IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No.: 64040

NEVADA POLICY RESEARCH INSTITUTE

Plaintiff/Appellant
v.
CLARK COUNTY SCHOOL DISTRICT

Defendant/Respondent .

Appeals from the Eighth Judicial District Court, Clark County
The Honorable Douglas E. Smith, District Judge
District Court Case No. A-13-679114-C

BRIEF OF AMICUS CURIAE BY THE AMERICAN CIVIL LIBERTIES UNION OF NEVADA FOUNDATION (ACLU-NV), IN SUPPORT OF APPELLANT, NEVADA PUBLIC INTEREST INSTITUTE, INC.

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DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

The ACLU of Nevada Foundation has no parent corporations, and no publicly held company owns 10% or more of its stock. There is no such corporation. Staci Pratt (Nev. Bar. No. 12630, Allen Lichtenstein (Nev. Bar No. 3992) and Amanda Morgan (Nev. Bar No. 13200) are our only attorneys that have appeared for amicus in this case (including proceedings in the district court or before an administrative agency) nor are any others expected to appear in this court in this case.

/s/ Allen Lichtenstein

TABLE OF CONTENTS

TABLE OF AUTHORITIES

cases

statutes/codes

Nevada Attorney General Opinions

AMICUS BRIEF OF THE ACLU OF NEVADA IN SUPPORT OF APPELLANT, NPRI

I. Statement of identity and interest of the ACLU of Nevada

The American Civil Liberties Union Foundation of Nevada (ACLU-NV) is a non-profit advocacy organization that protects the civil rights and civil liberties of all Nevada residents. The ACLU-NV litigates civil rights and civil liberties cases and also has filed numerous amicus briefs in both state and federal court in cases pertaining to a wide variety of constitutional issues. The ACLU-NV also has a long track record of working specifically on open records issues, both in and out of the courts. ACLU-NV representatives frequently utilize the provisions of Nevada's Public Records Law. The organization currently has several public records requests pending. The ACLU of Nevada has often testified before the Nevada Legislature on open records issues. It has also litigated public records controversies in cases such as *Gray v. Clark County School District* (No. 56326; District Court No. A543861), and currently has a pending Motion for Leave to file an Amicus Brief in the Nevada Supreme Court case of *LVMPD v. BlackJack Bonding, Inc.* (No. 62864 consolidated with No. 63541).

II. Summary of Argument

This case involves a request made by Appellant, the Nevada policy

Research Institute, Inc., (NPRI) to the Clark County School District (CCSD) for a copy of the directory of email addresses of CCSD teachers. The directory, and the email accounts themselves were created, maintained and paid for by the District, for the purpose of communication pursuant to their jobs as public school teachers. NPRI's request did not extend to the content of any emails, but merely the directory of email addresses. No request for any teacher's private email information was part of NPRI's request.

On March 28, 2013, NPRI filed its complaint in an attempt to obtain the records at issue. (Appx., at 1-8) On August 15, 2013, the District Court granted CCSD's Motion to Dismiss. (Appx., at 187-197) The District Court ruled that: 1) the directory of email addresses at issue was not a public record. (Appx., at 190); 2) the email directory was confidential. (Appx., at 191-194); and 3) the interest in non-disclosure outweighs the interest in access. (Appx., 194-197)

All three of these District Court conclusions by the District Court are erroneous under both Nevada statutory law and case law. The email directory in question is a public record as since it is 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," as set forth in NAC 239.091, and is used by public school teachers in the ordinary course of their public occupations.

The directory is not confidential because the email addresses contained within are generated by, maintained by and paid for by CCSD. They are not private pieces of information that were given over from private parties to the government. Thus, pursuant to NRS 239B.040(1) and (2), the email addresses cannot be considered confidential.

Because the material at issue consists of non-confidential public records, no balancing test of the public interest in disclosure versus the public interest in non-disclosure is appropriate. *See, Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990); *Reno Newspapers v. Sheriff* , 234 P.3d 922 (2010). Even if a balancing test were to be employed, the rationale for supporting disclosure, clearly outweighs any interest CCSD might have in non-disclosure. Disclosure allows for the public to communicate with teachers and promotes openness in government. All of the arguments for non-disclosure rest on improper hypothetic speculation of what "might" happen.

