

1 CODE NO. 2835
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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8

9 MARK E. SMITH,

Case No. CV18-01564

10 Plaintiff,

Dept. No. 6

11 vs.
12

13 INCLINE VILLAGE GENERAL
14 IMPROVEMENT DISTRICT, aka IVGID, a
15 governmental subdivision of the State of
16 Nevada; JASON GUINASSO, individually and
17 as counsel and de facto records officer for
18 IVGID; KENDRA WONG, Chairman of IVGID's
19 Board of Trustees, ABC CORPORATIONS I
20 through X; BLACK AND WHITE COMPANIES I
21 through X; and JOHN DOES I through X,
22 inclusive,

23 Defendants.
24
25 _____/

26 **ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT;**
27 **RULE 56(f) NOTICE OF COURT'S INTENTION TO GRANT**
28 **SUMMARY JUDGMENT IN FAVOR OF NON-MOVING PARTY**

Before this Court is *Defendants' Motion for Summary Judgment* ("Motion"), filed by
INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT ("IVGID"), JASON GUINASSO,
and KENDRA WONG ("collectively "Defendants" unless individually referenced), by and
through their attorneys of record Erickson, Thrope & Swainston, LTD.

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1 Plaintiff MARK E. SMITH ("Mr. Smith") filed *Plaintiff's Opposition to Motion for*
2 *Summary Judgment ("Opposition")* by and through his attorney of record, Winter Street Law
3 Group.

4 Defendants filed their *Reply in Support of Motion for Summary Judgment ("Reply")*
5 and the matter was submitted for decision thereafter.

6
7 **I. ASSERTED FACTS AND PROCEDURAL HISTORY.**

8 This action arises out of a dispute regarding the Nevada Public Records Act
9 ("NPRA"). On October 19, 2017, Mr. Smith submitted a written request (the Request) to
10 inspect electronic public records of IVGID, a governmental subdivision of the State of
11 Nevada. *Complaint*, ¶ 1. The request provided, in pertinent part, as follows:

12 . . . I hereby request that I be allowed to access, inspect, and copy all original
13 records . . . [a]ll communications by any form including e-mail between Jason
14 Guinasso (the District's attorney) on the one hand, and both yourself [Susan
15 Herron] and Steve Pinkerton on the other, for the period of January 1, 2016 to
16 the date of this request, excluding any privileged communications but including
17 a list of all excluded communications including the nature of each, as required
18 by law. . .

19 *Complaint*, Exhibit 1; *Complaint*, ¶ 1.

20 On October 19, 2017, Susan Herron, IVGID's Public Records Officer, provided a
21 written response to Mr. Smith informing him that "no documents will be provided to you as
22 requested. . . . All communications with the District's General Counsel are attorney/client
23 privileged and confidential." *Complaint*, Exhibit 2, p.1. Thereafter, Mr. Guinasso took over
24 response to the Request. *Complaint*, Exhibit 2, p. 3.

25
26 On February 2, 2018, Mr. Guinasso informed Mr. Smith additional time was needed
27 to complete his response to the Request and Mr. Guinasso estimated it would take "until the
28 end of February 2018 to complete the review of such emails and concurrently create a

1 privilege log identifying any non-public or otherwise protected records by the attorney-client
2 privilege and attorney work product doctrine which will not be produced.” *Complaint*, Exhibit
3 5.

4
5 On April 27, 2018, Mr. Guinasso provided a response to the Request. *Complaint*,
6 Exhibit 6. Mr. Guinasso informed Mr. Smith three-hundred and four (304) pages of
7 approximately thirteen-thousand (13,000) pages were responsive to the Request and were
8 not protected by attorney-client privilege. *Complaint*, Exhibit 6; *Complaint*, ¶ 2. Mr.
9 Guinasso informed Mr. Smith that, due to the extensive hours spent on the Request, Mr.
10 Smith could obtain the responsive documents for a price of \$1.00 per page, after the first
11 five pages, for a total payment of two-hundred ninety-nine dollars (\$299). *Complaint*, Exhibit
12 6; *Complaint*, ¶ 2.

