in mind the death certificates never list only one cause of death. They are usually three items that are listed on a death certificate.

There's a primary, secondary, and contributing or underlying medical condition. And in the world of proximate cause and legal cause, those do have a bearing on cause of death.

However, I would be willing to conduct an in camera review of the unredacted juvenile autopsy reports with an accompanying explanation on a redacted version by a qualified expert, whether it's the

Coroner's Office or someone in the Coroner's employ who's a medical doctor, somebody who's qualified to sign a death certificate opining as to why the redacted material was not relevant to the cause of death in this case.

And, of course, if the child had no evidence of trauma ever and died from a burst appendix, and there's no indication that there was any trauma related to the burst appendix, that's a pretty straightforward proposition.

But that's not what anybody's terribly concerned about here. So I hope that that's clear, too.

So with that in mind, Ms. Nichols, does that address your concerns in terms of what you would like to be able to do with regard to the redactions?

MS. NICHOLS: Yes, Your Honor.

THE COURT: All right, Ms. McLetchie, what are your thoughts regards me reviewing these in camera?

THE COURT RECORDER: Hold on. She's muted. She was the one giving --

MS. MCLETCHIE: Your Honor, here's -- just to be clear, the Supreme Court did not limit this Court's consideration to what information we can have about the cause and manner of death.

And I want to be clear that I think we're kind of having a circular problem here where the Coroner wants to now make proposed redactions of information that it believes are of information that is not related in its view to the cause and manner of death.

This is the central problem and I don't think this is something that the Court can resolve in camera. And I don't think it's something that we can litigate in the dark.

Here's the problem, Your Honor. First, what they believe may be the cause and may be related to the cause and manner of death, they may have gotten wrong.

They may have gotten the cause of death wrong. There may be information that's related to the cause and manner of death that they don't realize is related. Coroners do get it wrong.

THE COURT: I follow what you're saying.

MS. MCLETCHIE: Second --

THE COURT: I follow what you're saying, but we need to get off center here. And if I make a wholesale determination without having done a balancing as that meets the Supreme Court's directions, it's just going to send everybody back to the Supreme Court for another opinion and another remand.

I would like to get this handled here at the District Court level, so that if you do have to go back to the Supreme Court, it won't be for lack of effort in resolving this matter.

And so, you may be right. It may be that after I conduct an camera review, I am of the view that as to some of the contentions, I can make a determination that I agree with the redactions. They don't seem to have any relevance to cause of death or the suggestion of prior physical abuse leading up to a cause of death.

On the other hand, there might be some where I say, you

know, I think this is a self-serving effort to not make full disclosure of information.

And so, as to these, I want to conduct an evidentiary hearing, but the Supreme Court can't and won't be able to do this. It's just not something that an appellate court has the time or inclination to do.

I have both the time, inclination to do both. And I want to get the parties on a path, where the materials are being disclosed without unnecessary or improper redactions.

And yet, where redactions are appropriate, they would be upheld. If after my in camera review, I'm of the decision that there are some, which I cannot make a determination on the basis of only an in camera review, then I think those would need to be brought forth in an evidentiary hearing.

To do either polar opposite won't get us anywhere. It'll put the case in a stall position, and meanwhile, the object of this, which was to obtain this information, will be defeated and the expenses on both sides will only grow. So I'm trying to be practical here and bring about resolution that both parties can work with.

So with regard to with the -- how many juvenile autopsy reports are at issue?

MS. MCLETCHIE: Your Honor, this is Maggie McLetchie for the record. I don't have that exact number. But before we move on, I obviously have stated my concerns about delaying this and letting the Coroner have another bite at the apple, but before we move on to the number of autopsy --

THE COURT: Well, no, wait. This is not another bite at the apple. This is giving them the necessary opportunity, which they're entitled to, to try to rebut the position you're arguing, which I find compelling, that there is a significant public interest that greatly outweighs the non-trivial privacy interests, which the Coroner's Office has set forth.

So now we're going to the third phase. And in that third -- we can't simply have a case in chief, a defense case, and then no opportunity for rebuttal because that would defy logic.

So it's not another bite at the apple any more than any rebuttal case ever is. So start from there.

MS. MCLETCHIE: And I understand the point, Your Honor. And I understand the desire to get this case resolved in its entirety once and for all without further Supreme Court review.

My point is just that there's nothing in the Cameranesi test that then says and then, they can assert again some new privacy interest or more detailed privacy interest.

Essentially the way I see the Cameranesi test, Your Honor, they had the burden to come forward with some non-trivial privacy interest, and then, the Court found that they did.

