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7 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
8 **IN AND FOR CARSON CITY**

9 NEVADA POLICY RESEARCH INSTITUTE, INC.,

10 Petitioner,

11 vs.

12 PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF
NEVADA, a Public Agency; TINA M. LEISS, in her official
13 capacity as Executive Officer of the Public Employee Retirement
14 System of Nevada; STATE OF NEVADA,

15 Respondents.

) Case No.:

) Dept. No.

16
17 **PETITION FOR WRIT OF MANDAMUS**

18 Pursuant to NRS Chapter 239, the Nevada Public Records Act, (hereinafter, "NPRA") Petitioner,
19 Nevada Policy Research Institute, Inc., petitions the Court for Issuance of a Writ of Mandamus directing
20 the above-named Respondents to permit Petitioner to inspect and copy the public records described
21 herein.

22 The Nevada Open Records Act, NRS 239.001 *et seq.* ("NPRA"), requires, as a general rule, that
23 government entities make public records available to those requesting them within five (5) business days
24 of them being formally requested.

25 NPRI engages in year-round, ongoing reliance upon the NPRA to secure information from state
26 government entities for study, interpretation, and subsequent dispersal and disclosure to accomplish its
27 educational mission. This mission has been negatively impacted, at times, by certain entities that
28 belabor, delay, obstruct, and/or flat out refuse to provide certain records that, under the provisions of the

1 NPRA, must be disclosed. Additionally, certain government entities, contrary to the spirit and letter of
2 the NPRA, have “invented” means by which to deny or obfuscate the information sought, as is the case
3 here.

4 Pursuant to the provisions of the NPRA so allowing, Petitioner additionally requests an award of
5 all costs and attorney’s fees it incurs in prosecuting this matter, together with such other relief as the
6 Court deems proper.

7 This Petition is brought on the following grounds:

8 **Jurisdiction and Venue**

9 1. This Court has jurisdiction to issue writs of mandamus. Nev. Const., Art. 6, §6; NRS
10 34.160. The NPRA (and, more specifically, NRS 239.011) provides for jurisdiction and expedited
11 consideration by the state district court in which the challenged, non-compliant government entity lies.
12 In this case, jurisdiction lies in the First Judicial District Court of the State of Nevada, in and for Carson
13 City.

14 **Standing**

15 2. Standing is provided by statute. Under NRS 239.011, “if a request for inspection or
16 copying of a public book or record open to inspection and copying is denied, the requestor may apply to
17 the district court in the county in which the book or record is located for an order permitting the
18 requester to inspect or copy it.”

19 **Parties**

20 3. Petitioner, Nevada Policy Research Institute, Inc. (“NPRI”), is a free-market think tank
21 that seeks private solutions to public challenges facing Nevada, the West, and the nation. With an eye
22 towards full transparency in government, NPRI informs the public and often testifies before legislative
23 committees regarding actions and activities of the State of Nevada and its political subdivisions. The
24 Institute’s primary areas of focus are education and fiscal policy. NPRI is a 501(c)(3) organization as
25 defined by the Internal Revenue Code and is a non-profit corporation incorporated in the State of
26 Nevada.

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1 4. Among other things, NPRI maintains **TransparentNevada.com**, a website dedicated to
2 serving Nevada's public by providing transparency on all aspects of state, county, and city
3 governments, including the affairs of Respondent, PUBLIC EMPLOYEES' RETIREMENT SYSTEM
4 OF NEVADA (hereinafter "PERS").

5 5. Respondent, PERS, is a properly-constituted political subdivision, and as such, is a
6 "governmental entity" and subject to the requirement of the Nevada Public Records Act as set forth in
7 NRS Chapter 239.005(5).

8 6. Respondent, TINA M. LEISS, is named in her official capacity as Executive Officer of
9 PERS.

10 7. Respondent, STATE OF NEVADA (hereinafter "NEVADA"), resides in Carson City,
11 Nevada, and, pursuant to NRS § 12.105, is named as a Respondent as PERS is a political subdivision
12 and creation of the state of NEVADA.

