IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA POLICY RESEARCH INSTITUTE, INC., Appellant, vs. CLARK COUNTY SCHOOL DISTRICT, a political subdivision of the State of Nevada, *et al.* Respondent.	Supreme Court Case No.: 64040 District Court Case No.: A-13-679114-C

APPEAL

From the Eighth Judicial District Court, Department VIII,
Clark County, Nevada
THE HONORABLE DOUGLAS E. SMITH, District Judge

APPELLANT'S OPENING BRIEF

JOSEPH F. BECKER, ESQ.
Nevada Bar No. 12178

NPRI CENTER FOR JUSTICE AND CONSTITUTIONAL LITIGATION

1225 Westfield Avenue, Suite 7
Reno, Nevada 89509

Telephone (775) 636-7703
Facsimile (775) 201-0225
cjcl@npri.org

Attorney for the Appellant, Nevada Policy Research Institute, Inc.

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Nevada Policy Research Institute, Inc. ("NPRI"), Appellant, is a non-profit corporation incorporated in the State of Nevada and granted 501(c)(3)

status by the United States Internal Revenue Service. NPRI has no parent corporation and is not a publicly held corporation; and

Since the inception of this case, NPRI, Appellant, has been represented only by NPRI's Center for Justice and Constitutional Litigation and solely by the undersigned counsel of record. There were no administrative agency actions in this case and no other attorneys are expected to appear on Appellant's behalf.

Dated this 16th day of January, 2014.

JOSEPH F. BECKER, ESQ.
Nevada Bar No. 12178

NPRI Center for Justice and
Constitutional Litigation

1225 Westfield Avenue, Suite 7
Reno, Nevada 89509
Telephone: (775) 636-7703
Facsimile: (775) 201-0225

Attorney for Appellant,
Nevada Policy Research Institute, Inc.

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APPELLANT'S OPENING BRIEF

Appellant, Nevada Policy Research Institute, (hereinafter, "Appellant" "NPRI"), hereby files its opening brief.

I. JURISDICTIONAL STATEMENT

This appeal is from a final order — a Dismissal from the Eighth Judicial District of Clark County, Nevada (the "District Court") granted/filed on August 15, 2013. JA 0187-0197.

The basis for the Supreme Court's appellate jurisdiction is NRAP 3A(b)(1).[1] Pursuant to NRAP 4(a)(1), "a notice of appeal must be filed after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served." The Notice of Entry of Order was filed and served on August 19, 2013. JA 0198-0199. Appellant filed its Notice of Appeal on September 12, 2013. JA 0200-0201.

II. STATEMENT OF THE ISSUES

A. Whether the District Court erred in holding that a directory of government-issued, government employee e-mail addresses is not a public record?

[1] "A final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered."

B. Whether the District Court erred in holding that NRS 239B.040 applies to and makes confidential a public record consisting of an e-mail directory of government-issued, government employee e-mail addresses?

C. Whether, when a state entity "may not meet its burden with a non-particularized showing," the District Court erred: (1) in applying a fact-intensive "balancing of interests" test on a 12(b)(5) motion and prior to discovery; and/or (2) in so applying, holding that CCSD's interest in non-disclosure clearly outweighs the public's interest in access to a directory of government employees' contact information?

III. STATEMENT OF THE CASE

A. Nature of the Case

This appeal involves the District Court's dismissal of a case in which Nevada Policy Research Institute, Inc., a twenty-two-year-old , Nevada-centered non-profit "think tank," sought to obtain from Clark County School District ("CCSD"), pursuant to the Nevada Public Records Act[2] ("NPRA"), a directory of government employee's (government-issued) e-mail addresses. CCSD never denied that such a directory or record existed but instead "reclassified" the directory as a "database" and refused to comply with the

[2] NRS § 239.001 *et seq.*

NPRA arguing, for a variety of reasons, disclosure under the Nevada Public Records Act was not required.

B. Course of the Proceedings

After multiple requests to obtain the records, on March 28, 2013, pursuant to NRS 239.011, NPRI filed its Complaint against CCSD (and those co-Defendants implicated by CCSD's justifications for non-compliance) seeking judicial relief to secure from CCSD (or the co-Defendants) the public records sought. JA 0001-0032. On April 9, 2013, Plaintiff NPRI served CCSD with the Summons and Complaint. JA 0033-0036.

In response to NPRI's Complaint, on May 24, 2013, Defendant CCSD filed a Motion to Dismiss NPRI's Complaint citing three legal bases to justify dismissal:

(1) That NRS 239B, a Nevada statute governing "Disclosure of Personal Information *to Governmental Agencies*" (emphasis added), precludes CCSD from releasing government-generated, government-issued e-mail addresses of government employees to the public under the NPRA;

(2) That NRS 603, a Nevada statute relating to "unfair trade practices" that exempts proprietary computer programming code from disclosure

also prevents disclosure of CCSD's directory of government-issued e-mail addresses; and

(3) That CCSD's interest in non-disclosure clearly outweighs the public's interest in access to a public record enhancing transparent government and/or open communications with government employees.

