IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Appellant, vs. THE CENTER FOR INVESTIGATIVE REPORTING, INC., A CALIFORNIA NONPROFIT ORGANIZATION, Respondent.	Case No.: 77617/77965 Appeal from the Eighth Judicial District Court, the Honorable Elizabeth Gonzalez Presiding

APPELLANT, LAS VEGAS METROPOLITAN POLICE DEPARTMENT'S, PETITION FOR REHEARING

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I. INTRODUCTION

The Las Vegas Metropolitan Police Department ("LVMPD") respectfully requests rehearing of the April 2, 2020 Opinion (the "Opinion"), in which a Panel of this Court affirmed the District Court's order applying the catalyst theory in determining whether the Center for Investigative Reporting, Inc. ("CIR") prevailed for purposes of obtaining an award for attorney fees and costs pursuant to the Nevada Public Records Act (the "NPRA").[1] In its Opinion, the Panel overlooks or misapprehends certain facts and law to reach a newly-defined standard for determining whether a party prevails in a proceeding. The Panel concludes that the term "prevails" requires a broader interpretation than "prevailing party" and adopts the catalyst theory.

In reaching this conclusion, however, the Opinion overlooks or misapprehends that (1) the plain language of NRS 239.011 provides that a requester prevails when it obtains a court order to access public records; (2) alternatively, the legislative history demonstrates that the Legislature only intended the requester to recover its attorney fees and costs if it obtained a court order declaring the records sought to be public; and (3) Nevada has expressly adopted the prevailing party standard as announced in *Buckhannon*,[2] which

[1] The Panel's April 2, 2020 Opinion is attached **Exhibit 1**.

[2] *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001).

rejected the catalyst theory approved by the Panel. Upon these grounds, LVMPD respectfully requests that this Court grant it rehearing according to NRAP 40.[3]

II. LEGAL ARGUMENT

A. STANDARD FOR PETITIONS FOR REHEARING.

NRAP 40(c)(2) provides that the Court may consider rehearing in the following circumstances: (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case. Rehearing is necessary to allow the Court to consider several factual and legal points that the Court has overlooked. *See, e.g., Am. Cas. Co. of Reading, Pa. v. Hotel and Rest. Employees and Bartenders Intern. Union Welfare Fund,* 113 Nev. 764, 766, 942 P.2d 172, 174 (1997). In the instant case, rehearing is necessary to allow the Court to consider several factual and legal points the Panel has overlooked or misapprehended.

[3] If the Court orders CIR to file an answer to this petition for rehearing, LVMPD requests the opportunity to file a reply. *See* NRAP 40(d).

B. THE COURT OVERLOOKED OR MISAPPREHENDED THE PLAIN MEANING OF NRS 239.011.

The Panel's decision adopts a newly-defined standard, the catalyst theory, for the term "prevails," requiring a different analysis than the "prevailing party" standard announced in *LVMPD v. Blackjack Bonding*. In doing so, the Panel determined that "prevails" necessitates a broader interpretation than the phrase "prevailing party," and, therefore, "prevails" does not require a judgment on the merits. Instead, a requester may prevail under the NPRA, absent a judgment, if it causes the governmental agency to substantially change its behavior in the manner sought by the requester, also known as the catalyst theory. This conclusion, however, overlooks or misapprehends the plain meaning of NRS 239.011.

Where a statute is clear and unambiguous, this Court gives effect to the ordinary meaning of the text's plain language without turning to other rules of construction. *In re CityCenter Constr. & Lien Master Litig.*, 129 Nev. 669, 673-74, 310 P.3d 574, 578 (2013). "If a statute expressly provides a remedy, courts should be cautious in reading other remedies into the statute." *Builders Ass'n of N. Nev. v. City of Reno*, 105 Nev. 368, 370, 776 P.2d 1234, 1235 (1989); *see also State v. Yellow Jacket Silver Mining Co.*, 14 Nev. 220, 225

(1879) ("Where a statute gives a new right and prescribes a particular remedy, such remedy must be strictly pursued, and is exclusive of any other."), abrogated on other grounds by *Waste Mgmt. of Nev., Inc. v. W. Taylor St., LLC*, 135 Nev. 168, 443 P.3d 1115 (2019). Courts have a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized. *S. Nev. Homebuilders v. Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005).

At the time of CIR's request, NRS 239.011 provided:

> 1. If a request for inspection, copying or copies of a public book or record open to inspection and copying is denied, the requester may **apply to the district court** in the county in which the book or record is located **for an order**:
>
> (a) Permitting the requester to inspect or copy the book or record; or
>
> (b) Requiring the person who has legal custody or control of the public book or record **to provide a copy to the requester**,
>
> as applicable.
>
> 2. The court shall give this matter priority over other civil matters to which priority is not given by other statutes. **If the requester prevails**, the requester is entitled to recover his or her costs and reasonable attorney's fees in the proceeding from the governmental entity whose officer has custody of the book or record.

