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Pub. Emps.' Ret. Sys. of Nev., a Pub. Agency v. Nev. Pol'y Res. Inst. Inc., 134 Nev. Adv. Op. 81 (Oct. 18, 2018) (en banc)

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Recommended Citation

Brady, Daniel, "Pub. Emps.' Ret. Sys. of Nev., a Pub. Agency v. Nev. Pol'y Res. Inst. Inc., 134 Nev. Adv. Op. 81 (Oct. 18, 2018) (en banc)" (2018). *Nevada Supreme Court Summaries*. 1197.

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STATUTORY INTERPRETATION: NEVADA PUBLIC RECORDS ACT

Summary

The Court determined that the Nevada Public Records Act requires the government agency to disclose the requested information if: (1) it can be found by searching a database for existing information, (2) it is readily accessible and not confidential, and (3) the alleged risks of disclosure do not outweigh the benefits of the public's interest in the records.

Background

The Nevada Policy Research Institute, Inc. (NPRI) filed a public records request asking that the Public Employees' Retirement System of Nevada (PERS) turn over its payment records of government retirees, including their names, for 2014. They previously obtained that information from PERS for 2013. NPRI planned to post the information on their TransparentNevada.com website for public use.

PERS refused to supply the information. It based its refusal on the fact that the raw data used to analyze and value the retirement system does not contain names, only redacted socials, and that the law does not require them to create a new document to satisfy NPRI's request. NPRI then requested any other records that had the retiree's name, years of service credit, gross pension benefit amount, year of retirement, and last employer for 2014. PERS denied the new request by saying the information is not available.

NPRI then filed a petition for a writ of mandamus seeking the information on the grounds that it is not confidential and is easily accessible through an electronic search of the database. They sought the retiree name, payroll amount, date of retirement, years of service, last employer, retirement type, original retirement amount, and COLA increases. The district court, after an evidentiary hearing, found that the information is not confidential, the tasks did not outweigh the benefits, and PERS did have a duty to create the document. Accordingly, the district court granted NPRI's petition, but limited the disclosure to retiree name, years of service credit, gross pension benefit amount, year of retirement, and last employer. This appeal followed.

Discussion

PERS argued that the district court erred because the information was confidential and the risks of disclosure outweighed the benefits. Further, it argued that the district court's ruling contradicted the holding of *Public Employees' Retirement System of Nevada v. Reno Newspapers, Inc.*² because there the court held there was no duty to create new documents. Moreover, it argued that the exception created in *Las Vegas Metropolitan Police Department v. Blackjack Bonding, Inc.*³ only applies where the records are under the control of a third party.

¹ By Daniel Brady.

² 129 Nev. 833, 313 P.3d 221 (2013).

³ 131 Nev. 80, 343 P.3d 608 (2015).

NPRI argued that the information is a public record under Nevada law because it is stored on a government computer. Further, the exception from *Blackjack* requires disclosure because the information is readily accessible and PERS has provided the information previously.

Decisions to grant writs of mandamus are reviewed for abuse of discretion; however, if the writ involved a decision of statutory interpretation, then the decision is reviewed de novo.

The Nevada Public Records Act

The purpose of the Public Records Act is to foster democracy and promote government transparency by increasing public access to information.⁴ The law states that unless provided otherwise, all public books and records of a governmental agency must be open.⁵ The Court has held in the past that the Act's provisions must be "liberally construed" for access and limitations must be "narrowly construed."⁶ There is a presumption in favor of disclosure, and the government agency bears the burden to show by a preponderance of the evidence that the requested information is confidential.⁷ The burden is met by showing either: (1) a statute says the information is confidential, or (2) the interest in nondisclosure clearly outweighs the public's interest in access.⁸

The requested information was not declared confidential by statute

PERS claims the district court order would require information from the retirees' individual files which are protected by Nevada statutes. They argue that if the statute declares the underlying information confidential, then reports are generated exclusively from those files should be confidential as well.