13 Background

14 8. On or about January 5, 2015, NPRI employee, Robert Fellner, sent a request to PERS for
15 payment records of its retirees for the year 2014. NPRI made that request so it could publish the
16 requested information to its TransparentNevada.com website, which is provided to the public as a free
17 service by NPRI. The website is also intended to be a resource for public sector administrators, allowing
18 easy comparisons across jurisdictions within the state for labor and other costs.

19 9. On January 9, 2015, Mr. Fellner received an email response from PERS with the 2014
20 payroll report attached. *See* Exhibit 1. However, no retiree names were part of the report, thus making
21 the list of payment amounts contained in that report largely meaningless.

22 10. Mr. Fellner learned through additional communications with PERS officials that,
23 sometime subsequent to a 2013 Nevada Supreme Court opinion mandating that PERS release its retiree
24 payment information to those then requesting it under the NPRA, PERS altered its recordkeeping
25 methodology to attach only social security numbers to retiree payment amounts such that when social
26 security numbers are duly redacted (pursuant to the NPRA), the remaining records contain only payment
27 amounts with no indication as to which payee receives any of those amounts.

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1 11. Mr. Fellner also learned, through communications with PERS officials, that PERS *does*
2 maintain a separate record associating each name with its respective social security number.

3 12. Thus, the information that NPRI is requesting is within the legal custody and control of
4 PERS and is considered public record. “A governmental entity’s duty to disclose a public record applies
5 only to records within the entity’s custody or control.” NRS 239.010(4).

6 13. However, in an email to Robert Fellner on January 16, 2015, PERS states that a report,
7 such as the one NPRI requested, no longer exists and PERS does not have to create one. *See* Exhibit 2.
8 PERS, in denying NPRI’s record request, relied on different language from the same Nevada Supreme
9 Court decision which previously mandated disclosure. *PERS v. Reno Newspapers Inc.*, 313 P.3d 221
10 (2013) “. . . (concluding Ohio public records laws impose ‘no duty to create a new document by
11 searching for and compiling information from [a government agency’s] existing records’)” *see also*,
12 *State ex rel. Kerner v. State Teachers Ret. Bd.*, 82 Ohio St.3d 273, 695 N.E.2d 256, 258 (1998).

13 14. NPRI, in previous years, had requested from PERS a report containing: retiree name,
14 payroll amount, date of retirement, years of service, last employer, retirement type, original retirement
15 amount, and COLA increases. As recent as 2013, PERS has complied with this request.

16 15. In 2015, the Nevada Supreme Court held that “When an agency has a computer program
17 that can readily compile the requested information, the agency is not excused from its duty to produce
18 and disclose that information.” *See LVMPD v. Blackjack Bonding*, 343 P.3d 608 (2015) citing *State, ex*
19 *rel. Scanlon v. Deters*, 45 Ohio St.3d 376 (1989), overruled on other grounds by *State ex rel. Steckman*
20 *v. Jackson*, 70 Ohio St.3d 420 (1994). NPRI’s request of PERS to provide the 2014 retiree payroll
21 records **does not** force PERS to search for and compile new information from retirees files or other
22 records. In fact, the requested information has previously been disclosed by PERS when the 2013 report
23 was requested by NPRI. PERS has produced the report in the past and “. . . could produce the requested
24 information. Therefore, the requested public records are readily accessible and PERS does not prevent
25 their disclosure.” *See LVMPD v. Blackjack Bonding*, 343 P.3d 608 (2015).

26 16. To be certain that PERS’ post-*PERS v. Reno Newspapers Inc.* recordkeeping
27 methodology of excluding names from actuarial reports has not changed back to pre-2013 methodology,
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1 in March 2016, Mr. Fellner submitted a new request for the information detailed above which was,
2 again, met with the same denial of anything other than nameless payment amounts. *See* Exhibit 3.

3 17. Based upon the foregoing, the issuance of a writ of mandamus is necessary to compel
4 Respondents to provide NPRI prompt access to the requested records.