14 Mr. Smith thereafter informed Mr. Guinasso that Section I(E)(4)(b) of Resolution No.
15 137, Policy for the Provision of Records and Information, provides records which can be
16 provided in digital form will be provided to the requester at no charge. *Complaint*, Exhibit 7;
17 *Complaint*, ¶ 3. Mr. Smith further clarified he did not request copies or print outs of emails,
18 “which are incomplete (and sometimes altered) versions of the originals. Rather, [Mr. Smith]
19 wish[ed] to inspect the original electronic files, which include the email headers and the
20 information on distribution and routing for the email.” *Complaint*, Exhibit 7. Mr. Smith
21 asserts he did not receive the requested documents. *Complaint*, ¶ 5.

24 On July 30, 2018, Mr. Smith filed his *Complaint* asserting claims for (1) Declaratory
25 and Injunctive Relief, and (2) Violation of NRS 239.010. This *Motion* followed.

27 **Motion for Summary Judgment**

28 In the *Motion*, Defendants maintain Mr. Smith’s public records request is the latest

1 attempt by residents to utilize the NPRA “not as a legitimate tool to gain access to public
2 information, but rather, as a weapon to debilitate IVGID’s operations with harassing,
3 voluminous, and extraordinarily time consuming public records requests.” *Motion*, p. 3.

4
5 Defendants argue the Court should grant their *Motion* for six reasons. First,
6 Defendants assert only three-hundred and four (304) pages of the thirteen-thousand
7 (13,000) pages of records requested by Mr. Smith do not implicate the attorney-client
8 privilege. *Motion*, p. 8. Defendants maintain the NPRA and Section 239.010 of the Nevada
9 Revised Statutes provides public records must be open to inspection and copying unless
10 otherwise declared confidential. *Motion*, p. 8; citing City of Reno v. Reno Gazette-Journal,
11 119 Nev. 55, 61, 63 P.3d 1147, 1150 (2003). Thereafter, they argue NRS 49.095 includes
12 documents protected by the attorney client privilege under those excluded under the NPRA.
13 *Motion*, p. 8; citing NRS 49.095. As such, Defendants argue all communications requested
14 between Jason Guinasso and Steven Pinkerton and Susan Herron implicate attorney client
15 privilege and are protected from disclosure. *Motion*, p. 8.

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18 Second, Defendants maintain a request for documents which is likely confidential due
19 to the attorney-client privilege requires review and copying prior to inspection. *Motion*, p.
20 10. Defendants assert the Nevada Public Records Act: A Manual for State Agencies (“the
21 Manual”) sets forth the timeline and procedure to respond to a request for inspection or
22 copying. *Motion*, p. 10. Defendants argue all responses to Mr. Smith’s request complied
23 with the Manual and NRS 239.0107 and 239.012. *Motion*, p. 10.

24
25 Defendants argue, in this situation, Mr. Guinasso “was not in the position to simply
26 allow carte blanche inspection of electronic communications.” *Motion*, p. 13. Defendants
27 further argue the “circumstances of this matter” required each document to be printed and
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1 Bates numbered. *Motion*, p. 13. As such, Defendants contend it was not required to make
2 the documents available electronically. *Motion*, p. 13.

3 Third, Defendants maintain the records subject to NPRA were made available to Mr.
4 Smith. *Motion*, p. 13. Defendants assert, although the non-privileged documents were
5 made available at a fee, that was only because the request “made it impossible to Mr.
6 Guinasso to simply sit Mr. Smith down at a computer for him to review the records.” *Motion*,
7 p. 14. Defendants further argue the Manual allows a fee to be charged where an
8 extraordinary use of personnel or technological resources is necessary to produce the
9 records. Exhibit 5, p. 19. Therefore, because the request required an extraordinary use of
10 time, IT personnel, and resources, the fee is reasonable. *Motion*, p. 14.

13 Fourth, Defendants maintain NRS 239.052(1) provides a governmental entity may
14 charge a fee for providing a copy of a public record, so long as the fee does not exceed the
15 actual cost the entity incurred in providing the copy of the record. *Motion*, p. 15; citing NRS
16 239.052(1). Additional fees may also be assessed where extraordinary use of time and
17 resources has been assessed. *Motion*, p. 15; citing NRS 239.055.