(Emphasis added).[4] Construing these provisions together, and in harmony, the Opinion overlooks or misapprehends that the term prevails is limited to the requester obtaining an order to inspect or obtain copies of public records. In other words, the Legislature intended a requester to recover its costs and reasonable attorney's fees ***only*** after the Court ordered the records to be disclosed. *See LVMPD v. Blackjack Bonding*, 131 Nev. 80, 90, 343 P.3d 608, 615 (2015).

This interpretation is consistent with Nevada law and its determination of when a party prevails. *See Savage v. Pierson*, 123 Nev. 86, 94, 157 P.3d 697, 702 (2007) ("[W]hen the same word is used in different statutes that are similar in respect to purpose and content, the word will be used in the same sense, unless the statutes' context indicates otherwise . . . ."). Indeed, this Court consistently utilizes the term "prevails" in conjunction with the prevailing party standard. *See LVMPD v. Blackjack Bonding*, 131 Nev. 80, 90, 343 P.3d 608, 615 (2015) (Interpreting NRS 239.011, the court concluded "Blackjack was a prevailing party and is entitled to recover attorney fees and costs associated with its efforts to secure access to the telephone records, despite the fact that it

[4] NRS 239.011 was amended by the 2019 legislative session and now allows a requester to seek judicial intervention for: (a) an order permitting the requester to inspect or copy the record; (b) requiring the person who has legal custody or control of the record to provide a copy to the requester or (c) providing relief relating to the amount of the fee. The amendment did not change or alter the language at issue here, "[i]f the requester prevails."

was to pay the costs of production."); *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016) ("A party ... prevail[s] under NRS 18.010 if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit."); *Cole-Monahan v. Salvo*, 130 Nev. 1219 (2014) (NRS 116.4117(6) authorizes the district court to award attorney fees to a party who prevails in a CC & R-based lawsuit).

The Panel overlooks or misapprehends that the NPRA is entirely devoid of any language that would entitle a requester to an attorney fee and cost award without a judicial decision on the merits. *See State, Div. of Ins. v. State Farm Mut. Auto Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482 485 (2000) (explaining that statutory language that is "plain and unambiguous" leaves "no room for construction" (internal quotation marks omitted)). NRS 239.011 expressly permits a requester to seek judicial intervention ***for a court order*** to access public records and permits a court to award reasonable attorney fees and costs to a requester that prevails. (Emphasis added). That is, a requester prevails upon obtaining an order requiring production or inspection of public records. NRS 239.011. And, this Court is not at liberty to set aside, disregard, or rewrite the explicit language of the NPRA. *Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal,* 136 Nev. Adv. Op. 5, 458 P.3d 1048, 1060 (2020).

Thus, while "prevailing party" may be a legal term of art, it is axiomatic that a "prevailing party" and a party who "prevails" are synonymous. *Oil, Chem. & Atomic Workers Int'l Union, AFL–CIO v. Dep't of Energy*, 288 F.3d 452, 455 (2002) (superseded by statute) ("It is true, as the union points out, that *Buckhannon* treated 'prevailing party' as a 'legal term of art.' Yet all must agree that a 'prevailing party' and a 'party who prevails' are synonymous."); *Hayes v. Petroleum Helicopters, Inc.*, 48 F. App'x 481 (5th Cir. 2002) (rejecting the catalyst theory because the slight variance of "person who prevails" as opposed to "prevailing party" does not take the USERRA statutory language outside the rule set forth in *Buckhannon*). Accordingly, the Court should grant rehearing.

C. THE COURT'S STATUTORY CONSTRUCTION OF THE TERM "PREVAILS" IGNORES THE LEGISLATIVE HISTORY OF NRS 239.011.

Despite the plain language of NRS 239.011, the Panel determines that "prevails" differed from "prevailing party," rendering the term ambiguous. In reaching its decision, the Panel overlooks or misapprehends the legislative history of NRS 239.011 and, instead, relies on law from other states that is inapposite to Nevada and the NPRA.

The Opinion concludes the term "prevails" requires a broader interpretation than "prevailing party." In support of its interpretation, the Panel relies heavily on New Jersey's characterization of the term "prevails" in *Mason*

v. City of Hoboken, 951 A.2d 1017 (N.J. 2008). There, the New Jersey Supreme Court distinguished between its current Open Public Records Act ("OPRA") and the former Right to Know Law. *Id.* at 1031. Specifically, the *Mason* court recognized that the Legislature's changes required a broader interpretation of the term "prevails." *Id.* The former Right to Know Law permitted a court to award reasonable attorney's fees to "a plaintiff in whose favor such ***an order*** ***requiring access to public records issues.***" *Id*. (quoting N.J.S.A. 47:1A–4 (repealed 2002) (emphasis added)). The prerequisite of an order is consistent with *Buckhannon*'s judicially-sanctioned change requirement. The amendment, however, eliminated the requirement of an order and simply awarded reasonable attorney fees to a requester who prevails. *Id.* (citing N.J.S.A. 47:1A–6). Thus, the court recognized that the Legislature's amendment required a broader construction of the term "prevails" because the prior law mandated that the requestor obtain an order prior to being deemed the prevailing party. *Id.*

