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Las Vegas Review-Journal, Inc., v. Las Vegas Metro. Police Dep't, 139 Nev. Adv. Op. 8 (Mar. 30, 2023)¹

NEVADA PUBLIC RECORDS ACT FAVORS DISCLOSURE OF METRO DOCUMENTS

Summary

Pertaining to the Nevada Public Records Act (NPRa), NRS 49.335 does not justify withholding public records in their entirety simply because some portion of the record identifies an individual. Under the generalized balancing test, to determine whether disclosure of public records is appropriate, the government entity bears the burden of proving that its nondisclosure interests clearly outweigh the public's interest. Further, under the Clark County School District's (CCSD's) burden-shifting balancing test, speculative harm to nontrivial personal privacy interests is insufficient to shift the burden from the governmental entity to the plaintiff.

Background

A reporter for the Las Vegas Review-Journal, Inc. (LVRJ) made a public records request under the NPRa for the entire case regarding an investigation by Las Vegas Metropolitan Police Department (Metro) into a trooper that allegedly solicited a confidential informant (CI) to murder or harm his wife. Responding to the request, Metro withheld the records because they pertained to an open criminal investigation. The reporter obtained an Officer's Report from an undisclosed source and renewed his request, informing Metro that Metro had closed its investigation into the trooper a year earlier. Metro responded, indicating there were no public records available.

Eight days later, Metro produced three Property reports where all the information was redacted. The LVRJ, through counsel, emailed Metro regarding perceived deficiencies in its compliance with the NPRa. After no response, the LVRJ petitioned the district court for a writ of mandamus to access the records and impose penalties on Metro. The district court ordered Metro to produce a privilege log. The LVRJ questioned the log's completeness and challenged the generalized, identical string citation for each log entry as insufficient under the NPRa.

The district court denied the LVRJ's petition holding that NRS 49.335 justified withholding the entire case file, and two separate balancing tests also supported withholding the entire file. The LVRJ appealed the district court's decision.

Discussion

Standard of review under NPRa and overview of the act

The Court reviews a district court's denial of a petition for a writ of mandamus seeking access to public records for an abuse of discretion, except where, as here, the petition implicated questions of law, *de novo*.² Records are confidential and exempt from disclosure only when a specific statutory or caselaw exemption applies.³ Under the NPRa, when only portions of a record qualify as confidential, a government entity cannot deny a request based on confidentiality "if the

¹ By Lindsay Reynolds.

² Clark Cty. Sch. Dist. v. Las Vegas Review-Journal, 134 Nev. 700, 703–04, 429 P.3d 313, 317 (2018).

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

government entity can redact, delete, conceal or separate, including, without limitation, electronically, the confidential information from the non-confidential information.”⁴

Under the NPRPA’s principles, the Court analyzes confidentiality claims with a presumption in favor of disclosure.⁵ Absent a statutory exemption, the Court applies a balancing-of-the-interests test where the governmental entity bears the burden to prove that the requested records are confidential by showing that the records remain protected by a statutory exemption or that the entity’s interest in nondisclosure clearly outweighs the public’s interest in access.⁶

Waiver is not available to remedy noncompliance with the NRPA’s requirement for a governmental entity to respond to a records request within five business days

The LVRJ asked the Court to waive several of Metro’s confidentiality claims for its failure to timely respond to its requests, based on a 2019 amendment that expanded remedies under NPRPA and emphasized prompt access to records. Although the district court did not address the LVRJ’s waiver request, the Court did not perceive a basis for reversal where a waiver should not apply to bar Metro’s confidentiality claims.

Under NRS 239.0107(1)(d), governmental entities must respond to a records request and include citations to any relevant authority making the requested records confidential within five business days of the request. However, the Court recognized that the provisions of the NPRPA place an unmistakable emphasis on prompt disclosure.

Although the Court recognized that waiver constitutes an equitable remedy, the Court has adamantly disagreed with the suggestion that waiver, by virtue of the fact that it exists in equity, applies to claims of confidentiality as a result of noncompliance with the timeliness requirement.⁷ The Court found no cause to depart from its reasoning in *RAGA* that applying waiver to a governmental entity’s assertion of confidentiality would lead to an absurd penalty resulting in the public disclosure of Nevadan’s private information.

Metro failed to meet its burden to show that the records should be withheld as confidential under NRS 49.335 because the small portions of identifying information may be redacted without compromising such information

The LVRJ argued that contrary to the district court’s conclusion, NRS 49.335 does not justify withholding the records in their entirety simply because some portion of the record identifies the confidential informant (CI). The Court agreed, concluding that the district court abused its discretion in denying the LVRJ’s petition to access the Officer’s Report, Property Reports, and recordings.

