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### Summary of Reno Newspapers v. Gibbons, 125 Nev. Adv. Op. 23

Daniel M. Ryan  
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## EVIDENCE - CONFIDENTIAL RECORDS

### **Summary**

The Court considers whether after a public records lawsuit commences, when a party requests records from a state entity, and that state entity withholds the requested records, is the requesting party entitled to a log containing a factual description of each withheld record and a legal basis for nondisclosure. Also, the Court considers what the state entity withholding records is required to provide to the requesting party in prelitigation situations.

### **Disposition/Outcome**

The Court granted in part and denied in part a petition for a writ of mandamus challenging the Respondent's refusal to provide access to or information regarding certain e-mail communications. It held that, pursuant to the Nevada Public Records Act (NPRa), the party that requests records is entitled to a log that contains, at a minimum, a general factual description of each withheld record and a specific explanation for nondisclosure. The district court erred in not denying the request for the log.

The Court also found that pursuant to NRS 239.107(1)(d), if the state entity denies a public records request prior to the commencement of litigation, it must provide the requesting party with notice of its claim of confidentiality and citation to legal authority that justifies nondisclosure. The state entity in this case failed to do this.

### **Factual and Procedural History**

In 2008, Appellant Reno Newspapers, Inc., a Nevada corporation doing business as the Reno Gazette-Journal (RGJ), requested records pursuant to the NPRa for e-mails sent over a six-month time period between Respondent Governor Gibbons (Gibbons) and ten individuals. The request specified that the emails were being transmitted to or from Gibbons' state-issued email account. If the request was denied, RGJ asked that it be provided a log identifying, for each e-mail, the sender, all recipients, the message date, and the legal basis upon which the State was denying access. The State denied RGJ's request for the e-mails and for the log. The State cited to DR Partners v. Board of County Commissioners, 116 Nev. 616, 6 P.3d 465 (2000), California caselaw, a Nevada Attorney General Opinion, and the State of Nevada Policy on Defining Information Transmitted via E-mail as a Public Record, and informed RGJ that all of the requested e-mails were confidential because they were either privileged or not considered public records. RGJ repeated its request for a log so it could assess whether to challenge the State's classification of the e-mails as confidential and the State again denied RGJ's request.

Thereafter, RGJ filed a petition for a writ of mandamus in the district court seeking either access to the emails or a detailed log identifying the sender, recipients, date, subject matter, and the basis upon which the State was denying access to each of the total 104 requested emails. After conducting a hearing to consider the petition and an in camera review of the e-mails, the district court denied RGJ's request for a detailed log because it would disclose otherwise

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<sup>1</sup> By Bryan Schwartz.

confidential information. After ruling on the nature of the emails during an in camera review, the district court then granted the petition as to the 6 emails determined not to be confidential and denied the petition as to the remaining 98 emails. RGJ filed this appeal. The State did not file a cross-appeal challenging the 6 emails the district court granted the petition for. The Court's limited its decision on appeal to whether the district court erred in denying the RGJ's writ petition as to the remaining e-mails.

## **Discussion**

Chief Justice Saitta wrote for the unanimous court, sitting en banc. A district court's denial of a writ of petition is ordinarily review for an abuse of discretion, when the petition entails questions of law, however, the Court reviewed the district court's decision de novo.<sup>2</sup>

*The district court erred in denying the RGJ's request for a log.*

RGJ's primary contention on appeal is that the district court erred in refusing to order the State to provide a detailed log so it could make an informed decision whether to challenge the State's claim of confidentiality. The Court first looked at the NPRA.

### *Overview of the NPRA*

The 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.<sup>3</sup> The Legislature declared that the purpose is to ensure that public records are broadly accessible and the provisions of the NPRA are designed to promote government transparency and accountability.

In 2007, to further those purposes, the Legislature amended the NPRA to provide that its provisions must be liberally construed to maximize the public's right of access.<sup>4</sup> Also, any restrictions on the public's right of access must be narrowly construed.<sup>5</sup> Further, if a state entity withholds records, it bears the burden of providing, by a preponderance of the evidence, that the records are confidential.<sup>6</sup>

### *Overview of Nevada's NPRA jurisprudence*

The Court first reviewed several NPRA cases to more clearly define the standard in this case. The reviewed case law set up a framework for testing claims of confidentiality under the backdrop of the NPRA's declaration that its provisions must be construed liberally to facilitate access to public records. First, there is a presumption that all government-generated records are open to disclosure. The state entity bears the burden of overcoming this presumption by proving, by a preponderance of evidence, that the requested records are confidential. Next, in the absence of a statutory provision explicitly declaring a record to be confidential, any limitations must be based upon a broad balancing of the interests involved, and the state entity bears the burden to prove that its interest in nondisclosure clearly outweighs the public's interest in access. Finally,

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<sup>2</sup> Reno Newspapers v. Sheriff, 126 Nev. \_\_\_\_, \_\_\_\_, 234 P. 3d 922, 924 (2010).

<sup>3</sup> NEV. REV. STAT. § 239.010(1) (2007).

<sup>4</sup> Id. at (1)-(2).

<sup>5</sup> Id. at (3) (2007).