The Panel also cited to New Jersey's public policy to support its interpretation of "prevails." *Id.* at 1032. According to *Mason*, the catalyst theory serves a public policy purpose by prohibiting a government agency to vigorously defend a lawsuit and then unilaterally disclose documents at the eleventh hour to avoid entry of a court order. *Id.* Rejecting *Buckhannon*'s theory, the court reasoned that, unlike other statutes, OPRA does not permit

damages and is strictly limited to attorney fees. *Id.* Therefore, under OPRA, "plaintiffs can recover counsel fees if they are able to prove their lawsuit caused an eleventh-hour disclosure." *Id.*

The *Mason* court's logic and interpretation of its OPRA fee statute can be distinguished from the NPRA. Unlike OPRA, the NPRA did not have a significant amendment to its fee provision that would require a broader interpretation of "prevails." Indeed, as discussed *supra* Section B, NRS 239.011 allows a requester to obtain a court order for access to public records and then permits the court to enter a fee award if the requester prevails. Thus, rather than a broad interpretation, NRS 239.011 requires a strict interpretation.

This interpretation is further supported by the legislative history of NRS 239.011. The legislative history demonstrates that the term "prevails" as opposed to "prevailing party" was used so that the government entity could not recover its attorney fees and costs in an NPRA action if it prevailed. 4 JA 733-34. So, the Legislature did not intend for a different standard to apply. Rather, the language utilized by the Legislature demonstrates that it intended only a single party—the requester—be able to obtain a fee award. Therefore, the distinction between "prevails" and "prevailing" for purposes of interpreting NRS 239.011 is simply one of grammar. *See Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. 61, 65-66, 412 P.3d 56, 60 (2018), reh'g denied (Apr. 27, 2018)

(recognizing that rules of statutory construction involving grammar and punctuation use that are generally resorted to only when they can be employed consistently with the legislative intent) (Citing 1A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutes & Statutory Construction § 21.15 (7th ed. 2009) (stating that grammar and punctuation use are statutory interpretation aids, but "neither is controlling unless the result is in harmony with the clearly expressed intent of the Legislature," and acknowledging that "[c]ourts have indicated that punctuation will not be given much consideration in interpretation because it often represents the stylistic preferences of the printer or proofreader instead of the considered judgment of the drafter or legislator" (emphasis added))). Here, the underlying word is "prevail." As such, the Panel should have treated the language "[i]f the requester prevails" consistently with the phrase "prevailing party."

Additionally, at the time the Legislature enacted the fee provision codified at NRS 239.011, this Court must presume that the Legislature was aware of NRS 18.010(b)(2). *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 295, 995 P.2d 482, 486 (2000) ("[W]hen the legislature enacts a statute, this court presumes that it does so 'with full knowledge of existing statutes relating to the same subject.'"). NRS 18.010(b)(2) allows a party to seek attorney fees when the court finds that the claim or defense of the opposing party was brought or maintained without reasonable ground or to

harass the prevailing party. In other words, NRS 18.010(b)(2) can be relied upon by a requester in instances where a requester acts in bad faith and carries on a meritless defense only to release the records at the eleventh hour. Accordingly, the public policy concern raised by the Panel is remedied by an existing statute.

Finally, in contrast to OPRA, the NPRA contemplates damages. Indeed, this Court's recent decision in *Clark Cty. Office of Coroner/Med. Exam't v. Las Vegas Review-Journal*, 136 Nev. Adv. Op. 5, 458 P.3d 1048, 1060 (2020), recognized that it could not speculate as to what the Legislature intended when it codified NRS 239.012. Particularly, NRS 239.012 immunizes government agencies from *damages* for refusing to disclose records in good faith. (Emphasis added).[5] It must then follow that a requester may pursue damages against a government entity if it does not act in good faith in refusing to disclose records. *See id*. Because the NPRA contemplates damages, the *Mason* court's reasoning is not applicable to NRS 239.011.

[5] Although it was LVMPD's position that "damages" includes attorney fees contemplated by NRS 239.011, this Court rejected LVMPD's interpretation and concluded that "damages" within NRS 239.012 does not pertain to attorney fees. *Clark Cty. Office of Coroner/Med. Exam't v. Las Vegas Review-Journal*, 136 Nev. Adv. Op. 5, 458 P.3d 1048, 1060 (2020).