JA 0037-0044.

On June 11, 2013, NPRI filed an Opposition to CCSD's Motion to Dismiss arguing that:

(1) NRS 239B.040 applies only to databases containing data relating to certain private persons who submit information *to* government.

(2) NRS 603, an Unfair Trade Practices Statute that protects software programming code from disclosure does not allow CCSD to withhold all documents created with any proprietary software package CCSD happens to utilize.

(3) CCSD's interest in non-disclosure does not "clearly outweigh" the public's interest in transparent government and, even if it did, a 12(b)(5) motion filed prior to discovery is not the proper stage of litigation at which to conduct a fact-intensive "balancing of interests" test to so determine.

JA 0046-0157.

Included in Plaintiff's Opposition to CCSD's Motion to Dismiss were nearly seventy-five pages of attachments demonstrating the futility of CCSD's notion that its employees' government-issued e-mail addresses are confidential, including a single website publicly listing more than eight thousand of those very e-mail addresses NPRI sought to obtain and several CCSD school-operated websites that make public the very e-mail addresses CCSD now claims are somehow confidential and refused to provide. JA 0084-0157. (The latter remain available online even as of January 13, 2014). Appellants Opening Brief Exhibit 1, JA 0204-0212.

On June 25, 2013, CCSD filed a Reply to NPRI's Opposition to CCSD's Motion to Dismiss. JA 0158-0166,

On July 2, 2013, the District Court held a hearing on CCSD's Motion to Dismiss in Las Vegas, Nevada. JA 0167-0186.

C. Disposition Below

On August 15, 2013, the District Court granted CCSD's Motion to Dismiss. In dismissing the case, the District Court held that (1) A directory of government-issued contact information for government employees' official use is not a "public record;" (2) NRS 239B.040, (a statute enacted to prevent disclosure of contact information submitted *by the public to government agencies*) would otherwise render *government employee's (government-issued)*

contact information "confidential" and not subject to disclosure even if the directory were a "public record;" and (3) CCSD's interest in non-disclosure clearly outweighs the public's interest in access to contact e-mail addresses issued by government to government employees — this despite the lack of any evidence or discovery supporting what was to be a "fact-intensive 'balancing of interests' test." JA 0187-0197.

IV. STATEMENT OF FACTS

The facts related to this case are straightforward and believed by Appellant to be undisputed.

On or about June 11, 2012, Victor Joecks, Communications Director at NPRI requested from CCSD, a directory of government-provided e-mail addresses of all CCSD teachers pursuant to NRS 239, the Nevada Public Records Act (hereinafter, "the NPRA"). On July 3, 2012, Carlos L. McDade, General Counsel for CCSD replied to Mr. Joecks of NPRI with a letter claiming that the NPRA does not require disclosure of the directory of CCSD's government-issued e-mail addresses because:

(1) It is part of an employee's personnel record and must be safeguarded by CCSD;

(2) It is not a public record under the NPRA because it is similar to a book or pamphlet;

(3) Entities (then co-Defendants) which purchased the e-mail software used by CCSD somehow prevents disclosure; and

(4) A court would not require disclosure under the *Donrey* balancing test (*citing Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630 (1990) and *Reno Newspapers, Inc. v. Sheriff Haley*, 234 P.3d 922 (2010)).

JA 0010.

On February 25, 2013, NPRI sent by Certified Mail, Return Receipt Requested, a "final" request letter to CCSD (and co-Defendants implicated by CCSD as integral to the release of the requested directory) for the e-mail directory in question. JA 0021-26.

On March 5, 2013, CCSD responded to NPRI's "final" request with another letter refusing to disclose the e-mail directory because:

(1) It is part of an employee's personnel record and must be safeguarded by the district;

(2) It falls within the definition of a non-record; and

(3) A court would not require disclosure under the *Donrey* balancing test (*citing Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630 (1990) and *Reno Newspapers, Inc. v. Sheriff Haley*, 234 P.3d 922 (2010).

JA 0028.

Missing from CCSD's March 5, 2013 refusal letter was its earlier contention that the e-mail directory could not be made available because entities (formerly co-Defendants) which purchased the e-mail software program used by CCSD somehow prevented disclosure.

Thus, on March 28, 2013, pursuant to NRS 239.011, NPRI filed its Complaint against CCSD and those co-Defendants implicated by CCSD's "software argument" seeking judicial relief to secure from CCSD (or the co-Defendants) the public records sought. JA 0001-0032. On April 9, 2013, Plaintiff NPRI served CCSD with the Summons and Complaint. JA 0033-0036.

