

THE COURT OF APPEALS OF THE STATE OF NEVADA

In re Search Warrants Regarding
Seizure of Documents

Case No. 84931-COA

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**Las Vegas Review-Journal, Inc.'s Motion to Order Publication of
Unpublished Opinion Entered on April 7, 2023**

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The Las Vegas Review-Journal, Inc. (the “Review-Journal”) hereby moves, pursuant to NRAP 36(f), for the Court to order the publication of the opinion entered in this case on April 7, 2023, currently available at *In re Search Warrants Regarding Seizure of Documents*, 2023 Nev. App. Unpub. LEXIS 131, 2023 WL 2861201 (April 7, 2023) (the “Opinion”). The Opinion addresses the appropriate handling of privileged materials in the context of a return of property action. The Review-Journal is presently litigating this very issue in several other cases. It would assist the parties and the courts adjudicating those cases, as well as other parties facing similar issues, if this Court’s Opinion on the subject were published.

I. The rules permit a nonparty to seek publication of an unpublished disposition.

Under NRAP 36(f), “[a] motion to reissue an unpublished disposition or order as an opinion to be published in the Nevada Reports may be made . . . by any interested person.”¹ If filed by a nonparty, the motion must “identify the movant and his or her interest in obtaining publication.” NRAP 36(f)(3).

A motion seeking publication must be based on one or more of the criteria for publication set forth in Rule 36(c)(1)(A)-(C), and must specifically state on

¹ NRAP 36(f)(1) requires a motion for publication to be filed within 14 days after the filing of the order at issue (in this case, by April 21, 2023), and similarly requires that any motion to extend this time period be filed before the expiration of the 14-day deadline. The Review-Journal is concurrently filing a separate motion for relief from this 14-day deadline.

which criteria it is based and set forth argument in support of such contention. *Id.* Rule 36(c)(1) provides that “[t]he Supreme Court or Court of Appeals will decide a case by published opinion if it: (A) Presents an issue of first impression; (B) Alters, modifies, or significantly clarifies a rule of law previously announced by either the Supreme Court or the Court of Appeals; or (C) Involves an issue of public importance that has application beyond the parties.” NRAP 36(c)(1). The decision to grant or deny a motion seeking publication is “entrusted to the sound discretion of the panel that issued the disposition.” NRAP 36(f)(4).

II. The Review-Journal has an interest in obtaining publication of the Opinion.

The Review-Journal is currently involved in cases pending in the Nevada Supreme Court and the Eighth Judicial District Court arising from the seizure, by law enforcement, of its privileged materials.² Review-Journal investigative news reporter Jeff German was found murdered outside his home in early September 2022, and the Las Vegas Metropolitan Police Department (“Metro”) seized six electronic devices (five computers and a cell phone) from Mr. German as part of its

² Specifically, the Review-Journal and six of its employees initiated Case No. A-22-859361-C, a civil return of property action, in the Eighth Judicial District Court; related appeals are currently pending in the Supreme Court of Nevada, Case Nos. 85553, 85634, and 86295 (writ proceeding). There is also a related criminal case pending in the Eighth Judicial District Court, Case No. C-22-368935-1, in which there is an appeal pending in the Supreme Court of Nevada, Case No. 86857.

investigation into the murder. Defendant Robert Telles stands accused of Mr. German's murder.

The Review-Journal, together with several of its editorial employees, has asserted privilege over the newsgathering materials on the seized devices and any other newsgathering materials in the possession of, or sought by, Metro, the State, or Telles, based on Nevada's News Shield Statute, NRS 49.275 (which provides the press with an absolute privilege from compelled disclosure of sources and other materials related to newsgathering), as well as the qualified reporter's privilege under the First Amendment and the Nevada Constitution. Specifically, the Review-Journal parties filed a Motion for Return of Seized Property and Appointment of Special Master to Conduct Reporters' Privilege Review, pursuant to NRS 179.085 (the "Return of Property Motion"). In the Return of Property Motion, the Review-Journal parties asserted their privileges but agreed to partially waive those privileges to the extent of agreeing to entry of a specific search protocol that would protect their privileged materials. Under this proposed search protocol, two special masters would review the information on the seized devices and create privilege logs to permit any party to argue to the district court, if any dispute remains thereafter,³ that the party is entitled to access and use the

³ It may be that no dispute would remain after implementation of the proposed search protocol, because the Review-Journal parties may decide to waive their

privileged information. This protocol would also apply to any other newsgathering material obtained or sought as part of the German murder investigation.

Defendant Telles agrees that this search protocol best protects his own rights, and he jointly submitted it to the district court. But Metro and the State of Nevada have refused to agree to it, insisting, instead, on a search protocol whereby two Metro detectives and two prosecutors from the Clark County District Attorney's Office would review the information on the devices (even though the unrebutted evidence demonstrates that the Review-Journal, through Mr. German, has confidential news sources within these two very government agencies), after which they would provide what they consider to be privileged newsgathering materials to the Review-Journal parties to permit them to assert their privileges over those materials (after that privilege was already invaded by virtue of that review).

The litigation of these competing search protocol orders is the subject of extensive ongoing litigation. *See* note 2 *supra*. The Review-Journal therefore has an interest in obtaining publication of the Opinion because this Court's analysis and conclusions in the Opinion are directly applicable to the Review-Journal's ongoing litigation. The Opinion clarifies the type of search protocol that Nevada's

privileges over any materials on the seized devices that are relevant to the criminal case.

courts have found appropriate when privileged material is seized in connection with a law enforcement investigation, and it will therefore serve as a useful example for the Review-Journal to use when arguing the merits of its own proposed protocol in the various proceedings identified in note 2 above.