D. THE OPINION IGNORES NEVADA'S ADOPTION OF *BUCKHANNON*.

The Panel overlooks or misapprehends Nevada's express adoption of *Buckhannon*. The Opinion cites to a variety of cases in other jurisdictions with similar fee-shifting provisions in relation to public records. The Panel, however, overlooks or misapprehends that, unlike the jurisdictions relied on in the Opinion, Nevada has expressly adopted the prevailing party standard announced in *Buckhannon*.

The Opinion references the fee-provisions and related law of New Jersey, Illinois, and California in support of the adoption of the catalyst theory. While each of these states applied the catalyst theory to the fee provisions of their public record statutes, each state also expressly rejected the prevailing party standard announced in *Buckhannon*. *See Mason v. City of Hoboken*, 951 A.2d 1017 (N.J. 2008)[6] (relying on *Singer v. State*, 472 A.2d 138 (N.J. 1984) (adopting the catalyst theory in New Jersey prior to *Buckhannon*) and *Packard-Bamberger & Co., Inc. v. Collier*, 771 A.2d 1194, 1204 (N.J. 2001) (affirming New Jersey's adoption of the catalyst theory after *Buckhannon*); *Uptown People's Law Ctr. v. Dep't of Corr.*, 7 N.E.3d 102, 104-107 (Ill. Ct. App. 2014)

[6] New Jersey also does not limit the catalyst theory to public record cases. Indeed, it has adopted the catalyst theory as its prevailing party standard and has applied it to civil rights, discrimination, and attorney misconduct cases. *See Mason*, 951 A.2d 1030-31.

(expressly recognizing that the *Buckhannon* decision was "in contrast to Illinois jurisprudence" and that *Buckhannon* was limited to federal statutes and was not binding on states) (relying on *City of Elgin v. All Nations Worship Ctr.*, 868 N.E.2d 385 (Ill. Ct. App. 2007)); *Belth v. Garamendi*, 232 Cal.App.3d 896, 901 (Cal. Ct. App. 1991) (prior to *Buckhannon*, recognizing that California law dictates that a party prevails or is successful when there is a causal connection between the lawsuit and the relief obtained and not requiring a final judgment) (citing *Wallace v. Consumers Cooperative of Berkeley, Inc.*, 170 Cal.App.3d 836, 844 (Cal. Ct. App. 1985)).

In contrast to New Jersey, Illinois, and California, Nevada has expressly accepted the prevailing party standard announced in *Buckhannon*. *Works v. Kuhn*, 103 Nev. 65, 68, 732 P.2d 1373, 1376 (1987), disapproved of on other grounds by *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 35 P.3d 964 (2001) ("A party to an action cannot be considered a prevailing party within the contemplation of NRS 18.010, where the action has not proceeded to judgment."); *LVMPD v. Blackjack Bonding*, 131 Nev. 80, 90, 343 P.3d 608; 615 (2015) (A party prevails "if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit."); *145 E. Harmon II Tr. v. Residences at MGM Grand - Tower A Owners' Ass'n*, 136 Nev. Adv. Op. 14, 460 P.3d 455, 459 (2020) (recognizing that a voluntary dismissal with prejudice may materially alter the parties' legal

relationship because it is an adjudication on the merits for purposes of res judicata).

This Court recently addressed a similar issue in *City of Henderson v. Las Vegas Review-Journal*, 2019 WL 529087, Case No. 75407 (Nev. October 17, 2019) (unpublished disposition). In that case, the Court applied the following standard:

> To qualify as a prevailing party in a public records action, the requester must "succeed[ ] on any significant issue in litigation which achieves some of the benefit it sought in bringing suit." *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 90, 343 P.3d 608, 615 (2015) (quoting *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005)). While a records requester "need not succeed on every issue" to prevail, *id.* at 90, 343 P.3d at 615, this court has "consistently held that a party cannot be a 'prevailing party' where the action has not proceeded to judgment." *Dimick v. Dimick*, 112 Nev. 402, 404, 915 P.2d 254, 256 (1996).

City of Henderson, 2019 WL 529087, Case No. 75407, at *3. In the lower court, the Las Vegas Review-Journal, sought access to various documents from the City of Henderson pursuant to the NPRA. *Id.* at * 1. In addition to seeking access to the records, the Las Vegas Review-Journal brought declaratory and injunctive relief claims against the City in an attempt to invalidate the City's policies related to the fees it initially assessed for processing records requests. *Id.* at *4. Because the City of Henderson provided the requested records free of charge, the district court determined that the Las Vegas Review-Journal's equitable claims were moot and explicitly declined to decide those issues raised

in the petition. *Id.* The lower court ultimately denied the Las Vegas Review-Journal's petition. *Id.* This Court determined that the district court's refusal to consider the injunctive and declaratory relief claims asserted by the Las Vegas Review-Journal meant that the Las Vegas Review-Journal did not prevail on these claims—despite obtaining the records free of charge. *Id.* Using this reasoning, this Court concluded that the Las Vegas Review-Journal did not prevail and, therefore, was not entitled to an award of attorney fees and costs. *Id.* On the other hand, under the Panel's newly-adopted catalyst theory, the Las Vegas Review-Journal would have prevailed, as it obtained the records without being charged after a petition had been filed, but prior to the Court ruling on the merits of the case.