In response to NPRI's Complaint, on May 24, 2013, Defendant CCSD filed a Motion to Dismiss NPRI's Complaint citing three legal bases to justify dismissal:

(1) That NRS 239B, a Nevada statute governing "Disclosure of Personal Information *to Governmental Agencies*" (emphasis added) somehow precludes CCSD from releasing government-generated, government-issued e-mail addresses for government employees to the public under the NPRA;

(2) That NRS 603, a Nevada "unfair trade practices" statute seeking to protect proprietary computer programming code from being made

public, somehow prevents disclosure of CCSD's directory of government-issued e-mail addresses; and

(3) That CCSD's interest in non-disclosure clearly outweighs the public's interest in transparent government and/or the public interest in communicating openly with government employees.

JA 0037-0045.

This current installment of CCSD's complained-of failure to comply with the Nevada Public Records Act is in no way an isolated occurrence by CCSD in which CCSD finds some extraordinary fact, basis, or circumstance warranting non-disclosure under the Act. Rather, CCSD has an expansive and protracted record of delaying and obfuscating many public record requests made by NPRI[3] (and others),[4] this merely being the first to which NPRI has mounted a judicial challenge.

V. SUMMARY OF THE ARGUMENT

Appellant NPRI's arguments are as follows:

First, the District Court erred in holding that a directory of government-created, government employee contact information is not a public record as

[3] *See* Affidavit of NPRI Reporter Karen Gray detailing a partial but recent history of prolonged-and non-compliance by Clark County School District with numerous requests for records. JA 0062-0073.

[4] *E.g.* Paul Takahashi, *District Refuses Request to Release "Turnaround Schools'" Graduation Data,* Las Vegas Sun, December 29, 2012. JA 0075-0076.

defined by the Nevada Public Records Act. The District Court accepted as true that "CCSD possesses an e-mail directory of CCSD teachers." JA 0188.

The Nevada Public Records Act ("NPRA") provides that *all* public books and public records of governmental entities must remain open to the public, unless "otherwise declared by law to be confidential." NRS 239.010(1). The Legislature has declared that the purpose of the NPRA is to further the democratic ideal of an accountable government by ensuring that public records are *broadly* accessible. NRS 239.001(1). The District Court erred in its determination that a directory of government-issued e-mail addresses, the existence of which was never denied, somehow fails to meet the broad definition of a "public record" under the Nevada Public Records Act.

Second, the District Court erred in applying NRS 239B (a statute making certain "**public records**" confidential) in determining that CCSD's directory of government-issued e-mail addresses is "confidential" and, thus, not otherwise subject to disclosure under the NPRA.

NRS 239B, the Chapter entitled "DISCLOSURE OF PERSONAL INFORMATION TO GOVERNMENT AGENCIES" is a statute that, in its clear reading, was enacted to protect from disclosure databases compiled by government and comprised of personal information provided *by the public to government,* excepting from confidentiality such information provided to

government by persons with a business or contractual relationship with that government entity.[5]

Third, the District Court erred in holding that CCSD's interest in non-disclosure "clearly outweighs" the public's interest in open government. The first error was procedural in conducting a fact-intensive balancing test at the 12(b)(5) stage of litigation with no factual evidence put forth by CCSD.

Adding insult to procedural injury, CCSD relied entirely on hypothetical and speculative justifications for non-disclosure under NPRA despite the fact that, as recently as November 14, 2013, this Court held that simple assertions by government that are "hypothetical and speculative" will not suffice and "a mere assertion of possible endangerment does not clearly outweigh the public interest in access to . . . records." *Public Employees' Retirement System of Nevada v. Reno Newspapers, Inc.*, No. 60129 p. 9 (November 14, 2013).

VI. LEGAL ARGUMENT

A. The District Court Erred in Holding That a Directory of Government-Issued, Government Employee E-mail Addresses is not a Public Record.

1. Standard of Review

"An order granting an NRCP 12(b)(5) motion to dismiss 'is subject to a

[5] Ironically, NRS 239B, (the very statute argued by CCSD to make teacher e-mail addresses confidential), in actuality makes those addresses specifically **non-confidential** because every teacher whose e-mail address was sought by NPRI has a "business or contractual relationship with the governmental entity" (i.e. CCSD). NRS 239B.040(2)(a).

rigorous standard of review on appeal.'" *Stubbs v. Strickland*, 297 P.3d 326, 328 (2013) (quoting *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008)). This Court presumes all factual allegations in the complaint are true and draws all inferences in favor of the plaintiff. *Id.* at 228, 181 P.3d at 672. [This Court] review[s] all legal conclusions *de novo*. *Id.*

Moreover, "questions of statutory construction . . . including the *meaning and scope of a statute*, are questions of law, which this [C]ourt reviews *de novo*." *Public Employees' Retirement System of Nevada v. Reno Newspapers, Inc.*, No. 60129 p. 4 (November 14, 2013)(emphasis added) (*citing City of Reno v. Reno Gazette Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003)). The District Court itself also held that whether information constitutes a "public record" to be a question of law. JA 0189.

