


CLERK OF THE COURT

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7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 NEVADA POLICY RESEARCH INSTITUTE, INC.,) Case No. A-13-679114-C
Plaintiff,) Dept. No. VIII
10 vs.)
11 CLARK COUNTY SCHOOL DISTRICT, a political)
subdivision of the State of Nevada; THE)
12 NEVADA PUBLIC EDUCATION FOUNDATION; and)
THE PUBLIC EDUCATION FOUNDATION,)
13 Defendants.)
14)

15
16 **REPLY IN SUPPORT OF DEFENDANT**
CLARK COUNTY SCHOOL DISTRICT’S MOTION TO DISMISS

17 CCSD maintains a database of teacher email addresses to both ensure efficient school
18 district administration and encourage meaningful teacher-parent dialogue. Plaintiff seeks to
19 usurp this government tool for its own self-interested ends, masking its request for the
20 teacher email database under the guise of “open government.” Ironically, however,
21 plaintiff’s request, if granted by this Court, will only undermine open government by
22 allowing plaintiff (and anyone else who requests the database) to abuse CCSD’s Interact®
23 email system. Government email databases are not a megaphone for advertisements,
24 commercial or political—all paid for at the government and taxpayers’ expense. Meanwhile,
25 teachers and the citizens they serve will lose an important communication tool.

26 Fortunately, Nevada law does not sanction plaintiff’s position. As set forth in
27 CCSD’s motion and reply below, NRS 239B.040 unequivocally provides that a government-
28 maintained email database, such as the teacher email database requested by plaintiff here, is

1 confidential, not a public record, and may not be disclosed in a single unit. And the common
2 law balancing test set forth in *Donrey of Nevada v. Bradshaw* likewise bars plaintiff's
3 request because CCSD's interest in nondisclosure of its teacher email database clearly
4 outweighs the public's interest in disclosure. Indeed, CCSD's interest in nondisclosure is
5 actually aligned with the public's interest in open government communication: CCSD's
6 refusal to disclose its entire teacher email database prevents inevitable email abuse and
7 ensures the efficient and effective use of Interact® as a valuable resource for dialogue
8 between Nevada parents, students, and teachers.

9 Accordingly, for the reasons discussed in CCSD's motion and this reply, plaintiff's
10 complaint—based solely on CCSD's denial of its public records request for the entire
11 database of teacher email addresses—cannot state a claim under Nevada law and must be
12 dismissed. See NRCP 12(b)(5).

13 **I.**

14 **EXHIBITS AND ALLEGATIONS NOT CONTAINED IN THE COMPLAINT**
15 **CANNOT SAVE PLAINTIFF'S DEFICIENT PLEADING FROM DISMISSAL**

16 CCSD has moved, under Nevada Rule of Civil Procedure 12(b)(5), to dismiss
17 plaintiff's complaint. Accordingly, the Court can accept as true and consider only the
18 complaint's allegations, not extraneous exhibits and belated factual assertions improperly
19 referenced throughout plaintiff's opposition. See, e.g., *Sanchez v. Wal-Mart Stores*, 125
20 Nev. 818, 823, 221 P.3d 1276, 1280 (2009); *Stockmeier v. Nevada Dept. of Corrections*, 124
21 Nev. 313, 183 P.3d 133, 135 (2008).

22 The Court cannot consider, for example, plaintiff's other purportedly denied record
23 requests to CCSD or other school districts' decisions to provide teacher email addresses to
24 plaintiffs. These requests are not before the Court in this action, let alone in this motion to
25 dismiss, and plaintiff's apparent position—that CCSD should just copy the (erroneous)
26 decisions of other school districts and provide it with the database of teacher email
27 addresses, rather than abide by Nevada statutory law—clearly lacks merit.

28 Simply stated, plaintiff cannot save its defective complaint by making new factual

1 assertions in its opposition to CCSD’s motion. Because the complaint’s allegations fail to
2 state a claim, this lawsuit must be dismissed.

3 **II.**

4 **PLAINTIFF IS NOT ENTITLED TO REWRITE NRS 239B.040**

5 NRS 239B.040 explicitly provides that email address databases maintained by the
6 government (1) are confidential, (2) are not a public record, and (3) must not be disclosed as
7 a single unit. NRS 239B.040(1)(b). To overcome this clear bar to its public records request
8 for a database of all Clark County teacher email addresses, plaintiff tries, without authority,
9 to rewrite the statute and add an exception for government-issued email addresses.

10 Nothing in NRS 239B.040 suggests that it applies to only “private,” presumably non-
11 government email addresses, however. Contra Opp’n at 6:14-18 (arguing, without support,
12 that NRS 239B.040 “was enacted to protect those who interact [with] and provide private
13 information to a governmental entity” and does not apply to “email addresses generated by
14 the government itself” (emphasis added)). While plaintiff apparently misreads Chapter
15 239B’s reference to “personal information” to mean “private information,” the terms are not
16 synonyms. Teachers (and other government employees) are people, too, and the government
17 may provide them each with an individual, “personal” government-issued email address.
18 The mere fact that a teacher communicates with CCSD, a governmental entity, with his or
19 her personal work email address—and CCSD in turn maintains a database of these personal
20 teacher email addresses—does not render NRS 239B.040 inapplicable.¹

21 On the contrary, the statute’s mandate is clear: An electronic mail database
22 maintained by the government is confidential, not a public record, and cannot be disclosed.
23 The Court cannot look beyond this plain statutory language. “[T]here is no room for

24
25 ¹ Moreover, plaintiff’s inability to locate legal authority regarding this issue is not surprising. The
26 statute’s unequivocal language and clear purpose minimizes the likelihood that a plaintiff would
27 attempt to challenge the statute’s applicability by initiating a legal proceeding (let alone appealing
28 the issue after losing). Nonetheless, despite plaintiff’s inabilities, such cases do exist. E.g., Office of
Lietutenant Governor v. Mohn, __ A.3d __, 2013 WL 1749552 (Pa. Apr. 24, 2013) (reversing
agency’s decision to disclose agency-issued email addresses for public official).

1 construction, and the courts are not permitted to search for its meaning beyond the statute
2 itself.” Erwin v. State, 111 Nev. 1535, 1538-39, 908 P.2d 1367, 1369 (1995) (internal
3 quotations omitted).² The Court must apply NRS 239B.040 as the statute is written and
4 dismiss plaintiff’s request for a database of email addresses.

5 Even if there could be any doubts about the applicability of NRS 239B.040 to
6 plaintiff’s request for an email database (there cannot be), the legislative history confirms
7 that the Legislature enacted this provision “to prevent spammers or similar types of activities
8 from requesting databases of emails for purposes of spamming or phishing, et cetera.” Hr’g
9 Mins., Assembly Comm. Gov’t Affairs, p. 5 (Mar. 31, 2005) (A.B. 188, the bill enacting
10 NRS 239B.040, passed unanimously). And while legislative testimony predictably focused
11 on citizens, nothing indicates that the Legislature intended the law to fall short of protecting
12 Nevada citizens who happen to have a government-issued email address. Indeed, just like
13 spammers and phishers, NRS 239B.040 makes no distinction between private and
14 government email address databases:

15 **Anyone with an email inbox** knows the frustration of opening Microsoft Outlook,
16 only to find their inbox containing various offers for the latest wonder drug or the
17 most incredibly low mortgage interest rates. In researching this issue, we have found
18 several claims that **a verified email address**, which is what we are talking about when
19 we collect email addresses, is worth anywhere from \$7 to \$12 and can be sold many
20 times over to Internet spammers. In our situation, you can imagine the value of these
21 large lists of citizen email addresses to Internet spammers. **We want to remove these
22 email address lists from this market.**

23 Hr’g Mins., Assembly Comm. Gov’t Affairs, p. 8 (Mar. 23, 2005) (testimony of John
24 Slaughter, Office of the County Manager, Washoe County) (emphasis added). Thus, the
25 legislative history further underscores NRS 239B.040’s plain prohibition against the

26 ² See also In re Estate of Melton, 128 Nev. Adv. Op. No. 4, 272 P.3d 668, 671 (2012) (trial court
27 erred when it failed to apply statutory provision abolishing common law rules); Cramer v. State,
28 DMV, 126 Nev. Adv. Op. No. 38, 240 P.3d 8, 13 (2010) (administrative law judge abused its
discretion by admitting an expert’s affidavit that disregarded plain statutory requirements);
Richardson Const., Inc. v. Clark Cnty. Sch. Dist., 123 Nev. 61, 64, 156 P.3d 21, 23 (2007) (when
construing a statute, the court “may look no further than any unambiguous, plain statutory
language”); Towbin Dodge, LLC v. Eighth Judicial Dist. Court of State ex rel. Cnty. of Clark, 121
Nev. 251, 253, 112 P.3d 1063, 1065 (2005) (holding statute “must be enforced as written”).

1 disclosure of email databases, such as the email database requested by plaintiff in this action.

2 Plaintiff's unsupported (and unsupportable) attempt to rewrite NRS 239B.040 must be
3 disregarded. The statute unequivocally provides that government-maintained email
4 addresses are confidential, not public records, and "must not be disclosed in its entirety in a
5 single unit." Accordingly, CCSD properly rejected plaintiff's improper request for a
6 database of personal teacher email addresses, and plaintiff's complaint fails to state claim.

7 **III.**

8 **THE INTEREST IN NONDISCLOSURE CLEARLY OUTWEIGHS**
9 **PLAINTIFF'S INTEREST IN ACCESS TO THE REQUESTED EMAIL DATABASE**

10 Not only must the Court dismiss plaintiff's complaint in light of the plain language of
11 NRS 239B.040, but the *Donrey of Nevada v. Bradshaw* balancing test likewise weighs
12 heavily against disclosure in this case. Plaintiff's argument to the contrary is flawed for
13 several reasons.

14 **A. Non-Disclosure of the Entire Email Database**
15 **Does Not Undermine Open Government.**

16 Despite plaintiff's misplaced rhetoric about "transparent government" and the
17 public's ability to "communicat[e] therewith," Opp'n at 10:12-14, CCSD's decision to abide
18 by NRS 239B.040 and refuse to disclose its email database does not undermine the Nevada
19 Public Records Act's emphasis on open government. Clark County schools and teachers
20 routinely provide email contact information to parents and students to enable and encourage
21 communication between teachers and the public citizens they serve.

22 Indeed, CCSD is not hiding information or attempting to restrict public access. On
23 the contrary, its decision to follow the Legislature's pronouncement contained in NRS
24 239B.040 and refuse to disclose its email database strikes an appropriate balance between
25 government transparency and efficiency: It permits citizen-teacher dialogue while ensuring
26 that CCSD's limited resources are appropriately dedicated to public education, not spam and
27 propaganda. Such a compromise is consistent with Nevada law. See, e.g., *Reno Newspapers*
28 *v. Sheriff*, 126 Nev. Adv. Op. No. 23, 234 P.3d 922, 927-28 (2010) (requiring disclosure of

1 documents, but permitting redaction of certain information).

2 Plaintiff's position, in contrast, would make Interact® inboxes nothing more than an
3 electronic dumping ground of propaganda and ads for, among other things, "the latest
4 wonder drug or the most incredibly low mortgage interest rates." See supra at Sec. II. Thus,
5 far from promoting open government, public disclosure of the entire email database will only
6 have the opposite effect—it will completely diminish Interact's® utility as a tool for
7 meaningful teacher-citizen discourse.

8 Plaintiff uses open government "buzzwords," but it completely fails to explain how
9 public access is actually restricted under CCSD's balanced approach to disclosure. Clearly,
10 the public's interest in an entire database of teacher email addresses is minimal as teacher
11 contact information is available to parents and students.