5 Legal Authority

6 18. The Nevada Open Records Act, NRS 239.001 *et seq.*, defines public records in Nevada as
7 all public books and public records of a governmental entity, the contents of which are not otherwise
8 declared by law to be confidential and requires that these records must be open at all times during office
9 hours to inspection by any person, and may be fully copied or an abstract or memorandum may be
10 prepared from those public books and public records.

11 19. The purpose of the Nevada Public Records Act is to ensure the accountability of the
12 government to members of the public by facilitating public access to vital information about government
13 activities. *DR Partners v. Board of County Comm'rs*, 116 Nev. 616, 6 P.3d 465 (2000). Disclosure of
14 the PERS actuarial report of its retirees would serve to advance this important public purpose of
15 governmental transparency.

16 20. In order to enforce the Nevada Public Records Act, NRS 239.011 states that: "If a
17 request for inspection or copying of a public book or record open to inspection and copying is denied,
18 the requester may apply to the district court in the county in which the book or record is located for an
19 order permitting him to inspect or copy it."

20 21. The public official or agency bears the burden of establishing that the requested records
21 are "declared by law to be confidential." *DR Partners v. Board of County Comm'rs*, 116 Nev. 616, 6
22 P.3d 465 (2000); NRS 239.0113. The Respondents have failed to meet this burden.

23 22. The Nevada Legislature has mandated that the Nevada Public Records Act "be construed
24 liberally," and that any limitations on public disclosure be "construed narrowly." NRS 239.001; *DR*
25 *Partners v. Board of County Comm'rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000).

26 23. The Nevada Supreme Court begins analysis of public records act cases with a
27 presumption that all government-generated records are open to disclosure. *See Reno Newspapers v.*
28 *Sheriff*, 126 Nev. at —, 234 P.3d at 924; *DR Partners*, 116 Nev. at 621, 6 P.3d at 468. The state entity

1 therefore bears the burden of overcoming this presumption by proving, by a preponderance of the
2 evidence, that the requested records are confidential. NRS 239.0113; *DR Partners*, 116 Nev. at 621, 6
3 P.3d at 468.

4 24. A writ of mandamus is the appropriate procedural remedy to compel the disclosure of
5 public books and records under the Nevada Public Records Act. *DR Partners v. Board of County*
6 *Comm'rs*, 116 Nev. 616, 6 P.3d 465 (2000).

7 **Claim for Relief**

8 25. Petitioner realleges and incorporates by reference, Paragraphs 1 through 24 of this
9 Petition.

10 26. Respondents have refused to follow the public record mandate of the Nevada Public
11 Records Act. Notwithstanding the clear public interest in the records requested by NPRI, and
12 notwithstanding the absence of any applicable or properly applied law declaring those records
13 confidential and unavailable to the public, Respondents have unlawfully refused to comply with NPRI's
14 records request.

15 27. A writ of mandamus as requested by Petitioner is thus necessary in order to compel
16 Respondents to comply with the Nevada Public Records Act.

17 **Prayer for Relief**

18 Based upon the foregoing, Petitioner respectfully requests:

19 1. Issuance of a writ of mandamus directing Respondents to provide Petitioner a record of
20 retiree name, payroll amount, date of retirement, years of service, last employer, retirement type,
21 original retirement amount, and COLA increases.

22 2. A court order requiring Respondent PERS to disclose the requested information as
23 contemplated by the NPRA, which will allow NPRI to fulfill its mission of making government more
24 transparent.

25 3. An award to Petitioner of its reasonable attorney's fees and costs incurred in this action,
26 as provided by NRS 239.011; and

27 4. Such other and further relief as this Court may deem just and proper.

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This document does not contain the Social Security number of any person.

I declare under penalty of perjury, under the laws of the State of Nevada, that the foregoing statements are true and correct.

DATED this 6th day of July, 2016.

NPRI CENTER FOR JUSTICE AND
CONSTITUTIONAL LITIGATION

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