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DISTRICT COURT

CLARK COUNTY, NEVADA

KAREN GRAY,

Plaintiff,

Vs.

CLARK COUNTY SCHOOL DISTRICT; CLARK COUNTY SCHOOL DISTRICT BOARD OF SCHOOL TRUSTEES, CAROLYN EDWARDS, LARRY MASON, SHIRLEY BARBER, TERRI JANISON, MARY BETH SCOW, RUTH JOHNSON, SHEILA MOULTON, in their official capacities as Trustees,

Defendants.

Case No. A543861
Dept. No. XXII

ORDER

These matters, concerning Defendants' Motion for Summary Judgment filed August 15, 2008, and Plaintiff KAREN GRAY'S Counter-Motion for Summary Judgment filed September 9, 2008, both came on for hearing on the 14th day of October 2008 at the hour of 8:30 a.m. before Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada, with JUDGE SUSAN H. JOHNSON presiding; Plaintiff KAREN GRAY, appeared by and through LEE ROWLAND, ESQ. and ALLEN LICHTENSTEIN, ESQ. of ACLU OF NEVADA; and Defendants CLARK COUNTY SCHOOL DISTRICT and CLARK COUNTY SCHOOL BOARD OF TRUSTEES, appeared by and through

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their General Counsel, C.W. HOFFMAN, ESQ. This Court, having reviewed the papers and pleadings on file, heard oral arguments of the parties, taken this matter under advisement, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On June 28, 2007, Plaintiff KAREN GRAY filed her Complaint and Request for Mandatory Expedited Hearing Pursuant to NRS 239.011, seeking declaratory, injunctive and monetary relief. By virtue of her Complaint, Plaintiff requested access to:

a. Any records of telephone calls of any publicly provided or funded cellular phones in the possession of Defendant CLARK COUNTY SCHOOL DISTRICT BOARD OF SCHOOL TRUSTEES (identified as "CCSD TRUSTEES," herein) from November 2005 to November 2006; and

b. All electronic mails (referred to as "e-mails," herein) that were originated, received or distributed through InterAct[1] or other CCSD or Board of Trustees e-mail systems, which are public records, from November 2005 to November 2006.[2]

2. Plaintiff GRAY requested access to cellular telephone records and e-mails on matters of public concern for purposes of administrative or policy discussions, and to use such information to propose possible laws or regulations

[1]According to Plaintiff's Complaint, p. 5, "InterAct" is CCSD'S e-mail system used district-wide and by the individual Board of Trustees' members. CCSD employees and trustees' public e-mail addresses are all linked through InterAct.

[2]According to proof presented by CCSD (Exhibit C), MS. GRAY requested CCSD TRUSTEES' travel and mileage expenses on November 6, 2006 in addition to cell phone records and e-mails, and such documentation encompassing 93 copies was provided to her on November 17, 2006.

before the 2007 Nevada Legislature.[3] Apparently, Plaintiff has concerns as there have been repeated references to e-mails and telephone calls by CCSD TRUSTEES during discussions and votes regarding policies at the school board meetings.

3. There is no dispute the only member of the CCSD TRUSTEES who uses a publicly-provided cellular telephone is LARRY MASON. There also is no dispute CCSD TRUSTEE RUTH JOHNSON, who uses her own private cellular telephone, received and apparently still receives a $50.00 monthly stipend from the school district to support the use of her personal telephone used for work-related calls. The CCSD did not create, receive, or keep records relating to MS. JOHNSON'S personal cellular telephone use, including those that may relate to her work-related calls. The other CCSD TRUSTEES received no reimbursement or stipend from CCSD for any work-related calls that may have transpired on their private or personal cellular telephones; taking the matter a step further, CCSD did not receive and thus, does not keep any records relating to calls made by or to the other CCSD TRUSTEES.

4. On November 17, 2006, CCSD responded to MS. GRAY'S November 6, 2006 request to inspect CCSD TRUSTEES' cellular telephone records, noting (1) only one trustee, LARRY MASON, used a CCSD-provided telephone. but no invoices or billings relating to MR. MASON'S public cellular

[3]At the October 14, 2008 hearing, the parties discussed the possible use of such information in proposing legislation at the *2009* Legislature.

telephone use had then yet been received,[4] and (2) only one trustee, RUTH JOHNSON, received a $50.00 per month.