The public books and records are open to public inspection unless provided otherwise by statutes or law.⁹ Official records include informed stored on computers.¹⁰ Nevada law does state that individual members or retired employees files are exempt from disclosure.¹¹ That exception is reinforced by Nevada law that requires the individual to sign a waiver in order to review or copy their records.¹² These statutes are construed narrowly as they limit the public's right of access.¹³

The Court has addressed the scope of the Nevada law limiting the right of access previously.¹⁴ In *Reno Newspapers*, PERS denied the request for names of pensioners, their government employers, their salaries, hire and retirement dates, and the amount of the pension.¹⁵ PERS argued that all the information in the individual files is confidential but PERS provides an annual aggregate form of the information as a public record.¹⁶ The Court there held that NRS

⁴ NEV. REV. STAT. § 239.001 (2017); *Reno Newspapers*, 129 Nev. at 836–37, 313 P.3d at 223.

⁵ NEV. REV. STAT. § 239.101(1).

⁶ *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 878, 266 P.3d 623, 626 (2011).

⁷ NEV. REV. STAT. § 239.0113; *Reno Newspapers*, 129 Nev. at 837, 313 P.3d at 224.

⁸ *Reno Newspapers*, 129 Nev. At 837, 313 P.3d at 224.

⁹ NEV. REV. STAT. § 239.101(1).

¹⁰ NEV. REV. STAT. § 239.005(6)(b).

¹¹ NEV. REV. STAT. § 286.110(3) (2017).

¹² NEV. REV. STAT. § 286.117.

¹³ NEV. REV. STAT. § 239.001(2)–(3); *Gibbons*, 127 Nev. at 878, 266 P.3d at 63.

¹⁴ *See Reno Newspapers*, 129 Nev. at 838, 313 P.3d at 224.

¹⁵ *Id.* at 129 Nev. at 835, 313 P.3d at 222.

¹⁶ *Id.* at 835–36, 313 P.3d at 223.

286.110(3) does not extend confidentiality to all information in those files just for being in the file.¹⁷

Further, in *Reno Newspapers*, PERS gave the requested information to a third party thus placing the information outside the individual's file.¹⁸ Following the court's decision, PERS simply removed the names from the information it provides to third parties so that NPRI could not post the information it gained from the third party in a profile form based on the recipient's name.

Based on that, and the fact that PERS does not make that actuarial report anymore, they claim that the information sought by NPRI does not exist outside the individual's file. However, this reading of *Reno Newspaper* and NRS 286.110(3) is too broad. Just because the information in the physical file may not be inspected in its entirety, that does not make all the information in the file confidential when the information is stored electronically and PERs can recover the nonconfidential information from the individual files. PERS failed to show any rule, statute, or caselaw declaring the information requested to be confidential.

PERS has 55,000 individual files on its proprietary database. If the Court allows PERS to not disclose based on that grounds, it would prevent the public from ever seeing any of those records and thus would violate the plain language and purpose of the Nevada Public Records Act.¹⁹ If the public record has confidential information that can be redacted, the government entity cannot rely on confidentiality to prevent disclosure.²⁰ Thus, PERS has failed to show that the requested information is confidential by statute.

The district court did not err in concluding that the risks posed by disclosure of the requested information do not clearly outweigh the benefits of the public's interest in access

PERS argue that the risks of disclosure outweigh the benefits. The core of the argument is that disclosure of the retiree's names creates a heightened risk of either identity theft or cybercrime against the retirees. Thus, they contend that the risk outweighs the benefit to the public. PERS further asserts that the district court did not consider the privacy interest of the retirees.

NPRI argues that the risk is highly speculative so the district court did not err while doing its balancing test. The Court agrees with NPRI.

In *Reno Newspapers*, PERS advanced the same argument, but their only evidence was a PowerPoint presentation with statistics showing Nevada has a large amount of fraud complaints.²¹ There, the court concluded that PERS failed to show that the disclosure would actually cause harm, finding instead that the record shows the concerns were hypothetical and speculative.²² A mere assertion of a possible endangerment does not clearly outweigh public interest.²³ There is not a reasonable expectation of privacy for public employees salaries.²⁴

In this case, PERS provides an expert report that states disclosure would increase the risk of identity theft, fraud, or other cybercrime; however, that risk is hypothetical and speculative because NPRI's requests are limited in nature. Thus, the concerns do not clearly outweigh the

¹⁷ *Id.* at 838, 313 P.3d at 224–25.

