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1 Case No. 2023-CV-00162

2 Dept. No. 2

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IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7

IN AND FOR THE COUNTY OF DOUGLAS

8

9 RICKY DEAN MILLER, an  
10 individual, MARTIN SWISHER,  
11 JR., an individual, JOSEPH  
12 GIRDNER, an individual, and  
13 ROBBE LEHMANN, an individual,

14 Petitioners,

15

vs.

ORDER REGARDING PETITIONERS'  
ATTORNEY'S FEES AND COSTS;  
CIVIL PENALTIES

16

DOUGLAS COUNTY SCHOOL DISTRICT,  
SUSAN JANSEN, Trustee, Douglas  
County School District, TRUSTEE  
DAVID BURNS, Trustee, Douglas  
County School District, TRUSTEE  
KATHERINE DICKERSON, Trustee,  
Douglas County School District,  
and TRUSTEE DOUG ENGLEKIRK,  
Trustee, Douglas County School  
District,

19

Respondents.

20

21

In this action pertaining to Nevada's Public Records Act

22

("NPRA"), Respondents produced all records responsive to

23

Petitioners' public records requests prior to final judgment on

24

the merits. Remaining for judicial determination is whether

25

Respondents are required to pay Petitioners' attorney's fees and

26

costs (NRS 239.011(2)) and/or civil penalties (NRS 239.340).

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1 Overview

2 Petitioners served public records requests on Douglas County  
3 School District ("DCSD") on May 17 and July 26, 2023, for public  
4 records maintained on DCSD's servers and the personal electronic  
5 devices of elected DCSD Trustees Susan Jansen, David Burns,  
6 Katherine Dickerson and Doug Englekirk (collectively "Trustees").

7 DCSD and Trustees produced responsive records but Petitioners  
8 nonetheless sued on August 7, 2023, alleging that DCSD and  
9 Trustees failed to produce all responsive public records and  
10 requesting third party searches of DCSD's servers and Trustees  
11 personal electronic devices. DCSD and Trustees adamantly denied  
12 the existence of additional responsive public records and refused  
13 further searches of DCSD's server and Trustees' personal devices.  
14 DCSD and Trustees adamantly maintained this position until after  
15 the second witness testified at trial on March 27, 2024. Trial  
16 was stayed pending settlement. When settlement failed, DCSD and  
17 Trustees moved to further stay the trial, voluntarily offering to  
18 search of DCSD's server and conduct forensic searches of Trustees'  
19 personal electronic devices. The Court continued the trial until  
20 September 17, 2024, and ordered the offered searches. The Court  
21 did not assess whether DCSD and Trustees violated NPRA.

22 In July 2024, nearly one year after the lawsuit was  
23 initiated, DCSD and Trustees produced approximately 6,600 pages of  
24 public records from DCSD's servers and Trustees' personal  
25 electronic devices. This occurred prior to the completion of  
26 trial and before the Court issued a final order on the merits.  
27 Petitioners now seek their attorney's fees and costs (NRS  
28 239.011(2)) and civil penalties (NRS 239.340).



1 consistent with NRS 239.0107.

2 On June 9, 2023, DCSD and Trustees responded by re-stating  
3 various legal objections, producing records maintained on Trustee  
4 Dickerson's personal devices and setting July 31, 2023, as the  
5 timeline for producing records from Trustee Jansen and Trustee  
6 Burns.

7 On July 26, 2023, Petitioners served DCSD with a third public  
8 records request seeking records maintained on DCSD's servers and  
9 Trustees' personal electronic devices. The July 2023 request is  
10 one of two public records requests that are the subject of this  
11 litigation.

12 Effective July 19, 2023, and straddling the two public  
13 records requests at issue, DCSD terminated its long time legal  
14 counsel, Maupin, Cox & Legoy in favor of Joey Gilbert Law.

15 On August 3, 2023, six business days after Petitioners'  
16 served their July 26, 2023 public records request, Petitioners  
17 reminded DCSD that its response was due the day prior.  
18 Petitioners stated, "Please advise when we can expect the same."  
19 DCSD counsel replied, "our law firm does not have legal custody or  
20 control of all the public records requested, and as the Douglas  
21 County School District, or one or more of its Board of Trustees  
22 have legal custody or control of one or more of the public records  
23 requested, and as we are unable to make such records available by  
24 the end of today, we wish to provide you with notice that such  
25 records, as applicable, shall be made available to you by end of  
26 day (5pm PST) on August 13, 2023...." Further, "We apologize for  
27 any confusion regarding the number of business days required in  
28 responding to your request - we have today calendared as the date

1 due given Ashura for those who observe."

2 Also on August 3, 2023, DCSD and Trustees supplemented their  
3 response to Petitioners' May 17, 2023 public records request.  
4 This came three days after the July 31 deadline set by DCSD. The  
5 response indicated, "Trustees Burns and Jansen have searched their  
6 text messages and e-mail correspondence and did not have any  
7 documents or correspondence responsive to this request." Further,  
8 "DCSD has complied with your requests and any objections would be  
9 improper and writ relief is not appropriate..."

10 On August 4, 2023, DCSD/Trustees' counsel sent an email to  
11 Trustees Jansen, Burns and Dickerson in reference to the July 26,  
12 2023 public records request and scheduling a meeting for August 7.  
13 Counsel informed, "we are on a strict deadline to respond, so I am  
14 hoping everyone can attend."

15 On August 7, 2023, Petitioners filed a *Petition for Writ of*  
16 *Mandamus* ("Petition") naming DCSD.

17 On August 8, 2023, Trustee Burns responded to counsel, "I  
18 just went back thru all my text and emails and as for the district  
19 text and emails, I have absolutely nothing...[]. As for my personal  
20 text and emails, I went thru all of it and I found nothing that  
21 falls under their request, but I plan on going with Susan to have  
22 both our phones reviewed on text and emails in case either of us  
23 missed anything."

24 On August 9, 2023, the Court entered an *Order* denying the  
25 *Petition* without prejudice on procedural grounds.

26 On August 10, 2023, Petitioners filed an *Amended Petition for*  
27 *Writ of Mandamus* ("Amended Petition") naming DCSD. Petitioners  
28 requested a court order authorizing forensic searches of DCSD's

1 servers and Trustees' personal devices and requiring production of  
2 responsive records. Petitioners prayed that DCSD and Trustees pay  
3 Petitioners' attorney fees and costs and civil penalties.

4 On August 17, 2023, four days after the August 13 deadline,  
5 DCSD and Trustees informed Petitioners that all responsive non-  
6 privileged communications and documentation had been produced as  
7 to Petitioners' July 26, 2023 public records request. Trustees  
8 "have extensively surveyed their phones, applications, computers,  
9 and e-mails to determine all locations of the information  
10 requested, and have concluded the following:

- 11 1) Trustee Dickerson did not have any documents or  
12 correspondence responsive to this request.
- 13 2) Trustee Englekirk had one email responsive to this  
14 request.
- 15 3) Trustees Jansen and Burns had one text message  
16 exchange responsive to this request."