It is important to reiterate that any privacy interest in not receiving unwanted emails, if such interest exists at all, is one that the teachers themselves might have. The District has no interest in this matter. It is dubious to suggest that CCSD represents or is somehow an agent of the teachers. In this instance, that argument is unpersuasive. The fact is that CCSD itself has no valid privacy or

confidentiality interest in the email directory.

III. Argument

The Legislature's purpose in creating the Public records law is set forth in NRS 239.001:

> NRS 239.001. Legislative findings and declaration. The Legislature hereby finds and declares that:
> 1. The purpose of this chapter 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;
> 2. The provisions of this chapter must be construed liberally to carry out this important purpose;
> 3. Any 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; and
> 4. The use of private entities in the provision of public services must not deprive members of the public access to inspect and copy books and records relating to the provision of those services.

NRS 239.001.

Thus it is clear that the Legislature intended liberal construction of all provisions of the Public Records Act, with the further clarification that any restrictions on that openness must be construed narrowly. While paying lip service to this principle, the District Court rendered a decision that directly contradicts both the spirit and the language of NRS 239.001.

A. The email directory at issue is a public record under Nevada law.

On page 2 of its August 15, 2013 Order (Appx, at 190), the District Court

made certain findings of fact. Paragraph 3 notes that "CCSD possesses an email directory of CCSD teachers." *Id.* Paragraph 4 states that "NPRI" requested from CCSD the entire email directory of more than 17,000 CCSD teacher email addresses." *Id.* Paragraph 6 states that "CCSD denied NPRI's records request for the entire teacher email directory."

1. Under the pertinent sections of both NRS and NAC Chapters 239, the directory is a public record.

On page 3 of the District Court's Order, in Paragraph 9, the Court recites that NRS 239.010(1) provides that a governmental entity must provide for inspection and copying of "all public books and public records of a governmental entity, the contents of which are not otherwise declared by law to be confidential." *Id.* at 191.

As defined in Nevada Administrative Code (NAC) 239.091 a "public record" is "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 NRS239.121(3). Nor is there any dispute that the electronic directory in question was in fact created by the

government entity of the Clark County School District, and that the material in question was paid for with public money. In fact, CCSD acknowledges this on page 1 of its June 25, 2013 Reply in Support of Defendant Clark County School Districts Motion to Dismiss (Appx. at 158)("CCSD maintains a database of teacher email addresses **to both ensure efficient school district administration and encourage meaningful teacher parent dialogue.**" . . . "all paid for at the government and taxpayers expense." (emphasis added)

Despite this explanation for the teacher email directory, to "ensure efficient school district administration," the District Court, in Paragraph 12, on page 4 of the Order, determined that the requested material "does not reflect information created or received as part of CCSD's official business." (Appx., at 192) That conclusion by the District Court runs counter not only to CCSD's own statements, but to logic as well. Under the Court's reasoning, although created, maintained, and paid for by the District, the records of the email accounts given to teachers have nothing to do with official school business. Were that truly the case, there would be no justification for creating and maintaining these official email accounts at all, as they would just be a frivolous waste of money. Unfortunately, the District Court's Order never delves into the obvious implications of that logic or ruling.

It is important to note again, that the issue here does not involve any teacher's private email account, which would presumptively not be a public record pursuant to the criteria set forth in NAC 239.091. Instead, the controversy involves the email addresses provided to teachers by the school district for work purposes.

This is not the first time the distinction between private emails and those provided by CCSD as they related to the Nevada Public Records Act has been challenged. On January 7, 2009, Clark County District Court Judge Johnson, ruled in *Gray v. Clark County School District*, (Case No. 543861)(attached as Exhibit 1) that communications or email information "utilizing InterAct[1] or other school district computer or email system 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." *Id*, at 161-17.

One distinction between *Gray* and the instant case is that Karen Gray's request was for the content of all emails utilizing the InterAct system by School Board Trustees. As noted, Judge Johnson ruled that these were subject to the Public Records Act. In contrast, here NPRI only requested the electronic directory

[1] InterAct is "responsible for providing Internet connectivity and filtering for all schools. It also, provides external network protection(firewall) for all CCSD sites. Manages and operates InterAct, the District's email system as well as other hosted services for public consumption" quoting, http://ccsd.net/departments/internet-interact-operations/" NPRI Complaint, p. 3, n. 1, (Appx., at 3)

of email addresses, not the emails themselves.