Nevada law is clear—to prevail, a party must win on at least one of its claims, this includes a judicially sanctioned change in the legal relationship of the parties, not by a private settlement. *Northern Nev. Homes, Inc. v. GL Construction*, 134 Nev. Adv. Op. 60, 422 P.3d 1234, 1237-38 (2018); *Golightly & Vannah, PLLC v. TJ Allen, LLC*, 132 Nev. Adv. Op. 41, 373 P.3d 103, 107 (2016); *Azzarello v. Humboldt River Ranch Association*, 2016 WL 6072420, *1, Case No. 68147 (October 14, 2016) (unpublished disposition). Therefore, this Court should grant rehearing.

III. CONCLUSION

In summary, this Court should grant LVMPD's petition for rehearing because it overlooks or misapprehends that (1) the plain language of NRS 239.011 implies that a requester prevails when it obtains a court order to access public records; (2) alternatively, the legislative history demonstrates that the Legislature only intended the requester to recover its attorney fees and costs if it obtained a court order declaring the records sought to be public; and (3) Nevada has expressly adopted the prevailing party standard as announced in *Buckhannon*, which rejects the catalyst theory approved by the Panel.

Dated this 4th day of June, 2020.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this petition complies with the page- or type-volume limitations of NRAP 40 or 40A because it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 3,628 words; or

☐ does not exceed _____ pages.

Dated this 4th day of June, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT, LAS VEGAS METROPOLITAN POLICE DEPARTMENT'S, PETITION FOR REHEARING** was filed electronically with the Nevada Supreme Court on the 4th day of June, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

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Marquis Aurbach Coffing

Exhibit 1

136 Nev., Advance Opinion 15

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT,
Appellant,
vs.
THE CENTER FOR INVESTIGATIVE REPORTING, INC., A CALIFORNIA NONPROFIT ORGANIZATION,
Respondent.

No. 77617

FILED
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ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

LAS VEGAS METROPOLITAN POLICE DEPARTMENT,
Appellant,
vs.
THE CENTER FOR INVESTIGATIVE REPORTING, INC., A CALIFORNIA NONPROFIT ORGANIZATION,
Respondent.

No. 77965

Consolidated appeals from a final judgment and post-judgment order awarding attorney fees in a public records action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Affirmed.

Marquis Aurbach Coffing and Nicholas D. Crosby and Jacqueline V. Nichols, Las Vegas,
for Appellant.

Campbell & Williams and Philip R. Erwin and Samuel R. Mirkovich, Las Vegas,
for Respondent.

20-12548

BEFORE GIBBONS, STIGLICH and SILVER, JJ.

OPINION

By the Court, SILVER, J.:

The Nevada Public Records Act (NPRA) requires governmental entities to make nonconfidential public records within their legal custody or control available to the public. NRS 239.010. If a governmental entity denies a public records request, the requester may seek a court order compelling production. NRS 239.011(1). If the requesting party prevails, the requester is entitled to attorney fees and costs. NRS 239.011(2). Here, we are asked to determine whether the requesting party prevails for purposes of an award of attorney fees and costs when the parties reach an agreement that affords the requesting party access to the requested records before the court enters a judgment on the merits. To answer that question, we adopt the catalyst theory. "Under the catalyst theory, attorney fees may be awarded even when litigation does not result in a judicial resolution if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation." *Graham v. DaimlerChrysler Corp.*, 101 P.3d 140, 144 (Cal. 2004). Applying the catalyst theory here, we agree with the district court that respondent was entitled to reasonable attorney fees and costs under NRS 239.011(2). We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1996, American rap artist Tupac Shakur was shot and killed at the intersection of Flamingo Road and Koval Lane in Las Vegas. The case is still an open investigation.

In December 2017, the Center for Investigative Reporting, Inc. (CIR) submitted a public records request to the Las Vegas Metropolitan

Police Department (LVMPD) under the NPRA. CIR sought records related to Tupac's murder. One month later, when LVMPD still had not responded to the request, CIR followed up and pointed out that LVMPD had not complied with the NPRA's five-day period for responding to public records requests. LVMPD responded that same day and notified CIR that the public records request was forwarded to a Public Information Officer for follow-up. Twelve days later, CIR reached out again and notified the Office of Public Information that LVMPD was more than one month overdue in responding to the public records request under the NPRA. CIR did not receive a response.