2. **Discussion**

"At the outset, the [NPRA] establishes that 'all public books and public records of government entities must remain open to the public, unless 'otherwise declared by law to be confidential.'" *Public Employees' Retirement System* at 4-5 *quoting Reno Newspapers v. Gibbons*, 127 Nev. ____, ____, 266 P.3d 623, 626 (2011).

"Generally, when the language of a statute is plain and unambiguous, the courts are not permitted to search for its meaning beyond the statute itself."

Id. at 5(citations omitted).

Moreover, in order to advance the Act's public access goal, the Act's "provisions must be liberally construed to maximize the public's right of access" and "any limitations or restrictions on that access must be narrowly construed." *Id.* (*citing Gibbons* at 626).

In the instant case, we have a District Court that apparently doesn't want his 16 year-old child's "learning to be impeded" by open communications with that child's government-employee teacher (JA 0185) all the while ignoring the letter and the spirit of the Nevada Public Records Act, which demands that its provisions must be "liberally construed" to maximize the public's right of access and any "limitations or restrictions must be narrowly construed."

Here, NPRI seeks CCSD's directory of government-created contact information for government employees. No one (including CCSD) denies the existence of this directory. The District Court, in fact, found that "CCSD possesses an email directory of CCSD teachers." JA 0188.

As discussed below, there is no statute making either that record or information contained therein confidential. In fact, the only confidentiality statutes CCSD could offer up were a statute relating to the confidentiality of databases containing information submitted *to* government (not information the government itself creates) and a statute relating to proprietary software code.

The Public Records Act itself requires openness of records to be construed liberally, and yet we have a court, by construing the employee directory as a "communications device," denying it the status of a "public record." It should also be noted that no statute to the best of Plaintiff's knowledge makes a "public record" used as a "communications device" either confidential or a non-record.

Other than the statutory mandate that openness be construed broadly, there is another very compelling reason making the District Court's holding that CCSD's email directory is not a "public record" untenable. It can be found in CCSD's attempt, discussed below in Section VI(B)(2), to raise NRS 239B.040 as justification for non-disclosure.

There would, of course, be no reason for the existence of NRS 239B.040 making "public records confidential" if such a compilation of contact information (a "communications device," as the District Court would seemingly prefer to re-label it) were not a "public record" in the first place! In other words, it is only because a government compilation of contact information *is* a "public record" in the first place that such a statute as NRS 239B would be necessary to make it confidential.

As argued below, such confidentiality does not extend to a compilation of contact information consisting only of *government-created* e-mail addresses

issued by *government* to *government employees* for official use. However, the very existence of NRS 239B, in and of itself, demonstrates that such a data compilation, irrespective of how it may be relabeled, is, nevertheless, a "public record."

B. The District Court Erred in Holding That NRS 239B.040 Applies to and Makes Confidential a Public Record Consisting of a Directory of Government-Issued, Government Employee E-mail Addresses for Official Use.

1. Standard of Review

"An order granting an NRCP 12(b)(5) motion to dismiss 'is subject to a rigorous standard of review on appeal.'" *Stubbs v. Strickland*, 297 P.3d 326, 328 (2013) (citing *Buzz Stew, LLC v. City of N. Las Vegas,* 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008)). This Court presumes all factual allegations in the complaint are true and draws all inferences in favor of the plaintiff. *Id.* at 228, 181 P.3d at 672. [This Court] review[s] all legal conclusions *de novo*. *Id.*

Moreover, "questions of statutory construction . . . including the *meaning and scope of a statute*, are questions of law, which this [C]ourt reviews *de novo*." *Public Employees' Retirement System of Nevada v. Reno Newspapers, Inc.*, No. 60129 p. 4 (November 14, 2013)(emphasis added)(*citing City of Reno v. Reno Gazette Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003).

The scope and applicability of NRS 239B.040 is precisely at issue here. Appellant NPRI contends that NRS 239B.040 does not apply to a government-

generated e-mail directory that contains only contact information created and issued by government to government employees for official use.

2. Discussion

The District Court held that even if the directory of e-mail addresses were a "public record," it is confidential under NRS 239B.040.[6] NRS 239B, the Chapter entitled "DISCLOSURE OF PERSONAL INFORMATION TO GOVERNMENT AGENCIES" is a statute that, in its clear reading, was enacted to protect from disclosure databases compiled by government and comprised of personal information provided by the public to government, excepting that information provided to government by some person with a business or contractual relationship with that government entity. NRS 239B.040(2)(a).