5. On November 17, 2006, CCSD also responded to MS. GRAY'S requests to inspect CCSD TRUSTEES' e-mails. As such e-mails may include public, private and/or privileged information, CCSD informed MS. GRAY it would take time and effort to inspect, separate and/or redact the public and non-public e-mails and information. For a one-year period, CCSD estimated the cost of retrieval and review to be $4,280.00.[5] For a 90-day period, the cost would be $1,448.00.[6] It is CCSD'S position such inspection, separation and/or redaction of documents/information would require it to extend extraordinary use of its personnel or technological resources, whereby it may charge a fee for such extraordinary use. MS. GRAY argues the proposed estimated cost is "exorbitant" and "unduly expensive" for someone who merely desires to inspect the public record.[7]

[4]At the time of MS. GRAY'S November 6, 2006 records request, MR. MASON'S cellular had recently been issued to him, and thus, no invoice had been received by CCSD at that time. See Exhibit Affidavit of CINDY KROHN, attached as D to CCSD'S Motion for Summary Judgment filed August 15, 2008. It is this Court's understanding that, since the invoices have been received concerning MR. MASON'S cellular telephone use, such records have been afforded MS. GRAY for her inspection.

[5]The $4,280 total cost is calculated as 30 hours of technology department staff at $60.00 per hour, plus 62 hours of Board office staff review of all e-mails for confidential material at $38.00 per hour. In addition to the over $4,000 in estimated costs, CCSD proposed in its November 17, 2006 letter to MS. GRAY (Exhibit C to CCSD'S Motion for Summary Judgment filed August 15, 2008) there would be a charge of 10 cents per copy over 100 pages requested. As MS. GRAY desires to inspect the records, and not receive copies of them, the proposed photocopy charge is not at issue in this case.

[6]The $1,448 total cost is calculated as 14 hours of technology department staff at $60.00 per hour, plus 16 hours of Board office staff review of all e-mails for confidential material at $38.00 per hour.

[7]See MS. GRAY'S Opposition, pp. 2-3.

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6. Thereafter, at the April 12, 2007 CCSD TRUSTEES' Meeting,[8] MS. GRAY requested all policies, procedures and protocol regarding the repository and retrieval of CCSD TRUSTEES' electronic public records. According to MS. GRAY'S Complaint, p. 8, CCSD provided her a brief response,[9] but accorded no answers for retention or management policies of electronic records. MS. GRAY raised the issue of the Board's "non-response" and "non-receipt" of the requested cellular telephone records and e-mails at subsequent CCSD TRUSTEES' Meetings held May 7 and 31, 2007.

7. MS. GRAY claims she has been irreparably harmed by Defendants' non-compliance with NRS 239.010 as she was unable to use these public records to support her legislative proposals submitted to the 2007 Nevada Legislature (which is now out of session). She claims she has a right to and a continuing need for such records given her position as a community activist concerned with the accountability of the school district and CCSD TRUSTEES. She also intends to re-introduce her failed bill proposal to the 2009 Nevada Legislature to be bolstered by records she now seeks to access.

8. MS. GRAY has asserted three causes of action against Defendants for violations of NRS 239.010 by not making publicly-funded cellular telephone

[8]While there may have been some confusion, it appears there was some discussion, but no consensus, regarding whether MS. GRAY should obtain the information without tendering the estimated cost of over $4,000 for the "extraordinary" effort. NRS 239.052(2) provides "[a] governmental entity may waive all or a portion of a charge or fee for a copy of a public record if the governmental entity: (a) Adopts a written policy to waive all or a portion of a charge or fee for a copy of a public record; and (b) Posts, in a conspicuous place at each office in which the governmental entity provides copies of public records, a legible sign or notice that states the terms of the policy." MS. GRAY also requested the policies in writing on April 12, 2008. See Exhibit H to CCSD'S Motion for Summary Judgment filed August 15, 2008.