On pages 4 and 5 of its Order, the District Court appears to conclude that the actual emails themselves stored on the electronic InterAct system are public records, but that the email addresses contained within that system somehow fall out of the public record category. This distinction makes no sense. It would be the equivalent of stating that the books in a library are all public records but the card catalog would not be. It would be merely a worksheet. (Appx., at 192-193). The District Court also seems to insinuate that because records are stored on an electronic database, they are somehow exempt from the provisions of Nevada's Public Records Act. There is nothing in NRS Chapter 239 nor in any decision by the Nevada Supreme Court to support this view. It also directly contradicts the decision in *Gray, supra.*

2. The case law cited by the District Court to bolster its argument that the directory is not a public record does not support that conclusion.

The cases cited by the District Court do not support that Court's conclusion that the email directory in question is not a public record subject to the provisions of NRS Chapter 239. In Paragraph 12 on page 4 of the Order (Appx., at 190), the Court cites *DR Partners v. Board of County Commissioners,* 116 Nev. 616, 6 P.3d 465 (Nev. 2000) for the premise that the email directory "does not reflect

information created or received as part of CCSD's official business or other 'vital information about governmental activities'" 116 Nev. at 621, 6 P3d at 468. *DR Partners* involved a dispute in which newspapers "requested that the county manager of Clark County produce copies of records documenting the use, over a two-year period, of publicly owned cellular telephones issued to the individual respondents." 116 Nev. at 619, 6 P3d at 467. The fact that Clark County Commissioners' cell phone billing records were public records was never in doubt.

> Neither party to this appeal disputes that the records at issue are public records under the Act. This view is consistent with the prevailing weight of legal authority. See, e.g., *City of Elkhart v. Agenda: Open Government, Inc.*, 683 N.E.2d 622 (Ind.Ct.App.1997); *PG Publishing Company v. County of Washington*, 162 Pa.Cmwlth. 196, 638 A.2d 422 (1994); *Dortch v. Atlanta Journal*, 261 Ga. 350, 405 S.E.2d 43 (1991).

116 Nev. at 621, 6 P3d at 468.

Rodgers v. Hood, 906 So.2d 1220, (Fla. App. 2005) also does little to support the District Court's conclusions. The *Rogers* Court noted that unused ballots are not public records, and in fact, are akin to blank pieces of paper that do not "perpetually, communicate, or formalize" knowledge. However, the main reason for the ruling in *Rogers* that unused ballots are not to be viewed as public records was a specific statute enacted by the Florida Legislature.

> [T]he Legislature saw fit to make provision for retention and

> destruction of unused ballots by enacting section 101.545, Florida Statutes (1977). See Ch. 77–175, § 20, Laws of Fla. According to the statute, "[a]ll unused ballots ... may, with the approval of the Department of State, be destroyed by the supervisor after the election for which such ballots ... were to be used." The Legislature has chosen to treat unused ballots as a sort of surplus property and has delegated to the executive branch discretion in the maintenance or destruction of these ballots.

906 So.2d at 1223. Thus, under Florida law, the material in question was specifically exempted from that state's open records law. No similar provision exists in the Nevada Revised Statutes for the material at issue in the instant case.

SDC Development Corp. v. Mathews, 542 F.2d 1116 (9th Cir. 1976), is similarly unsupportive of the conclusion drawn by the District Court. In *SDC Development*, Congress had established the National Library of Medicine "to acquire and preserve medical publications, index and catalogue the materials, make the indexes and catalogues available to the public . . ." *Id*, at 1117. The statute also provided for making all or part of the material available for a fee. *Id*, at 1117-1118. ("Direct access to the MEDLARS data bank is available on a subscription basis through MEDLINE, the National Library's on-line terminal reference retrieval system. A user desiring to acquire and copy the MEDLARS tapes may purchase the complete data bank through the National Technical Information Service.") The Plaintiff in *SDC* attempted to circumvent the statutory

scheme, particularly the fee structure, by obtaining the same information through a FOIA request. *Id*, at 1118.