The informant privilege allows a government entity to refuse to disclose the identity of a person who has furnished information to law enforcement purporting to reveal the commission of a crime.⁸ Identity refers to “any attribute of an individual that *serves to identify* that individual to an ordinary, reasonable viewer or listener, including but not limited to (i) name, (ii) signature, (iii)

⁴ NEV. REV. STAT. § 239.010(3) (2023).

⁵ Pub. Emps.’ Ret. Sys. of Nev. v. Reno Newspapers, Inc., 129 Nev. 833, 837, 313 P.3d, 221, 223–24 (2013).

⁶ *Gibbons*, 127 Nev. at 880, 266 P.3d at 628.

⁷ Republican Att’y Gen. Ass’n v. Las Vegas Metro. Police Dep’t, 458 P.3d 328, 332 (2020).

⁸ NEV. REV. STAT. § 49.335 (2023).

photograph, (iv) image, (v) likeness, or (vi) voice.”⁹ Based on this understanding of identity, there may be circumstances where the informant privilege extends “to the content of an informant’s statements” because the statements, by their subject matter, “disclose the identity of the informer.”¹⁰ Combining these authorities, under NRS 49.335, the plain meaning of identity includes any attribute, quality, personality, or character that distinguishes or indicates an individual and encompasses the content of the informant’s statements to law enforcement only to the extent such content reveals the identity of the informant.

The Court applied this definition and held that the district court abused its discretion in permitting Metro to withhold all records under NRS 49.335. In doing so, the court first recognized that the Officer’s Report contained attributes and qualities of the CI that made it possible to identify him or her but held that these background details do not justify withholding the Officer’s Report in its entirety. Further, the Court held that the district court’s conclusion that the report, in full, identified the CI was based on unsubstantiated claims that Metro solely relied on the CI to investigate the trooper and exaggerated assertions that the CI’s assistance in the investigation by itself identified the CI. The Court disagreed that the trooper’s solicitation of the CI and the CI’s decision to advise law enforcement of the potential crime differentiated the CI from any other CI in any meaningful way.

Second, the Court held that there was no evidence in the record that the Property Reports revealed the identity of the CI. That Court reasoned that while Metro stated that the Property Reports contained the personal information of the CI, Metro never explained what personal information was implicated or that the personal information was inseparable from other information.

Finally, the Court assumed, without deciding, that the CI’s voice constituted a distinguishing attribute, but that Metro offered no explanation nor evidence for why modification of the CI’s voice did not adequately protect the CI’s identity. Metro insisted that modification required the creation of a new record. However, the Court agreed with the Ohio Supreme Court’s reasoning in addressing a provision like NRS 239.010(3) under its public-records act, that a record “already exist[s]” if “reasonable computer programming” permits the governmental entity to “produce the requested output.”¹¹ Metro provided no support that it lacked the ability to modify the CI’s voice or redact portions of the recordings.

Metro failed to meet its burden to show that the records are confidential under our court’s balancing tests because, when compared to the public’s significant interests in the records, Metro’s unsubstantiated allegations of potential harm to individuals or privacy from disclosure fail to overcome the NPRA’s presumption of disclosure

The LVRJ argued that, in applying the Court’s balancing tests, the district court improperly deferred to Metro’s unsupported claims that law enforcement would face harm and third parties would see their nontrivial privacy interests violated if the records were disclosed. Further, the

⁹ Nationstar Mortg. LLC v. Benavides, 171 N.E.3d 514, 520 (Ill. Ct. App. 2020) (emphasis added) (quoting Illinois’s Right to Publicity Act, 765 Ill. Comp. Stat. Ann. 1075/5 (West 2018)).

¹⁰ See, e.g., People v. Martinez, 33 Cal. Rptr. 3d 328, 333–34 (Ct. App. 2005) (quoting in the second quotation People v. Hobbs, 873 P.2d 1246, 1252 (Cal. 1994)).

¹¹ See Welsh-Huggins v. Jefferson Cty. Prosecutor’s Office, 170 N.E.3d 768, 786 (Ohio 2020).

LVRJ contended that the district court failed to give appropriate weight and deference to the public's numerous interests in access to the public records. Metro claimed that the records were properly withheld because they were confidential and private; therefore, a general balancing test applicable to records implicating nontrivial privacy interests.

Our generalized balancing test favor disclosure of the investigative records

The Court clarified the general balancing test, where the Court narrowly construes exemption and liberally applies the “policy for an open and accessible government.”¹² As early as 2007, the Court recognized that the NPRA favors public interest to access over the governmental entity's interest in nondisclosure.¹³ It is the governmental entity's burden to show that its interests in confidentiality or nondisclosure “*clearly* outweigh[]” the public's interest in access to the records, as this balance promotes the importance of the NPRA in ensuring government accountability and transparency.¹⁴

The Court held that the district court abused its discretion in permitting Metro to support withholding the records in their entirety based on unsubstantiated claims that releasing the records would endanger the lives of those involved in the investigation. Metro did not offer support that the descriptions of evidence contained in the Property Reports would endanger officers, reveal investigative techniques, identify the CI, or implicate the privacy interest of anyone involved. Further, the Court held that the Officer's Report contained generalized descriptions of commonly known police tactics, and even if the tactics were confidential, Metro offered no support that disclosure would jeopardize the health and safety of law enforcement.