In March 2018, roughly three months after its initial request, CIR followed up for a third time, to no avail. About two weeks later, CIR's counsel sent a letter to LVMPD's Director of Public Information setting forth LVMPD's failure to comply with its statutory obligations under the NPRA and demanding a response within seven days. LVMPD responded eight days later by producing a two-page police report but failed to indicate whether additional records existed or were otherwise exempt. Then, CIR contacted LVMPD and inquired whether it had withheld records that were responsive to CIR's request and, if so, under what legal authority. Assistant General Counsel for LVMPD responded the following day, acknowledging that LVMPD should have originally advised CIR that it would research the request and respond within 30 days. Further, LVMPD stated that because Tupac's murder was an "open active investigation," any other records in the investigative file were (i) not public records under NRS 239.010(1), (ii) declared by law to be confidential, (iii) subject to the "law enforcement privilege," and (iv) protected from disclosure because law enforcement's

policy justifications for nondisclosure outweigh the public's interest in access to the records.

Dissatisfied with LVMPD's response, CIR contacted LVMPD and disputed that the records were confidential because LMVPD labeled the investigation "open" and "active" and again asked LVMPD to comply with its statutory obligations under the NPRA. However, LVMPD maintained the records were not subject to disclosure.

CIR then filed a petition for a writ of mandamus, seeking to inspect or obtain copies of all records related to Tupac's murder within LVMPD's custody and control. The district court indicated during a hearing on the petition that LVMPD had not met its burden of demonstrating that all records in the investigative file were confidential under Nevada law. The district court gave LVMPD two options: produce the requested records with redactions or participate in an in-camera evidentiary hearing regarding confidentiality. LVMPD opted for the latter, and the district court scheduled a sealed evidentiary hearing. But before the scheduled hearing, LVMPD and CIR reached an agreement: LVMPD would produce portions of its records along with an index identifying and describing any redacted or withheld records. As part of the agreement, CIR reserved the right to challenge LVMPD's redactions or withholdings and reserved the right to seek attorney fees and costs pursuant to NRS 239.011(2). Over the next three months, LVMPD provided CIR with roughly 1,400 documents related to Tupac's murder.

At a subsequent status check, LVMPD and CIR informed the district court that they disagreed as to whether CIR "prevailed" for purposes of an award of attorney fees and costs under NRS 239.011(2). CIR asserted that the district court should follow the catalyst theory of recovery, which

allows a petitioner to recover fees as the prevailing party in a public records case where the petitioner's actions led to the disclosure of information. LVMPD argued CIR had not prevailed because it did not obtain a judgment in its favor, given that the parties had reached an agreement before the district court entered a judgment on the merits. The district court entertained argument on the issue and ruled that CIR prevailed because the filing of its petition caused LVMPD to produce the records.[1] The district court subsequently entered a written order dismissing the petition as moot based on the parties' agreement, concluding that CIR had prevailed for purposes of NRS 239.011(2), and affording CIR time to file a motion for attorney fees and costs.

CIR thereafter filed its motion for attorney fees and costs. LVMPD opposed the motion and argued that NRS 239.012, which provides immunity from "damages" for withholding records in good faith, precluded an award of attorney fees and costs against it here. LVMPD also asserted that CIR improperly sought prelitigation fees, which it was not entitled to under NRS 239.011(2). The district court rejected LVMPD's immunity argument and awarded CIR attorney fees and costs. These appeals challenging the award of attorney fees followed.

DISCUSSION

The primary issue before us is whether CIR prevailed for purposes of NRS 239.011(2). LVMPD argues that CIR did not prevail because the district court did not enter an order compelling production of

[1]Before the hearing, the case was transferred from Judge Joanna Kishner to Judge Elizabeth Gonzalez.

the requested records.[2] LVMPD contends that the district court erroneously applied the catalyst theory to determine whether CIR prevailed, instead of applying the prevailing party standard laid out in *Las Vegas Metropolitan Police Department v. Blackjack Bonding, Inc.*, 131 Nev. 80, 343 P.3d 608 (2015). CIR argues that it prevailed because the filing of its petition caused LVMPD to turn over the records, which it originally refused to disclose. Instead of requiring that the requester receive a judgment on the merits, CIR argues that this court should follow other courts that apply a catalyst theory to determine whether a requester prevailed and therefore is entitled to attorney fees.

The parties' arguments present a matter of statutory interpretation, which we review de novo. *Clark Cty. Coroner's Office v. Las Vegas Review-Journal*, 136 Nev., Adv. Op. 5, ___ P.3d ___, ___ (February 27, 2020). "When a statute is clear on its face, we will not look beyond the statute's plain language." *Washoe Med. Ctr. v. Second Judicial Dist. Court of State of Nev. ex rel. Cty. of Washoe*, 122 Nev. 1298, 1302, 148 P.3d 790, 793 (2006). However, when a statute is ambiguous, we look to legislative history for guidance. *Id.* Finally, "we consider the policy and spirit of the law and will seek to avoid an interpretation that leads to absurd results." *Id.* (quoting *City Plan Dev., Inc. v. Office of the Labor Comm'r*, 121 Nev. 419, 435, 117 P.3d 182, 192 (2005) (internal citations omitted)).