¹⁸ *Id.* at 838, 313 P.3d at 224.

¹⁹ *See Am. C.L. Union*, 377 P.3d at 345; *See also* NEV. REV. STAT. § 239.010(3).

²⁰ *Blackjack Bonding*, 131 Nev. at 84, 343 P.3d at 611.

²¹ *Reno Newspapers*, 129 Nev. at 839, 313 P.3d at 225.

²² *Id.*; *see also Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 218, 234 P.3d 922, 927 (2010).

²³ *Haley*, 126 Nev. at 218, 234 P.3d at 927.

²⁴ *Ret. Ass'n v. Superior Ct.*, 127 Cal. Rptr. 3d 479, 489 (Ct. App. 2011) (quoting *Int'l Fed'n of Prof'l & Tech. Eng'rs, Local 21, AFL-CIO v. Superior Ct.*, 165 P.3d 488, 494 (Cal. 2007)).

public's presumed right to the information.²⁵ Also, the government retirees do not have a reasonable expectation of privacy in the requested information.

However, in certain cases the risk of identity theft, fraud, or other cybercrime may outweigh the benefits to the public. If the disclosure includes disclosure of sensitive personal information like date of birth, sex, marital status, beneficiary information, and beneficiary birth dates, the test might weigh in favor of nondisclosure. The information here is limited in scope and promotes government transparency. Thus, PERS has failed to demonstrate that the risks outweigh the benefits, especially with the presumption in favor of disclosure.

Since the information is not confidential, the Court must determine if requiring the extraction of the information from the database creates a new record.

The requested information did not require the creation of a new record

PERS argues that the NPRI request requires the creation of a new document. While PERS was correct that it has no duty to create a new record, its conclusion that searching its database is creating a new record is wrong. Several courts have distinguished between requests that simply require an agency to search its electronic database to obtain the information requested from those that require an agency to create a document or report about the information in the database. The Court provided an example of a Freedom of Information Act (FOIA) request. A federal district court held that if a FOIA request asks for aggregate data, the agency does not need to create a database or reorganize its method of archiving, but that searching a database that the agency already stores records in is not creating a new record.²⁶

The Court relied on the reasoning of the *NSC I* court where it stated that sorting a pre-existing database of information to make information intelligible is not making a new record because retrieving files stored on a computer requires the application of code regardless and sorting a database by a particular data field is just the application of a code and that is not creating a new record.²⁷ Rather, that is just another form of searching that is within the scope of an agency's duties.²⁸

Other jurisdictions have employed similar logic regarding an agency's duty to disclose. The Court noted that the Arizona Court of Appeals similarly held that searching a database for existing records is not the same thing as searching a database to compile information about what information the database contains.²⁹ The Arizona court believed that a public employee creates a record to retrieve records that already exist when they fill out a form to obtain public records from a storage room.³⁰ It reasoned that creating a query to search an electronic database is, functionally, the same thing.³¹ Accordingly, the court held that the Arizona Public Records Law requires a state agency to search its electronic database if the agency keeps public records on an electronic

²⁵ *Reno Newspapers*, 129 Nev. at 839, 313 P.3d at 225.

²⁶ *Nat'l Sec. Couns. v. CIA (NSC I)*, 898 F. Supp. 2d 233, 270 (D.D.C. 2012); see also *People for Am. Way Found. v. U.S. Dep't of Just.*, 451 F. Supp. 2d 6, 14 (D.D.C. 2006).

²⁷ *NSC I*, 898 F. Supp. 2d at 270.

²⁸ *Id.*

²⁹ *Am. C.L. Union v. Ariz. Dep't of Child Safety*, 377 P.3d 339, 346 (Ariz. Ct. App. 2016).

³⁰ *Id.* at 345.