19 Fifth, Defendants contend a pre-litigation request for public records does not require
20 the governmental entity prepare a privilege log for withheld records. *Motion*, p. 16; citing
21 NRS 239.867; Pers v. Reno Newspapers Inc., 134 Nev. Adv. Op. 81, 429 P.3d 280, 283
22 (2018). Defendants assert a privilege log has only been required after the commencement
23 of a lawsuit. *Motion*, p. 17; citing Reno Newspapers, Inc. v. Gibbons, 127 Nev. 873, 266
24 P.3d 623 (2011). Moreover, Defendants contend they provided sufficient notice and citation
25 of the reason certain records could not be accessed due to attorney-client privilege. *Motion*,
26 p. 19; citing NRS 239.0107(d).
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1 Sixth, Defendants maintain there is no legal justification for inclusion of Chairwoman
2 Kendra Wong, or Jason Guinasso in this action. As such, Defendants assert they should be
3 summarily dismissed. *Motion*, p. 19. Defendants contend neither of these individuals
4 possess or own the public records of IVGID and should not be named individually. *Motion*,
5 p. 20. Lastly, Defendants assert, “[s]hould this Court find that the records were not properly
6 produced, IVGID will most certainly produce them in any form directed by this Court.”
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8 *Motion*, p. 20.

9 **Opposition to Motion for Summary Judgment**

10 In his *Opposition*, Mr. Smith seeks an order from the Court denying Defendants’
11 *Motion* in its entirety, requiring IVGID to provide Mr. Smith with immediate access to inspect
12 the electronic documents Defendants agree are not privileged, for immediate disclosure of
13 the privilege log, and requiring Defendants to pay the costs and reasonable attorney’s fees
14 incurred by Mr. Smith in these proceedings. *Opposition*, p. 3.
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17 Mr. Smith contends he did not request printed copies of the requested documents.
18 *Opposition*, p. 6. Instead, Mr. Smith specifically, requested he “access, inspect and copy all
19 original records – **in their original format** . . .” (emphasis in original). Moreover, Mr. Smith
20 maintains Defendants have refused to provide a privilege log, despite stating it was forced
21 to make one as support for charging defendant for copies. *Opposition*, p. 6.
22

23 Mr. Smith argues Defendants’ handling of the request is contrary to the plain
24 language and spirit of the NPRA. *Opposition*, p. 8. Specifically, Mr. Smith contends NRS
25 239.010 requires public records of governmental entities must be open, at all times during
26 office hours, to inspection by any person. *Opposition*, p. 8; citing Clark Cty. Sch. Dist. v. Las
27 Vegas Review-Journal, 134 Nev. Adv. Op. 84, 429 P.3d 313,317 (2018). Moreover, Mr.
28

1 Smith maintains a governmental agency that seeks to withhold records, "bears the burden
2 of proving, by preponderance of the evidence, that the records are confidential by law."
3 *Opposition*, p. 8; citing NRS 239.0113. As such, Mr. Smith contends Defendants failed to
4 meet that burden in establishing the attorney-client privilege applies to more than 13,000
5 pages of withheld documents. *Opposition*, p. 9.

7 Mr. Smith asserts Defendants "blanket" assertion the attorney client privilege
8 prevents disclosure is insufficient. *Opposition*, p. 9. Mr. Smith argues acts or services
9 performed by an attorney for his client, which are accessible to others or the public, do not
10 fall within the attorney-client privilege. *Opposition*, p. 10; citing Nevada Tax Commission v.
11 Hicks, 310 P2d 852, 73 Nev. 115 (1957).

13 Mr. Smith maintains, at the very least, Defendants are in violation of the NPRA by
14 refusing to permit him to inspect the responsive documents. *Opposition*, p. 11. Specifically,
15 Mr. Smith contends NRS 239.010(4)(a) provides a person may request a copy of a public
16 record in any medium in which the record is readily available and a governmental entity
17 cannot refuse to provide a copy of that record in the available medium because the agent
18 "has already prepared or would prefer to provide the copy in a different medium."
19 *Opposition*, p. 11; citing NRS 239.010(4)(a).

22 Mr. Smith contends Defendants' arguments with respect to fees for extraordinary use
23 of personnel and resources fails as a matter of law. *Opposition*, p. 13. Mr. Smith argues
24 NRS 239.055 provides a governmental entity may charge a fee not to exceed fifty (50) cents
25 per page for extraordinary use or personnel or technological resources. *Opposition*, p. 14;
26 citing NRS 239.055. However, Mr. Smith maintains, the governmental entity must inform
27 the requester in writing of the amount of the fee before preparing the requested information
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1 and the fee must be reasonable. *Opposition*, p. 14; citing Id. Mr. Smith maintains he was
2 never provided an estimate of the amount of fees for extraordinary use of personnel or
3 resources. *Opposition*, p. 14.