NRS 239.011(1) provides that if a governmental entity denies a public records request, the requester may seek a court order permitting

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[2]LVMPD alternatively argues that NRS 239.012 immunizes it from an attorney fees award under NRS 239.011(2) because it acted in good faith. We recently rejected that argument in *Clark County Coroner's Office v. Las Vegas Review-Journal*, 136 Nev., Adv. Op. 5, ___ P.3d ___, ___ (February 27, 2020).

inspection of the record or requiring the government to provide a copy of the record to the requester. NRS 239.011(2) provides that "[i]f the requester *prevails*, the requester is entitled to recover his or her costs and reasonable attorney's fees in the proceeding from the governmental entity whose officer has custody of the book or record."[3] (Emphasis added.) However, the Legislature did not define "prevails."

We have addressed NRS 239.011(2) once before in *Las Vegas Metropolitan Police Department v. Blackjack Bonding, Inc.*, 131 Nev. 80, 343 P.3d 608 (2015). There, we held that a requester prevails for NPRA purposes if the requester "succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit." 131 Nev. at 90, 343 P.3d at 615 (quoting *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005)). Ultimately, we determined that the requester there was a "prevailing party" for purposes of NRS 239.011(2) because it obtained a writ compelling the production of records that were wrongfully withheld. *Id.* Notably, the two cases cited in *Blackjack Bonding* addressed statutory provisions that allow an attorney fees award to a "prevailing party." *Id.*; *see Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (interpreting 42 U.S.C. § 1988, which allows an attorney fees award to a "prevailing party" in federal civil rights actions); *Overfield*, 121 Nev. at 10, 106 P.3d at 1200 (addressing NRS 18.010, which allows an attorney fees award to a "prevailing party" in civil actions under certain circumstances). However, the Legislature utilized the broader term "prevails" in drafting NRS

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[3]The Legislature amended NRS 239.011 during the 2019 session. 2019 Nev. Stat., ch. 612, § 7, at 4007-08. The amendments apply to actions filed on or after October 1, 2019. *Id.* § 11, at 4008. As the underlying action was filed in 2018, those amendments do not apply. But notably, the language relevant to the issue presented here was not materially changed.

239.011(2). Moreover, here, the district court did not enter an order compelling production of the records because the parties came to an agreement before the district court could enter an order on the merits. Thus, *Blackjack Bonding* does not address the specific issue raised by this appeal: whether a requester prevails under NRS 239.011(2) where the governmental entity voluntarily produces the requested records before the court enters an order on the merits.

Although we have not addressed that issue, other state courts have done so in the context of attorney fee provisions in public records statutes similar to NRS 239.011(2). Those courts have rejected a stringent requirement that public records requesters must obtain an order on the merits to prevail for purposes of an attorney fees award. *See, e.g., Belth v. Garamendi*, 283 Cal. Rptr. 829, 831-32 (Ct. App. 1991); *Uptown People's Law Ctr. v. Dep't of Corr.*, 7 N.E.3d 102, 108-09 (Ill. App. Ct. 2014). For example, in *Mason v. City of Hoboken*, the New Jersey Supreme Court considered a statute that closely resembles NRS 239.011(2) in providing that a "requester who *prevails* in any proceeding shall be entitled to a reasonable attorney's fee." 951 A.2d 1017, 1031 (N.J. 2008) (emphasis added) (quoting N.J. Stat. Ann. § 47:1A-6 (West 2014)). The court adopted the "catalyst theory,"[4] holding that "requestors are entitled to attorney's

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[4]The catalyst theory developed to guide courts in determining whether a plaintiff had "substantially prevailed" in an action under the Freedom of Information Act (FOIA). *See, e.g., First Amendment Coal. v. U.S. Dep't of Justice*, 878 F.3d 1119, 1127 (9th Cir. 2017) (listing cases). Although the United States Supreme Court held in 2001 that the catalyst theory could not be used to award attorney fees and costs under two federal acts that allowed the "prevailing party" to obtain an award of attorney fees and costs, *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600-10 (2001), Congress amended FOIA in 2007

fees under [the Open Public Records Act], absent a judgment . . . , when they can demonstrate: (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.'" *Id.* at 1032 (citing *Singer v. State*, 472 A.2d 138 (N.J. 1984)).