Weisberg v. Dept of Justice, 631 F.2d 824 (D.C. Cir. 1980), in which the Plaintiff attempted through a FOIA request to obtain copyrighted photographs from the FBI, explained that case's distinction from *SDC.*

> [A]bsent a FOIA request, there is no guarantee that the photos would be disclosed. Indeed, interpreting FOIA as the Government urges would allow an agency "to mask its processes or functions from public scrutiny" simply by asserting a third party's copyright. This sharply contrasts with SDC where dissemination of the medical reference data was assured by separate congressional mandate.

Id, at 828. The distinction between *Weisberg* and *SDC* is significant for the instant case. *SDC* involved an attempt to circumvent the standard process for obtaining a totally accessible database, for the purposes of getting it more cheaply. In contrast, *Weisberg* involved the accessibility of requested records under FOIA. Here, like *Weisberg*, the issue is the availability of obtaining the material rather than the cost.

The District Court's citation from *State ex rel. McCleary v. Roberts,* 725 N.E.2d 1144, 1148 (Ohio,2000), that "holding information regarding citizens was not a public record despite the fact that it was 'obtained by a public office, reduced to writing and placed in record form and used by the public office in implementing

some lawful regulatory policy,'" (Appx., at 190), is also misplaced. The information at issue in *McCleary* was provided by parents to the Recreation and Parks Department for the purpose of safeguarding their children. These children were not governmental employees.

> However, the specific information requested consists of certain personal information regarding children who participate in the Department's photo identification program. Standing alone, that information, i.e., names of children, home addresses, names of parents and guardians, and medical information, does nothing to document any aspect of the City's Recreation and Parks Department. . . . The subjects of appellee's public records request are not employees of the government entity having custody of the information. They are children—private citizens of a government, which has, as a matter of public policy, determined that it is necessary to compile private information on these citizens. It seems to us that there is a clear distinction between public employees and their public employment personnel files and files on private citizens created by government. To that extent the personal information requested by appellee is clearly outside the scope of R.C. 149.43 and not subject to disclosure. *See State ex rel. Dispatch Printing Co. v. Wells* (1985), 18 Ohio St.3d 382, 385, 18 OBR 437, 439, 481 N.E.2d 632, 634–635.

725 N.E.2d 1147 -1148.

The Ohio Legislature subsequently codified the Court's ruling in *McCleary*. *State ex rel. O'Shea & Assocs. Co., L.P.A. v. Cuyahoga Metro. Hous. Auth.*, 962 N.E.2d 297, 303 (Ohio 2012)("The General Assembly later codified the holding in *McCleary* by excepting "[i]nformation pertaining to the recreational activities of a person under the age of eighteen from the definition of 'public record' for

purposes of the Public Records Act.")

Nevada has developed a standard similar to that of Ohio in specifically designating certain information provided to the government and kept by the government as outside of the designation of a public record. What constitutes a confidential document is set forth in NRS 239.0105(1).

> NRS 239.0105(1) Records of a local governmental entity are confidential and not public books or records within the meaning of NRS 239.010 if:
>
> (a) The records contain the name, address, telephone number or other identifying information of a natural person; and
>
> (b) The natural person whose name, address, telephone number or other identifying information is contained in the records provided such information to the local governmental entity for the purpose of:
>
> (1) Registering with or applying to the local governmental entity for the use of any recreational facility or portion thereof that the local governmental entity offers for use through the acceptance of reservations; or
>
> (2) On his or her own behalf or on behalf of a minor child, registering or enrolling with or applying to the local governmental entity for participation in an instructional or recreational activity or event conducted, operated or sponsored by the local governmental entity.

NRS 239.0105(1)

B. The directory is not confidential.

The District Court, on page 6 of its Order (Appx. at 192) cites NRS 239B.040 for its conclusion that the database containing CCSD's teacher email addresses is "declared by [NRS 239B.040] to be confidential. *Id.* The District

Court is quite correct in stating that it is "bound to enforce the plain, unambiguous language of NRS 239B.040." That plain language, however, explicitly states the opposite of how the District Court has interpreted it. The two pertinent sections of the statute, Sections 1 and 2, read as follows:

> 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.
>
> 2. 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 relationship with the governmental entity; or
>
> (b) In the course of seeking to establish a business or contractual relationship with the governmental entity, including, without limitation, in response to a request for proposals or invitation to bid from the governmental entity. (emphasis added)