And then, the burden shifts to us to show how our interest and access outweighs that asserted privacy interest. It doesn't now shift back to them to give them another opportunity in a more detailed manner establish any specific privacy concern. So that's my position, Your Honor.

THE COURT: Let me first say this.

MS. MCLETCHIE: With -- sure.

THE COURT: First of all, with regard to your position, I do find that your significant public interest substantially outweighs their non-trivial privacy interest.

So in terms of your record if this case goes up, I do find that the multiple significant public interests that have been identified in your briefs in my mind far outweigh the non-trivial privacy interest that the Coroner's Office has asserted.

However, I do think that if given the chance to look at a case that's in this posture, the Supreme Court is going to say, okay, but did the Coroner's Office come forward then and say, well, we would like to rebut that because we think we can?

And I think that given what's at stake with these public records, and the non-trivial privacy interest, and the significant public interest, it makes sense to me that the trial court should do everything it can to make sure that that non-trivial privacy interest is considered, that the significant public interest is considered.

And when it is found that the significant public interest outweighs the non-trivial privacy interest, it seems appropriate to me that the Court should give the Coroner's Office in this setting the opportunity having heard my view of why I think the significant public interest significantly outweighs the non-trivial privacy interest to articulate a justification for their otherwise generically explained redactions, which are only these -- this is a non-trivial privacy interest of the minors' health

information. So that's what I want to do.

So, Ms. Nichols, can you tell me how many juvenile autopsy reports we're talking about?

MS. NICHOLS: Your Honor, this is going to be an approximation. I don't have the exact number, but I believe it's based off of their request and their time period. It's 6- to 700 juvenile autopsy reports.

THE COURT: Okay, okay. And have you previously made redactions in each of these 6- to 700 autopsy reports that were requested?

MS. NICHOLS: No, Your Honor.

THE COURT: You haven't?

MS. NICHOLS: We have not. We did the sample that we initially provided them before the lawsuit --

THE COURT: Well, I understand --

MS. NICHOLS: -- came about.

THE COURT: -- I understand about the sample, but if you haven't made redactions on these reports other than the samples, then you haven't shown a non-trivial privacy interest as to those that were not sampled. You just haven't.

MS. NICHOLS: Well, Your Honor, it's my understanding that the Review Journal does not want them redacted. They want them unredacted.

And so, if the Court orders them to be redacted, my concern, of course, is that they're going to say that they don't want them, which --

THE COURT: Well, no, no.

MS. MCLETCHIE: -- goes to the second argument --

THE COURT: No, my point is if you haven't already made redactions prior to the Nevada Supreme Court's decision, then it's too late for you now to assert that as to those juvenile autopsy reports that have been requested.

MS. NICHOLS: Your Honor, I disagree because they haven't been produced. So we haven't waived our ability to argue that.

THE COURT: How so?

MS. NICHOLS: Because they haven't been produced. The other side doesn't know. So we reserve the right to redact those.

The Supreme Court dealt -- already made that finding that we did assert a privacy interest --

THE COURT: As to --

MS. NICHOLS: -- even though they weren't produced.

THE COURT: -- those where you redacted, but you couldn't have made that if you didn't already make the redaction.

The redaction was justified on the basis that it was a non-trivial privacy interest. If you haven't made redactions, then you haven't asserted a non-trivial privacy interest. Do you understand?

MS. NICHOLS: No, Your Honor, I'm sorry, I would have to disagree because they haven't been produced.

THE COURT: I know they haven't been produced.

MS. NICHOLS: And so, we know what redactions would be made to the report.

THE COURT: How could you know that if you haven't considered them and made them already?

MS. NICHOLS: Because it would be anything that's not related to the cause and manner of death.

THE COURT: Yeah, that's circular. That is circular. That should have already been done.

If you were going to stand on redactions and your claim of a non-trivial privacy interest, you needed to do that. And then, all those would come under the umbrella of the Supreme Court's decision that you have made a declaration of a non-trivial privacy interest that shifts the burden.

Having not done so, as to those other 6- or 700 reports, I think there's a very legitimate argument that you've waived the redaction opportunity as to all those that were other than the sample three or four cases.

Ms. McLetchie, what are your thoughts?

MS. MCLETCHIE: I would agree with that, Your Honor. And I think it illustrates the fact that whether under the CCSD test or any other test, the -- when looking at public records, the government is supposed to produce as much as possible.

And they're supposed to make case-by-case and information-by-information specific determinations of what can and can't be produced.

That's also consistent, for example, not just with their initial evidentiary burden in any public records case, but also with the statutory

mandate redact as little as possible and produce as much as possible.