4 Mr. Smith argues the law is clear that a privilege log is required. *Opposition*, p. 16.
5 He asserts he was informed by Mr. Guinasso in his February 2, 2018 correspondence
6 additional time was needed to complete the request and concurrently create a privilege log.
7 *Opposition*, p. 16. Mr. Smith states he has not received any such log to date. *Opposition*,
8 p. 16. Mr. Smith further maintains the Nevada Supreme Court has held if a government
9 agency denies a public records request prior to the initiation of an NPRA lawsuit, it must
10 provide the requesting party notice and citation to legal authority justifying non-disclosure.
11 *Opposition*, p. 16; citing Reno Newspapers, Inc. v. Gibbons, 127 Nev. 873, 266 P.3d 623
12 (2011). Mr. Smith further points out that Defendants agree a privilege log is required once
13 litigation has commenced but have still failed to provide one. *Opposition*, p. 18.

14 Lastly, Mr. Smith maintains Ms. Wong and Mr. Guinasso are proper parties to this
15 action. *Opposition*, p. 19. Mr. Smith contends, in direct conflict with Defendants' assertion
16 that Ms. Wong and Mr. Guinasso do not possess or own the public records of IVGID, Mr.
17 Guinasso himself stated e-mails were obtained from "General Counsel's servers."
18 *Opposition*, p. 20. Regardless, Mr. Smith argues Defendants have set forth nothing in their
19 *Motion* supporting dismissing Ms. Wong or Ms. Guinasso from this action at this time.
20 *Opposition*, p. 20.

21 **Reply in Support of Motion for Summary Judgment**

22 In their *Reply*, Defendants assert Mr. Smith failed to identify any material facts in
23 dispute. *Reply*, p. 2. Accordingly, Defendants maintain trial in this matter is not necessary
24

1 as the Court can dispose of the issues beforehand. *Reply*, p. 2.

2 Defendants argue they met their their burden to establish by preponderance of the
3 evidence that the records withheld are protected by attorney-client privilege. *Reply*, p. 5.
4 Defendants contend Mr. Guinasso informed Mr. Smith approximately thirteen-thousand
5 (13,000) e-mails were protected by the attorney-client privilege. *Reply*, p. 6. Moreover,
6 Defendants assert a “blanket” assertion the attorney-client privilege protected the e-mails is
7 appropriate because the attorney-client privilege creates an explicit exemption from NPRA;
8 and, therefore, no balancing test is required. *Reply*, p. 7; citing DR Partners v. Bd. Of Cty.
9 Comm'rs of Clark Cty., 116 Nev. 616, 621, 6 P.3d 465, 468 (2000).
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12 Defendants assert, they are unsure if Mr. Smith is requesting emails in their “native”
13 format, or simply by electronic means. *Reply*, p. 9. Defendants contend the law does not
14 require them to produce “unaltered electronic files not altered or compressed files such as
15 PDF which strip important metadata from the public records,” as requested by Mr. Smith.
16 *Reply*, p. 11.

17
18 Defendants reiterate the fees it requested are authorized by the NPRA. *Reply*, p. 11.
19 Defendants further reiterate they are not required to produce a privilege log in response to
20 Mr. Smith’s request. *Reply*, p. 13. Most relevant, Defendants contend they are reluctant to
21 produce a privilege log because the log, in and of itself, can reveal information which is fully
22 protected by the attorney-client privilege. *Reply*, p. 14. Defendants further assert they are
23 “deeply concerned” this case is being used to create an impermissible legal precedent.
24 *Reply*, p. 14. Lastly, Defendants reiterate IVGID is the owner and possessor of the
25 documents at issue and is, therefore, the only necessary party. *Reply*, p. 15.
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1 **II. SUMMARY JUDGMENT STANDARD AND APPLICABLE LAW.**

2 Summary judgment is appropriate under Rule 56 of the Nevada Rules of Civil
3 Procedure "when the pleadings, depositions, answers to interrogatories, admissions, and
4 affidavits, if any, that are properly before the court demonstrate that no genuine issue of
5 material fact exists, **and the moving party is entitled to judgment as a matter of law.**"
6 Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007)
7 (emphasis supplied).
8