[9]Presumably, that "brief response" was by CINDY KROHN, Executive Assistant to the CCSD TRUSTEES dated April 26, 2007. A copy of this letter is attached as Exhibit H and as part of Exhibit D to CCSD'S Motion for Summary Judgment filed August 15, 2008.

records, public e-mails, and official CCSD policies on Public Records available for access by the public.

CONCLUSIONS OF LAW

Standard of Review

1. Summary judgment is appropriate and "shall be rendered forthwith" when the pleadings and other evidence on file demonstrate no "genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." *See* NRCP 55(c); Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026 (2005). The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. *Id.*, 121 Nev. at 731. A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the non-moving party. *Id.*, 121 Nev. at 731.

2. While the pleadings and other proof must be construed in a light most favorable to the non-moving party, that party bears the burden "to do more than simply show that there is some metaphysical doubt" as to the operative facts in order to avoid summary judgment bent entered in the moving party's favor. Matsushita Electric Industrial Co. v. Zenith Radio, 475 U.S. 574, 586 (1986), *cited by* Wood, 121 Nev. at 732. The non-moving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." Bulbman Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992), *cited by* Wood, 121 Nev. at 732. The non-moving party "'is not entitled to build a case on the

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gossamer threads of whimsy, speculation, and conjecture.'" Bulbman, 108 Nev. at 110, 825 P.2d 591, *quoting* Collins v. Union Fed. Savings & Loan, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983).

3. The purpose of NRS Chapter 239 is "to foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law." *See* NRS 239.001(1). The provisions of NRS Chapter 239 *must* be construed liberally to carry out its important purpose. *See* NRS 239.001(2). As NRS Chapter 239 must be interpreted liberally, "[a]ny exemption, exception or balancing of interests which limits or restricts access to public books and records by members of the public must be construed *narrowly.* " NRS 239.001(3)(emphasis added).[10]

4. NRS 239.010(1) provides:

> Except as otherwise provided in subsection 3,[11] all public books and public records of a governmental entity, *the contents of which are not otherwise declared by law to be confidential,* ***must be open*** at all times during office hours to inspection by any person, and may be fully copied or an abstract or memorandum may be prepared from those public books and public records. Any such copies, abstracts or memoranda may be used to supply the general public with copies, abstracts or memoranda of the records or may be used in any other way to the advantage of the governmental entity or of the general public. This section does not supersede or in any manner affect the federal laws governing copyrights or enlarge, diminish or affect in any other manner the rights of a person in

[10] *Also see* DR Partners v. Board of County Commissioners, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000), *citing* Ashokan v. State, Department of Insurance, 109 Nev. 662, 668, 856 P.2d 244, 247 (1993)[*citing* United States v. Nixon, 418 U.S. 683, 710, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)] ("The public official or agency bears the burden of establishing the existence of privilege based upon confidentiality. It is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly.").

[11] Section 239.010(3) provides: "A governmental entity that has legal custody or control of a public book or record shall not deny a request made pursuant to subsection 1 to inspect or copy a public book or record on the basis that the requested public book or record contains information that is confidential if the governmental entity can redact, delete, conceal or separate the confidential information from the information included in the public book or record that is not otherwise confidential."

any written book or record which is copyrighted pursuant to federal law. (emphasis added)

5. A "public record" is defined in Nevada Administrative Code (NAC) 239.091 as "a record of a local governmental entity that is ***created, received or kept*** in the performance of a duty ***and paid for*** with public money." (emphasis added) There is no dispute that CCSD, or a school district, is encompassed within the definition of a "local governmental entity," and is subject to the requirements set forth in NRS Chapter 239 and NAC Chapter 239. *See* NRS 239.121(3).