They first relied in this case, Your Honor, on the general idea that they didn't -- that they were beyond the reach of the Public Records Act and autopsy reports weren't public records.

And now, they're -- and clearly they're -- that was never, other than a few sample reports they made, they never made a specific case-by-case determination that there's a privacy interest at stake that outweighs the interest in access.

And hearing Ms. Nichols speak, she is, I think, misreading the Supreme Court decision and taking the position that there's a bright line rule that says that all information concerning not related to the cause of -- cause and manner of death in the Coroner's determination is not a public record.

That is not what the decision says. And if those are the redactions they're going to make, I don't know what point there even would be to a review in camera.

If there were to be an in camera review, obviously, we would want two things. And that's as much information as possible on a privilege log through the inherent problems with in camera review.

And we'd want to reserve the right for direct access if -- at least by attorneys on the case and potentially an expert for the Las Vegas Review Journal, so that we can assess their determinations.

But again, the decision by the Supreme Court was not that any information that's not related to the cause and manner of death is properly redacted. That would have been a very easy decision for them

to make and they could have just remanded for that.

That the -- position of the Coroner's Office as Ms. Nichols has made clear today is that they're never going to produce any information that's in their determination not related to the cause and manner of death.

And for that reason, I think that the Court is right that they have waived any arguments that there are specific redactions and specific information that when the balancing test is now applied on remand, that that information specifically outweighs the interest and access as articulated by the Review Journal. Again, they could have made these arguments in their answering brief. Their position is abundantly clear.

And I think for that reason, no in camera review is needed. And I think that the -- we are -- we're entitled to full except perhaps for the sample autopsy reports the Court has indicated.

And I think it's time, Your Honor, to move on in the case. We requested this information back in 2017. And, obviously, there is a significant policy interest in assessing not just the Coroner's performance, but the child and abuse neglect system.

We've seen with reporting in other states like Colorado, that this kind of access has led to significant positive policy changes. And I think the time for delay is over, Your Honor.

THE COURT: Well, I agree. And the heel dragging that's gone on as a member of the community, it's just upsetting to see that there's this kind of heel dragging that would go on in a public records

case, but it has. And so, here we are today.

So I do completely agree that there is a significant public interest, multiple significant public interests that are articulated in the Review Journal's briefing in this case, which I completely agree with. And that those outweigh the non-trivial privacy interest that has been asserted by the Coroner's Office in the sample cases.

For example, I think there were three, three or four. And so, even as to those cases, those reports should be produced in an unredacted form because I have -- I am finding that it's the significant public interests plural greatly outweigh the non-trivial privacy interest that is advanced by the Coroner's Office as to those samples.

Likewise, that is even more so as to the balance of the reports, which have not been produced or offered even in the redacted form, because that means that even at this late date, the Coroner's Office made no effort to provide redacted reports on the balance of the 6- or 700 reports that came within the description of the materials that were requested by the Review Journal.

Accordingly, I am finding that a significant public interest plural greatly outweigh the non-trivial privacy interests that have been argued and advanced by the Coroner as to all of the juvenile autopsy reports requested within the time frame that -- made by the Review Journal newspaper. And they therefore must be produced in unredacted form within 30 days from today's date.

Secondly, there is the issue of copy charges and what the Coroner's Office argues is their desire to be able to charge for

extraordinary use of personnel.

The Supreme Court was pretty clear on that and said the Coroner's Office can inform the records requester what those actual costs will be per hour, per person, what the estimated overall cost will be, et cetera. And they can charge them, but they are capped at 50 cents per page.

So you can -- you must inform the requester you're going to be charging $45 an hour for somebody to review them and that's going to require 14 hours of time by one person and $75 an hour and 10 hours for another person. And you can add up all those charges and tell the requester that they will be responsible for them.

And they will, but only up to a maximum charge that equates to 50 cents per page. And that's in the Supreme Court's opinion on page 24. So I think that addresses the extraordinary use of copy charges.

Any additional items that either side feels need to be addressed this morning following the Supreme Court's remand, Ms. McLetchie?

MS. MCLETCHIE: If -- just to be clear, Your Honor, and I don't know how -- we didn't raise the cost issue in our opening brief. I'm not sure that it was really properly addressed in the answering brief.

We did address it in brief form in the reply, but one thing I wanted to make clear about the extraordinary use, I would agree with the Court about the Supreme Court's findings.

It upheld this Court's ruling. It rejected the hourly rate

argument that the Coroner had previously made. And based on the law of the case doctrine, Your Honor, I think that the Court's order in the -- they did raise other arguments on appeal regarding the Court's determination as to what were the appropriate costs and fees in this case for the Coroner to charge.