A canon of statutory construction is that, "Statutes should be internally consistent. A particular section of the statute should not be inconsistent with the rest of the statute." Interpreting NRS 239B to include a directory of government-issued, government employee e-mail addresses is completely illogical given Paragraph 2 of NRS 239B. The very statute argued by CCSD to make confidential teacher e-mail addresses, in actuality, if applied in error as recommended by CCSD, makes those addresses specifically **non-confidential**

[6] As discussed above, were a database of contact information not a "public record" in the first place, there would be no reason for a statute specifically making such a "public record" confidential and exempting it from disclosure.

because every teacher whose e-mail address was sought by NPRI has a "business or contractual relationship with the governmental entity:"

> The individual electronic mail address or telephone number of a person is **not** confidential and may be disclosed individually in accordance with applicable law if the person or his or her agent provides the electronic mail address or telephone number to a governmental entity:
> (a) In the course of an existing business or contractual with the governmental entity;

NRS 239B.040(2)(a) (emphasis added).

Although at least one state, Florida, has statutorily made e-mail addresses submitted to government public but requires notice of that fact to submitters (JA 0078), most states have a provision similar to that in Nevada protecting the private e-mail addresses of those who either through interaction with government or at the request of government, have submitted their e-mail addresses.[7]

Despite extensive research on this point of law, Plaintiff has found no legal authority that any such statute has ever been used to justify non-disclosure of government-generated and/or government-issued e-mail addresses for official use to members of the public.

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[7] *See e.g.* Tex. Gov't Code § 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES. JA 0052-53 n. 4.

In fact, if such were the case and these directories of e-mail addresses were confidential, twelve school districts in Nevada which *have* complied with NPRI's public records act requests for teacher e-mail address directories or lists, would be (and would have historically been) in direct and repeated violations of NRS 239B.040 as (mis)construed by Defendant CCSD.[8] Plaintiff cannot believe such would be the case; nor should this Court.

Even more damaging to Defendant CCSD's argument misconstruing the statute to avoid compliance with the NPRA is the fact that CCSD itself would be in direct violation of NRS 239B (as it construes it) because a number of CCSD's own schools make these e-mail addresses (contended now by CCSD to be confidential) public on CCSD school websites.[9] Such continues to be the case, even in the wake of the District Court's ruling below. *See* Appellant's Opening Brief Exhibit 1, JA 0204-0212. Yet, in an apt demonstration of its "spirit" with respect to the NPRA, CCSD, has, in an unprecedented fashion, begun redacting individual e-mail addresses from NPRI record requests, citing as its basis for non-compliance, the decision below in this case. See Appellant's Opening Brief Exhibit 2, JA 0202-0203. Appellant, of course, believes this to be yet another in the series of NPRA violations by CCSD.

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[8] JA 0080-82. *See* Affidavit of Victor Joecks, NPRI Communications Director.
[9] *See* Plaintiff's Opposition Exhibit 5. JA 0083-0092 (A quick internet search reveals that at least several schools within Clark County School District post a complete directory of teacher e-mail addresses on their websites).

While CCSD would have the Court believe that the language of NRS 239B.040 should be stretched and tortured to protect something more than contact information submitted *to* government by private parties, this interpretation would make no sense given the provisions of the same statute that make non-confidential the contact information relating to those with business and contractual dealings with the government entity. NRS 239B(2)(a)(b).

Moreover, as stated in VI(A)(2) above, if such compilations were not otherwise public records, the existence of NRS 239B would be totally redundant, unnecessary, and would carve out a meaningless exception to the Nevada Public Records Act — that is, providing that "non-records" are "non-disclosable" because they're also "confidential."

C. The District Court Erred In Applying a Fact-Intensive "Balancing of Interests" Test on a 12(b)(5) Motion and Prior to Discovery.

1. Standard of Review

"An order granting an NRCP 12(b)(5) motion to dismiss 'is subject to a rigorous standard of review on appeal.'" *Stubbs v. Strickland*, 297 P.3d 326, 328 (2013) (citing *Buzz Stew, LLC v. City of N. Las Vegas,* 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008)). This Court presumes all factual allegations in the complaint are true and draws all inferences in favor of the plaintiff. *Id.* at 228, 181 P.3d at 672. [This Court] review[s] all legal conclusions *de novo*. *Id.*

2. Discussion

As a preliminary matter, even if, *arguendo*, the "balancing test" factors somehow favored CCSD, a Motion to Dismiss is not the proper method for disposition of a case in which a fact-intensive balancing test is to be employed. "In many cases, factual development is necessary, so the balancing *cannot* be performed on a 12(b)(6) motion." *Weisbuch v. County of Los Angeles*, 119 F.3d 778, 783 (9th Cir. 1997); *Hyland v. Wonder*, 972 F.2d 1129, 1140 (9th Cir. 1992)(emphasis added). For this reason alone, the District Court erred in granting Appellee CCSD's Motion to Dismiss.

