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Las Vegas Metropolitan Police Department v. The Center for Investigative Reporting, Inc., a California Nonprofit Organization, 136 Nev. Adv. Opn. No. 15 (2020)

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Recommended Citation

Silva, Paige, "Las Vegas Metropolitan Police Department v. The Center for Investigative Reporting, Inc., a California Nonprofit Organization, 136 Nev. Adv. Opn. No. 15 (2020)" (2020). *Nevada Supreme Court Summaries*. 1297.

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Las Vegas Metropolitan Police Department v. The Center for Investigative Reporting, Inc., a California Nonprofit Organization, 136 Nev. Adv. Opn. No. 15 (2020).¹

OPINION

Pursuant to NRS 239.010, the Nevada Public Records Act (NPRA), governmental entities are required to make available to the public, nonconfidential public records that the governmental entity has in its legal custody or control. If a governmental entity denies a request for public records, the person requesting such records may seek a court order to compel production. NRS 239.011(1). If the party requesting such records prevails, that party is entitled to receive attorney fees and costs. NRS 239.011(2).

This case asks whether the requesting party is entitled to receive attorney fees and costs when the parties reach an agreement that gives the requesting party access to the requested records before the court enters a judgment on the merits of the case. In response to this question, the Court adopts the catalyst theory, which provides that, “attorney fees may be awarded even when litigation does not result in a judicial resolution if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation.”²

Accordingly, the Court affirms the district court’s decision that the Respondent, The Center for Investigative Reporting, Inc., is entitled to receive attorney fees and costs in a reasonable amount, pursuant to the NPRA under NRS 239.011(2).

FACTUAL AND PROCEDURAL BACKGROUND

The rap artist, Tupac Shakur, was shot and killed at the intersection of Flamingo and Koval in Las Vegas, Nevada. The case remains an open investigation.

The Center for Investigative Reporting, Inc. (CIR) submitted a request to Las Vegas Metropolitan Police Department (LVMPD) in December 2017, for public records related to Tupac’s murder, pursuant to the NPRA. A month passed and LVMPD did not respond to the request, so CIR followed up, explaining that LVMPD was in violation of the NPRA’s five-day turnaround time for responding to such requests. LVMPD responded the same day, indicating that CIR’s request was submitted to a Public Information Officer.

Twelve days later, CIR followed up again and informed the Office of Public Information that the LVMPD had not fulfilled their request as required by the NPRA, for over one month. The Office of Public Information did not respond.

In March of 2018, approximately three months after CIR’s first request, CIR followed up again, and was ignored. Two weeks later, CIR’s counsel sent a letter to LVMPD’s Director of Public Information, explaining LVMPD’s obligations under the NPRA and demanded a response in the next seven days. Eight days later, LVMPD provided a two-page police report, but did not indicate whether additional records existed or whether such records were exempt.

CIR again contacted LVMPD and inquired whether it was withholding records and if so, pursuant to what statutory authority. The next day, LVMPD’s Assistant General Counsel responded that it would research CIR’s request and respond within thirty (30) days.

¹ Paige Silva, 2L.

² *Graham v. DaimlerChrysler Corp.*, 101 P.3d 140,144 (Cal. 2004).

LVMPD also stated that because Tupac's murder was an open investigation, any other files were (i) not public records³, (ii) declared confidential by law, (iii) protected by "law enforcement privilege," and (iv) protected because public policy outweighed the public's interest in access to such records. CIR disputed LVMPD's contentions and asked LVMPD to abide by its legal obligations under the NPRA. LVMPD insisted that the records were protected.

CIR filed a petition for a writ of mandamus, to inspect or obtain all records within LVMPD's custody related to their request. The district court opined that LVMPD had not satisfied its burden to demonstrate the confidential nature of the requested records and gave LVMPD two options. The first, produce the records with necessary redactions; the second, participate in an in-camera evidentiary hearing regarding the records' confidentiality. LVMPD opted for the second option, and the district court scheduled the hearing.

However, before the hearing, LVMPD and CIR agreed that LVMPD would produce portions of its records with an index which would identify and describe any redacted or withheld records. CIR was then allowed to challenge LVMPD's redactions and withholdings with the right to seek attorney fees and costs.⁴ LVMPD ultimately provided around 1,400 documents related to their request.

At a later status check, both parties disagreed as to whether CIR should receive attorney fees and costs. CIR asserted the catalyst theory, and LVMPD contended that CIR did not obtain a judgment in its favor because the parties reached an agreement before the court decided the merits of their case, and therefore could not receive attorney fees and costs. The district court ruled that CIR prevailed and instructed CIR to file a motion for attorney fees and costs.

CIR filed their motion, which LVMPD opposed. LVMPD argued that immunity from damages are provided under NRS 239.012 when records are withheld in good faith, and that CIR improperly filed for fees incurred prior to litigation, which should not be covered. The district court disagreed and awarded CIR attorney fees and costs. LVMPD appealed.