Both Sections 1 and 2 limit their scope to those persons who provide their

pre-existing email information to the government. There is simply no other way to construe the plain language of the statute. Yet, the District Court ruling neglects that particular statutory language. Moreover, the District Court decision neglects the clear distinction made between emails provided to the government by purely private individuals, which are deemed confidential pursuant to Section 1, and those provided by people "in the course of an existing business or contractual relationship with the governmental entity," or seeking to establish such relationship, in Section 2. The emails at issue here are specifically not confidential under NRS 239B.040 (1) and (2).

C. A "balancing test" is inapplicable here.

In its Order, the District Court attempts a balancing analysis for the public value of disclosure versus non-disclosure. (Appx. 194-197) This is inappropriate because the material in question is neither confidential nor related to a criminal investigation, and is therefore not subject to a balancing test.

The Nevada Supreme Court's ruling in *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990) involved a request by media for access to a report involving a prior criminal investigation. 106 Nev. at 631, 798 P.2d at 145. The case was limited to the question of confidentiality of criminal investigations.

A "record of criminal history" is defined at NRS 179A.070 and

> specificallyand specifically excludes investigative or intelligence information. Although this court has never interpreted the criminal history records statute, in 1983 the Attorney General rendered an opinion that criminal investigative reports were confidential and were not public records subject to NRS 239.010. See 83 Op. Att'y Gen. No. 3 (May 2, 1983).

106 Nev. at 632-633, 798 P.2d at 145. Thus, while the *Donrey* Court recognized a common law balancing test, it explicitly limited it to documents involving criminal investigations.

> The dissent argues that if the reports are non-confidential and subject to disclosure under N.R.S. 239.010, then "the reports are to be made available to any person, at all times during office hours, for any advantage and for copying in full." Stating that this is an untenable conclusion, the dissent asserts that we have rewritten N.R.S. 239.010 with a balancing limitation regarding investigative and intelligence files. Rather than rewriting the Public Records Act, however, we simply recognize a common law limitation on the otherwise unlimited provisions of N.R.S. 239.010.

106 Nev. at 635, 798 P.2d at147, n. 2. Moreover, in issuing the Writ of Mandamus, the Nevada Supreme Court specifically stated that the common law exception to the requirements of N.R.S. 239.010 are only applicable in matters of a violation of an individual's privacy or with a criminal investigation.

> 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 appellants' petition and remand with instructions to issue a writ of mandamus ordering respondents to release to

appellants the entire police investigative report.

106 Nev. at 636, 798 P.2d at 148 (emphasis added).

It is totally incorrect that there exists a general balancing test of the public interest in disclosure versus the public interest in non-disclosure for N.R.S. 239.010. In *Reno Newspapers v. Sheriff*, 234 P.3d 922 (2010), the Nevada Supreme Court made this clear as it limited any balancing test to matters that might compromise an individual's privacy or law enforcement investigation, stating that "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 interests against privacy or law enforcement justification for non-disclosure." *Id*. at 923. The Court further went on to state the following:

> Under the Nevada Public Records Act (the Act), all public records generated by government entities are public information and are subject to public inspection unless otherwise declared to be confidential. N.R.S. 239.010. The purpose of the Act is to foster principles of democracy by allowing the public access to information about government activities. N.R.S. 239.001(1); *see DR Partners v. Bd. of County Comm'rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000). In 2007, the Legislature amended the Act to ensure the presumption of openness, and provided that all statutory provisions related to the Act must be construed liberally in favor of the Act's purpose. N.R.S. 239.001(2); 2007 Nev. Stat., ch. 435, § 2, at 2061. In contrast, any exemption, exception, or a balancing of interests that restricts the public's right to access a governmental entity's records must be