6. While a "public record" generally must be open to inspection at all times by the general public, there is an exception for records that are considered "confidential." *See* NRS 239.010(1). Such exceptions include, but are not limited to:

a. *Student educational records*, as set forth by NRS 392.029, Title 20 U.S.C. §1232(g) (Family Educational Rights and Privacy Act) and 34 C.F.R. Part 99;

b. *Employment records,* as indicated in NRS 386.365 and Clark County School District Regulation 1212;

c. *Person's identifying information contained within the public record,* as noted in NRS 239.0105;

d. *Attorney-client privileged communications,* indicated in NRS 49.095;[12]

e. *Psychologist and patient communications,* NRS 49.207;

[12] *See* NRS 49.115 for exceptions.

f. *Doctor and patient communications,* NRS 49.215;

g. *Marriage and family therapist and client communications,* NRS 49.246;

h. *Social worker and client communications,* NRS 49.252;

i. *Victim's advocate and victim communications,* NRS 49.2546;

j. *Counselor and pupil communications,* NRS 49.290;

k. *Teacher and pupil communications,* NRS 49.291; and

l. *Confidential information communicated to public officer when public interests would suffer by disclosure,* set forth in NRS 49.285.

Unless a statute provides an absolute privilege against disclosure, the burden of establishing the application of a privilege based upon confidentiality can be satisfied only pursuant to a balancing of interests. "In balancing the interests..., the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference....The citizen's predominant interest may be expressed in terms of the burden of proof which is applicable in this class of cases; the burden is cast upon the agency to explain why the records should not be furnished." *DR Partners,* 116 Nev. at 621, *quoting* MacEwan v. Holm, 226 Ore. 27, 359 P.2d 413, 421-22 (Ore. 1961); *also see* Donrey of Nevada v. Bradshaw, 106 Nev. 630, 635-636, 798 P.2d 144, 147-148 (1990).

7. While public records, not considered "confidential," ***must be open*** and available to MS. GRAY and the community in general, NRS 239.052

provides the governmental entity may charge a reasonable fee for providing a copy.[13] Further, there may be additional fees for transcription services or for information from a geographic information system. *See* NRS 239.053 and 239.054. Perhaps more pertinent here, NRS 239.055 provides there may be an additional fee when ***extraordinary use of personnel or technological resources is required*** by the governmental entity.[14]

8. The term "extraordinary use of personnel or technological resources" is not defined in NRS Chapter 239 (or within NRS 239.055 specifically). From a historical perspective, NRS 239.055 was enacted in 1997 through the passage of Assembly Bill (AB) 214. *See* Assembly Bill 214 of the 1997 Legislative Session. AB 214's history sheds light on the Legislature's purpose in using this term. At that time, Dale Erquiaga, Deputy Secretary of State, described an example of an "extraordinary use of a governmental entity's technological resources:

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[13]NRS 239.052(1) provides "[e]xcept as otherwise provided in this subsection, a governmental entity may charge a fee for providing a copy of a public record. Such a fee must not exceed the actual cost to the governmental entity to provide the copy of the public record unless a specific statute or regulation sets a fee that the governmental entity must charge for the copy. A governmental entity shall not charge a fee for providing a copy of a public record if a specific statute or regulation requires the governmental entity to provide the copy without charge."

[14]NRS 239.055 provides:

> 1. Except as otherwise provided in NRS 239.054 regarding information provided from a geographic information system, if a request for a copy of a public record would require a governmental entity to make extraordinary use of its personnel or technological resources, the governmental entity may, in addition to any other fee authorized pursuant to this chapter, charge a fee for such extraordinary use. Upon receiving such a request, the governmental entity shall inform the requester of the amount of the fee before preparing the requested information. The fee charged by the governmental entity must be reasonable and must be based on the cost that the governmental entity actually incurs for the extraordinary use of its personnel or technological resources. The governmental entity shall not charge such a fee if the governmental entity is not required to make extraordinary use of its personnel or technological resources to fulfill additional requests for the same information.
>
> 2. As used in this section, "technological resources" means any information, information system or information service acquired, developed, operated, maintained or otherwise used by a governmental entity.

> As an example, Mr. Erquiaga said if a person came into the Secretary of State's office and wanted a list of all corporations which had been filed pursuant to Nevada Revised Statutes (NRS), Chapter 82, a program would have to be written to pull the information out of the database—which was extraordinary use of that office's technology.