³¹ *Id.*

database.³² The Arizona court concluded that to hold otherwise would place most public records maintained in databases outside public records laws.³³

The Court agrees with the above courts and holds that the Nevada Public Records Act requires a state agency to search its database to produce responsive records if the agency keeps its public records in an electronic database. The Court clarified that a search of a database or the creation of a program to search the existing information is not the creation of new documents that was contemplated by *Reno Newspapers*.³⁴ This is consistent with both *Reno Newspapers* and *Blackjack*.³⁵ The Court further clarified that if the requested material has confidential information, the disclosure of the requested material with appropriate redactions does not constitute the creation of a new document.³⁶ The Court further found that the additional staff time and cost incurred by PERS fulfilling the request is not an adequate basis to deny the request because PERS could charge NPRI for the incurred fee.³⁷

The Court reversed the district court's order to produce a document with the requested information because the record indicates that PERS's database is not static and that PERS may not be able to get the information as it existed when NPRI requested it in 2014. The Court remanded the case to the district court to determine how PERS should satisfy the request and how the associated costs, if any, should be split.

The Court affirmed the district court's order in part by concluding that searching PERS' electronic database is not the creation of a new record. Since PERS may not be able to obtain the information as it existed in 2014 by searching the database, the Court reversed the district court's order to produce the 2014 information and remanded the matter to the district court for further proceedings.

Conclusion

The Court held that the Nevada Public Records Act requires state agencies to search their electronic database if they maintain public records on it. Accordingly, PERS must search their database and produce the requested information, with appropriate redactions if necessary. However, as PERS' database is not static, the Court remanded to the district court to determine the appropriate way to produce the information.

Justice Stiglich, with whom Justice Hardesty and Justice Parraguirre agree, dissenting:

The majority's decision cannot be reconciled with the court's prior decision in *Reno Newspapers*.³⁸ This decision interprets the Nevada Public Records Act to require an agency to create records as opposed to simply disclose existing public records. They now have a duty to create records so long as the court determines that technology is available to gather the information.

The dissent's disagreement is largely factual. It notes three categories of documents at issue. First, the retirees' individual files contained in the PERS database which are confidential

³² *Lunney v. State*, 418 P.3d 943, 950 (Ariz. Ct. App. 2017).

³³ *Am. C.L. Union*, 377 P.3d at 345; *see also Commonwealth, Dep't of Env'tl. Prot. V. Cole*, 52 A.3d 541, 547 (Pa. Commw. Ct. 2012).

³⁴ 129 Nev. 833, 313 P.3d 221 (2013).

³⁵ *Id.*; *Blackjack*, 131 Nev. 80, 343 P.3d 608.

³⁶ *See* NEV. REV. STAT. § 239.010(3); *see also Stephan v. Harder*, 641 P.2d 366, 374 (Kan. 1982).

³⁷ *See* NEV. REV. STAT. § 239.052; *see also* NEV. REV. STAT. § 239.055(1).

³⁸ *Pub. Emps.' Ret. Sys. of Nev. V. Reno Newspapers, Inc.*, 129 Nev. 833, 840, 313 P.3d 221, 225 (2013).

under Nevada law,³⁹ but the information is not confidential to the extent it is within other non-confidential public records.⁴⁰ Second, PERS' monthly payment register reports which contain both retirees' names and social security numbers which PERS has provided to NPRI before. Third, raw data feeds that PERS produces annually for actuarial purposes. PERS provided a list of the 2014 documents without the names and the district court ordered that PERS provide NPRI the retirees' names to the data provided.

The dissent's first objection to the majority's opinion is that it overrules *Reno Newspapers*.⁴¹ The facts of this case are nearly identical to *Reno Newspapers*. The plaintiff requested several categories of information from PERS, and some of the information was contained in two documents: the retirees' individual file stored in PERS database and the 2013 raw data feed. The court rejected PERS' argument that the information was confidential solely because it was in the individual's confidential files.⁴² While the court ordered PERS to provide information so long as it is kept in another location besides the individual file, it clarified that the agency does not have to create new documents or customized reports.⁴³ The state codified that holding in NAC 239.867.⁴⁴

Reno Newspapers resolves this case. A report containing pensioners' names and the amount of their pension for 2014 does not exist because, unlike *Reno Newspapers*, the 2014 raw data does not contain names. Thus, PERs could only provide such a report by creating a new record from extracting the information from the retirees' files in the electronic database. *Reno Newspapers* prohibits that.⁴⁵ However, that is what the majority orders PERS to do.

