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### Comstock Residents Ass'n v. Lyon Cty. Bd. of Comm'rs, 134 Nev. Adv. Op. 19 (Mar. 29, 2018)

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## CIVIL LAW: NEVADA PUBLIC RECORDS ACT

### **Summary**

The Court held that privately-maintained public records are within the scope of the Nevada Public Records Act (“NPRO”). Accordingly, the district court’s denial of the Comstock Residents Association’s (“CRA”) petition for a writ of mandamus was erroneous.

### **Facts and Procedural History**

The Lyon County Board of Commissioners (“the Board”) voted to deny a zoning change which would allow for industrial development in Lyon County in 2013. At a subsequent meeting, the issue was reintroduced and approved.

As a result, the CRA brought suit challenging the Board’s approval and subsequently made a public records request for all communications concerning the approval of the zoning change, which Lyon County partially complied with. Lyon County provided only information maintained on county equipment and elected to notify the CRA that it “did not provide or pay for phones or email accounts to any commissioners.” The County conceded that the commissioners’ personal phone numbers and email addresses were used to conduct county business.

The CRA filed, and was denied, a petition for a writ of mandamus to compel the disclosure of the commissioners’ communications because the district court found that “the records were not (1) open to public inspection, (2) within the control of the county, and (3) records of official actions of the county or paid for with public money.”

### **Discussion**

#### *Standard of Review*

The Court reviewed the district court’s denial of the writ of mandamus for abuse of discretion, but reviewed questions of statutory interpretation regarding the desired records under the NPRO de novo.<sup>2</sup>

#### *Communications on private devices or servers are not categorically exempt from the Nevada Public Records Act*

Applying the NPRO, the Court found that records of private entities which are used when providing a public service must be open to public inspection.<sup>3</sup> The NPRO creates a presumption that public records must be disclosed to the public<sup>4</sup> unless the governmental entity can show, by a

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<sup>1</sup> By Steven Kish.

<sup>2</sup> *Las Vegas Metropolitan Police Department v. Blackjack Bonding, Inc.*, 131 Nev. 80, 86, 343 P.3d 608, 613 (2015).

<sup>3</sup> *Blackjack*, 131 Nev. at 86, 343 P.3d at 613; *see also* NEV. REV. STAT. § 239.001(4);

<sup>4</sup> *PERS v. Reno Newspapers, Inc.*, 129 Nev. 833, 836–37, 313 P.3d 221, 223–24 (2013).

preponderance of the evidence, that the information is confidential by law<sup>5</sup> or “the balance of interests weighs clearly in favor of the government not disclosing the requested records.”<sup>6</sup>

*A. Public records are not limited to records maintained in government offices, but include all records concerning the provision of a public service*

First, the Court dismissed the Board’s argument that only records maintained in government offices are public records under NRS 239.010(1). The Board’s characterization of public records contradicted other provisions of the NPRA, including NRS 239.001(4)<sup>7</sup> and NRS 239.0107(1)<sup>8</sup>, which indicated that public records included those not maintained at a government location. Further, the Board’s argument was inconsistent with previous cases compelling production of privately-owned public records not kept in a government office.<sup>9</sup>

Instead, the Court found that public records are those which “concern ‘the provision of a public service’ as defined in *Blackjack*.”<sup>10</sup> The commissioners, who fell within the definition of a governmental entity<sup>11</sup>, admittedly conducted business on their private phones and email addresses. Accordingly, the NPRA required producing those communications unless otherwise exempt. The district court did not make any findings regarding which communications specifically did not constitute a public record, nor did it make any findings regarding which may be exempt; the case was remanded to make such findings.

*B. Records that can be generated or obtained by the county or its commissioners are within the county’s control*

The district court erred when it concluded that the records were not public records. Public records must be within the legal custody of a governmental entity.<sup>12</sup> The Board argued that, because the phones and email addresses were private, the records were not within its legal custody and, accordingly, not public records. The county may have had legal custody notwithstanding the Board’s argument under the administrative regulations of NAC 239.041—which the Court reasoned applied to local government management programs created under NRS 239.125(1)—because the commissioners were, themselves, governmental entities.

The district court relied solely on the administrative definition of legal custody without making any finding of fact. Accordingly, the district erred by failing to consider whether the commissioners’ effective control over their private phones and email addresses constituted legal custody of the records.

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<sup>5</sup> NEV. REV. STAT. § 239.010(1).

<sup>6</sup> PERS, 129 Nev. at 837, 313 P.3d at 224.

<sup>7</sup> NEV. REV. STAT. § 239.001(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.”)

<sup>8</sup> NEV. REV. STAT. § 239.0107(1) (allowing five business days for a governmental entity to resolve a public records request.)

<sup>9</sup> See *Las Vegas Metropolitan Police Department v. Blackjack Bonding, Inc.*, 131 Nev. 80, 82, 86–87, 343 P.3d 608, 610, 613 (2015); see also *Reno Newspapers Inc. v. Gibbons*, 127 Nev. 873, 876, 885–86, 266 P.3d 623, 625, 631 (2011).

<sup>10</sup> *Blackjack*, 131 Nev. at 86, 343 P.3d at 613.

<sup>11</sup> NEV. REV. STAT. § 239.005(5)(a).

<sup>12</sup> NEV. REV. STAT. § 239.010(4).

The Board also argued that producing privately-maintained public records is impractical and violates the privacy rights of the commissioners. The Court indicated that any challenges regarding practicality or privacy can be made in the district court on remand.

### **Conclusion**

A public record must be produced unless the government entity can show that it is exempt. The fact that the public record is maintained on private devices or servers does not automatically exempt it from production. Instead, if the information concerns the provision of a public service, it must be disclosed. The case was remanded to the district court to find whether the records requested in the CRA's writ were public records.