As explained by this Court in *Public Employees' Retirement System of Nevada*, "[a] mere assertion of possible endangerment does not clearly outweigh the public interest in access to . . . records." No. 60129 p. 9 (November 14, 2013)(*quoting Haley*, 126 Nev. at ____, 234 P.3d at 927). Here, as in *Public Employees' Retirement System*, CCSD "failed to present any evidence that the requested information would actually cause harm to [the teachers] or even increase the risk of harm, the record indicates that their concerns were merely hypothetical and speculative." *Id.*

"[C]aselaw stresses that the state entity cannot meet this burden with a non-particularized showing, *DR Partners,* 116 Nev. at 627–28, 6 P.3d at 472–73, or by expressing hypothetical concerns. *Reno Newspapers, Inc. v. Sheriff*

Haley, 126 Nev. at ____, 234 P.3d at 927." *Id.* "Hypothetical concerns" are, nevertheless, exactly what Respondent CCSD invokes to justify dismissal here and with no factual evidence introduced by CCSD to satisfy a balancing test requiring such evidence to "clearly outweigh" the public's interest in disclosure. As such, the Court erred in dismissing the case on these grounds in the 12(b)(5) hearing.

D. The District Court Erred in Holding That CCSD's Interest in Non-Disclosure Clearly Outweighs the Public's Interest in Access to a Directory of Government Employee Contact Information.

1. Standard of Review

"An order granting an NRCP 12(b)(5) motion to dismiss 'is subject to a rigorous standard of review on appeal.'" *Stubbs v. Strickland*, 297 P.3d 326, 328 (2013) (citing *Buzz Stew, LLC v. City of N. Las Vegas,* 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008)). This Court presumes all factual allegations in the complaint are true and draws all inferences in favor of the plaintiff. *Id.* at 228, 181 P.3d at 672. [This Court] review[s] all legal conclusions *de novo*. *Id.*

2. Discussion

Even if, *arguendo*, a dismissal under a fact-intensive balancing of interests test were not premature and procedurally infirm for the reasons cited in Section VI(C)(2) above, under NRS 239 and supporting caselaw, Respondent CCSD must surmount a huge legal presumption in favor of open government records, and this it has failed to do.

When this Court evaluates interests supporting non-disclosure, it has limited those interests to privacy and law enforcement concerns. "The Nevada Public Records Act considers all records to be public documents available for inspection unless otherwise explicitly made confidential by statute or by a balancing of public interest against *privacy or law enforcement justifications* for non-disclosure." *Reno Newspapers, Inc. v. Sheriff Haley*, 234 P.3d 922, 923 (2010)(emphasis added). *See also: DR Partners v. Clark County*, 116 Nev. 616, 6 P.3d 465 (2000)(a case weighing *privacy* concerns against public disclosure) and *Donrey v. Bradshaw*, 106 Nev. 630, 638 798 P.2d 144, 148(1990) ("Accordingly, *weighing the absence of* ***any privacy or law enforcement policy justifications for non-disclosure*** *against the general policy in favor of open government*, we reverse the district court's denial of appellant's petition and remand with instructions to issue a writ of mandamus ordering respondents to release to appellants the entire police investigative report.")(emphasis added).

CCSD made no argument that disclosure of information requested by NPRI affected either *privacy*[10] or *law enforcement* matters. Rather, CCSD

[10] In fact, it would be difficult for CCSD to argue the requested e-mail addresses are "private" given the fact they, themselves post them on CCSD school websites that are open to the public.

arguments can be reduced to its concerns that efficiency would be impacted by disclosure of CCSD's e-mail directory.

However, efficiency is not the guiding principle as to what is or is not disclosable under the NPRA. Of course, any governmental entity could be more "efficient" in the narrowest sense if it were not required to respond either to public records requests or concerns of the public as addressed via electronic communications. The Legislature, however, has prescribed, even in having a public records law, that open government and open records trump this "reduced efficiency" argument. In actuality, "[o]penness will . . . promote *efficiency* and effectiveness in Government."(emphasis added).[11]

Even in the case relied upon almost exclusively below by Appellee CCSD to support its "balancing test argument," *Reno Newspapers, Inc. v. Gibbons*, 266 P.3d 623, (2011), the Nevada Supreme Court held that the state's former chief executive must provide to a requester under the NPRA, a detailed log or index identifying sender, recipient(s), date, and subject matter of e-mail communications.

[11] Transparency and Open Government, Barack Obama, 74 Federal Register 4685-86 (January 21, 2009).

In *Reno Newspapers, Inc. v. Sheriff Haley*, the Nevada high court again favored disclosure over non-disclosure, requiring only that certain confidential information be redacted, if present.

Additionally, although now redacting individual e-mail addresses from documents responsive to NPRI's record requests, CCSD had not previously suggested that a list of teacher's *names* would not be subject to disclosure under the NPRA and, in fact, CCSD has already made that and salary information available to NPRI.