17 DCSD and Trustees requested that Petitioners withdraw the lawsuit  
18 or face Rule 11 sanctions.

19 DCSD filed an *Opposition to Petitioners' Amended Petition for*  
20 *Writ of Mandamus* on August 21, 2023, and an *Answer* on August 22,  
21 2023. DCSD denied the existence of additional responsive  
22 documents stating, "the issue at hand is not Petitioners and DCSD  
23 disputing whether certain documents are confidential, it is  
24 whether certain documents and communications exist." *Opposition,*  
25 p. 15-16.

26 On August 23, 2023, DCSD and Trustees produced additional  
27 records from DCSD and Trustees as follows:

- 28 1) Trustee Burns located four (4) e-mails regarding

1                   regaining Joey Gilbert Law responsive to several  
2                   sections of the request that are enclosed.

3                   2) DCSD also located July 17, 2023 E-mail  
4                   correspondence containing Joey Gilbert Law's  
5                   Professional Services Contract that is enclosed.

6 DCSD/Trustee's counsel further stated, "Once again, DCSD has  
7 complied with the July 26, 2023 NPRA request, NRS 239, and  
8 relevant case law. My Client reiterates its request that the  
9 Petitioners withdraw" their lawsuit.

10                  On August 25, 2023, the Court entered its *Order to Join*  
11 *Necessary Parties (NRCP 19)* requiring Petitioners to name and  
12 serve Trustees. *Order to Join Necessary Parties (NRCP 19)*.

13                  On August 28, 2023, Petitioners filed a *Second Amended*  
14 *Petition for Writ of Mandamus ("Second Amended Petition")* naming  
15 DCSD and individual Trustees. Petitioners again requested a court  
16 order authorizing forensic searches of DCSD's servers and  
17 Trustees' personal devices and requiring production of responsive  
18 records. Petitioners prayed that DCSD and Trustees pay  
19 Petitioners' attorney's fees and costs and be subject to civil  
20 penalties.

21                  On September 27, 2023, DCSD and Trustees filed a singular  
22 *Answer* and an *Opposition to Petitioners' Second Amended Petition*  
23 *for Writ of Mandamus* on behalf of DCSD and Trustees. DCSD and  
24 Trustees unitedly and vociferously denied the existence of  
25 additional responsive documents on DCSD's servers and Trustees'  
26 personal devices, stating, "the issue at hand is not Petitioners  
27 and DCSD disputing whether certain documents are confidential, it  
28 is whether certain documents and communications exist." *Second*

1 *Opposition*, p. 22.

2       On November 9, 2023, the Court issued its *Order to Show Cause*  
3 directing DCSD and Trustees to file affidavits in support of their  
4 *Answer* and *Second Opposition* to include "the methodology employed  
5 by Respondents in searching for the requested public records."  
6 On November 20, 2023, DCSD and Trustees filed affidavits from  
7 Trustees Jansen, Burns, Dickerson and Englekirk. Trustees'  
8 affidavits generally aver that upon being made aware of  
9 Petitioners' public records requests by DCSD counsel, Trustees  
10 searched their personal devices and produced responsive documents.  
11 DCSD did not provide an affidavit from DCSD's head of IT or anyone  
12 else indicating that DCSD searched DCSD servers in relation to  
13 Petitioners' July 26, 2023 public records request.

14       On November 20, 2023, Petitioners filed a declaration from  
15 Keith Lewis ("Lewis 1"). On November 23, 2023, DCSD and Trustees  
16 filed a declaration from Keith Lewis ("Lewis 2"). On November 29,  
17 2023, Petitioners filed a supplemental declaration from Keith  
18 Lewis ("Lewis 3"). Lewis was DCSD's Superintendent through July  
19 31, 2024, although he went on administrative leave in  
20 approximately November 2023. Lewis 1, ¶1. Pursuant to DCSD  
21 Policy 815, Lewis had sole responsibility for authorizing the  
22 inspection and copying of public records pursuant to public  
23 records requests. Lewis 1 at ¶3. Historically, DCSD adhered to  
24 the policy even prior to its implementation as the policy  
25 confirmed prior practice. As to records maintained by DCSD, upon  
26 being made aware of Petitioner's May 17, 2023 public records  
27 request, Lewis authorized a search of DCSD's servers and the  
28 production of responsive documents. Lewis 2, ¶6, 7.



1           Petitioners served their July 27, 2023 public records request  
2 on DCSD's counsel. In contravention of DCSD Policy 815, DCSD's  
3 counsel never showed the request to Lewis. Lewis did not see the  
4 request until receiving it as an attachment to a subpoena duces  
5 tecum from Petitioners on or about August 23, 2023. Lewis 1 at  
6 ¶6, 7, 8, 9. Lewis declared, "To my knowledge, the District never  
7 conducted a search of District servers in an effort to locate  
8 documents and records that would be responsive to Petitioners'  
9 July 26, 2023, NRS 239 public records request and I was never  
10 asked by District Counsel to conduct or cause such a search to be  
11 conducted." Lewis 1, ¶13; Lewis 3, ¶6. "I am informed and  
12 believe that if the District were to conduct a search of its  
13 servers, it would locate documents and communications responsive  
14 to Petitioners' July 26, 2023, NRS 239 public records request."  
15 Lewis 1, ¶17; Lewis 3, ¶7.

16           A trial on Petitioners' *Second Amended Petition* commenced on  
17 March 27, 2024. DCSD and Trustees appeared with the same counsel.  
18 Lewis was Petitioners' first witness. Lewis testified  
19 consistently with Lewis 1, Lewis 2 and Lewis 3, and adding detail.  
20 Lewis' credible testimony levelled the claims of DCSD and Trustees  
21 that DCSD's server and Trustees' personal devices were adequately  
22 searched and no additional responsive public documents exist. As  
23 per DCSD Policy 815, Lewis had sole authority to authorize public  
24 record searches and production and did not delegate the authority.  
25 The policy was adhered to until DCSD retained new counsel on July  
26 19, 2023. As such, DCSD's former counsel brought Petitioner's May  
27 17, 2023 public records request to the attention of Lewis. Lewis  
28 authorized a search of DCSD's server and the production of

1 responsive documents. In comparing what DCSD produced as compared  
2 to what was produced from Trustees' personal devices, Lewis was of  
3 the opinion that additional responsive documents existed on  
4 Trustees' private devices. Lewis shared his opinion to DCSD's  
5 former counsel, Rick Hsu, Esq.

6 In derogation of DCSD Policy 815, DCSD's new counsel did not  
7 inform Lewis of Petitioners' July 26, 2023 public records request  
8 and did not copy Lewis on DCSD's responses. Not knowing of the  
9 request, Lewis did not authorize a corresponding search of DCSD's  
10 server and/or production of responsive documents and did not  
11 notify Trustees. To Lewis' knowledge, DCSD never searched its  
12 servers for records associated with Petitioners' July 26, 2023  
13 public records request. Lewis offered a compelling opinion that  
14 DCSD servers contained additional documents responsive to  
15 Petitioners' July 26, 2023 request that could be located with a  
16 simple search. As to Trustees, after learning of the public  
17 records request during litigation, Lewis himself produced a  
18 responsive email from Trustee Jansen that DCSD and Trustee Jansen  
19 had previously failed to produce.

20 Petitioners next called Trustee Jansen. Trustee Jansen's  
21 testimony was inconsistent from answer to answer and was riddled  
22 with answers to the effect of "I don't know," "I don't remember"  
23 and "If you say so." Trustee Jansen's testimony effectively  
24 proved Respondents' failure to produce all documents responsive to  
25 Petitioners' public records requests. This was demonstrated by  
26 multiple examples wherein DCSD produced emails from or to Trustee  
27 Jansen's personal devices that were not produced by Trustee  
28 Jansen.

1 The Court recessed for lunch. After lunch, the parties  
2 requested a stay pending settlement. The parties entered a  
3 stipulation on the record with an intent to be bound and were  
4 canvassed by the Court. DCSD and Trustees agreed to searches of  
5 DCSD's servers and Trustees' private devices and to payment of  
6 Petitioners' attorney fees and costs by DCSD. The stipulation was  
7 contingent on the approval of the DCSD Board of Trustees. The  
8 Court stayed the proceedings pending DCSD Board approval.

9 On May 10, 2024, Petitioners filed a *Request to Reschedule*  
10 *and Continue Evidentiary Hearing* informing the Court that DCSD's  
11 Board voted to "not approve the settlement and have the attorneys  
12 go back and negotiate a more favorable term for the district."  
13 The Court scheduled resumption of the trial for June 4, 2024.

14 On May 21, 2024, DCSD and Trustees moved to stay the  
15 proceedings a second time, offering to conduct forensic searches  
16 of DCSD's server and Trustees' personal devices at DCSD's expense.  
17 The Court granted a continuance and ordered DCSD to conduct the  
18 proposed searches, stating, "To be clear, Respondents do not need  
19 a court order or a settlement agreement to search servers and cell  
20 phones in response to public records requests and nothing that  
21 this Court or Petitioners have done during the scope of this  
22 litigation has prevented Respondents from previously conducting  
23 the very searches that they now desire to perform." *Order*  
24 *Regarding Respondents' Motion to Stay and/or Enforce Settlement*  
25 *Agreement*, p. 5, May 31, 2024. The Court made no findings that  
26 DCSD or Trustees had or had not violated NPRA.

27 Ultimately, trial was set to resume on September 17, 2024.  
28 By this time, DCSD was represented by new counsel and Trustees

1 had independent representation (one attorney representing all  
2 named Trustees). The parties announced that following a search of  
3 DCSD's servers and forensic searches of Trustees' personal devices  
4 at DCSD's cost, in July 2024 DCSD produced approximately 500 pages  
5 of public records and Trustees produced approximately 6,100 pages  
6 of public records. While the parties made no effort to synthesize  
7 the records or breakdown how many records came from each Trustee's  
8 personal devices, the parties agreed that at least some of the  
9 records produced from each source contained responsive records not  
10 previously produced.

11 Petitioners decided against pursuing any argument that DCSD  
12 and/or Trustees had not, as of September 2024, produced all  
13 responsive records. Accordingly, the searches and corresponding  
14 productions reduced the issues for judicial determination to  
15 Petitioners' requests for attorney's fees/costs and civil  
16 penalties. The evidentiary hearing resumed solely to address  
17 these issues.

18 Petitioners called Rick Hsu, Esq., former long term counsel  
19 for DCSD. Hsu represented DCSD until replaced by Joey Gilbert Law  
20 on July 19, 2023. Hsu testified that in the context of  
21 Petitioners' NPRA requests for records maintained on Trustees'  
22 personal devices, his client(s) was the individual Trustee as per  
23 NPRA's definition of "governmental entity." Trustees waived the  
24 attorney client privilege as between themselves and their attorney  
25 pertaining to records on their personal devices. Upon receipt of  
26 Petitioners' May 2023 public records request, Hsu notified Lewis  
27 and Trustees and relied upon them to search DSCD's servers and  
28 Trustees' personal devices. Hsu became concerned when records

1 provided by Lewis from DCSD's servers revealed communications  
2 to/from Trustees' personal devices that Trustees failed to  
3 produced. Examples were provided during Hsu's testimony. Hsu  
4 brought his concern to the attention of Trustees Jansen, Burns and  
5 Dickerson by email on May 25, 2023, stating in relevant part:

6  
7 I have received emails from each of you stating you have  
8 no documents responsive to the public records request of  
9 [Petitioners] sent May 17, 2023. I am reluctant to  
10 inform [Petitioners] of your statements until you review  
11 this email advising of risks and the attached documents  
12 which were part of the DCSD production sent yesterday.

13 These documents are emails which were forwarded to each  
14 of your personal email addresses. At a minimum, these  
15 emails sent to your personal email addresses should be  
16 produced by each of you. Recall that I previously sent  
17 you a copy of the Nevada Supreme Court decision,  
18 *Comstock Residents Ass'n v. Lyon County Bd. Of Comm'rs*,  
19 134 Nev. 142, 414 P.3d 318 (2018), which held that  
20 records maintained on the individual elected officials'  
21 private cellphones and private email accounts constitute  
22 "public records" when they concern "a service rendered  
23 in the public interest." The Court also held that the  
24 elected officials themselves are "governmental entities"  
25 for purposes of producing public records.

26 If I inform [Petitioners] that each of you have no  
27 records whatsoever, he will point to the attached  
28 emails. There would be a substantial risk that he files  
29 suit against each of you as "governmental entities"  
30 under NRS 239.011, which is quoted and highlighted  
31 below. [Petitioners] could obtain a court order  
32 permitting him to inspect your personal emails or your  
33 personal cell phones and could obtain an award of  
34 attorney's fees. As counsel, I need to advise you of  
35 this risk.

36 Please produce to me copies of the forwarded emails from  
37 your private email accounts to lessen the risk of  
38 [Petitioners] filing suit. Please also consider the  
39 principles of the *Comstock Residents* decision and  
40 reevaluate whether you have text messages and emails  
41 responsive to the request. If after your reevaluation

1           you still have nothing to produce (other than the  
2           forwarded emails), please advise and I will relay the  
3           same to [Petitioners].

4           Plaintiff's Exhibit 33 (emphasis added). In response, Trustee  
5           Dickerson produced additional documents. Trustees Jansen and  
6           Burns failed to respond, even after a reminder. Notably, Hsu had  
7           counseled Trustees in February 2023 against using personal devices  
8           in the provision of public service. Plaintiff's Exhibit 32.  
9           Hsu's testimony was credible.

10           Petitioners next recalled Trustee Jansen followed by Trustees  
11           Burns, Dickerson and Englekirk. Each unabashedly claimed good  
12           faith reliance on the legal advice of Joey Gilbert Law. Trustees  
13           Jansen, Burns and Dickerson testified that upon being notified of  
14           Petitioners' July 2023 public records request, they turned their  
15           personal devices over to Joey Gilbert Law to search for responsive  
16           documents and make decisions regarding production (Trustee  
17           Englekirk searched his personal devices using search terms  
18           supplied by Joey Gilbert Law). This testimony directly  
19           contradicted affidavits signed by Trustees Jansen, Burns and  
20           Dickerson back in November 2023, indicating that Trustees  
21           personally searched their own personal devices and produced all  
22           responsive documents. The contradiction is such that the sworn  
23           affidavits and sworn in-court testimony cannot both be true. The  
24           in-court testimony regarding reliance on the advice of counsel was  
25           corroborated by the consistent testimony of Trustees Jansen,  
26           Burns, Dickerson and Englekirk regarding the creation of the  
27           affidavits by counsel, lack of training and understanding as to  
28           NPRa and complete reliance on counsel to search, determine what

1 was responsive, and determine what was privileged. All testified  
2 that their attorney forwarded the affidavits without any  
3 explanation or discussion. All signed the affidavits without much  
4 thought or consideration. This testimony from Trustees is  
5 corroborated by similar testimony from former DCSD Superintendent  
6 Lewis. Lewis testified that Joey Gilbert Law sent him an  
7 affidavit without explanation or discussion. Unlike the Trustees,  
8 Lewis carefully read the affidavit and refused to sign it unless  
9 factual inaccuracies were corrected. The testimony of Trustees  
10 was also corroborated by the testimony of Amber Kammann, former  
11 paralegal for Joey Gilbert Law. Kammann corroborated that  
12 Trustees Jansen, Burns and Dickerson handed over their personal  
13 devices to Joey Gilbert Law. Kammann searched the devices using a  
14 list of search terms supplied by Gilbert and returned the devices  
15 to Trustees. Joey Gilbert, Esq., did not testify.

16 The testimony of Trustee Jansen and corresponding exhibits  
17 proved that at least one of the documents produced in July 2024  
18 came from Trustee Jansen's person devices/accounts. The testimony  
19 of Trustee Burns and corresponding exhibits proved that at least  
20 one of the documents produced in July 2024 came from Trustee  
21 Burns' person devices/accounts. The testimony of Trustee  
22 Dickerson and corresponding exhibits proved that at least one of  
23 the documents produced in July 2024 came from Trustee Dickerson's  
24 person devices/accounts. The testimony of Trustee Englekirk and  
25 corresponding exhibits proved that at least one of the documents  
26 produced in July 2024 came from Trustee Englekirk's person  
27 devices/accounts.

28 The parties stipulated that the forensic search of Trustees'

1 personal electronic devices was "inconclusive" as to whether  
2 Trustees deleted any responsive records.

3 Conclusions of Law

4 The purpose of NPRA "is to foster democratic principles by  
5 providing members of the public with prompt access to inspect,  
6 copy or receive a copy of public books and records to the extent  
7 permitted by law." NRS 239.001(1). NPRA "must be construed  
8 liberally to carry out this important purpose." NRS 239.001(2).

9 "Not later than the end of the fifth business day after the  
10 date on which the person who has legal custody or control of  
11 a...record of a governmental entity receives a written or oral  
12 request from a person to...receive a copy of the...record, a  
13 governmental entity shall...provide such copy to the person...[or] if  
14 the governmental entity is unable to make the...record available by  
15 the end of the fifth business day...[p]rovide to the person, in  
16 writing, notice of the fact that it is unable to make the...record  
17 available by that date and the earliest date and time after which  
18 the governmental entity reasonably believes the public...record will  
19 be available to the person. If the public...record or the copy of  
20 the public...record is not available to the person by that date and  
21 time, the governmental entity shall provide to the person, in  
22 writing, an explanation of the reason the public...record is not  
23 available and a date and time after which the governmental entity  
24 reasonably believes...a copy of the public...record will be available  
25 to the person." NRS 239.0107(1).

26 DCSD is a political subdivision of the State of Nevada. NRS  
27 386.010(2); NRS 41.0305. As such, DCSD is a "governmental entity"  
28 in the purview of NPRA. NRS 239.005(5)(b).



1 Trustees are elected officers of DCSD, a political  
2 subdivision of this State, and, as such, are each governmental  
3 entities within the purview of NPRA. NRS 239.005(5)(a); *Comstock*  
4 *Residents Ass'n v. Lyon County*, 134 Nev. 142, 148 (2018).

5 "The use of private entities in the provision of public  
6 services must not deprive members of the public access to inspect,  
7 copy or receive a copy of books and records relating to the  
8 provision of those services." NRS 239.001(4). Records of private  
9 entities used in the provision of public services are considered  
10 public records subject to disclosure. *Las Vegas Metropolitan*  
11 *Police Department v. Blackjack Bonding, Inc.*, 131 Nev. 80, 86, 343  
12 P.3d 608, 613 (2015). Communications conducted by Trustees on  
13 their personal electronic devices regarding DCSD business fall  
14 within the definition of public service and are, therefore, public  
15 records subject to disclosure. *Comstock Residents Association v.*  
16 *Lyon County*, 134 Nev. 142, 146, 414 P.3d 318 (2018).

17 Here, Petitioners submitted public record requests to DCSD on  
18 May 17 and July 26, 2023 seeking copies of public records  
19 maintained on DCSD's servers and Trustees' personal electronic  
20 devices. DCSD and Trustees produced what they represented were  
21 all responsive records in existence.

22 Petitioners, believing that more responsive records existed on  
23 DCSD's servers and Trustees' personal electronic devices, filed  
24 suit on August 7, 2023, based upon DCSD's and Trustees' "failure  
25 and/or refusal to release the requested records to Petitioners in  
26 a violation of the Nevada Public Records Act." *Second Amended*  
27 *Petition*, Third Claim for Relief, ¶44. DCSD and Trustees answered  
28 that no additional responsive records existed.



1 fee-shifting statute "is both one-sided and mandatory. By its  
2 terms, the statute entitles a prevailing record requester to  
3 recover costs and reasonable attorney fees. [...]. It does not make  
4 reciprocal provision for the government to recover costs and fees  
5 from the requester, should the government prevail. In this way,  
6 NRS 239.011(2) incentivises the government to honor public record  
7 requests outside of court, since the government must pay its own  
8 litigation expenses if it wins and both its own and its opponent's  
9 litigation expenses if it loses." *LVRJ v. Clark County Office of*  
10 *the Coroner/Medical Examiner*, 138 Nev.Adv.Op. 80, 521 P.3d 1169,  
11 1173 (2022) (internal citation omitted). A finding of willful  
12 misconduct is not required and there is no good faith exception.  
13 Governmental entities had best understand the construct of NPRA  
14 and the need for swift and full compliance. If a lawsuit is  
15 filed, NPRA compliance is the only way to stop the attorney fee  
16 meter from turning. The governmental entity need not and should  
17 not wait for court before searching for and producing responsive  
18 records. In this respect, the law is not grey.

19 **A**

20 **Catalyst Theory**

21 "Generally, an action must have proceeded to final judgment  
22 for a party to have prevailed." *Henderson*, 137 Nev. at 769  
23 (internal citation omitted). "Whether a party prevails in a  
24 public records matter that ultimately is resolved outside the  
25 court is determined by application of the catalyst theory." *Id.*  
26 (internal citation omitted). "Under the catalyst theory, a  
27 requester prevails when its public records suit causes the  
28 governmental agency to substantially change its behavior in the

1 manner sought by the requester, even when the litigation does not  
2 result in a judicial decision on the merits." *Id.* (internal  
3 citation omitted). The policy favoring the catalyst theory is to  
4 dissolve "the potential for government abuse in that an agency  
5 otherwise could deny access, vigorously defend against the  
6 lawsuit, and then unilaterally disclose the documents sought at  
7 the eleventh hour to avoid the entry of a court order and the  
8 resulting award of attorney's fees." *LVMPD v. Ctr. For*  
9 *Investigative Reporting*, 136 Nev. 122, 127, 460 P.3d 952  
10 (2020) (internal citations and quotations omitted).

11 "In assessing whether a requester prevailed under the  
12 catalyst theory, the district court must consider

13 (1) when the documents were released, (2) what actually  
14 triggered the document's release,... (3) whether [the  
15 requester] was entitled to the documents at an  
16 earlier time. Additionally the district court  
17 should take into consideration [(4)] whether the  
18 litigation was frivolous, unreasonable, or  
19 groundless, and [(5)] whether the requester  
reasonably attempted to settle the matter short of  
litigation by notifying the governmental agency of  
its grievances and giving the agency an opportunity  
to supply the records within a reasonable time."

20 *Id.* (internal quotation marks and citation omitted). The Nevada  
21 Supreme Court has declined to "direct the district courts to apply  
22 greater or lesser weight to any of the factors in all instances,  
23 regardless of the nuances that specific circumstances may  
24 present." *Id.* at. 770.

25 Unless the governmental entity failed to respond at all  
26 within five business days of receiving the public records request,  
27 "[a] requester seeking fees under NRS 239.011(2) has the burden of  
28 proving that the commencement of the litigation caused the

1 disclosure." *LVMPD v. Center for Investigative Reporting*, 136  
2 Nev. 122, 126 @ footnote 3, 460 P.3d 952 (2020). Here, the burden  
3 is a mixed bag. DCSD timely responded to Petitioners' May 2023  
4 public records request but was one day late in responding to  
5 Petitioners' July 2023 request.

6 **1. When were the documents released?**

7 The public record were released in July 2024. Petitioners  
8 submitted public records requests in May and July 2023. Shortly  
9 thereafter, DCSD and Trustees produced some responsive records.  
10 DCSD and Trustees did not produce the remainder of responsive  
11 records until approximately July 2024. Notably, there was never  
12 any dispute regarding privileges or objections to production.  
13 Rather, DCSD and Trustees consistently maintained that no  
14 additional responsive records existed until supplementing  
15 production in July 2024.

16 **2. What triggered production of the documents?**

17 The lawsuit triggered production of the public records. From  
18 no later than August 7, 2023, when Petitioners filed suit until  
19 the first day of trial on March 27, 2024, DCSD and Trustees  
20 steadfastly represented that all responsive unprivileged records  
21 had been produced. "The issue at hand is not Petitioners and  
22 Respondents disputing whether certain documents are confidential,  
23 it is whether certain documents and communications exist.  
24 Petitioners' entire Second Amended Writ relies on the assumption  
25 that documents and communications are being held with nothing but  
26 superstitions as back up." *DCSD/Trustees' Opposition to*  
27 *Petitioners' Second Amended Petition for Writ of Mandamus*, p. 22,  
28 lines 2-6. Stuck in this belief, for months DCSD and Trustees

1 stubbornly refused to conduct further searches of DCSD's servers  
2 and Trustees' personal electronic devices. DCSD and Trustees  
3 subsequently conducted supplemental searches and produced  
4 additional responsive documents.

5 DCSD's and Trustees' pivot came after the first two witnesses  
6 testified at trial. Former DCSD Superintendent Lewis' credible  
7 testimony levelled DCSD's and Trustees' claims that additional  
8 unprivileged responsive documents did not exist, calling into  
9 question the adequacy of DCSD's and Trustees' initial searches.  
10 Trustee Jansen's testimony was inconsistent from answer to answer  
11 and was riddled with answers to the effect of "I don't know," "I  
12 don't remember" and "If you say so." Trustee Jansen's testimony  
13 firmly established that Trustee Jansen's personal electronic  
14 devices harbored additional responsive records.

15 The first two witnesses having struck a blow to DCSD's and  
16 Trustees' defense, DCSD and Trustees extended a case-ending offer  
17 to stop the NPRA attorney fee bleed. Specifically, DCSD and  
18 Trustees offered to search DCSD's servers, forensically search  
19 Trustees' personal electronic devices at DCSD's expense, produce  
20 all responsive unprivileged records AND pay Petitioners'  
21 attorney's fees (nearly all of what Petitioners prayed for in the  
22 *Second Amended Petition*). The offer was contingent on DCSD Board  
23 approval. Petitioners accepted the offer, which required little  
24 of Petitioners, and the trial was stayed pending DCSD Board  
25 approval.

26 The subsequent rejection of the settlement agreement by  
27 DCSD's Board necessitated that the lawsuit move forward and  
28 effectively ripped off the NPRA attorney's fee scab. In apparent

1 understanding of the same, DCSD and Trustees moved to stay  
2 resumption of the trial so that DCSD and Trustees could conduct  
3 the contemplated searches despite the failed settlement. Over  
4 Petitioners' objection, the Court continued the trial and ordered  
5 DCSD and Trustees to conduct the offered searches. The Court  
6 stated, "To be clear, [DCSD and Trustees] do not need a court  
7 order or a settlement agreement to search servers and cell phones  
8 in response to public records requests and nothing that this Court  
9 or Petitioners have done during the scope of this litigation has  
10 prevented Respondents from previously conducting the very searches  
11 that they now desire to perform." *Order Regarding Respondents'*  
12 *Motion to Stay and/or Enforce Settlement Agreement*, p. 5, May 31,  
13 2024. The Court did not assess whether DCSD and Trustees violated  
14 NPRA.

15 DCSD and Trustees now claim that they always intended to  
16 conduct further searches and produce responsive documents and  
17 would have done so irrespective of the lawsuit. Trustees recently  
18 testified to the same. This claim and corresponding testimony  
19 bear frivolity considering that DCSD and Trustees refused to  
20 conduct the supplemental searches until after the trial testimony  
21 of Lewis and Trustee Jansen coming approximately eight months  
22 after the lawsuit was filed. Pre-lawsuit and even after the  
23 lawsuit was filed, it would have cost DCSD and Trustees next to  
24 nothing to competently search DCSD's servers and Trustees'  
25 personal devices (NPRA does not require forensic searches, just  
26 competent ones). DCSD and Trustees refused, arrogating that  
27 Petitioners' claim of the existence of additional records was  
28 built on "superstitions," despite evidence to the contrary. Even

1 after the lawsuit was filed, DCSD and Trustees continued to decry  
2 the existence of additional responsive records and refused to  
3 conduct simple searches to prove the same. DCSD has never  
4 explained or proven why Petitioners' July 2023 public records  
5 request was not forwarded to Superintendent Lewis in conformance  
6 with DCSD Policy 815. With information then available, it should  
7 not have taken the lawsuit and Petitioners' first two witnesses at  
8 trial to trigger DCSD and Trustees to conduct competent searches  
9 and produce responsive records, but that is what happened.

10 This finding is further supported by the recent testimony of  
11 Trustees. For example, Trustee Burns testified that he would have  
12 agreed to the search of his personal electronic devices even  
13 without the lawsuit or court order, but also testified that he  
14 ultimately agreed to the search because attorney's fees were a  
15 concern and he wanted the lawsuit to stop. Trustee Burns  
16 acknowledged that paragraph 11 of his November 15, 2023 affidavit  
17 (Exhibit 20), "I have since searched my personal cell phone again  
18 and did not locate any responsive messages" and paragraph 16, "I  
19 conducted an additional search through my personal e-mail and was  
20 able to located four (4) e-mails regarding retaining Joey Gilbert  
21 Law responsive to several sections of the Second Request," are  
22 false. Trustee Englekirk testified that he originally opposed a  
23 search of his personal devices because he felt pestered to produce  
24 records that did not exist or that he felt were not damning in  
25 nature (neither of which are grounds to ignore public records  
26 requests). According to Trustee Englekirk, what changed his mind  
27 was a need to resolve the lawsuit when he became aware of the  
28 attorney's fees and costs. Trustee Jansen testified that she



1 would have agreed to the search sooner had she been asked nicely  
2 and kindly (neither of which are requirements of NPRA requests).  
3 DCSD's former legal counsel Hsu testified that Trustee Jansen made  
4 a comment to the effect of, "I will never give up my cell phone."  
5 Trustee Jansen acknowledges making this comment. Trustee  
6 Dickerson testified on September 18, 2024, that she first learned  
7 of the lawsuit "yesterday" and would have consented to the search  
8 of her personal devices even without the lawsuit. The *Second*  
9 *Amended Petition* was personally served on Trustee Dickerson on  
10 September 3, 2023. See, *Declaration of Service*, September 12,  
11 2023. Trustee Dickerson was present in Court when trial commenced  
12 on March 27, 2024, and was canvassed on the proposed settlement.

13       Lastly, this is not a situation where the governmental entity  
14 produced documents shortly after the lawsuit was filed. Rather,  
15 DCSD and Trustees did not conduct further searches or produce  
16 additional records, or even offer to do so, until after the trial  
17 had begun. Critically, well before trial, DCSD and Trustees had  
18 the benefit of Hsu's opinion and Lewis' declarations indicating  
19 that DCSD's and Trustees' productions were problematic.  
20 Nonetheless, DCSD and Trustees pressed forward to trial, thereby  
21 solidifying the conclusion that the lawsuit triggered NPRA  
22 compliance.

23 **3. Were Petitioners entitled to production at an earlier time?**

24       Yes, Petitioners were entitled to a much earlier production.  
25 NPRA requires production within five business days of the request  
26 for public records. NRS 239.0107(1)(a). If the governmental  
27 entity is unable to produce in five business days, the  
28 governmental entity must give written notice of the same and

1 indicate, "the earliest date and time after which the governmental  
2 entity reasonably believes the public book or record will be  
3 available to the person." NRS 239.0107(1)(c)(1). If the  
4 governmental entity does not have legal custody or control of the  
5 public record, the governmental entity must provide written notice  
6 of the fact and provide the name and address of the governmental  
7 entity that has legal custody or control, if known. NRS  
8 239.0107(1)(b).

9 Here, DCSD/Trustees responded to Petitioners' May 17, 2023  
10 request on the fifth business day by producing some documents,  
11 raising objections/privileges as to others, and indicating that  
12 more time would be needed for full production. DCSD/Trustees did  
13 not initially provide a timeline for production. After being  
14 nudged by Petitioners, DCSD/Trustees set July 31, 2023, as the  
15 deadline for full production. Full production did not occur until  
16 July 2024.

17 DCSD/Trustees responded to Petitioners' July 26, 2023 request  
18 on the sixth business day, one day beyond the NRS 239.0107(1)  
19 requirement. DCSD/Trustees raised objections/privileges and set  
20 August 13, 2023, as the deadline for production. Full production  
21 did not occur until July 2024.

22 DCSD and Trustees have never offered any explanation as to  
23 why they waited until July 2024 to search DCSD's servers and  
24 Trustees' personal devices and produce additional responsive  
25 documents.

26 **4. Was the litigation frivolous, unreasonable or groundless?**

27 No, the litigation was not frivolous, unreasonable or  
28 groundless. Petitioners' lawsuit claimed that DCSD and Trustees

1 did not produce all non-privileged responsive records.  
2 Petitioners sought a court order requiring DCSD/Trustees to  
3 conduct adequate searches and produce all non-privileged  
4 responsive documents. DCSD/Trustees refused further searches and  
5 pointedly refuted the existence of additional unprivileged  
6 responsive records. Approximately one year into the lawsuit and a  
7 court order later, DCSD/Trustees conducted supplemental searches  
8 and produced 6,600 pages of public records.

9       When coupled with information known to Petitioners, DCSD's  
10 and Trustees' pre-suit productions amply supported Petitioners'  
11 claim of the existence of additional responsive documents. For  
12 instance, Trustees indicated during board meetings that they had  
13 received many communications responsive to the Petitioners' public  
14 record requests and yet only produce a small number of records.  
15 As another example, DCSD produced emails demonstrating usage of  
16 the Trustees' private devices for the provision of public service  
17 but Trustees did not produce the same emails. *See, e.g., LVRJ v.*  
18 *LV Metropolitan Police Dept.*, 139 Nev.Adv.Op. 8, 15 at ft. 5  
19 (March 30, 2023) (NPRA "does not limit a governmental entity's  
20 obligation to produce public records simply because the requester  
21 may have obtained some or all of those records through another  
22 source"). DCSD and Trustees' counsel at the time, Rick Hsu, Esq.,  
23 recognized the problem pre-lawsuit and warned Trustees that if the  
24 inconsistency was not remedied, Petitioners would file a lawsuit  
25 and be entitled to attorney fees. Hsu emailed Trustees Jansen,  
26 Burns and Dickerson on May 25, 2023, stating in relevant part:

27  
28

I have received emails from each of you stating you

1 have no documents responsive to the public records  
2 request of [Petitioners] sent May 17, 2023. I am  
3 reluctant to inform [Petitioners] of your statements  
4 until you review this email advising of risks and the  
5 attached documents which were part of the DCSD  
6 production sent yesterday.

7 These documents are emails which were forwarded to each  
8 of your personal email addresses. At a minimum, these  
9 emails sent to your personal email addresses should be  
10 produced by each of you. Recall that I previously sent  
11 you a copy of the Nevada Supreme Court decision,  
12 *Comstock Residents Ass'n v. Lyon County Bd. Of Comm'rs*,  
13 134 Nev. 142, 414 P.3d 318 (2018), which held that  
14 records maintained on the individual elected officials'  
15 private cellphones and private email accounts constitute  
16 "public records" when they concern "a service rendered  
17 in the public interest." The Court also held that the  
18 elected officials themselves are "governmental entities"  
19 for purposes of producing public records.

20 If I inform [Petitioners] that each of you have no  
21 records whatsoever, he will point to the attached  
22 emails. There would be a substantial risk that he files  
23 suit against each of you as "governmental entities"  
24 under NRS 239.011, which is quoted and highlighted  
25 below. [Petitioners] could obtain a court order  
26 permitting him to inspect your personal emails or your  
27 personal cell phones and could obtain an award of  
28 attorney's fees. As counsel, I need to advise you of  
29 this risk.

30 Please produce to me copies of the forwarded emails from  
31 your private email accounts to lessen the risk of  
32 [Petitioners] filing suit. Please also consider the  
33 principles of the *Comstock Residents* decision and  
34 reevaluate whether you have text messages and emails  
35 responsive to the request. If after your reevaluation  
36 you still have nothing to produce (other than the  
37 forwarded emails), please advise and I will relay the  
38 same to [Petitioners].

39 Plaintiff's Exhibit 33 (emphasis added). Hsu was prescient, as  
40 Petitioners filed suit when Trustees failed to produce all  
41 responsive documents.

42 5. Did Petitioners reasonably attempt to settle short of

1 litigation by notifying DCSD/Trustees of its grievances and giving  
2 DCSD/Trustees an opportunity to supply the records within a  
3 reasonable time?

4 No, Petitioners did not reasonably attempt to settle short of  
5 litigation. DCSD and Trustees' chief argument against invocation  
6 of the catalyst theory is that Petitioners rushed to the  
7 courthouse with minds set on accruing attorney fees and making  
8 Trustees look bad. The point is well taken.

9 The catalyst theory factors are designed to "alleviate  
10 concerns that the catalyst theory will encourage requesters to  
11 litigate their requests in district court unnecessarily." *LVMPD*  
12 *v. Ctr. for Investigative Reporting*, 136 Nev. 122, 126, 128, 460  
13 P.3d 952, 957 (2020). The Court has observed as a practitioner  
14 and as a judicial officer, that common courtesy between requesters  
15 and governmental entities often adorns public records request,  
16 particularly where the governmental entity is responsive and  
17 making effort to comply. Here, no such courtesies were extended.

18 Trustees Jansen, Burns and Dickerson took office the  
19 beginning of January 2023 as newly elected and first time DCSD  
20 Board members. Shortly thereafter, Petitioners submitted a public  
21 records request. It is uncontroverted that DCSD and Trustees  
22 fully complied with Petitioners' January 2023 request and without  
23 Petitioners' needing to resort to litigation.

24 Petitioners' May 17, 2023 request was for records thought to  
25 evidence an open meeting law violation by Trustees Jansen, Burns,  
26 Dickerson and Englekirk. The request consisted of nine line items  
27 necessitating five governmental entities to search DCSD's servers,  
28 DCSD issued phones and all of Trustees' personal electronic

1 devices and accounts for memos, emails, text messages, phone logs,  
2 policies, etc. The request was served on DCSD's/Trustees' counsel  
3 by email who replied on the fifth business day thereafter by  
4 producing some records, raising appropriate objections/privileges  
5 and stating that more time was needed as it related to Trustees  
6 personal devices. On June 1, 2023, Petitioners "revised" line  
7 items 6, 7 and 8. On June 9, 2023, DCSD/Trustees provided a  
8 supplemental response addressing Petitioners' June 1 revisions,  
9 providing additional productions from Trustee Dickerson and  
10 setting and setting July 31<sup>st</sup> as the anticipated date for  
11 additional production from Trustees Jansen and Burns. Trustee  
12 Burns was out of state until July.

13 Known to Petitioners was that DCSD was contemplating a change  
14 in legal counsel at its July 19, 2023 Board meeting. Finding the  
15 proposal "ill-advised," Petitioners emailed DCSD's counsel  
16 stating, "If the Board is inclined to move forward with new legal  
17 representation, please advise them that we expect full compliance  
18 with our May 17, 2023, and June 1, 2023, NRS 239 Request. [...]. If  
19 the Board fails to respond. We will file suit. The Board should  
20 be made aware that NRS 239.011(2) gives priority to NRS 239  
21 matters and entitles a prevailing requester to an award of  
22 reasonable attorney's fees. Even more, NRS 239.340 allows courts  
23 to impose civil penalties for any willful violation of NRS 239.  
24 [...]. The Board's obligations under NRS 239 are not altered by  
25 their ill-advised decision to hire new counsel. Kind regards...."

26 On July 19, 2023, DCSD voted to terminate counsel of 20 years  
27 in favor of a new law firm. Common sense, and the testimony of  
28 Hsu, indicates that this transition entailed more than dropping a

1 file folder off for new counsel and that Petitioners' public  
2 records request was not the only DCSD issue in need of legal  
3 attention. On July 24, 2023, DCSD's new counsel formally advised  
4 Petitioners of the transition. On August 3, 2023, DCSD's new  
5 counsel sent a ten-page letter to Petitioners entitled "DCSD's  
6 Third Supplemental Response to 5/17/2023 Public Records Request."  
7 The response came three days beyond DCSD's self-imposed July 31<sup>st</sup>  
8 deadline but informed that new counsel is "still in the process of  
9 getting up to speed on the file and the specific requests and  
10 outstanding disputes...." The letter offers a chronology of DCSD's  
11 May 24, 2023 Response to First Request and June 9, 2023  
12 Supplemental Response to First Request. The letter provides  
13 DCSD's Third Supplemental Response and concludes with a statement  
14 that DCSD has fully complied with Petitioners' May 17, 2023 public  
15 records request.

16 Petitioner filed suit twelve days later without any further  
17 correspondence to DCSD and Trustees in reference to the May 2023  
18 request. Petitioners' first claim for relief alleges that  
19 Trustees Jansen's and Burn's decisions to delay his/her responses  
20 until July 31<sup>st</sup> is a "clear violation of NRS 239." *Second Amended*  
21 *Petition*, ¶128 and ¶131. The Court disagrees. Given all involved  
22 with Petitioners' May 2023 request and the fact that Trustee Burns  
23 was out of state until July, the July 31 deadline was more than  
24 reasonable.

25 Petitioners emailed another public records request to DCSD's  
26 and Trustees' counsel on July 26, 2023. The request consisted of  
27 ten line items, four of which were directed to DCSD's decision to  
28 change legal counsel. The request necessitated five governmental

1 entities to search DCSD's servers, DCSD issued phones and all of  
2 Trustees' personal electronic devices and accounts for responsive  
3 emails, text and messaging application messages. DCSD and  
4 Trustees replied on August 3, 2023, the sixth business day  
5 thereafter, by producing some records, raising appropriate  
6 objections/privileges and setting an August 13, 2023 deadline for  
7 producing records from Trustees personal devices. As for being  
8 one day late in responding, counsel stated, "We apologize for any  
9 confusion regarding the number of business days required in  
10 responding to your request - we have today calendared as the date  
11 due given Ashura for those who observe. We thank you for your  
12 consideration in this matter and look forward to working with you  
13 as always."

14 Notably, Petitioners voiced no opposition to the August 13  
15 deadline but nonetheless filed suit on August 7, 2023, well in  
16 advance of the deadline. Petitioners' second claim for relief is  
17 for "Violation of the Nevada Public Records Act, July 26, 2023  
18 Public Records Request." Therein, Petitioners state that "DCSD's  
19 August 2, 2023 attempt to extend the response deadline to August  
20 13, 2023, in reliance on NRS 239.0107(1)(b) is misplaced as it  
21 applies only '[i]f the governmental entity does not have legal  
22 custody and control of the book or record...'" *Petition*, p. 18,  
23 ¶94. "DCSD's failure to adequately respond to Petitioners' July  
24 26, 2023, public records request is a clear violation of the  
25 Nevada Public Records Act." *Id.* at ¶96.

26 The Court disagrees. Petitioners filed suit a mere 12 days  
27 after serving their July 26, 2023 public records request.  
28 Petitioners filed suit on August 7 even though DCSD and Trustees



1 responded on August 3 and set a deadline for production on August  
2 13 (18 days from the date of the request). A requester of public  
3 records may seek judicial recourse if the request is "denied or  
4 unreasonably delayed." NRS 239.011(1). The deadline by DCSD and  
5 Trustees was reasonable and well in compliance with NRS  
6 239.0107(1)(c)(1). Yet, Petitioners raced to the courthouse prior  
7 to expiration of the deadline.

8 As seen, Petitioners did not extend common courtesy to DCSD  
9 and Trustees and gave no consideration for DCSD's and Trustees'  
10 circumstances. These included: three Trustees were newly  
11 elected; DCSD was undergoing a change in legal counsel; DCSD was  
12 going through a superintendent change; Trustee Burns was out of  
13 state for an extended period; a deadline was missed by one day due  
14 to faith observance; and Petitioners public records requests not  
15 only required searches of DCSD's servers, but searches of Trustees  
16 private electronic devices. Given that DCSD and Trustees fully  
17 complied with Petitioners' January 2023 request and were being  
18 responsive to Petitioners' May and July 2023 requests, there was  
19 no good reason for Petitioners to race to the courthouse before  
20 fully and transparently communicating their concerns to DCSD and  
21 Trustees and affording them time to remedy the same.

22 The lawsuit hindered DCSD's and Trustees' attempts to comply  
23 with NPRA as DCSD and Trustees missed their self-imposed August  
24 13th deadline by four days. DCSD and Trustees counsel explained  
25 to Petitioners that due to the lawsuit, "My client has been forced  
26 to direct its efforts to opposing the Amended Writ." This is a  
27 reasonable and adequate explanation for the four-day delay and  
28 complied with NRS 239.0107(1)(c)(1).

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The Court has considered and weighed the required factors. Weighing in favor of invoking the catalyst theory is that Petitioners were entitled to the public records well-before July 2024 and their non-frivolous lawsuit triggered the late production.

Weighing against employment of the catalyst theory is Petitioners' rush to the courthouse. However, it requires no degree of speculation to conclude that Petitioners would have refused further searches even had Petitioners fully communicated their concerns and extended professional courtesy in advance of the lawsuit. DCSD and Trustees knew or should have known without being told by Petitioners, that their initial searches and corresponding productions were inadequate. DCSD's unexplained failure to adhere to DCSD Policy 815 meant that DCSD's NPRA designee, Keith Lewis, was never advised of Petitioners' July 2023 request and did not authorize a search of DCSD's servers. The public records requests called or recent communication that Trustees knew or should have know were on their personal devices. Trustees were informed by their legal counsel, Rick Hsu, Esq., that their productions were clearly deficient and the failure to remedy would draw a legit lawsuit and responsibility for Petitioners' attorney's fees. Nonetheless, for some incomprehensible reason, DCSD and Trustees refused to conduct supplemental searches while maintaining that no additional responsive documents existed.

DCSD's and Trustees' conduct after being served with the lawsuit is also telling. Instead of quickly conducting

1 supplemental searches to prove their claim that no further records  
2 existed, DCSD and Trustees doubled down and refused to conduct  
3 competent searches. Indeed, DCSD and Trustees continued to  
4 maintain this position until after the second witness testified at  
5 trial. Even then, DCSD and Trustees inexplicably delayed  
6 conducting the searches for another couple of months.

7 The Court finds that the lawsuit caused a substantial change  
8 in DCSD's and Trustees' behavior in the manner sought by  
9 Petitioners. Specifically, DCSD and Trustees were originally  
10 adamant that there were no grounds for conducting further searches  
11 as no additional responsive documents existed. DCSD and Trustees  
12 doggedly held this position until after the trial had begun and  
13 then, at the eleventh hour, changed course and offered to conduct  
14 further searches of DCSD's server and Trustees' personal devices  
15 and pay Petitioners' attorney's fees. When settlement failed,  
16 most likely due to the attorney's fees component, DCSD and  
17 Trustees conducted additional searches months later, leading to  
18 the production of approximately 6,600 pages of records. While  
19 Petitioners may have been quick to court, their lawsuit was not  
20 frivolous and DCSD and Trustees cannot blame Petitioners for the  
21 ensuing extraordinary delay in producing responsive public  
22 records. The Court finds there is a factual nexus between the  
23 litigation and the production of responsive records and  
24 Petitioners are entitled to their costs and reasonable attorney  
25 fees in the proceeding. NRS 239.011(2).

26 **B**

27 **Legal Custody or Control**

28 Petitioners are entitled to have their costs and reasonable

1 attorney fees in the proceeding paid by "the governmental entity  
2 that has legal custody or control of the record." NRS 239.011(2).  
3 As used in NPRA, legal custody and control are distinct concepts  
4 and a governmental entity having either is exposed to attorney fee  
5 liability. NRS 239.011(2); *See, Comstock Residents Ass'n v. Lyon*  
6 *County*, 134 Nev. 142, 148, 414 P.3d 318, 323 (2018) (holding that  
7 the district court erred when it only made findings as to whether  
8 the governmental entity had legal custody of the requested records  
9 without also examining whether the requested records were within  
10 its legal control); *see also*, 1A Norman J. Singer & J.D. