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DISTRICT COURT
CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH
INSTITUTE, INC.,

Plaintiff,

v.

CLARK COUNTY SCHOOL DISTRICT, a
political subdivision of the State of Nevada;
THE NEVADA PUBLIC EDUCATION
FOUNDATION; and THE PUBLIC
EDUCATION FOUNDATION,

Defendants.

CASE NO: A-13-679114-C
DEPT. NO.: VIII

**ORDER GRANTING DEFENDANT CLARK
COUNTY SCHOOL DISTRICT'S MOTION
TO DISMISS**

Defendant Clark County School District's ("CCSD") Motion to Dismiss came for hearing before the Court on the 2nd of July, 2013. Having considered the arguments of counsel and examined the motion, opposition, and the other papers on file in the above-entitled matter, the Court accepts as true, for purposes of this NRCPC 12(b)(5) motion to

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DOUGLAS E. SMITH
DISTRICT JUDGE

DEPARTMENT EIGHT
LAS VEGAS NV 89155

1 dismiss only, the following factual allegations contained in Plaintiff Nevada Policy Research
2 Institute, Inc.'s ("NPRI") Complaint¹ or to which NPRI has otherwise conceded:

3 1. NPRI is a "think tank" focused on education and fiscal policy. It "informs
4 the public and often testifies before legislative committees regarding actions and activities of
5 the State of Nevada and its political subdivisions." (Compl. ¶ 3.)

6 2. CCSD is a political subdivision of the State of Nevada. (Compl. ¶ 4.)

7 3. CCSD possesses an email directory of CCSD teachers. (Id.)

8 4. NPRI requested from CCSD the entire email directory of more than 17,000
9 CCSD teacher email addresses. (See Compl. ¶¶ 11, 17.) NPRI did not request any
10 particular email records or any particular email address(es). (See Ex. 6 to Compl.)

11 5. NPRI maintains that individual teacher email addresses are already publicly
12 available.

13 6. CCSD denied NPRI's public records request for the entire teacher email
14 directory. (See Compl. ¶¶ 12, 18.)

15 7. NPRI has conceded that, once the teacher email database is disclosed, there is
16 nothing to restrict how NPRI may use the database. NPRI further conceded that, upon
17 disclosure, it could sell the database to internet spammers and phishers, among others.

18 The Court, for good cause appearing, further makes the following CONCLUSIONS
19 OF LAW:

20 8. The Nevada Public Records Act, NRS 239.001 et seq., was enacted to "foster
21 democratic principles by providing members of the public with access to inspect and copy
22 public books and records to the extent permitted by law," NRS 239.001(1), and to "promote
23 government transparency and accountability," Reno Newspapers, Inc. v. Gibbons, 127 Nev.
24 Adv. Op. No. 79, 266 P.3d 623, 626 (2011). While the Nevada Public Records Act must be

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26 ¹ Under NRCF 12(b)(5), when all factual allegations are accepted as true and all reasonable inferences are
27 drawn in plaintiff's favor, "the allegations must be legally sufficient to constitute the elements of the claim
28 asserted." Sanchez v. Wal-Mart Stores, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009). "Dismissal is proper
where the allegations are insufficient to establish the elements of a claim for relief." Stockmeier v. Nev. Dept.

(continued)

1 construed liberally to carry out its purpose, NRS 239.001(2); see also NRS 239.001(3)
2 (“exemptions, exceptions or balancing of interests” that restrict public disclosure must be
3 construed narrowly), the law explicitly excludes from disclosure public books and public
4 records that are declared by law to be confidential, NRS 239.010(1).

5 9. Section 239.010 requires the government to provide, for inspection and/or
6 copying, “all public books and public records of a governmental entity, the contents of
7 which are not otherwise declared by law to be confidential.” NRS 239.010(1).
8 Accordingly, the Court first must determine whether a request seeks a “public book or
9 record.” If the request does so, the Court then must determine whether the requested public
10 book or public record is confidential and, therefore, not subject to disclosure.

11 **I. The Requested Email Database Is Not a Public Book or a Public Record**

12 10. Whether information constitutes a public book or record required to be
13 disclosed under the Nevada Public Records Act is a legal question for the Court to
14 determine. E.g., Reno Newspapers, Inc. v. Gibbons, 127 Nev. Adv. Op. No. 79, 266 P.3d
15 623, 631 (2011) (district court must determine whether requested information is subject to
16 disclosure); Reno Newspapers, Inc. v. Sheriff, 126 Nev. Adv. Op. No. 23, 234 P.3d 922, 928
17 (2010) (same); see also Richardson Const., Inc. v. Clark Cnty. Sch. Dist., 123 Nev. 61, 64,
18 156 P.3d 21, 23 (2007) (“Statutory construction is a question of law that this court reviews
19 de novo.”).

20 11. Chapter 239 of the Nevada Revised Statutes does not define “public book” or
21 “public record.” See generally NRS 239.001 et seq. The Nevada Administrative Code
22 defines “public record” as “a record of a local governmental entity that is created, received
23 or kept in the performance of a duty and paid for with public money.” NAC 239.091.
24 “Record of a local governmental entity” is, in turn, defined as

25 information that is created or received pursuant to a law or ordinance, or in
26 connection with the transaction of the official business of any office or
27 department of a local governmental entity, including, without limitation, all
documents, papers, letters, unpublished books, maps, charts, blueprints,

28 of Corrections, 124 Nev. 313, 183 P.3d 133, 135 (2008) (internal quotations omitted).

1 drawings, photographs, films, computer printouts, newspapers received
2 pursuant to NRS 247.070, artifacts entered as exhibits in any proceeding in
3 any court, information stored on a magnetic tape, computer, laser disc or
4 optical disc, or any material which is capable of being read by a machine,
including microforms and audio and visual materials, and any other evidence,
including all copies thereof.

5 NAC 239.101. The Nevada Administrative Code also defines a “nonrecord” to include
6 “worksheets used to collect or compile data after it has been included in a record.” NAC
7 239.051.

8 12. NPRI’s request for CCSD’s entire teacher email database does not appear to
9 seek a public record. Unlike, for example, an actual email or other document, the requested
10 database does not reflect information created or received as part of CCSD’s official business
11 or other “vital information about governmental activities.” DR Partners v. Bd. of Cnty.
12 Comm’rs, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000); cf. Rogers v. Hood, 906 So.2d 1220
13 (Fla. App. 2005) (holding unused ballots are not public records because they do not
14 “perpetuate, communicate, or formalize” knowledge); SDC Dev. Corp. v. Mathews, 542
15 F.2d 1116, 1120 (9th Cir. 1976) (denying public records request for computer databank of
16 medical library materials, stating: “The agency is seeking to protect not its information, but
17 rather its system for delivering that information.”).

18 13. Rather, the email database is part of CCSD’s communication infrastructure –
19 it is, in effect, a virtual loudspeaker that enables CCSD to communicate with all its
20 employees simultaneously. NPRI’s admission that it already has access to email addresses
21 on an individual basis, but nonetheless requires the entire database, underscores the
22 conclusion that its request is one for a communication device or method, not a record. And
23 the mere fact that this intangible communication method is electronically stored or could be
24 reduced to a written form does not automatically render it a “public book” or “public record”
25 subject to disclosure. See, e.g., State ex rel. McCleary v. Roberts, 725 N.E.2d 1144, 1148
26 (Ohio 2000) (holding information regarding citizens was not a public record despite the fact
27 it was “obtained by a ‘public office,’ reduced to writing and placed in record form and used
28 by the public office in implementing some lawful, regulatory policy”); 76 C.J.S. Records § 1

1 (“[T]he mere fact that a document is made by a public officer, is deposited or filed in a
2 public office, or with a public officer, or is in custody of a public officer, does not
3 automatically make it a public record.”).

4 14. Moreover, the requested database also falls within the definition of a
5 nonrecord, as it is nothing more than an electronic “worksheet” that collects and compiles
6 data, i.e., the individual teacher email addresses. NAC 239.051.

7 15. Accordingly, Plaintiff’s complaint fails to state a claim because the requested
8 email database is not a “public book” or “public record” that CCSD is required to publicly
9 disclose pursuant to the Nevada Public Records Act.²

10 **II. The Requested Email Database Is Confidential**

11 16. To determine whether a public book or a public record is confidential and,
12 therefore, not subject to disclosure, the following two-part framework applies: First, the
13 state entity must prove, by a preponderance of the evidence, that a statutory provision
14 declares the requested records to be confidential. Reno Newspapers, Inc. v. Gibbons, 127
15 Nev. Adv. Op. 79, 266 P.3d 623, 628 (2011). Next, if there is no statutory provision on
16 point, the Court must perform a “broad balance of the interests involved.” Id. (internal
17 quotation marks omitted). The state entity bears the burden of establishing “its interest in
18 nondisclosure clearly outweighs the public’s interest in access.” Id.

19 17. As set explained below, the requested email database is confidential pursuant
20 to both Nevada statute and the broad balance of interests involved.

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24 ² The Court is aware that a government entity bears the burden of establishing a “public book or record” is
25 confidential. NRS 239.0113; see also NRS 239.001(1)-(2) (statute should be liberally construed to carry out
26 purpose of providing “the public with access to inspect and copy public books and records” (emphasis added)).
27 The Nevada Public Records Act does not address who bears the burden of establishing whether a request seeks
28 a “public book or record” in the first instance, however. Even when the Court assumes, for purposes of this
motion only, that CCSD bears the burden, the Court concludes that CCSD has satisfied it. Briefing and oral
argument demonstrate that NPRI seeks the infrastructure for government communication through its request

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A. **The Requested Database Is Confidential Under NRS 239B.040**

18. Even if the Court were to assume the requested database of teacher email addresses was a public record, the database is explicitly “declared by [NRS 239B.040] to be confidential.” See NRS 239.010(1). This is an independent basis for dismissal of NPRI’s complaint.³

19. Chapter 239B of the Nevada Revised Statutes states, in relevant part:

NRS 239B.040 Databases containing electronic mail addresses or telephone numbers of certain persons; use of information; confidentiality.

- 1. Except as otherwise provided in this section or by specific statute:
 - (a) If a person or his or her agent provides the electronic mail address or telephone number of the person to a governmental entity for the purpose of or in the course of communicating with that governmental entity, the governmental entity may maintain the electronic mail address or telephone number in a database.
 - (b) A database described in this subsection:
 - (1) Is confidential;
 - (2) Is not a public book or record within the meaning of NRS 239.010; and
 - (3) Must not be disclosed in its entirety as a single unit.

NRS 239B.040(1).

20. The Court is bound to enforce the plain, unambiguous language of NRS 239B.040. 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”); Erwin v. State, 111 Nev. 1535, 1538-39, 908 P.2d 1367, 1369 (1995) (“Where the language of a statute is plain and unambiguous, and its meaning clear

for the email database, not books, records, or other public information.
³CCSD concedes, and the Court agrees, that analysis of NRS 603.070 might require the Court to engage in factual determinations that are inappropriate on a motion to dismiss. Accordingly, the Court will not consider CCSD’s arguments regarding NRS 603.070 at this time.

1 and unmistakable, there is no room for construction, and the courts are not permitted to
2 search for its meaning beyond the statute itself.” (internal quotations omitted)).

3 21. Applying the statute’s language as written, the Court must reject NPRI’s
4 argument that NRS 239B.040(1) applies to just databases of private, non-government email
5 addresses. NRS 239B.040(1) does not make any distinction between “government-issued”
6 and “private” email addresses. Rather, the statute references “the electronic mail address . . .
7 of the person.” NRS 239B.040(1)(a). There is no dispute that teachers are “persons” and
8 that teacher email addresses are provided and used for the purpose of communicating with
9 CCSD, a governmental entity. Accordingly, under the statute’s plain, unambiguous
10 language, CCSD’s database of teacher email addresses is “confidential,” is “not a public
11 book or record,” and “must not be disclosed in its entirety as a single unit.” NRS
12 239B.040(1)(b).

