

PUBLIC RECORDS

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Summary of the Nevada Public Records Act

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Nevada Public Records Act (NPRA)

- ▣ Codified in NRS Chapter 239.
- ▣ All state agency records are public unless declared confidential by law. NRS 239.010.
- ▣ Under the NPRA, open government is the rule.

General Premise of NPRA

- ▣ All public books and public records of governmental entities must remain open to the public unless otherwise declared confidential by law. NRS 239.010(1).
- ▣ Many confidentiality provisions now specified in NRS 239.010(1) plus catch-all phrase: “and unless otherwise declared by law to be confidential.”
- ▣ Confidentiality provisions from the NAC are not included, but still have the force and effect of law and should be included in the “catch-all” in NRS 239.010(1).
 - “A properly adopted substantive rule establishes a standard of conduct which has the force of law.” *State ex rel. Tax Comm’n v. Safeway*, 99 Nev. 626, 630, 668 P.2d 291, 294 (1983).

Court Decisions

- ▣ *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990).
- ▣ *DR Partners v. Bd. of County Comm'rs*, 116 Nev. 616, 6 P.3d 465 (2000).
- ▣ *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 63 P.3d 1147 (2003).
- ▣ *Reno Newspapers v. Sheriff*, 234 P.3d 922, 126 Nev., Adv. Op. 23 (July 1, 2010).
- ▣ *Reno Newspapers, Inc. v. Jim Gibbons, Governor of the State of Nevada*, 266 P.3d 623, 127 Nev., Adv. Op. 79 (Dec. 15, 2011).
- ▣ *Civil Rights for Seniors v. Administrative Office of the Courts*, 313 P.3d 216, 129 Nev., Adv. Op. 80 (Oct. 31, 2013).
- ▣ *Public Employees' Retirement System of Nevada v. Reno Newspapers, Inc.*, 313 P.3d 221, 129 Nev., Adv. Op. 88 (Nov. 14, 2013).
- ▣ *Blackjack Bonding, Inc. v. Las Vegas Metro. Police Dept.*, 131 Nev., Adv. Op. 10 (March 5, 2015).

General Premise of NPRA

- ▣ The NPRA favors transparency in government and open access to governmental entity records, and the provisions of the NPRA must be construed liberally in order to maximize the public's right of access to government records. *Reno Newspapers, Inc. v. Jim Gibbons, Governor of the State of Nevada*, 127 Nev. Adv. Op. 79, at 5 (2011).
- ▣ “The Legislature has declared that the purpose of the NPRA is to further the democratic ideal of an accountable government by ensuring that public records are broadly accessible.” *Gibbons*, 127 Nev. Adv. Op. 79, at 5 (2011) (citing NRS 239.001(1)).

Donrey of Nevada v. Bradshaw (1990)

- ▣ Balancing test articulated by the Court, Court later refers to it as *Bradshaw* balancing test
 - Used by government entities to determine whether there is an exception to the Nevada Public Records Act (NPRA) that justifies the withholding of a requested record.
 - This test involves balancing the governmental entity's public policy interest in withholding the document against the general policy in favor of open government.

Access to Public Records = a “Fundamental Right”?

- ▣ In *DR Partners*, the Court said any limitation on the general disclosure requirements of NRS 239.010 must be based upon a balancing or “weighing” of the governmental entity’s interests in non-disclosure against the general policy in favor of open government and the requestor’s “fundamental right” to access public records.

Burden on Government When Withholding Records

- ▣ After conducting the *Bradshaw* balancing test, the burden is upon the governmental entity to explain why the records requested should not be furnished, with specific evidence justifying the withholding of the records.

Reno Newspapers v. Sheriff (2010)

- ▣ The 2007 legislative amendments affected the *Bradshaw* balancing test.
 - Now, a narrower interpretation of private or governmental interests promoting nondisclosure to be weighed against the policy for an open and accessible government.
- ▣ “A mere assertion of possible endangerment does not clearly outweigh the public interest in access to . . . records.”

Reno Newspapers v. Sheriff (cont.)