> construed narrowly. NRS 239.001(3); 2007 Nev. Stat., ch. 435, § 2, at 2061. Thus, this court will presume that all public records are open to disclosure unless either (1) the Legislature has expressly and unequivocally created an exemption or exception by statute, *see Cowles Pub. Co. v. Kootenai County Bd* ., 144 Idaho 259, 159 P.3d 896, 899 (2007) (holding that unless public records are "expressly exempted by statute," they are presumed to be open to inspection by the public); *Kroeplin v. Wisconsin DNR*, 297 Wis.2d 254, 725 N.W.2d 286, 292 (Wis.Ct.App.2006) (holding that "exceptions to the open records law are to be narrowly construed; unless the exception is explicit and unequivocal, we will not hold it to be an exception"); or (2) balancing the private or law enforcement interests for non-disclosure against the general policy in favor of an open and accessible government requires restricting public access to government records. See *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 635-36, 798 P.2d 144, 147-48 (1990). And, in unity with the underlying policy of ensuring an open and accountable government, the burden is on the government to prove confidentiality by a preponderance of the evidence. NRS 239.0113(2).

234 P.3d at 924-925.

Clearly, the District Court erred in applying a balancing test to this case.

D. Any balancing test must favor disclosure.

In paragraph 26 on pages 8-9 of its Order (Appx., 194-195), the District Court cites *Reno Newspapers, Inc. v. Gibbons*, 266 P.3d 623, 628 (Nev. 2011), for the proposition that the balancing test is applicable to more than just privacy or law enforcement concerns and should be characterized "in broad general terms." *Id.* at 194. A closer reading of *Gibbons* indicates that the "broad balancing of interests" it addressed is to be applied only to information that is deemed

confidential.

> First, we begin with the presumption that all government-generated records are open to disclosure. *See Reno Newspapers v. Sheriff*, 126 Nev. at ——, 234 P.3d at 924; *DR Partners*, 116 Nev. at 621, 6 P.3d at 468. The state entity therefore bears the burden of overcoming this presumption by proving, by a preponderance of the evidence, that the requested records are confidential. NRS 239.0113; *DR Partners*, 116 Nev. at 621, 6 P.3d at 468. Next, 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 Newspapers v. Sheriff*, 126 Nev. at ——, 234 P.3d at 927. Finally, **our case law 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 v. Sheriff*, 126 Nev. at ——, 234 P.3d at 927. (emphasis added)

266 P.3d at 628. The District Court does not attempt to explain any distinction between private records and confidential records. This is a matter of semantics, as both were for the same thing.

Even with the exercise of the balancing test, the *Gibbons* Court stated that the purported harm of disclosure cannot be argued through conjecture, but must be specific. Yet, all of the harms cited by the District Court are in fact hypothetical and conjectural. No specific harm from the mere act of turning over the directory to NPRI is mentioned. Instead, the District Court ruled based on several "what if"

scenarios. This runs counter to the Nevada Supreme Court's instructions.

Furthermore, CCSD is purporting to be protecting the interests, not of itself, but of teachers whose official email addresses are contained in the directory. CCSD does not represent these teachers. In fact, in many cases the interests of the District and of its teachers are adverse. Thus, even under the improperly utilized balancing test, the greater weight must be given to the interests of open government and disclosure.

IV. Conclusion

In its Order, the District Court made several errors that run contrary to both statutory and case law. The directory of teacher email addresses is a public record under NRS Chapter 239. Because the email addresses were created, maintained, and paid for by the Clark County School District, and used as part of the teachers' job, the directory is not confidential. Because it is not confidential, it is not subject to any balancing test. Even if it were, the hypothetical list of horrors that might perhaps occur with disclosure, still cannot override presumption of openness and important public purpose of access to government and those who represent it.

For all these reasons, the District Court's grant of CCSD's Motion to Dismiss should be reversed, and NPRI's appeal granted.

Dated this 23rd day of January 2014

Respectfully submitted by:

/s/ Allen Lichtenstein
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REPRESENTATION STATREMENT PURSUANT TO NRAP 28.2

(1) Attorney Allen Lichtenstein hereby represents and certifies that he has read the brief; and,

(2) To the best of his knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and for,

(3) That the brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the briefs regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found; and

(4) That the brief complies with the formatting requirements of Rule 32(a)(4)-(6), and the page- limitations stated in Rule 32(a)(7). The brief contains 4954 words and has a typeface of 14 points.

/s/Allen Lichtenstein

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2014 I served all parties in the above titled case with the ACLU of Nevada's Motion for Leave to File an Amicus Brief, and a copy of said brief, via the Court's electronic filing and service system.

/s/Allen Lichtenstein