13 22. Further, the legislative intent of NRS 239B.040 reflects the Legislature’s
14 desire to prevent spamming and phishing. E.g., Hr’g Mins., Assembly Comm. Gov’t
15 Affairs, p. 5 (Mar. 31, 2005) (enacting NRS 239B.040 “to prevent spammers or similar
16 types of activities from requesting databases of emails for purposes of spamming or
17 phishing, et cetera”); Hr’g Mins., Assembly Comm. Gov’t Affairs, p. 8 (Mar. 23, 2005)
18 (testimony of John Slaughter, Office of the County Manager, Washoe County) (noting \$7-
19 \$12 value for active email addresses and explaining “We want to remove these email
20 address lists from this [Internet spam] market”).

21 23. NPRI concedes that if CCSD provided the requested database, nothing would
22 prevent NPRI from selling the approximately 17,000 teacher email addresses. The parties
23 also recognize if CCSD were obligated to provide NPRI the requested email addresses
24 pursuant to a Nevada Public Records Act request, then it would also be obligated to provide
25 any other citizen or entity (whether private or commercial) with the database upon request.
26 Such a scenario would undermine the public policy underlying NRS 239B.040.

27 24. NPRI’s reliance on Reno Newspapers, Inc. v. Sheriff (Haley), 126 Nev. Adv.
28 Op. 23, 234 P.3d 922 (2010) and the presumption of openness cannot overcome the explicit

1 mandate against disclosure contained in NRS 239B.040. Indeed, the Court, out of an
2 abundance of caution, has considered the legislative intent despite NRS 239B.040's
3 unambiguous declaration that the requested database is confidential. The legislative history
4 and public policy only bolster the Court's conclusion that the statute bars NPRI's request,
5 however. And while the Haley Court emphasized that exceptions must be narrowly
6 construed, it did not hold that exceptions could be disregarded altogether. On the contrary,
7 Haley held that information "explicitly made confidential" by statute must be redacted to
8 prevent disclosure. 234 P.3d at 928. Following Haley, the requested database must likewise
9 be prevented from disclosure here because it is "explicitly made confidential" by NRS
10 239B.040.

11 **B. Interest in Nondisclosure Clearly Outweighs the Interest in Access**

12 25. Finally, even if the Court had not already determined that (1) the requested
13 database is not a public book or record under the Nevada Public Records Act, and (2) NRS
14 239B.040 explicitly declares the requested database to be confidential, the Court concludes
15 that CCSD's interest in nondisclosure of the database clearly outweighs the interest in public
16 access, another independent reason for the dismissal of NPRI's complaint.

17 26. As a threshold matter, the Court rejects NPRI's argument that privacy and
18 law enforcement interests are the only state interests that may outweigh the public's interest
19 in nondisclosure. When adopting the common law balancing of interests approach in
20 Donrey of Nevada v. Bradshaw, the Nevada Supreme Court first stated its holding in general
21 terms of "the interests involved" and then applied this general test to the case at hand, which
22 happened to involve a law enforcement investigation. 106 Nev. 630, 635-36, 798 P.2d 144,
23 147-48 (1990). Since Bradshaw, the Supreme Court has applied the test to interests besides
24 privacy and/or law enforcement concerns, e.g., DR Partners, 116 Nev. 616, 6 P.3d 465
25 (balancing government entity's interest in the deliberative process privilege), and continued
26 to characterize the balancing test in broad, generalized terms, e.g., Gibbons, 266 P.3d at 628
27 ("broad balance of the interests involved" (emphasis added)). The Court therefore
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1 concludes that it may consider CCSD's interests in nondisclosure, even if such interests do
2 not implicate privacy or law enforcement matters.

3 27. Several compelling policy interests weigh heavily in favor of nondisclosure
4 of the requested email database. As noted above, the Legislature has already recognized,
5 when it passed NRS 239B.040, the public's interest in precluding the public disclosure of
6 entire email databases to prevent spam and phishing schemes. See, e.g., Hr'g Mins.,
7 Assembly Comm. Gov't Affairs, p. 5 (Mar. 31, 2005); Hr'g Mins., Assembly Comm. Gov't
8 Affairs, p. 8 (Mar. 23, 2005).⁴

9 28. Further, CCSD has an obvious interest in opening the lines of communication
10 between students, parent and teachers – an interest which would clearly be undermined if
11 any person or corporate entity could request, then sell and/or utilize, the teacher email
12 database for any purpose, whether unlawful, propaganda, or commercial. Indeed, CCSD's
13 email system, including both the publicly available individual teacher email addresses and
14 the non-public teacher email database, depends on an element of trust that students, parents,
15 and teachers will not abuse this educational resource. Here, CCSD has no way to ensure
16 that NPRI will avoid such abuse if the email database is disclosed. On the contrary, NPRI
17 has conceded that there is nothing to stop it (or any other person who may request the
18 database in the future) from abusing the database, whether through, for example,
19 disseminating commercial and/or propaganda emails or selling the database to internet
20 spammers and phishers.