In adhering to the catalyst theory, the New Jersey Supreme Court noted the legislature's use of the broad term "prevails" as opposed to the legal term of art "prevailing party." *Id.* at 1032. Nevada's Legislature similarly used the broad term "prevails" in drafting NRS 239.011(2). The New Jersey Supreme Court also pointed out a policy reason for allowing an attorney fees award in a public records action absent a judgment on the merits—the potential for government abuse in that an agency otherwise could "deny access, vigorously defend against a lawsuit, and then unilaterally disclose the documents sought at the eleventh hour to avoid the entry of a court order and the resulting award of attorney's fees." *Id.* at 1031. We agree that this is a sound policy reason and supports utilizing the catalyst theory to determine whether a requester has prevailed in an NPRA lawsuit. That theory also promotes the Legislature's intent behind the NPRA—public access to information. *See* NRS 239.001.

Under the catalyst theory, a requester prevails when its public records suit causes the governmental agency to substantially change its behavior in the manner sought by the requester, even when the litigation does not result in a judicial decision on the merits. *Graham v.*

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and a number of circuit courts of appeal have held that the amendment restored the catalyst theory in FOIA litigation. *See First Amendment Coal.*, 878 F.3d at 1128-29 (discussing cases that address the impact of the 2007 amendment).

DaimlerChrysler Corp., 101 P.3d 140, 148 (Cal. 2004). But as the Ninth Circuit has explained, "[t]here may be a host of reasons why" a governmental agency might "voluntarily release[ ] information after the filing of a [public records] lawsuit," including reasons "having nothing to do with the litigation." *First Amendment Coal.*, 878 F.3d at 1128. In other words, while "'the mere fact that [the government] ha[s] *voluntarily* released documents [should] not preclude an award of attorney's fees to the [requester],' it is equally true that 'the mere fact that information sought was not released until after the lawsuit was instituted is insufficient to establish that'" the requester prevailed. *Id.* (quoting *Church of Scientology of Cal. v. U.S. Postal Serv.*, 700 F.2d 486, 491-92 (9th Cir. 1983)). Accordingly, there must be a "causal nexus between the litigation and the voluntary disclosure or change in position by the Government." *Id.*

We therefore hold that a requester is entitled to attorney fees and costs under NRS 239.011(2) absent a district court order compelling production when the requester can demonstrate "a causal nexus between the litigation and the voluntary disclosure or change in position by the Government." *First Amendment Coal.*, 878 F.3d at 1128. To alleviate concerns that the catalyst theory will encourage requesters to litigate their requests in district court unnecessarily, the court should consider the following three factors: (1) "when the documents were released," (2) "what actually triggered the documents' release," and (3) "whether [the requester] was entitled to the documents at an earlier time." *Id.* at 1129 (quoting *Church of Scientology*, 700 F.2d at 492). Additionally, the district court should take into consideration (1) whether the litigation was frivolous, unreasonable, or groundless, and (2) whether the requester reasonably attempted to settle the matter short of litigation by notifying the

governmental agency of its grievances and giving the agency an opportunity to supply the records within a reasonable time.[5] *See Graham*, 101 P.3d at 154-55 (discussing limitations on the catalyst theory).

Applying the catalyst theory here, the district court determined that CIR prevailed for purposes of NRS 239.011(2). We agree. CIR tried to resolve the matter short of litigation. CIR put LVMPD on notice of its grievances and gave LVMPD multiple opportunities to comply with the NPRA. At each juncture, LVMPD either failed to respond or claimed blanket confidentiality. It was not until CIR commenced litigation and the district court stated at a hearing that LVMPD did not meet its confidentiality burden that LVMPD finally changed its conduct. The record thus supports the conclusion that the litigation triggered LVMPD's release of the documents. LVMPD does not proffer any other reason aside from the litigation that it voluntarily turned over the requested documents. And it appears that CIR was entitled to at least some of the documents at an earlier time because it is unlikely the blanket confidentiality privilege LVMPD eventually asserted applied to all responsive documents in LVMPD's possession. Critically, LVMPD agreed to turn over roughly 1,400 documents when faced with an in-camera evidentiary hearing. Thus, the record supports the district court's determination that the lawsuit was the catalyst for the LVMPD's release of the requested records. Accordingly, CIR

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[5]A requester seeking fees under NRS 239.011(2) has the burden of proving that the commencement of the litigation caused the disclosure. *Mason*, 951 A.2d at 1032. However, that burden shifts to the responding agency when the agency fails to respond at all within five business days. *Id.*; *see* NRS 239.0107. In such cases, the agency must prove that the commencement of the litigation was not the catalyst for the disclosure. *Mason*, 951 A.2d at 1032.

prevailed in the NPRA proceeding and is entitled to attorney fees and costs pursuant to NRS 239.011(2). As the LVMPD does not otherwise challenge the attorney fees and costs award, we affirm the judgments of the district court.[6]

_____, J.
Silver

We concur:

_____, J.
Gibbons

_____, J.
Stiglich

[6]Although LVMPD argues that the district court erred by including prelitigation fees in the award, our review of the record and the district court's order confirms that the district court *did not* include prelitigation fees and costs in the award.