III. The Opinion should be published because it involves an issue of public importance that has application beyond the parties, and it presents an issue of first impression.

The Review-Journal seeks publication of the Opinion pursuant to the criteria listed in NRAP 36(c)(1)(C) (publication is appropriate when an opinion “[i]nvolves an issue of public importance that has application beyond the parties”) and NRAP 36(c)(1)(A) (publication is appropriate when an opinion “[p]resents an issue of first impression”). *See* NRAP 36(f)(3).

As is the case with the Review-Journal proceedings, the Opinion concerns the seizure of privileged materials by Metro. Last year, Metro seized several electronic devices from erotic dance locations in Las Vegas (the “Establishments”) in connection with an investigation into prostitution-related activities at the Establishments. The Establishments filed a motion in the district court to return the seized property pursuant to NRS 179.085. The district court denied the return of property motion and entered a search protocol proposed by Metro, whereby the Establishments would provide members of Metro’s Digital Forensics Lab with names, email addresses, and phone numbers that would be considered privileged

and lab employees would review the materials for privileged information, then redact privileged material before turning over the documents to the investigative team at Metro.

On appeal, this Court concluded that the district court erred in denying the Establishments' return of property motion and entering the search protocol requested by Metro. Opinion at *22. In reaching this conclusion, this Court made several findings that would apply equally in the Review-Journal proceedings, all of which are matters of first impression in Nevada's appellate courts (*see* NRS 36(c)(1)(A)):

- The fact Metro had returned the physical devices did not render the issue moot because Metro still retained copies and images of the devices. *Id.* at *11-12.⁴
- The fact that Metro alleges it has an ongoing need for the property in connection with a criminal investigation does not preclude its retention of the property from being “unreasonable” under NRS 179.085, given the privileged nature of the property. *Id.* at *16.
- NRS 179.085 “allow[s] the district court to grant a party relief from the seizure of privileged materials in a manner that would protect the government’s interest in ‘access to the property’ for ‘use in later proceedings.’” *Id.* at *16-17.
- Metro’s requested search protocol “violated NRS 49.095 by allowing [the digital forensics lab] to disclose potentially confidential

⁴ This is true in the Review-Journal proceedings, as well; Metro made and possesses copies of the devices. A district court injunction prohibiting Metro or any other party from reviewing the imaged devices remains in place by virtue of the Eighth Judicial District Court’s stay, pending appeal, of an order dissolving that injunction.

communications to law enforcement’s investigatory arm based on its own unilateral determination of privilege. . . . The proposed protocol was also inadequate because it did not provide appellants with any opportunity to review [the digital forensics lab’s] privilege determinations before the seized property was forwarded to the investigating detectives.” *Id.* at *19-22.

In the Review-Journal proceedings, the district court similarly entered a search protocol order requested by Metro, and that search protocol order is similarly unprotective of privilege (in those proceedings, the reporter’s privilege held by innocent third parties who are not suspects or targets of the investigation).

In addition to adjudicating these issues of first impression, the Opinion also concerns an issue of statewide public importance: the protection of privileged materials seized by the State in connection with a criminal investigation. *See* NRAP 36(c)(1)(C). This Court’s analysis of what type of review protocol would (and would not) appropriately protect privileged information on the facts of this case has application beyond the parties to this particular dispute; it would be useful for *any* party whose privileged materials of *any* kind are seized by a law enforcement agency in connection with a criminal case.

Furthermore, the Opinion contains useful analysis of what constitutes an “unreasonable” retention of seized property by law enforcement, within the meaning of NRS 179.085(1)(e)—particularly in the situation in which a third party has used the return of property statute to seek the return of *privileged* materials. This Court’s analysis of what constitutes an “unreasonable” retention of privileged

materials will be helpful for the Review-Journal parties, as well as other future litigants, seeking the return of their privileged materials.

The adjudication and protection of statutory and common law privileges are issues of statewide public importance, with effects extending far beyond the Review-Journal and the parties to this case. For example, the degree of protection given to the attorney-client privilege affects the level of candor clients are willing to engage in with their attorneys, therefore affecting the quality of legal advocacy across the state. Similarly, the degree of protection given to journalists' privileged information, including identifying information about confidential sources, affects whether sources of important, newsworthy information will feel comfortable that they can come forward in a way that reveals that information to the public without exposing themselves to retaliation. This, in turn, results in much of the important investigative news reporting that Nevadans see every day, uncovering serious issues including government corruption, crime, and other malfeasance. In short, the Opinion's careful consideration of how to protect an asserted privilege in the context of a criminal investigation where privileged information is seized by law enforcement has sufficiently important and far-reaching effects to warrant publication.

IV. Conclusion

This Court's publication of its order entered on April 7, 2023, will assist the Review-Journal, the other parties, and the courts in several ongoing proceedings concerning the adjudication of privileges in the context of a law enforcement seizure and a request for return of property. The Order addresses numerous matters of first impression relating to these very issues, and the same issues are likely to recur in other cases. Given these important salutary effects, this Court should order publication of the Opinion.

Dated: July 14, 2023

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed electronically with the Nevada Supreme Court on July 14, 2023. The following case participants were served electronically by the Eflex system. Case participants who are registered with Eflex will be served by the Eflex system and other parties, listed below, who are not registered with the Eflex will be served with a copy of the foregoing via hand delivery or U.S. Mail.

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