12 **B. CCSD Can Take Steps to Prevent Abuse of**
13 **Its Interact® Email System Notwithstanding the Existence**
14 **of Statutes Designed to Punish Such Abuse After It Occurs.**

15 Plaintiff cites to NRS 41.725-.730 (providing civil damages for certain email
16 advertisements) and NRS 205.492 (criminalizing certain instances of email misconduct) in
17 an attempt to undermine CCSD concerns over email abuse. Plaintiff's argument is
18 nonsensical. It apparently expects CCSD to facilitate such email abuse by providing its
19 entire email database to anyone who requests it and then either (1) incur significant legal
20 fees and costs (at taxpayer expense, no less) to bring a civil action against the often unknown
21 senders of spam and malware, or (2) sit idly by and wait for the district attorney or attorney
22 general to prosecute. The mere existence of statutes designed to punish email abuse that has
23 already occurred does not mean that CCSD cannot take proactive steps to avoid such abuse
24 in the first place.

25 On the contrary, the statutes cited by plaintiff only support CCSD's position by
26 demonstrating that email abuse is a legitimate concern. If it was not, there would be no need
27 for the statutes in the first place.
28

1 **C. Plaintiff Ignores the Big-Picture Ramifications of Its Request.**

2 Plaintiff also ignores the obvious point that if CCSD provides its entire email database
3 to plaintiff, CCSD will have to provide the email database to every other person—including
4 hackers, internet marketing companies, and any other commercial entity—who requests it.
5 Thus, even if the Court could somehow accept plaintiff’s unpled assertion that “releasing the
6 directory to plaintiff should not further burden the school district,” Opp’n at 14:11 (emphasis
7 added), plaintiff’s argument does nothing to counter CCSD’s legitimate concern that
8 disclosing the entire teacher database to plaintiff and anyone and everyone else who requests
9 it will lead to an influx of spam email and the inevitable waste of taxpayer resources. The
10 government (and therefore Nevada taxpayers) will be required to foot the bill for additional
11 server space and spam- and virus-monitoring for the district’s thousands of employees, rather
12 than allocate the funds to Nevada’s education system. Similarly, teachers will spend time
13 and energy weeding through their Interact® email inboxes, rather than focusing on students.
14 Meanwhile, Nevada citizens will experience a negligible (if any) improvement in
15 government access because, as noted above, teacher email address are already provided to
16 the parents and students they serve.

17 While plaintiff may be able to ignore the big-picture implications of its request,
18 CCSD and the Court cannot. CCSD’s interest in preventing the abuse of taxpayer and
19 teacher resources far outweighs the public’s minimal interest in obtaining an entire email
20 database.

21 **IV.**

22 **CONCLUSION**

23 Plaintiff, in its opposition, impermissibly seeks to rewrite NRS 239B.040. It further
24 ignores that: (1) the non-disclosure of the entire email address database is a minimal
25 restriction on the public’s access to government and is necessary to prevent email abuse that,
26 in turn, would completely thwart Interact’s® utility as a tool to communicate with Nevada
27 parents and students; (2) CCSD should be permitted (and, indeed, encouraged) to take
28 proactive steps to prevent abuse of the Interact® email system; and (3) CCSD’s response to

1 plaintiff's request has big-picture ramifications that must be considered. As set forth above,
2 CCSD is not only precluded from disclosing the database of personal teacher email addresses
3 by the plain, unambiguous language of NRS 239B.040, but CCSD's interest in nondisclosure
4 clearly outweighs any marginal benefits to the public's interest in disclosure in this limited
5 circumstance. Plaintiff's complaint consequently fails to state a claim—an issue that
6 plaintiff cannot remedy by relying on extraneous unpled assertions and materials in its
7 opposition. Accordingly, plaintiff's complaint must be dismissed.

8 DATED this 25th day of June 2013.

9 LEWIS AND ROCA LLP

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1 CERTIFICATE OF SERVICE

2 Pursuant to Nev. R. Civ. P. 5(b), I HEREBY CERTIFY that on the 25th of June, 2013, I
3 served the foregoing REPLY IN SUPPORT OF DEFENDANT CLARK COUNTY SCHOOL
4 DISTRICT'S MOTION TO DISMISS by depositing a copy for mailing, first-class mail, postage
5 prepaid, at Las Vegas, Nevada, to the following:

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