- ▣ The Court held that the identity of a holder of a concealed firearms permit and records of any post-permit investigations, suspensions, or revocations of such permits are public records subject to disclosure and that any confidential information in the records should be redacted before disclosure.
 - Rule: Whenever possible, redact and provide.
 - ▣ Confidential information such as social security numbers, financial information, drivers' license numbers, dates of birth, etc., should be redacted.

High Burden on Government

- ▣ The Court indicated that the governmental entity's burden is to prove its interest in nondisclosure "clearly" outweighs the public's right to access, and the governmental entity cannot meet this burden with hypothetical concerns.

Reno Newspapers, Inc. v. Jim Gibbons, Governor (2011)

- ❑ Internal governmental entity policies that do not have the force and effect of law do not constitute specific authority justifying withholding the requested record under the NPRA.
- ❑ The governmental entity *generally* must provide a log to the requestor describing each individual withheld record. *Gibbons*, 127 Nev. Adv. Op. at 12.
- ❑ The governmental entity may be exempt from providing a log to the requestor if the governmental entity can demonstrate that the requestor has sufficient information to meaningfully contest the claim of confidentiality without a log.

Withheld Records Log

- ▣ This log should contain “a general factual description of each record withheld and a specific explanation for nondisclosure.” *Gibbons*, 127 Nev. Adv. Op. at 13.
- ▣ The explanation should include specific authority supporting the nondisclosure of the record and a reason why this authority supports the governmental entity’s claim of confidentiality. “[A] string of citations to a boilerplate declaration of confidentiality” does not satisfy the governmental entity’s requirements under the NPRA. *Gibbons*, 172 Nev. Adv. Op. at 16 (citing NRS 239.0107(1)(d)(2)).

PERS of Nevada v. Reno Newspapers, Inc. (2013)

- ▣ The Court “begins its analysis of claims of confidentiality under the [NPRRA] with a presumption in favor of disclosure.”
- ▣ “The state entity bears the burden of overcoming this presumption of openness by proving by a preponderance of the evidence that the requested records are confidential.”
- ▣ “The state entity may either show that a statutory provision declares the record confidential, or, in the absence of such a provision, ‘that its interest in nondisclosure clearly outweighs the public’s interest in access.’” (quoting *Gibbons*, 266 P.3d at 628).
- ▣ Exceptions to disclosure must be construed narrowly.

PERS of Nevada v. Reno Newspapers, Inc. (cont.)

- ▣ PERS raised concerns regarding identity theft and elder abuse in releasing the records requested.
 - Provided statistics indicating that Nevada is the third leading state in the number of fraud complaints to the Federal Trade Commission and the sixth leading state in the number of identity theft complaints.
- ▣ The Court stated “[b]ecause PERS failed to present evidence to support its position that disclosure of the requested information would actually cause harm to retired employees or even increase the risk of harm, the record indicates that their concerns were merely hypothetical and speculative.”
 - Thus, the district court correctly balanced the interests involved in favor of disclosure.

A Duty to Create Requested Records?

- ▣ The Court strongly implied that governmental entities do not have a duty to create new documents in response to a public records request, even if the data or information needed to create that document is already owned or maintained by the governmental entity. *PERS*, 129 Nev. Advance Opinion 88, at 9-10.
 - The Court made no explicit such holding, however.
 - In a footnote, the Court cites to Ohio cases holding that in general a governmental entity does not have a duty to create a record in response to a public records request.

Attorney General Opinions

- ▣ There are many and most are older and provide the same framework as the case law, which now controls.
- ▣ Unpublished letter AGO that states that drafts are not public records.
 - Coincides with definition in NAC 239.705, definition of “official state record.” No obligation to keep drafts under retention schedule. *See* NAC 239.711.
- ▣ If you have questions about an Attorney General Opinion on public records, please ask your legal counsel.
- ▣ You can search Attorney General Opinions at ag.nv.gov

Attorney General Opinion Requests

- ▣ If you have a specific public records question that is not addressed in the statutes or case law and you want an Attorney General Opinion, please talk to your assigned legal counsel and consider making the request.
- ▣ Local governments may request Attorney General Opinions.