See Hearing on AB 214 Before the Assembly Committee on Government Affairs, 1997 Legislative Session 7 (March 20, 1997). To wit, the state's legislative record supports the conclusion the term "extraordinary use," as it relates to technological resources, would include the necessity of having to write a computer program for purposes of information retrieval.

Some guidance as to the intended scope of the term "extraordinary use" as it relates to an agency's personnel is found in an exchange between State Senator William Raggio and Kent Lauer, Executive Director, Nevada Press Association:

> Senator Raggio asked how Mr. Lauer would reply to Mr. Glover's concern regarding low costs of public records opening a door for nuisance behavior and tying up government. Noting although one could stop productivity of an office, the senator maintained, he did not agree with creating a disincentive to provide public information. Mr. Lauer replied a provision in the bill would provide for this situation. He recognized language stipulates requests requiring "extraordinary use of personnel" would provide the right to charge fees to cover "extraordinary use of personnel."

See Hearing on AB 214 Before the Senate Committee on Government Affairs, 1997 Legislative Session 14 (May 28, 1997). Given the aforementioned statements and concerns, it appears the authority granted a governmental entity to recover actual costs for the "extraordinary use" of personnel in retrieving and copying public records, at least in part, may have been intended to make the entity whole in responding to nuisance inquiries or any inquiry that encompasses an unusual amount of staff time.

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Public Access to CCSD TRUSTEES' Cellular Telephone Records

9. Notably, the parties' focus has been upon those cellular telephone records generated by CCSD TRUSTEES RUTH JOHNSON and LARRY MASON. MS. JOHNSON accepted a monthly stipend of $50.00 for use of her private cellular telephone in making/accepting work-related calls. MR. MASON used and still utilizes a cellular telephone supplied him by the CCSD. There is no evidence the other CCSD TRUSTEES, namely CAROLYN EDWARDS, SHIRLEY BARBER, TERRI JANISON, MARY BETH SCOW, and SHEILA MOULTON, accepted or currently accepts any public funding to reimburse them for any work-related calls conducted on their private cellular telephones. As the telephone records of all CCSD TRUSTEES, except MS. JOHNSON and MR. MASON, are not, in any way, "***created, received or kept*** in the performance of a duty ***and paid for*** with public money," such records do not fall within the definition of "public record,"[15] and thus, are not subject to the requirements of NRS 239.010. In short, this Court concludes neither MS. GRAY nor any member of the public is entitled to private cellular telephone records of CCSD TRUSTEES CAROLYN EDWARDS, SHIRLEY BARBER, TERRI JANISON, MARY BETH SCOW, and SHEILA MOULTON.[16] Summary judgment, therefore, should be granted in favor of the CCSD Defendants, pursuant to NRCP 56, with respect to the right of these Defendants not to disclose their private

[15] *See* NAC 239.091.

[16] It should be noted here that, on February 8, 1996, Congress passed the Telecommunications Act of 1996, which further protected the privacy of customer information while using their telephones. *Also see* Fred H. Cate, *Privacy and Telecommunications*, 33 Wake Forest L.Rev 1, 40 (1998). More recently, on January 12, 2007, President George W. Bush signed into law "The Telephone Records and Privacy Protection Act of 2006," which established criminal penalties for the unauthorized disclosure of telephone records.

cellular telephone records. Such is true *even though* these CCSD TRUSTEES may have made work-related calls on their private cellular telephones.

10. It is undisputed that, sometime during the period, November 2005 and November 2006, LARRY MASON was issued and utilized a publicly-provided and funded cellular telephone.[17] As this telephone was publicly-provided and funded, the records, generated as a result of MR. MASON'S use, likewise, are ***"created, received or kept*** in the performance of a duty ***and paid for*** with public money."[18] To wit, MR. MASON'S cellular telephone records are considered "public" within the definition set forth in NAC 239.091, and therefore, they are accessible to MS. GRAY and the public in general,[19] absent them falling within the exception of being confidential, private or non-public. Again, as noted above, the CCSD Defendants would have the burden of explaining why the records could not be furnished.

Here, it is this Court's understanding that, at the time MS. GRAY made her initial request (early November 2006), MR. MASON'S cellular telephone had "recently" been issued, whereby records/billings had not yet been received by the school district from the telephone company and thus, they were not then available. This situation was not a matter of CCSD refusing MS. GRAY access to MR.