The Court held that the district court abused its discretion in engaging in only a perfunctory analysis of the public's interest in disclosure. The Court instead agreed with the LVRJ that there are several compelling interests that the public possesses in the disclosure of these records. The district court incorrectly concluded that the public lacked any interest because neither was a crime committed nor was a public official accountable to voters involved. However, the Court held that the public had a significant interest in deciding whether Metro's decision to close the investigation and its participation, if any, was informed and proper.

Our burden-shifting balancing test under CCSD favors disclosure of the investigative records

Applying the *CCSD* balancing test, the Court held that the district court abused its discretion in permitting Metro to withhold all the records based on the conclusion that portions of those documents implicated nontrivial personal privacy interests. The *CCSD* balancing test requires the government to establish a

personal privacy interest stake to ensure that disclosure implicates a personal privacy interest that is nontrivial or more than de minimis. Second, if the agency succeeds in

¹² Reno Newspapers, Inc. v. Haley, 126 Nev. 211, 218, 234 P.3d 922, 926 (2010). See also NEV. REV. STAT. § 239.001(1)–(3) (2023).

¹³ See Haley, 125 Nev. at 218–218, 234 P.3d at 926.

¹⁴ See id. 126 Nev. at 217–18, 234 P.3d at 926–27; Gibbons, 127 Nev. at 880, 266 P.3d at 628 (emphasis added).

showing that the privacy interest at stake is nontrivial, the requester must show that the public interest sought to be advanced is a significant one and that the information sought is likely to advance that interest.¹⁵

The governmental entity bears the initial burden to prove by a preponderance of the evidence that the public records implicate “individual nontrivial privacy rights.”¹⁶ However, the governmental entity does not need to wait for serious harm from an unwarranted intrusion on personal privacy to occur to justify nondisclosure.¹⁷ The harm cannot be speculative or implausible.¹⁸ The *CCSD* balancing test does not provide a basis to withhold all information because selective redaction of private information eliminates its identifying features and concomitant harms.¹⁹

The district court abused its discretion in allowing Metro to withhold all records based on the conclusion that portions of the documents implicated nontrivial personal privacy interests. First, Metro only identified three discrete aspects in the Property Reports that involved personal privacy concerns. However, the Court held that even if this were true, redaction remained available, particularly because Metro failed to show why redaction would not protect the victim.

Second, addressing the Officer’s Report, the Court held that the district court disregarded that the victim herself disclosed many details of the investigation that, in its view, warranted nondisclosure. Reactions of the victim’s and suspect’s name and address eliminate any identifying aspect without resorting to withholding the entirety of the Officer’s Report. Further, the Court recognized that the *CCSD* balancing test does not require proof of harm, but Metro’s speculated harm would seem to justify withholding all police reports. Therefore, the Court held that Metro failed to make a plausible showing that disclosure implicated harm.

Finally, the Court held that even if the burden properly shifted to the LVRJ, the district court abused its discretion in concluding that the LVRJ failed to meet its burden to show that access to the information advances significant public interests. The public should not and, according to the NPRA, does not have to accept at face value Metro’s claims that it acted lawfully and legitimately. Thus, the public has a significant interest in determining whether Metro properly handled the investigation.

Conclusion

Metro’s withholding of the documents is not supported under NRS 49.335 because Metro did not provide evidence that disclosure would identify the CI, and redaction remained an appropriate remedy. Further, under the generalized balancing test, Metro failed to meet its burden of showing that its interest clearly outweighed the public’s interest. Lastly, Metro failed to show that speculative harm to nontrivial personal privacy interests resulted in a plausible

¹⁵ *Clark County School District*, 134 Nev. at 707–08, 429 P.3d at 320 (citation and alterations omitted) (quoting *Cameranesi v. U.S. Dep’t of Def.*, 856 F.3d 626, 637 (9th Cir. 2017)).

¹⁶ *See id.*, 134 Nev. at 708–09, 429 P.3d at 321.

¹⁷ *See Las Vegas Metro. Police Dep’t v. Las Vegas Review-Journal*, 136 Nev. 733, 738, 478 P.3d 383, 388 (2020).

¹⁸ *Id.*, at 733 n.8, 478 P.3d at 388 n.8.

¹⁹ *See Clark Cty. Office of Coroner v. Las Vegas Review-Journal (Coroner’s Office)*, 136 Nev. 44, 55–56, 458 P.3d 1048, 1057 (2020).

showing that disclosure implicated harm. Therefore, the Court reversed the district court's order denying the petition for a writ of mandamus and remanded with instructions to the lower court.