General Tips and Reminders

- ▣ Written Response Required Unless Readily Available
 - An agency must respond in writing to records requests by not later than the end of the fifth business day after the request is received. NRS 239.0107(1).
 - ▣ Options are (1) provide copy, (2) allow inspection, (3) it is confidential, and (4) we need more time, and (5) do not have it.
 - If a public book or record is readily available, in lieu of a written response the agency shall allow the requestor to inspect or copy or receive a copy of the record.
- ▣ **Practice Tip:** Put procedures in place now to ensure that public records requests are handled within the time period required in order to avoid any future problems.

Verbal Records Requests

- ▣ Please note that the NPRA allows both written and oral public records requests. NRS 239.0107(1). Thus, it is important to ensure that the agency has appropriate procedures in place such that oral requests for records are logged and/or handled appropriately under the NPRA.

Extraordinary Requests MUST be in writing.

- ▣ Pursuant to recent changes in the 2013 session, all extraordinary requests must be in writing. *See* NRS 239.055.
 - For more information about the definition for “extraordinary,” please review the manual for state agencies published by Library and Archives.
- ▣ Non-extraordinary requests may be oral and may not be ignored or required to be submitted in writing.

Legal Custody ≠ Ownership

- ▣ Possession of a records may not equal Legal Custody.
 - Legal custody is defined in NAC 239.041 and means:
 - ▣ “all rights and responsibilities relating to the maintenance of and access to a record or series of records are vested in an office or department of a local governmental entity and the official or head of the department is charged with the care, custody and control of that record or series of records.”
 - ▣ “The term does not include the ownership of the record.”

Where Is It?

- ▣ If the record is not in the legal custody of the agency, the agency must provide the requestor with written notice of that fact and provide the name and address of the government agency that has custody of the record, if known.
- ▣ If it has been destroyed or transferred to State Archives pursuant to records retention schedule, inform requestor.

Verbal Discussions to Clarify or Discuss Request

- ▣ Agencies may have a verbal discussion with the requestor about the records request to clarify or otherwise discuss the request. However, the final notification pursuant to NRS 239.0107(1) about the status of the record must be in writing. The agency should keep a copy of this notification for its records.
- ▣ The agency should document in writing, e.g., by letter to the requestor, any verbal discussions that it has with the requestor that clarify, narrow, or otherwise alter the original records request.

Recovering Actual Costs

- ▣ An agency may recover its actual costs in providing a copy of a public record to the requestor. NRS 239.052.
- ▣ ****NEW**** The fee for providing a copy of a public book or record in the custody of a law library operated by a governmental entity must not exceed 50 cents per page. NRS 239.052(4).
 - All county clerks are also now limited to charging no more than 50 cents per page for copies of court records. (Previously, the limit was \$1 per page.)
See AB 31 (2013).

Actual Costs (NRS 239.055)

- ▣ Providing copies of public records to the public is deemed part of the agency's regular duties. Thus, these costs generally may include only actual costs incurred in responding to the records request, such as those for toner, paper, and postage, and not employee time in responding to the request, unless the request is extraordinary.
- ▣ ****NEW**** The fee for extraordinary use may not exceed 50 cents a page.

****NEW** No Charge for Minutes and Recordings of Meetings**

- ▣ *Minutes of public meetings are public records. Minutes or audiotape recordings of the meetings must be made available for inspection by the public within 30 working days after the adjournment of the meeting and a copy of the minutes or audio recordings must be made available to a member of the public upon request at no charge. NRS 241.035(2) (emphasis added).*

Exception: Court Reporter Transcripts

- ▣ The requirements of NRS 241.035(2) does not
 - Prohibit a court reporter from charging a fee to the agency for any services relating to the transcription of a meeting; or
 - Require a court reporter who transcribes a meeting to provide a copy of any transcript, minutes or audio recording of the meeting prepared by the court reporter to a member of the public at no charge.
- ▣ Check NRS 239.053.

List of Fees

- ▣ The agency must prepare and maintain a list of its fees for providing public records, which should be posted in a conspicuous place in each of its offices. NRS 239.052(3).
 - In lieu of posting the list of fees for providing public records request, the agency may post the location at which a list of each fee that the agency charges to provide a copy of a public record may be obtained.
- ▣ The agency's list of fees must also include per page fee for court reporter transcripts. NRS 239.053(2).

