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Clark Cty. Sch. Dist. v. Las Vegas Review Journal, Nev. Adv. Op. 84 (Oct. 25, 2018) (en banc)

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PUBLIC RECORDS DISCLOSURE: PRIVACY INTEREST

Summary

The Court determined that the interest of individuals who participate in an internal investigation by a state agency regarding the inappropriate behavior of an elected official should be considered before publishing their identity or identifying information on public records. The Court adopted the *Cameranesi* test to determine the scope of redactions of names of persons identified in an investigative report with nontrivial privacy claims.

Background

The Clark County Office of Diversity and Affirmative Action (ODAA) initiated an investigation against Clark County School District (CCSD) Trustee, Kevin Child, after CCSD employees complained that Trustee Child had engaged in inappropriate behavior. The complaints alleged Trustee Child had engaged in sexual harassment, including suggestive sexual comments and gestures towards employees, discussed suicide with pupils, and engaged in disruptive, threatening and inappropriate behavior at public events. The ODAA recommendation concluded that Trustee Child's behavior resulted in a hostile work environment under Title VII of the Civil Rights Act of 1964. ODAA recommended limiting Trustee Child's access to CCSD properties and employees. On December 5, 2016, CCSD implemented these recommendations and notified employees of the sanctions through email.

On December 5, 2016, the Las Vegas Review-Journal (Review-Journal) made a request for documents pertaining to the investigation and actions taken against Trustee Child. CCSD continually delayed the production of records, thus violating the five-day statutory requirement pursuant to NRS § 239.0107 of the Nevada Public Records Act (NPRA).² On January 26, 2017, the Review-Journal filed the first petition for writ relief asking the district court to compel CCSD to produce the requested records. CCSD produced heavily redacted records, and on February 10, 2017, the Review-Journal made an expanded amended record request pursuant to NRS § 239.0107.³

On February 14, 2017, the district court granted the writ for the initial records request and ordered the redactions to be limited to the names of students, staff and direct victims. The district court's order however, did not include the redaction of witnesses or teachers who participated in the investigation. CCSD continued to produce heavily redacted records, invoking the same privileged address in the prior writ hearing.

On May 9, 2017, the district court ordered CCSD to submit all documents related to Trustee Child's investigation for an in-camera review. After weighing the interest in preserving the victim's privacy with the interest of an investigation against an elected official, the Court granted

¹ By Edgar Cervantes.

² NEV. REV. STAT. § 239.0107 (2018) ("Not later than the end of the fifth business day after the date on which the person who has legal custody or control of a public book or record of a governmental entity receives a written or oral request from a person to inspect copy or receive a copy of the public book or record, a governmental entity shall do one of the following.").

³ *Id.*

the writ of mandamus. CCSD appealed the district court's ruling arguing that the records are by law confidential, should be confidential when applying a balancing test or alternatively, that additional redactions are necessary.

Discussion

CCSD alleges that the district court: 1) erred pursuant to the NPRA; and 2) erred in limiting CCSD's ability to redact. Furthermore, CCSD alleges that the Court should reverse the district court pursuant to a) federal law and guidelines; b) CCSD regulations; c) the deliberative process privilege; d) the Nevada Administrative Code; and e) the common law balancing test.⁴

The Court must first determine whether CCSD's withheld documents are confidential by law. Because of the absence of a statutory provision explicitly declaring CCSD's records to be confidential, the Court must balance the interests involved.⁵ Furthermore, CCSD bears the burden of proving that the interest in nondisclosure clearly outweighs the public's interest in access.⁶ Additionally, the Court reviews the district court's grant of the petition for a writ of mandamus for an abuse of discretion.⁷ Finally, because the petition entails a question of law, the Court reviews the district court's decision de novo.⁸

The withheld documents are not confidential by law

The Court rejects CCSD's argument that its regulations are laws and thus the documents ordered by the district court to disclose are confidential pursuant to NRS § 386.350.⁹ The Court determined that CCSD's regulations cannot limit the scope of the NPRA. To allow otherwise would create a loophole which would enable government organizations to create internal regulations that render documents confidential in order to avoid statutory compliance with the NPRA.

The district court did not abuse its discretion when, after balancing the interest, it determined that the documents should not be withheld

Pursuant to *Gibbons*¹⁰, the Court reviews the district court's grant of the petition for a writ of mandamus for an abuse of discretion.

Deliberative process privilege

⁴ *Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630, 635, 798 P.2d 144, 147 (1990).

⁵ *Reno Newspaper, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011).

⁶ *Id.*

⁷ *Id.* at 626.

⁸ *Id.*

⁹ NEV. REV. STAT. § 386.350 (2018) (Each board of trustees is hereby given such reasonable and necessary powers, not conflicting with the Constitution and the laws of the State of Nevada . . .”).

¹⁰ *Gibbons*, 127 Nev. at 880, 226 P.3d at 628.

The Court rejects CCSD's argument that pursuant to *DR Partners*¹¹ it is not required to disclose documents that fall under the protections afforded under the deliberate process privilege for three reasons. First, the deliberative process privilege does not apply in situations where the government's actions are in question, and where records may reveal a Title VII violation.¹² Second, the deliberate process privilege applies to CCSD employees, but Trustee Child is not employed by CCSD. Third, the deliberative process privilege requires an important public policy. Here, CCSD's investigation is a particular personnel matter limited to a single individual under specific and isolated facts. CCSD failed to meet the burden of demonstrating why the deliberative process privilege applies and thus the district court did not abuse its discretion.

Common law balancing test

The Court affirms the district courts order requiring CCSD to disclose the documents pursuant to the *Gibbons* balancing test. CCSD argues that the interest in maintaining the records confidential as opposed to redacting names outweighs other interests because of the employee's fear that they will be identified by Trustee Child. The Review-Journal argues, and the Court agrees, that the interest weighs in favor of releasing the documents with the redaction of names. This will better protect employees through transparency while also protecting the identity of the individuals. In addition, the release of the documents would allow voters to hold Trustee Childs accountable for his actions.

Privacy interest and redactions in public record disclosure

The Court adopts the *Cameranesi*¹³ test in cases where a court must determine if a government agency should redact information in a public records request by balancing individual privacy rights against the public's right of access. The *Cameranesi* test is a two-prong test. First, the government must establish that the privacy interest at stake by the disclosure is nontrivial.¹⁴ Next, if the agency succeeds in demonstrating the first prong, the requester must demonstrate that the public interest in releasing the information sought is a significant one and the release of the information sought will advance that public interest.

Conclusion

The district court's order limited the redaction of identifying information to victims, students and staff. This excluded the redaction of identifying information of teachers and witnesses who participated in the investigation and thus may face backlash. The Court held that the privacy interest of those excluded should be considered before disclosure of their names or other identifying information. Accordingly, the Court reversed the redaction order of the district court and remanded for further proceedings consistent with the opinion.

¹¹ See *DR Partners v. Bd. of Cty. Comm'rs.*, 116 Nev. 616, 622, 6 P.3d 465, 469 (2000) (The deliberative process or "executive" privilege is one of the traditional mechanisms that provide protection to the deliberative and decision-making processes of the executive branch of government .).

¹² See e.g., *Anderson v. Marion Cty. Sheriff's Dep't* 220 F.R.D. 555, 560 (S.D. Ind. 2004).

¹³ *Cameranesi v. U.S. Dep't of Defense*, 856 F.3d 626, 637 (9th Cir. 2017).

¹⁴ *Id.*