DISCUSSION

LVMPD contends that CIR is not entitled to attorney fees and costs because the district court never entered an order to compel production of the records.⁵ Furthermore, LVMPD contends that the district court should have applied the prevailing party standard rather than the catalyst theory.⁶ CIR contends that LVMPD provided the records because of CIR's initial claim against it, and that the Court should apply the catalyst theory.

This is a question of statutory interpretation, reviewed de novo.⁷ If a statute is clear, the Court will not look beyond its plain language.⁸ When a statute is ambiguous, the Court looks to

³ Under NEV. REV. STAT. § 239.010(1).

⁴ Pursuant to NEV. REV. STAT. § 239.011(2).

⁵ In the alternative LVMPD argues that it is immune because it acted in good faith. However, the Court rejected that argument in *Clark County Coroner's Office v. Las Vegas Review-Journal*, 136 Nev. Adv. Op. 5, P.3d (Feb. 27, 2020).

⁶ The prevailing party standard is laid out in *Las Vegas Metropolitan Police Dept. v. Blackjack Bonding, Inc.*, 131 Ne. 89, 343 P.3d 608 (2015).

⁷ *Clark Cty. Coroner's Office*, 136 Nev. Op. 5, P.3d.

⁸ *Washoe Med. Ctr. v. Second Judicial Dist. Court of State of Nev., ex rel. Cty. of Washoe*, 122 Nev. 1298, 1302, 148 P.3d 790, 793 (2006).

legislative history for guidance, and considers the policy of the law, avoiding an interpretation which leads to absurd results.⁹

NRS 239.011(1) provides that when a governmental entity denies a request for public records, the requester can seek a court order.¹⁰ NRS 239.011(2) provides that, “if the requester *prevails*, the requester is entitled to recover his or her costs and reasonable attorney’s fees in the proceeding from the governmental entity whose officer has custody of the book or record.”¹¹ The Legislature did not define “prevails.”

In *Las Vegas Metropolitan Police Department v. Blackjack Bonding, Inc.*, this Court held that a requester prevails under the NPRA if the requester “succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit.”¹² In this Court’s previous decisions, it awarded attorney fees to the “prevailing party,” however, the Legislature used the expansive term “prevails” in the language of NRS 239.011(2).¹³ Furthermore, the district court did not enter an order to compel production because the parties came to an agreement before the case was heard on the merits. Thus, this is an issue of first impression before this Court.

Other courts have declined to adopt a narrow requirement that requesters must obtain an order on the merits to “prevail” to receive attorney fees and costs under statutes similar to the NPRA.¹⁴ Such courts adopt the “catalyst theory,” in which “requestors are entitled to attorney’s fees under [the Act], absent a judgment . . . when they can demonstrate: (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’”¹⁵

Accordingly, the Court holds that a requester is entitled to attorney fees and costs pursuant to NRS 239.011(2) without a district court order compelling production, if the requester demonstrates, “a causal nexus between the litigation and the voluntary disclosure or change in position by the Government.”¹⁶ The court should consider the following factors: (1) “when the documents were released,” (2) “what actually triggered the documents’ release,” and (3) “whether [the requester] was entitled to the documents at an earlier time.”¹⁷ In addition, the court should consider “(1) whether the litigation was frivolous, unreasonable, or groundless, and (2) whether the requester reasonably attempted to settle the matter without litigation and allowed the government agency reasonable time to fulfill the request.”¹⁸

Applying the catalyst theory to the case at bar, the district court was correct in its determination that CIR prevailed under NRS 239.011(2). CIR attempted to resolve the matter without litigation, put LVMPD on notice and gave LVMPD ample opportunity to comply. LVMPD repeatedly failed to respond or explain its confidentiality belief, and it was not until CIR sought litigation that LVMPD agreed to produce the records. Thus, the facts indicate that CIR’s

⁹ *Id.*

¹⁰ NEV. REV. STAT. § 239.011(1).

¹¹ NEV. REV. STAT. § 239.011(2) (emphasis added).

¹² 131 Nev. at 90, 343 P.3d at 615.

¹³ *See Hensely v. Eckerhart*, 461 U.S. 424, 433 (1983); *Valley Elect. Assn’n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005)). NEV. REV. STAT. 239.011(2).

¹⁴ *See, e.g., Belth v. Garamendi*, 283 Cal. Rptr. 829, 831–32 (Ct. App. 1991); *Uptown People’s Law Ctr. v. Dep’t of Corr.*, 7 N.E.3d 102, 108–09 (Ill. App. Ct. 2014).

¹⁵ *Mason v. City of Hoboken*, 951 A.2d 1017, 1031 (N.J. 2008).

¹⁶ *First Amendment Coal.*, 878 F.3d at 1128.

¹⁷ *Id.* at 1129.

¹⁸ *See Graham*, 101 P.3d at 154–55.

lawsuit was the catalyst for LVMPD's production of the records. Therefore, CIR "prevailed" under the NPRA and is entitled to attorney fees and costs.