9 A factual dispute is genuine when the evidence is such that a rational trier of fact
10 could return a verdict for the nonmoving party. Wood v. Safeway, Inc., 121 Nev. 724, 731,
11 121 P.3d 1026, 1031 (2005). The pleadings and other proof "must be construed in a light
12 most favorable to the nonmoving party," who bears the burden to "do more than simply
13 show that there is some metaphysical doubt as to the operative facts in order to avoid
14 summary judgment" in favor of the moving party. Id., 121 Nev. at 732, 121 P.3d at 1031.
15 The substantive law controls which factual disputes are material and will preclude summary
16 judgment; other factual disputes are irrelevant. Id., 121 Nev. at 731, 121 P.3d at 1031.
17

18 The manner in which each party may satisfy its burden of production depends on
19 which party will bear the burden of persuasion on the challenged claim at trial. Cuzze, 123
20 Nev. at 602, 172 P.3d at 134. If the moving party will bear the burden of persuasion, that
21 party must present evidence that would entitle it to a judgment as a matter of law in the
22 absence of contrary evidence. Id. If the nonmoving party will bear the burden of persuasion
23 at trial, the party moving for summary judgment may satisfy the burden of production in two
24 ways: (1) the moving party may submit evidence which negates an essential element of the
25 nonmoving party's claim, or (2) the moving party may merely point out the absence of
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1 evidence to support the nonmoving party's case. Id. In such instances, in order to defeat
2 summary judgment, the nonmoving party must transcend the pleadings and, by affidavit or
3 other admissible evidence, introduce specific facts that show a genuine issue of material
4 fact. Id.

5
6 While addressing the law applicable to genuine issues of material fact above, the
7 Court notes the gravamen of its decision is, in this unique case, whether the Defendants are
8 entitled to judgment as a matter of law. Establishing the moving party is entitled to judgment
9 as a matter of law is an essential aspect of a summary judgment motion under Rule 56.
10 NRCP 56; See generally, Simonian v. Univ. & Cmty. Coll. Sys. of Nevada, 122 Nev. 187,
11 128 P.3d 1057 (2006) (no genuine issues of material fact remain and the moving party is
12 entitled to judgment as a matter of law).

13
14 Also applicable to the present case, is Rule 56(f) of the Nevada Rules of Civil
15 Procedure which provides, a court, after giving notice and a reasonable time to respond,
16 may grant summary judgment for a nonmovant. NRCP 56(f).

17
18 **III. FINDINGS OF UNDISPUTED MATERIAL FACT.**

19 1. On October 19, 2017, Mr. Smith submitted a written request (the Request) to
20 inspect electronic public records of IVGID, a governmental subdivision of the State of
21 Nevada. *Complaint*, ¶ 1. The request provided, in pertinent part, as follows:

22
23 . . . I hereby request that I be allowed to access, inspect, and copy all original
24 records . . . [a]ll communications by any form including e-mail between Jason
25 Guinasso (the District's attorney) on the one hand, and both yourself [Susan
26 Herron] and Steve Pinkerton on the other, for the period of January 1, 2016 to
27 the date of this request, excluding any privileged communications but including
28 a list of all excluded communications including the nature of each, as required
by law. . .

Complaint, Exhibit 1; *Complaint*, ¶ 1.

1 2. On October 19, 2017, Susan Herron, IVGID's Public Records Officer, provided
2 a written response to Mr. Smith informing him that "no documents will be provided to you as
3 requested. . . . All communications with the District's General Counsel are attorney/client
4 privileged and confidential. *Complaint*, Exhibit 2, p.1.
5

6 3. Mr. Guinasso took over handling the response to the Request. *Complaint*,
7 Exhibit 2, p. 3.
8

9 4. On February 2, 2018, Mr. Guinasso informed Mr. Smith additional time was
10 needed to complete the response to the Request and Mr. Guinasso estimated it would take
11 "until the end of February 2018 to complete the review of such emails and concurrently
12 create a "privilege log" identifying any non-public or otherwise protected records by the
13 attorney-client privilege and attorney work product doctrine which will not be produced."
14 *Complaint*, Exhibit 5.
15

16 5. On April 27, 2018, Mr. Guinasso provided a response to the Request.
17 *Complaint*, Exhibit 6.
18

19 6. Mr. Guinasso informed Mr. Smith three-hundred and four (304) pages of
20 approximately thirteen-thousand (13,000) pages were responsive to the Request and not
21 protected by attorney-client privilege. *Complaint*, Exhibit 6; *Complaint*, ¶ 2.
22

23 7. Defendants did not provide Mr. Smith with an estimate of costs prior to
24 processing the request.
25

26 8. Mr. Guinasso informed Mr. Smith, due to the extensive hours spent on the
27 Request, Mr. Smith could obtain the responsive documents for a price of one dollar (\$1.00)
28 per page, after the first five (5) pages, for a total payment of two-hundred ninety-nine dollars
(\$299) dollars. *Complaint*, Exhibit 6; *Complaint*, ¶ 2.