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[17]As noted above and shown in Affidavit of CINDY KROHN, attached as Exhibit D to CCSD'S Motion for Summary Judgment filed August 15, 2008, MR. MASON was "recently" issued a CCSD cellular telephone at the time she responded to MS. GRAY on November 17, 2006.

[18]NAC 239.091.

[19]*See* DR Partners v. Board of County Commissioners, 116 Nev. 616; *also see* City of Elkhart v. Agenda: Open Government, Inc., 683 N.E.2d 622 (Ind.Ct.App. 1997); PG Publishing Company v. County of Washington, 638 A.2d 422 (Pa.Commwealth 1994); Dortch v. Atlanta Journal and Atlanta Constitution, 261 Ga.350, 405 S.E.2d 43 (1991)(cellular bills of governmental officials using publicly funded phones were not exempted from Georgia's Open Records Act, Ga. Code Annot. §50-18-70, *et seq.*);

MASON'S cellular telephone records. CCSD cannot accord MS. GRAY information/documents it did not then possess or have access. Shortly after November 2006, MR. MASON'S cellular records were received by CCSD, and then provided to MS. GRAY at no cost. As MS. GRAY has been provided access to MR. MASON'S cellular telephone records as she requested, such matter is now moot.[20]

11. With respect to records relating to CCSD TRUSTEE JOHNSON'S telephone use, MS. GRAY provided this Court no case law or other authority supporting the proposition a public official's personal cellular use automatically became a matter of public record, open to review and scrutiny by the community, when the bureaucrat is partially reimbursed by a governmental entity. This Court's research likewise produced no such case law, statute or other authority.

To fall within the definition of "public record," as set forth in NAC 239.091, the Code requires the particular documentation be ***created, received*** or ***kept*** in the performance of the official's duty ***and*** it be paid for with public money. Although MS. JOHNSON was reimbursed $50.00 monthly for use of her personal telephone for work-related calls, the school district did not create,

[20]Normally, a controversy must be live through all stages of the proceeding. *See* University and Community College System of Nevada, et al. v. Nevadans for Sound Government, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004), *citing* Arizonans for Official English v. Arizona, 520 U.S. 43, 67, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997). "The duty of every judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it. *Id., citing* NCAA v. University of Nevada, 97 Nev. 56, 57, 624 P.2d 10 (1981). However, when a matter becomes moot because of a subsequent event, the Court may determine the matter is capable of repetition, yet evading review. *University and Community College System of Nevada,* 120 Nev. at 720, *citing* Traffic Control Services v. United Rentals, 120 Nev. 168, 171-172, 87 P.3d 1054, 1057 (2004). There was nothing suggested by MS. GRAY or the CCSD Defendants that access to MR. MASON'S public cellular telephone records would be impeded in the future, or that this particular controversy would be repeated.

receive or keep records of her use.[21] As CCSD did not create, receive or keep the records, this Court concludes MS. JOHNSON'S personal cellular telephone records do not come within "public record" definition, and therefore, do not fall within the purview of open review and scrutiny by MS. GRAY or the public in general. Summary judgment, therefore, should be granted in favor of the CCSD Defendants, pursuant to NRCP 56, with respect to CCSD having no obligation to accord MS. GRAY or the public access to MS. JOHNSON'S private cellular records, inasmuch as it did not create, receive or keep them.

Public Access to CCSD Policies/Procedures Re: Holding/Managing Electronic Files

12. On April 12, 2007, MS. GRAY requested, *in writing,* from CCSD the following policies, procedures or protocol:

a. Establishing repository for holding and managing electronic files;

b. Ensuring that metadata information contained within the e-mail transmission is included in the public records (i.e. headers, forward headers and transmission data);

c. That address the ability to efficiently locate specific files when necessary; and

d. That ensure public records remain fully accessible throughout the entire records retention period.

See Exhibit H to CCSD'S Motion for Summary Judgment.