The majority did not distinguish *Reno Newspapers*, rather they cited foreign jurisdiction cases to support the idea that the order is to purely search PERS electronic database, not compile a report about the information in the database. That distinction fails for two reasons.

First, the order goes beyond requiring PERS to search its database. It is not like *Blackjack*. There, the court held that if the agency has a computer program that can readily compile the information, the agency still must produce the information requested.⁴⁶ Unlike *Blackjack*, PERS does not have a computer program that can readily compile the information.⁴⁷ Therefore, to comply with the order is to create a new program, and the order is close to requiring PERS to create a customized record which is not what the court ordered in *Blackjack*. The agency does not have to create a record that does not exist at the time of the request, but can at the discretion of the agency.⁴⁸

Even the cases the majority relies on does not impose such an expansive duty. Creating a computer program is not drawing information from a database⁴⁹ but requires the agency to conduct research⁵⁰ which goes beyond the agency's duty under the Public Records Act.⁵¹

³⁹ NEV. REV. STAT. § 286.110(3).

⁴⁰ *Reno Newspapers*, 129 Nev. at 835, 313 P.3d at 222.

⁴¹ *Id.*

⁴² *Id.* at 838, 313 P.3d at 224.

⁴³ *Id.* at 839–40, 313 P.3d at 225.

⁴⁴ NEV. ADMIN. CODE § 239.867 (2018).

⁴⁵ 129 Nev. at 840, 313 P.3d at 225.

⁴⁶ *Id.* at 87, 313 P.3d at 613.

⁴⁷ *Id.*

⁴⁸ NEV. ADMIN. CODE § 230.869 (2018).

⁴⁹ *Commonwealth, Dep't of Envtl. Prot. V. Cole*, 52 A.3d 541, 547 (Pa. Commw. Ct. 2012).

⁵⁰ *Nat'l Sec. Couns. v. CIA*, 898 F. Supp. 2d 233, 270 (D.D.C. 2012).

⁵¹ *See, e.g., People for Am. Way Found v. U.S. Dep't of Just.*, 451 F. Supp. 2d 6, 14 (D.D.C. 2006); *see also Frank v. U.S. Dep't of Just.*, 941 F. Supp. 4, 5 (D.D.C. 1996).

Even if the order only requires a search, the information is confidential, and this court's precedent prohibits the court from ordering PERS to search individuals' files.⁵² The majority's error is factual. Neither the 2014 retiree names or 2014 pension amounts are confidential because that information is in public documents.⁵³ However, no public report links the retiree names to the pension amounts, that is contained exclusively in the individual files in the PERS system. PERS cannot be ordered to extract information contained exclusively in those files.⁵⁴ The majority's suggestion that an agency can search the PERS database under NRS 239.005(6)(b).⁵⁵ That law only defines an official state record to include documents stored on a computer or magnetic tape,⁵⁶ but does not suggest that information deemed confidential under NRS 286.110(3) is no longer confidential because it is stored on a computer.⁵⁷

The second objection is that the majority's decision is a judicial transformation of the Nevada Public Records Act. The order imposes a duty on PERS to create a customized report that has the requested information. However, that ignores the plain language of the Act.⁵⁸ The legislature had the option of creating the system the majority holds today, but the legislature did not.

In summation, the majority's opinion violates the plain language of the Nevada Public Records Act. It exposes otherwise confidential information to agency searches simply because they are stored on a computer. It overrules *Reno Newspaper*⁵⁹ and sets Nevada apart from other jurisdictions that have considered this issue.

⁵² *Reno Newspapers*, 129 Nev. at 840, 313 P.3d at 225.

⁵³ *See Id.* at 839, 313 P.3d at 225.

⁵⁴ *Id.* at 840, 313 P.3d at 225.

⁵⁵ NEV. REV. STAT. § 239.005(6)(b).

⁵⁶ *Id.*

⁵⁷ *Id.* § 186.110(3).

⁵⁸ NEV. REV. STAT. § 239.010(1).

⁵⁹ 129 Nev. at 833, 313 P.3d at 22.