1 9. Mr. Smith informed Mr. Guinasso that Section I(E)(4)(b) of Resolution No. 137,
2 Policy for the Provision of Records and Information, provides records which can be provided
3 in digital form will be provided to the requester at no charge. *Complaint*, Exhibit 7;
4 *Complaint*, ¶ 3.
5

6 10. Mr. Smith clarified he did not request copies or print outs of emails, “which are
7 incomplete (and sometimes altered) versions of the originals. Rather, [Mr. Smith] wish[ed]
8 to inspect the original electronic files, which include. the email headers and the information
9 on distribution and routing for the email.” *Complaint*, Exhibit 7.
10

11 11. Mr. Smith has not received the electronic versions of the requested
12 documents.

13 12. Mr. Smith has not received hard copies of the requested documents.

14 13. A privilege log has not been provided by Defendants.

15 14. Should any of the following conclusions of law contain or be construed to
16 contain findings of fact, they are incorporated here.
17

18 **IV. CONCLUSIONS OF LAW.**

19 Based on the foregoing Findings of Undisputed Material Fact, the Court makes the
20 following Conclusions of Law.
21

22 1. To the extent any of the foregoing Findings of Undisputed Material Fact
23 constitute or may be construed to constitute conclusions of law, they are incorporated here.

24 **First Cause of Action for Declaratory and Injunctive Relief**

25 2. Mr. Smith’s First Cause of Action is for Declaratory and Injunctive Relief. In
26 Nevada, Declaratory relief is available if: (1) a justiciable controversy exists between
27 persons with adverse interests; (2) the party seeking declaratory relief has a legally
28

1 protectable interest in the controversy; and (3) the issue is ripe for judicial determination.

2 Cty. of Clark, ex rel. Univ. Med. Ctr. v. Upchurch, 114 Nev. 749, 961 P.2d 754 (1998).

3 3. The decision to make a declaratory determination in an action for declaratory
4 judgment is within the district court's discretion and will not be disturbed on appeal unless
5 the district court abused that discretion. Id.

7 4. Mr. Smith asserts Defendants have failed, and continue to fail, to comply with
8 the provisions of NRS Chapter 239; and, therefore, Mr. Smith is entitled to a declaratory
9 judgment as he has no adequate remedy at law.

11 5. Section 239.010 of the Nevada Revised Statutes provides, unless otherwise
12 declared by law to be confidential, all public books and public records of a governmental
13 entity must be open, at all times during office hours, to inspection by any person, and may
14 be fully copied or an abstract or memorandum may be prepared from those public books
15 and public records.

17 6. Section 49.095 of the Nevada Revised Statutes provides the attorney-client
18 privilege protects confidential communications made between the client and the client's
19 lawyer or between the client's lawyer and the lawyer's representative where made for the
20 purpose of facilitating the rendition of professional legal services to the client. NRS 49.095.

22 7. The attorney-client privilege does not exist as to conversation held in the
23 presence of third person. Nevada Tax Comm'n v. Hicks, 73 Nev. 115, 310 P.2d 852 (1957)
24 (overruled on other grounds).

25 8. Section 239.010(4) of the Nevada Revised Statutes provides:

26 A person may request a copy of a public record in any medium in which the
27 public record is readily available. An officer, employee or agent of a
28 governmental entity who has legal custody or control of a public record:

1 (a) Shall not refuse to provide a copy of that public record in a readily available
2 medium because the officer, employee or agent has already prepared or
would prefer to provide the copy in a different medium.

3 (b) Except as otherwise provided in NRS 239.030, shall, upon request,
4 prepare the copy of the public record and shall not require the person who has
5 requested the copy to prepare the copy himself or herself.

6 9. Section 239.055 of the Nevada Revised Statutes allows a public entity to
7 charge a fee, not to exceed fifty cents (\$.50) per page, for extraordinary use of its
8 personnel or technological resources. NRS 239.055(1). The Defendants attempted to
9 charge Mr. Smith an amount in excess of fifty cents (\$.50) per page.