Waiving Fees

- ▣ Should an agency wish to waive a portion or all of its fee for providing records, the agency must adopt a written policy and post notice of this policy in a conspicuous place in each of its offices. NRS 239.052(2).

Policy and Procedure

- ▣ **Practice Tip:** Develop a public records policy now delineating the agency's policy and procedure related to the handling of public records requests, including the fees charged for records requests and any fee waiver policy.

Risks of Non-Disclosure

- ▣ If a state agency decides not to disclose requested records and the issue is litigated and the agency loses, the requestor is entitled to recover costs and reasonable attorney's fees in pursuing the court action. NRS 239.011.
- ▣ It is important that the agency and its decision maker(s) recognize that an incorrect decision to withhold requested records may be costly.
- ▣ **Practice Tip:** Not all requested records should be released. It is important to ensure that the agency and its decision maker(s) understand that there are potential risks in denying a records request and such requests should not be denied arbitrarily or without careful consideration and a solid legal position supporting the denial.

Good Faith Immunity

- ▣ The NPRA provides immunity from damages for disclosure or refusal to disclose information as long as the public officer or employee is acting in good faith. NRS 239.012.
- ▣ If the agency and its decision maker discloses or fails to disclose requested information in “good faith,” even if the decision is later found to be incorrect, the agency and the decision maker(s) are immune from liability for damages incurred by either the requestor or the person whom the information concerns.

Good Faith Immunity: It is For the Public Officer or Employee!

- ▣ **Practice Tip:** To receive this good faith immunity, the agency itself, *not legal counsel*, should make the decision regarding the disclosure of information.

Judicial Review in State District Court

- ▣ Pursuant to NRS 239.011, if a public records request is denied by the agency, the requestor may apply to the district court in the county where the book or record is located for an order:
 - Permitting the requestor to inspect or copy the book or record; or
 - Requiring the agency who has legal custody or control of the public book or record to provide a copy to the requestor.

Judicial Review (cont.)

- ▣ This matter is given priority over other civil matters to which priority is not given by other statutes.
- ▣ If the requester prevails, he or she is entitled to his or her costs and reasonable attorney's fees from the governmental entity having custody of the book or record.
- ▣ A writ of mandamus is the proper remedy to compel the disclosure of public records. *See DR Partners*, 116 Nev. 616, 6 P.3d 465 (2000).

Burden on Judicial Review

- ▣ NRS 239.0113: If the confidentiality of a public book or record is at issue in a judicial or administrative proceeding and the governmental entity that has legal custody of the public book or record asserts that the public book or record is confidential, *the government agency has the burden of proving by a preponderance of the evidence that the book or record, or a part thereof, is confidential.*
 - Applies in administrative proceedings, if both elements of the statute are met.
 - Burden is only on the governmental entity, and this burden is a preponderance of the evidence.

SB74 (2013)

- ▣ The agency shall, upon request, prepare the copy of the public record and shall not require the person who has requested the copy to prepare the copy himself or herself. NRS 239.010(4)(b).

AB31 (2013)

- ▣ The head of each agency of the Executive Department shall designate one or more employees of the agency to act as records official for the agency.
- ▣ The records official shall carry out the duties imposed pursuant to NRS 239 and NAC 239 with respect to a request to inspect or copy a public book or record of the agency.

AB31 (2013)

- ▣ The State Library and Archives Administrator, in cooperation with the Attorney General, shall prescribe:
 - The form for a request by a person to inspect or copy a public book or record of an agency;
 - The form for written notice required to be provided by an agency pursuant to NRS 239.0107(1);
 - By regulation, the procedures with which a records official must comply in carrying out his or her duties.

Forms and Procedures

- ▣ Each agency of the Executive Department *shall* make available on any website maintained by the agency on the Internet or its successor the forms and procedures prescribed by the State Library and Archives Administrator and the Attorney General. AB31 (2013).
- ▣ Go to:
[http://nsla.nv.gov/Records/Public_Records/
Public_Records/](http://nsla.nv.gov/Records/Public_Records/Public_Records/) for more information.

Questions??