[21] As CCSD did not create, receive or keep such records, it had nothing to produce to MS. GRAY or the community with respect to information/documentation relating to MS. JOHNSON'S personal cellular telephone use.

13. The evidence adduced from the parties' papers and at the hearing indicates CCSD provided MS. GRAY its policies, procedures or protocol establishing repository for holding and managing electronic files via a copy of the District Regulation §§3620 (Retention of Records) and 3621 (Records Retention Schedule) on April 26, 2007.[22] In response to the second request identified above, CCSD, by CINDY KROHN'S April 26, 2007 letter, informed MS. GRAY that each message or e-mail transmission on the InterAct or CCSD computer system contains the header information (sender, date, time and recipient) as part of the message; presumably, such e-mails remain archived on the computer system as long as the computer's hardware and software exists.[23] With respect to MS. GRAY'S third request, CCSD, again via MS. KROHN'S April 26, 2007 letter, indicated specific e-mails or files could be located by the "Find" feature on the InterAct system. "The 'Find' feature on InterAct permits the user to search the messages by the sender, recipient, date attachment name, or text contained the body of the message." MS. GRAY'S fourth request identified above was answered by CCSD:

> The ability to locate and/or retrieve any specific record or file depends on several factors that include, but are not limited to, the age and design of the system, the amount of information on which to base the search, and the date of the data.

Public Access to CCSD TRUSTEES' Electronic Mails

14. CCSD concedes communications or e-mails generated by CCSD TRUSTEES, utilizing InterAct or other school district computer or e-mail system,

[22]Such documentation encompassed 20 pages.

[23]Exhibit I of CCSD'S Motion for Summary Judgment did not indicate how long electronic mail is kept or maintained.

fall within the definition of "public record," and thus, absent issues of confidentiality or privilege, such documentation/information is open to review by the public. However, CCSD proposes e-mails generated by the trustees containing confidential or privileged information fall within the exception to open disclosure to the public. Further, from a technological resource perspective, it claims it would take some extraordinary effort to (1) retrieve e-mails sent or received by CCSD TRUSTEES during the requested one-year period (November 2005 to November 2006), separate them from e-mails generated by or to the other thousands of CCSD employees, (2) review the retrieved e-mails to ensure they do not contain confidential, privileged or other non-public information, and (3) redact any confidential or privileged information that may be found within the trustees' e-mails. According to CCSD, such e-mail retrieval/separation, review and possible redaction would consume "extraordinary use of personnel and technological resources," whereby it seeks to be reimbursed for such expenses. It anticipates the cost of the extraordinary use of school district resources to be over $4,000 for retrieval, review and possible redaction of e-mails generated over the requested one-year period.[24]

15. With respect to retrieval/separation of the CCSD TRUSTEES' e-mails from those generated by other CCSD personnel, CCSD has admitted specific e-mails or files can be located by the "Find" feature on the InterAct system. The 'Find' feature on InterAct permits the user to search the messages by the sender, recipient, date attachment name, or text contained the body of the

[24]See Affidavits of CINDY KROHN and DAN WRAY, attached as Exhibits D and F, respectively, to CCSD'S Motion for Summary Judgment filed August 15, 2008.

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message. Further, such e-mails remain archived on the school district's computer system as long as the computer's hardware and software exists.[25] Inasmuch as the e-mails of each school board trustee can be located by a simple search utilizing the "Find" feature, it is difficult to perceive why extraordinary use of personal or technological resources is required, or that the cost is $1,800.00 (30 hours @ $60.00 per hour for a technology department staff member) to retrieve/separate such records over a one-year period would be incurred. If anything, taking the CCSD'S position in its papers as true, the actual retrieval/separation of all e-mails generated by seven (7) school board trustees should expend little of the technology staff's time in making a few computer key strokes. With that said, the Court is not making a finding that extraordinary use of personal or technological resources would not be required as CCSD claims. This Court will hold an evidentiary hearing prior to the upcoming 2009 Nevada Legislative session to allow CCSD to present further testimony and an explanation from its technology department staff as to why at least 30 hours to retrieve e-mails generated over a one-year period needs to be expended. *See infra.*

16. With respect to CCSD'S review for and possible redaction of confidential information, this Court first notes the Nevada Legislature's intent in 1997, when NRS Chapter 239 was enacted, was to ensure openness of its records, and not create disincentives by the governmental entity to provide public information.[26] While NRS 239.055 was enacted to reimburse the local

[25]See Affidavits of CINDY KROHN and DAN WRAY, attached as Exhibits D and F, respectively, to CCSD'S Motion for Summary Judgment filed August 15, 2008.