<sup>6</sup> NEV. REV. STAT. § 239.0113 (2007).

the state cannot meet this burden with a non-particularized showing, or by expressing hypothetical concerns.<sup>7</sup>

*After the commencement of an NPRA lawsuit, the state entity withholding requested records is generally required to provide the requesting party with a log.*

RGJ asserted that the district court should have ordered the State to provide it with a log describing each e-mail so that it could assess and challenge the State's claim that the requested emails were confidential. RGJ asked the court to adopt a rule whereby each time a state entity asserts that requested records are confidential, the state entity must provide the requesting party with a log in the form of a "Vaughn index". Without a Vaughn index, RGJ contended that the requesting party is at a severe disadvantage in NPRA cases because it otherwise lacks the necessary information to meaningfully advocate for disclosure.

A Vaughn index is commonly used in Freedom of Information Act (FOIA) cases, the federal analog of the NPRA. This submission typically contains detailed public affidavits identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption.<sup>8</sup> It is designed to preserve a fair adversarial proceeding when a lawsuit is brought after the denial of a FOIA request.

The Court agreed that in this case, RGJ should have been provided with a log. However, the Court did not find that the log must be a Vaughn index or that a log is required each time records are withheld. FOIA cases have acknowledged that even a Vaughn index is not necessarily required in all cases.<sup>9</sup> Also, the Court found that if it required a log each time a lawsuit is brought after the denial of an NPRA request, it would essentially be rewriting the NPRA because it imposes no such unqualified requirement.

Nonetheless, the Court held that the NPRA places an unmistakable emphasis on disclosure. Further, there is also an unmistakable emphasis placed by the NPRA jurisprudence on adequate adversarial testing. Therefore, the Court agreed with the Vaughn court that it is anomalous and inequitable to deny the requesting party basic information about the withheld records. A claim that records are confidential can only be tested in a fair and adversarial manner, and in order to truly proceed in such a fashion, a log typically must be provided to the requesting party.

The Court concluded that after the commencement of an NPRA lawsuit, the requesting party is generally entitled to a log unless, for example, the state entity withholding the records demonstrates that the requesting party has sufficient information to meaningfully contest the claim of confidentiality without a log. The Court declined to precisely explain what the log must contain. The Court indicated that in most cases, the log should contain, at a minimum, a general factual description of each record withheld and a specific explanation for nondisclosure. The Court acknowledged that it does not require the state entity to compromise the secrecy of the information, and additionally, when there are hundreds of logs needed, a log providing a representative sampling of the larger group of records may be appropriate.

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<sup>7</sup> DR Partners v. Board of County Commissioners, 116 Nev. 616, 627-28, 6 P.3d 465, 472-73 (2000); Reno Newspapers, 126 Nev. at \_\_\_, 234 P.3d at 927.

<sup>8</sup> Lion Raisins v. U.S. Dept. of Agriculture, 354 F.3d 1072, 1082 (9th Cir. 2004).

<sup>9</sup> Fiduccia v. U.S. Dept. of Justice, 185 F.3d 1035, 1042-43 (9th Cir. 1999).

The State argued that it is not required to provide the RGJ with a log because the district court conducted an in camera review of the requested e-mails. The Court found that an in camera review is not improper<sup>10</sup>, but it is not a replacement for a log when a log is necessary to preserve a fair adversarial proceeding.<sup>11</sup> An in camera review may be used to supplement a log but it may not be used as a substitute when a log is necessary to preserve a fair adversarial proceeding.

Here, the State responded to RGJ's petition for a writ of mandamus by providing the district court with the e-mails claimed to be confidential, as well as a log. The State did not provide RGJ with a log of any type, nor did it demonstrate that the RGJ possessed sufficient information to argue for disclosure without a log. Therefore, the State's response was deficient. The Court concludes that the district court erred in denying RGJ's request for a log containing a general factual description of each of the records withheld and a specific explanation for nondisclosure.

*The State failed to satisfy its prelitigation duties under the NPRA.*

RGJ contended that the State also failed to satisfy its prelitigation duties under the NPRA and was required to provide them with a Vaughn index. The Court declined to adopt the Vaughn index as a prelitigation requirement under the NPRA because it is not required outside of the litigation context.<sup>12</sup> Moreover, the NPRA already defines exactly what is required in prelitigation situations. If a state entity declines a public records request prior to litigation, it must provide the requesting party with notice and specific citation to legal authority that justifies nondisclosure.<sup>13</sup> No log, in the form of Vaughn index or otherwise, is required. The Court found that the State's response to RGJ's prelitigation request for Governor Gibbons' emails was insufficient to satisfy NRS 239.0107(1)(d).

## **Conclusion**

After the commencement of an NPRA lawsuit, the requesting party is generally entitled to a log, unless the state entity withholding the records demonstrates that the requesting party has sufficient information to meaningfully contest the claim of confidentiality without a log. Also, under the NPRA, a state entity that declines a public record prior to litigation must provide the requesting party with notice and a specific citation to legal authority that justifies that nondisclosure.

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<sup>10</sup> Griffis v. Pinal County, 156 P.3d 418, 422 (Ariz. 2007).

<sup>11</sup> Wiener v. F.B.I., 943 F.2d 972, 979 (9th Cir. 1991).

<sup>12</sup> Natural Resources Defense Council, Inc. v. N.R.C., 216 F.3d 1180, 1190 (D.C. Cir. 2000).

<sup>13</sup> NEV. REV. STAT. § 239.0107(1)(d) (2007).