This said, individual teacher e-mail addresses could be sought under the NPRA one-at-a-time as an individual e-mail address is certainly not a database under NRS 239B. While claiming efficiency concerns, the alternative presented by CCSD would be for Plaintiff to e-mail Respondent CCSD some 17,000 public record requests, each one requesting an individually-named teacher's e-mail address. In fact, insofar as CCSD construes 239B.040 to apply to compilations of *government* employee's contact information, the addresses denied by CCSD are explicitly non-confidential under paragraph 2 of that statute. NRS 239B.040(2)(a).

As stated earlier, "in the absence of a statutory provision that explicitly declares a record to be confidential, any limitations on disclosure must be based

upon a broad balancing of the interests involved, *DR Partners,* 116 Nev. at 622, 6 P.3d at 468; *Bradshaw,* 106 Nev. at 635, 798 P.2d at 147, and the state entity bears the burden to prove that its interest in nondisclosure clearly outweighs the public's interest in access. *Reno Newspaper, Inc. v. Sheriff Haley,* 126 Nev. at ____, 234 P.3d at 927." *Reno Newspapers, Inc. v. Gibbons*, 266 P.3d 623, 628 (2011).

Finally, "caselaw stresses that the state entity cannot meet this burden with a non-particularized showing, *DR Partners,* 116 Nev. at 627–28, 6 P.3d at 472–73, or by expressing hypothetical concerns. *Reno Newspapers, Inc. v. Sheriff Haley,* 126 Nev. at ____, 234 P.3d at 927." *Id.*

"Hypothetical concerns" are, nevertheless, exactly what Respondent CCSD invoked to justify dismissal below. JA 0042-0044. Appellee CCSD's sole claimed interests in the balancing test can be reduced to two concerns, both relating to school district efficiency: (a) excessive e-mails will clog CCSD's servers and computer systems; and (b) teachers will be subject to phishing scams, computer viruses, and unsolicited e-mail. Although introducing no factual evidence to this end, there are clear reasons and exhibits provided by Appellant to the court below demonstrating that CCSD's justifications for non-disclosure are completely without merit.

(a) CCSD's Server Will Not Be Clogged.

CCSD itself sends e-mails to its entire directory regularly without any difficulty. While NPRI's purpose for seeking this record is legally irrelevant, an e-mail communication or two annually from NPRI will not clog CCSD's servers. In its letter of March 5, 2013, General Counsel for CCSD admitted that Plaintiff NPRI has "demonstrated an ability to e-mail thousands of our teachers through InterAct," all with no mention at that time of NPRI ever having clogged CCSD's servers. JA 0028.

Moreover, the Nevada Education Coalition made available 8,393 Clark County School District e-mail addresses on its public website which could be e-mailed by any person or entity at any time and this somehow has not "clogged the CCSD servers." JA 0093-0122.

Even teachers themselves apparently use the e-mail directory to send pro-union, political e-mail messages to large numbers of teachers, seemingly without any difficulty. See JA 0123-0157. If such e-mail "blasts" were a clogging concern, certainly CCSD would restrain its own employees from sending blast e-mails for unofficial, pro-union, pro-political, and non-official-business purposes. *Id.*

Meanwhile, CCSD schools themselves post this directory information on individual CCSD school websites (JA 0083-0092) on an ongoing basis and, yet, again, no evidence of clogged servers has been introduced.

Speaking further of efficiency and CCSD's purported interest to "ensuring the efficient use of its taxpayer-funded resources," it's difficult to fathom that increasing server capacity to accommodate increased communication with public school teachers could be more costly than repeatedly hiring outside counsel to avoid compliance with the clear mandates of the NPRA, not to mention costs awardable under the NPRA to opposing counsel.

(b) Phishing, Computer Viruses and Spam Exist Irrespective of Whether CCSD Complies With Plaintiff's NPRA Request and Some Hypothetical Increase Therein Does Not Outweigh the Benefit of Transparent and Open Government.

> Gentleman, progress has never been a bargain. You've got to pay for it. Sometimes, I think there's a man behind a counter who says, "All right, you can have a telephone; but you'll have to give up privacy, the charm of distance. Madam, you may vote; but at a price; you lose the right to retreat behind a powder-puff or a petticoat. Mister, you may conquer the air; but the birds will lose their wonder, and the clouds will smell of gasoline!"[12]

Naturally, most e-mail accountholders become frustrated from time to time with unsolicited e-mails ("spam"), e-mails from Nigeria with promises of

[12] JEROME LAWRENCE AND ROBERT E. LEE, INHERIT THE WIND (1955).

lost oil fortunes about to be made available, and e-mails attempting to fraudulently mimic those from legitimate vendors who seek personal or financial information from e-mail recipients ("phishing"). These conditions pre-exist Plaintiff's request for records under the NPRA but, the fact that these conditions (like telemarketers) exist, does not warrant a wholesale abandonment of the legislatively ordained fundamental principle of transparent government. In fact, as discussed below, the Nevada Legislature has enacted other statutes to address unsolicited e-mail as well as e-mail fraud and deception.