And the Supreme Court implicitly rejected any other arguments. In this Court's order in my -- from my point of view, the November 9th, 2017 order, paragraph 52 to 57, those stand under the law of the case doctrine.

And the Court has already made those determinations. Even if it had not, we have other arguments that asked about why 5287 cannot be applied, why it's not retroactive.

And I also want to point out that the Supreme -- the Coroner seems to think that the -- that there's now a flat 50 percent fee that could be charged, assuming you could apply the now repealed extraordinary use provision, but the Supreme Court as the Court just made crystal clear never said there was a flat 50 cent per page fee.

Instead, the Court said that there was a cap.

THE COURT: That's a cap.

MS. MCLETCHIE: There were other limitations. Correct.

THE COURT: Okay. Okay.

MS. MCLETCHIE: And there were other limitations, Your Honor, as well, but it's been repealed.

And more importantly, the Supreme Court rejected their arguments on appeal as to this Court's determination regarding the cost

and fees the Coroner could charge in this case.

In fact, the only costs the Court -- the Coroner could charge, the Court has already determined is the cost of a medium that they provide records on.

THE COURT: All right. Agreed. Now I also want to alert both sides that given my ruling today, it seems only a matter of time before I declare the Plaintiff to be the prevailing party.

And that will become relevant on the issue of fees and costs. I think that the effect of today's ruling is that the Plaintiff becomes the prevailing party. I don't know if it's premature to make that determination, but I do know that it is a predicate to a determination on the fees and costs.

But before we get to that, Ms. Nichols, are there any other items which you feel need to be addressed in light of this case having been remanded from the Supreme Court?

MS. NICHOLS: So, Your Honor, I guess I was kind of confused by Ms. McLetchie's argument just now. Are you saying that the Coroner is not allowed to charge for extraordinary use of personnel?

THE COURT: No, the Supreme Court said that you are allowed to, but that when all is said and done regards to what those actual internal costs are, and they have to be actual costs, and they have to be disclosed to the requester, they cannot total more than 50 cents per page.

So, for example, if you had 500 pages of materials that you produced and you had internal costs, hourly and equipment wise and

perhaps special consultants that were $2,300, you would have to notify the requester that that's what it was going to be costing you to get this job done. But with 500 pages of records, the most you could actually charge them for would be $250. That's --

MS. NICHOLS: Understood, Your Honor.

THE COURT: Okay. All right.

MS. NICHOLS: Yeah, absolutely. I just want [indiscernible].

THE COURT: All right.

MS. MCLETCHIE: Your Honor, if I may, I think there are a few other remaining issues then on fees and costs that need to be addressed.

And that's that the -- the Supreme Court did say -- did talk about the prior extraordinary use fee provision and did say what the Court -- what the Coroner could charge for. However, it did not overturn anything about this Court's ruling on fees and costs and what the Coroner could charge.

And those rulings were that the Coroner could not charge for legal fees, for confidentiality claims, which obviously make sense in light of the Court's current rulings. There won't be redactions, so there can't be costs associated with that.

And it's hard to imagine what the extraordinary use costs would be now even if it were applicable since they can't redact information.

I don't think that there -- under certain circumstances, it's true. There was an extraordinary use provision that under which extraordinary

use fees could be charged.

But here, we have a different situation than what the Coroner articulated previously. Besides the debate between the hourly fee and the per page cap that applied, there was also litigation -- the litigation previously in this Court also addressed whether or not they could charge for privilege review. That was at the heart of the issues on appeal.

And this Court has found that they can't redact any information. So, obviously, there is no privilege review to charge for.

And their arguments on extraordinary use fall apart. There is no extraordinary use. Their extraordinary use demand was based on the idea that they had to --

THE COURT: All right --

MS. MCLETCHIE: -- do a privilege review and redact information.

THE COURT: Since I'm a very practically oriented person, let me just bring up a very practical point. For many years now, the cost for medical records under NRS 622.061 have been capped at 60 cents per page.

And that's because before that statute was enacted, sometimes if you made a request for medical records, even if the doctor only saw the person one time and had three pages of medical records, you would get a bill for $250 for the doctor's time in reviewing the records before they were copied. And so, a statute was enacted, so that the costs for medical records would be capped at 60 cents a page.

Now, obviously, when a doctor's office had to produce three

pages of records and mailed them back to you for $1.80, the doctor's office got the short end of the stick because it cost them a lot more $1.80 to have a staff member pull the chart, copy it, mail it, and so forth.