10 10. The governmental entity must inform the requester, in writing, of the amount of
11 the fee before preparing the requested information. NRS 239.055(1). The Defendants did
12 not inform Mr. Smith in accordance with NRS 239.055(1).

13 11. The fee must be reasonable and based on the cost the entity actually incurred
14 for the extraordinary used of personnel or technological resources. NRS 239.055(1).
15 Defendants have not established the fee of one dollar (\$1.00) after the first five (5) pages
16 was reasonable.

17 12. Defendants are legally precluded from charging Mr. Smith a fee for the cost
18 of copying because it was their preferred method of organization.

19 13. The Defendants are not entitled to judgment as a matter of law on Mr. Smith's
20 First Cause of Action.

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24 **Second Cause of Action for a Violation of Section 239.010 of the Nevada**
25 **Revised Statutes**

26 14. Mr. Smith's Second Cause of Action is for a Violation of Section 239.010 of the
27 Nevada Revised Statutes. As concluded above, Section 239.010 of the Nevada Revised
28 Statutes provides, unless otherwise declared by law to be confidential, all public books and

1 public records of a governmental entity must be open, at all times during office hours, to
2 inspection by any person, and may be fully copied or an abstract or memorandum may be
3 prepared from those public books and public records.
4

5 15. The Defendants unlawfully denied Mr. Smith access to public records required
6 to be open to the public and are not declared by law to be confidential.

7 16. IVGID is a state entity.

8 17. If a state entity declines a public records request prior to litigation, it must
9 provide the requesting party with notice and citation to legal authority that justifies
10 nondisclosure. Reno Newspapers, Inc. v. Gibbons, 127 Nev. 873, 885, 266 P.3d 623, 631
11 (2011). It is legally insufficient to provide a blanket assertion of privilege such as, "all
12 requested emails are either privileged or are not considered public records." Id.
13

14 18. After the commencement of a lawsuit under the NPRA, the requesting party
15 generally is entitled to a log containing a factual description of each withheld record and a
16 specific explanation for nondisclosure unless, for example, the state entity withholding the
17 records demonstrates that the requesting party has sufficient information to meaningfully
18 contest the claim of confidentiality without a log. Id.
19

20 19. Defendants unlawfully failed to provide Mr. Smith with a privilege log or a
21 detailed explanation of the basis for non-disclosure.
22

23 20. Defendants have not provided a sufficient log for Mr. Smith to determine
24 whether a communication is confidential.

25 21. Defendants provided a blanket assertion that approximately 13,000 e-mails
26 identified as protected by attorney client privilege are withheld pursuant to Section 49.095 of
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1 the Nevada Revised Statutes. This blanket assertion is legally insufficient after
2 commencement of a lawsuit under the NPRA.

3 22. The Defendants are not entitled to judgment as a matter of law on Mr. Smith's
4 Second Cause of Action.
5

6 **V. ORDER.**

7 Based on the foregoing findings of undisputed material fact and conclusions of law,
8 and good cause appearing therefor,

9 **IT IS HEREBY ORDERED:**

10 1. *Defendants' Motion for Summary Judgment* is DENIED;

11 2. Pursuant to Rule 56(f) of the Nevada Rules of Civil Procedure, notice is given
12 to the parties of the Court's intention to grant summary judgment in favor of the nonmoving
13 party.
14

15 3. Defendants shall have ten (10) days to file their response or opposition to the
16 Court's notice;
17

18 4. As part of its entry of summary judgment in favor of the non-moving party, the
19 Court intends to order:

20 a. Defendants provide the 304 hard copies at a rate of (\$.50) in lieu of
21 providing the files electronically.
22

23 b. Mr. Smith is entitled to obtain the 304 hard copies and is not entitled, at
24 this time, to obtain the 304 copies in their electronic form.

25 c. Defendants provide a privilege log to Mr. Smith for the remaining
26 documents subject to the request but asserted as confidential. The privilege log will consist
27 of identification of any withheld communications by date, author, recipient, whether a third
28

1 party is party to the communication, and a one word identifier for the property or outside
2 party involved; and,

3 5. The Court's determination in this matter is restricted to the unique facts and
4 circumstances of this case and does not, and should not be construed to, establish a
5 precedent for blanket access to documents maintained by IVGID.
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7 Dated this 5th day of April, 2019.
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11 DISTRICT JUDGE
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