Respondent CCSD would instead have this Court believe that releasing a list of e-mail addresses pursuant to the Nevada Public Records Act — e-mail addresses which attached Exhibits demonstrate are already to a large extent public[13] — will significantly burden their employees with such unsolicited e-mails, phishing scams, and viruses such as to bring school district operations to a standstill and that this hypothetical result justifies abandoning the strong statutory language favoring openness in government and the release of public records.

Of course, empirically, we already know what will happen when thousands of teacher e-mail addresses are released publicly. Nothing. As noted above, twelve school districts in Nevada have already complied with NPRI's

[13] *See* Appellant's Opposition Exhibits 4, 5, 6, and 7. JA 0079-01157.

request for teacher e-mail addresses. JA 0080-0082. There are no indications that students and teachers in those educational systems are suffering from crashing servers or teachers being inundated with e-mail.

Apparently lost on CCSD are the statutes that exist to curtail exactly the type of activity CCSD hopes the hypothetical threat of which will justify non-disclosure of public records.

With the enactment of NRS 41.730, the matter of unsolicited electronic mail has been appropriately and adequately dealt with by the Nevada Legislature. With the enactment of NRS 205.492, the Nevada Legislature has dealt with the remaining hypothetical concerns of fraudulent or deceptive e-mail and viruses identified by Respondent CCSD so as to justify non-disclosure. As such, Respondent CCSD must not be allowed to claim the threat of activities already and otherwise made illegal under Nevada state law as justification for its stark departure from the legislatively ordained presumption in favor of open records.

Moreover, anti-virus and spam filters are simple and commonplace ways by which almost any entity of any size further combats the negative aspects of the efficiency-enhancing technology of electronic mail (e-mail). Because Respondent CCSD's e-mail addresses are already public to a large extent, releasing the directory to plaintiff should not further burden the school district

with anti-virus and anti-spam software — software that any entity with more than 17,000 teacher-employees almost certainly already employs.

For all these reasons, Respondent CCSD fails, with its allegations of hypothetical and empirically falsified concerns, to satisfy the balancing test, especially given the heavy presumption in favor of releasing public records under NRS 239, the Nevada Public Records Act.

VII. CONCLUSION

For all of the aforementioned reasons, this Court should remand the case to the District Court with instructions to grant relief sought by Appellant.

DATED this 16th day of January, 2014.

BY: _____

JOSEPH F. BECKER, ESQ.
Nevada State Bar No. 12178
NPRI CENTER FOR JUSTICE
AND CONSTITUTIONAL LITIGATION
1225 Westfield Avenue, Suite #7
Reno, Nevada 89509
Tel: (775) 636-7703
Fax: (775) 201-0225
cjcl@npri.org
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

1. I hereby certify that Appellant's Opening Brief, filed on this date, complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and type style requirements of NRAP 32(a)(6) because the brief was prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14 point font; Times New Roman style.

2. I further certify that Appellant's Opening Brief (excluding this certificate of Compliance and the Certificate of Service), filed on this date, complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is: Proportionally spaced, has a typeface of 14 points or more, contains 6,010 words and/or does not exceed 30 pages.

3. Finally, I hereby certify that I have read Appellant's Opening Brief, filed on this date, and, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that the brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page number and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that

the accompanying brief is not in conformity with the requirement of the Nevada Rules of Appellate Procedure.

DATED this 16th day of January, 2014.

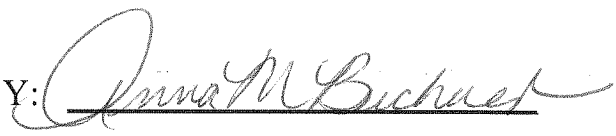
BY: _____

JOSEPH F. BECKER, ESQ.
Nevada State Bar No. 12178
NPRI CENTER FOR JUSTICE
AND CONSTITUTIONAL LITIGATION
1225 Westfield Avenue, Suite #7
Reno, Nevada 89509
Tel: (775) 636-7703
Fax: (775) 201-0225
cjcl@npri.org
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January, 2014, I caused to be deposited in the United States Mail at Reno, Nevada, a true and correct copy of the foregoing APPELLANT'S OPENING BRIEF enclosed in a sealed envelope upon which first class postage was paid, addressed as follows:

Daniel F. Polsenberg
Joel D. Henriod
LEWIS AND ROCA, LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169

BY: 

ANNA M. BUCHNER
An employee of:

NPRI CENTER FOR JUSTICE AND CONSTITUTIONAL LITIGATION

Attorney for Appellant