But when a hospital made a copy of 3,000 pages of records, they also charged 60 cents a page. And when they collected $1,800 for working a photocopy machine hard to produce materials at 5 or 6 cents per click, they did very well.

But it was considered that that was a trade-off. In order to avoid the overcharging on the small pages, people were willing to accept the fact it would be more on the -- now you would think that somebody could say, well, geez, you don't have to charge 60 cents a page. You could have charged us 25 cents a page when you were cranking out 1,800 pages of materials.

But as we know, when someone is told that's the maximum you can charge, they're going to charge the maximum. And so, I appreciate the arguments you're making, Ms. McLetchie, regarding whether they can charge for privilege or this or that, but if the maximum charge is 50 cents per page, they're going to charge you 50 cent per -- 50 cents per page.

And all of those considerations you're talking about now that could go into making up that number, they don't matter. You're going to get a bill for 50 cents a page. Whether that includes requested charges for privilege exam and expert consultant and all that, it won't matter. It's 50 cents per page.

And as the Supreme Court noted, the statute is very clear on

this and it makes no exceptions for that. So I don't think that the arguments about what goes into making up the charges that they throw at the requester is of any consequence, okay?

What else?

MS. MCLETCHIE: Your Honor, so I would just disagree with the analogy to the medical records, the medical record statute, because here, it specifically says that this 50 cent per page, this only applies assuming it even is still alive. I think it's not because it's been repealed, but it only ever applied, Your Honor, if there were extraordinary use of personnel.

Here, they're not redacting anything. There is no extraordinary use. The Public Records Act, all the provisions of the Public Record Act, have to be applied in a manner that's consistent with the mandates of the NPRA --

THE COURT: All right, I --

MS. MCLETCHIE: -- and the Court's already determined --

THE COURT: -- have to disagree with you. Putting together and copying 6- to 700 juvenile autopsy reports is an excessive use of personnel.

It's going to require people doing more than just incidentally making a copy of something that they generated. So I think it's an argument that's not worth making.

Anything else?

MS. MCLETCHIE: I would just point the Court to its prior ruling that the Las Vegas Review Journal indicated it was to receive

electronic copies of the requested records.

The LBG -- LBRJ is not requesting hard copies and the NPRA does not permit a per page fee to be charged for electronic copies. That's because the only cost for electronic copies is that of the media on a CD. The Court finds that the Coroner's Office may not charge any additional fee besides the cost of the CD.

THE COURT: That's fine. If electronic media is used --

MS. MCLETCHIE: I would argue that under the law of the case doctrine --

THE COURT: That's fine if electronic media's used, that's fine, but if we're talking about a per page --

MS. MCLETCHIE: And that's what we've requested, Your Honor.

THE COURT: -- for a hard copy, it's 50 cents per page max. All right, anything else?

MS. MCLETCHIE: I don't have anything else, Your Honor.

THE COURT: Ms. Nichols?

MS. NICHOLS: No, Your Honor.

THE COURT: All right, so Ms. McLetchie, I need you to prepare the order finding that the significant public interests greatly outweigh the non-trivial privacy interests that were advanced by the Coroner's Office, as to both the sample autopsy reports that were provided in redacted form and as to the other 6- or 700, and that's an approximate number, juvenile autopsy reports that were not provided at all in either redacted or non-redacted form, such that the Review Journal

is entitled to receive and the Coroner's Office must provide unredacted copies, if it's in digital format, in digital format, of all of the juvenile autopsy reports that were originally requested by the Plaintiff back in I guess it was 2017. Or was it earlier?

MS. MCLETCHIE: Your Honor, it was April of 2017.

THE COURT: Okay, in April of 2017.

And with regard to extraordinary use, the -- if the juvenile autopsy reports are provided in hard copy paper format, the charges are capped at 50 cents per page.

If they are provided in digital format, wasn't there a digital media cost that was described?

MS. MCLETCHIE: Your Honor, your prior order did give them the right to charge us for the cost of a medium such as a CD.

THE COURT: Okay, so that'll be the order as to that also.

And then, finally, the order should provide that based upon today's ruling, the Court finds that the Plaintiff is the prevailing party and will consider its supplemental application for fees and costs, including those that were previously awarded.

Anything else for the Plaintiff?

MS. MCLETCHIE: No, I think I have that all down. Thank you, Your Honor.

THE COURT: Ms. Nichols, anything else from the Coroner's Office?

MS. NICHOLS: No, Your Honor.

THE COURT: All right, thank you.

[Proceedings concluded at 10:32 a.m.]

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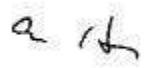
ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Chris Hwang
Transcriber