21 29. In contrast to these distinct interests favoring nondisclosure, NPRI fails to
22 point to any interest that favors disclosure. Its argument is based on only the general
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24 ⁴NRS 41.725-.730 (providing civil damages for certain email advertisements) and NRS 205.492 (criminalizing
25 certain instances of email misconduct) further demonstrate the state's interest in preventing email abuse. NPRI
26 argues that the existence of these statutes, which punish email abuse after it occurs, negates any interest in
27 preventing email abuse in the first place (by, for example, keeping email databases confidential). This Court is
28 not persuaded, as Nevada law may simultaneously prevent and punish unlawful conduct. See, e.g., NRS
205.463 (criminalizing identity theft) and NRS 603A.200 (requiring the destruction of records containing
personal information).

1 presumption of openness contained in the Nevada Public Records Act. NPRI fails to explain
2 how the public's interest in openness is undermined in light of its voluntary admission that
3 individual CCSD teacher email addresses are public. Nothing in NPRI's pleading or
4 argument suggests that CCSD refuses to provide the email address of a specific teacher or
5 otherwise seeks to prevent public email communications with teachers. (Rather, as discussed
6 above, NPRI's interest in disclosure lies only in the database's utility as a communication
7 infrastructure, not in openness of government records.)

8 30. This Court acknowledges that a balancing of interests will rarely provide
9 grounds for dismissal under NRCP 12(b)(5) and the Nevada Public Records Act. See
10 Gibbons, 266 P.3d at 628 (state entity cannot meet burden under balancing test "with a non-
11 particularized showing" or "by expressing hypothetical concerns"). Here, however, the
12 public policy interests embodied in NRS 239B.040 and other Nevada statutes specifically
13 and concretely demonstrate a clear interest against disclosure of the requested email
14 database.

15 31. Moreover, NPRI has not indicated what further evidence it expected to
16 unearth during discovery that would enlighten the Court's determination of the legal issues.
17 NPRI also conceded that: (1) there is nothing to stop it (or any other person or entity that
18 may request the email database) from selling or otherwise abusing the 17,000 email
19 addresses contained in the database, and (2) teacher emails are publicly available on an
20 individual basis, rendering nondisclosure a minimal (if any) limitation on the public's ability
21 to communicate with CCSD teachers or on other forms of government "openness." Thus,
22 the Court has no reason to forestall concluding, as a matter of law, that there is only a
23 negligible (if any) public interest favoring disclosure of the entire teacher email database.

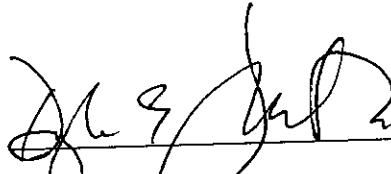
24 32. Thus, considering these established interests—the legislatively-recognized
25 policy against email abuse and the interests of Nevada parents, students, and teachers in
26 effective communication tools, on the one hand, and the usurpation of the government's
27 communication infrastructure, on the other hand—the Court concludes that CCSD's
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1 interests in nondisclosure clearly outweigh the interest in access in this narrow case. This is
2 another, independent basis for dismissal of NPRI's complaint.


3 **ORDER**

4 IT IS HEREBY ORDERED that CCSD's Motion to Dismiss is GRANTED.

5 Dated this 15 day of August, 2013.

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9 District Court Judge

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24 I hereby certify that on the date filed, I caused to be placed
25 A copy of the foregoing Order in the folder(s) in the Clerk's
26 Office or mailed to the following:
27 Joseph F. Becker, NPRI Center for Justice and Constitutional Litigation.
28 Joel Henriod, Lewis and Roca LLP.

27 
28 Susanne Anderson, Judicial Assistant