[26]*See* Hearing on AB 214 Before the Senate Committee on Government Affairs, 1997 Legislative Session 14 (May 28, 1997).

governmental entity where public record requests require extraordinary use of personal or technological resources for retrieval, there is nothing contained within that statute to suggest a citizen, such as MS. GRAY, should bear the costs of the entity's review for and redaction of what it may claim to be confidential or privileged material. Given the balance between the citizen's fundamental and predominant interest to have public records access, and the governmental entity's interest to be free from unreasonable interference, it is evident CCSD must be the party to first explain what records, if any, are confidential or privileged, and then why they should not be furnished. To wit, it is not MS. GRAY'S burden to bear the expense to determine what public records she seeks may be confidential. Once she makes a request for public records, it is the governmental entity's burden to produce the record or explain why it is not furnished. In short, if CCSD believes certain e-mails generated by its school trustees contain confidential information, it is the one who should bear the expense of review and redaction, if any, as well as provide MS. GRAY an explanation as to why the public record will not be produced. Plaintiff KAREN GRAY'S Counter-Motion for Summary Judgment, therefore, is granted with respect to CCSD'S request for anticipated costs of "extraordinary use of personnel and technology resources" to review the e-mails for and redaction of confidential information.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED Defendants' Motion for Summary Judgment filed August 15, 2008 is granted in part, and denied in part, as set forth more fully above and below;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's Counter-Motion for Summary Judgment filed September 9, 2008 is granted in part, and denied in part, as set forth more fully above and below;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff KAREN GRAY is entitled to publicly provided or funded cellular telephone records generated by CCSD TRUSTEE LARRY MASON'S use from the time he was provided the cellular telephone, and records were created, received or kept by Defendant CCSD. Again, it is this Court's understanding MS. GRAY was afforded such documentation, whereby such issue of production now is moot;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff KAREN GRAY is not entitled to any records generated by CCSD RUTH JOHNSON'S use of her private or personal cellular telephone as they were created, received or kept by Defendant CCSD. As noted above, the definition of "public record" requires that it be created, received or kept *and* paid for by the governmental entity;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff KAREN GRAY is not entitled to any records generated by the other CCSD SCHOOL TRUSTEES' use of their private or personal cellular telephones as they were not created, received or kept, or paid for by Defendant CCSD. Such records do not fall within the definition of "public record;"

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT TWENTY TWO
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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, as Defendant CCSD provided Plaintiff KAREN GRAY the following information/documentation:

a. Establishing repository for holding and managing electronic files;

b. Ensuring that metadata information contained within the e-mail transmission is included in the public records (i.e. headers, forward headers and transmission data);

c. That address the ability to efficiently locate specific files when necessary; and

d. That ensure public records remain fully accessible throughout the entire records retention period,

the production is no longer at issue, and the question now is moot;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff KAREN GRAY should not be charged an additional fee for "extraordinary use of personal or technological resources" where Defendant CCSD finds it necessary to review and possibly redact public records sought for confidential information;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court shall take additional evidence and testimony from Defendants regarding the necessity of expending of extraordinary use of personal or technological resources

. . .

to retrieve/separate the e-mails generated by CCSD TRUSTEES during the period sought, as well as the extent of the cost thereof, on **Friday, January 23, 2009, at 9:00 a.m.**

DATED this 6th day of January 2009.

SUSAN H. JOHNSON, DISTRICT COURT JUDGE

CERTIFICATE

I hereby certify that on the date filed, I either placed within the attorney's folder with the Court Clerk's Office, or mailed a true and correct copy of the foregoing ORDER to the following counsel of record, and that first-class postage was fully prepaid thereon:

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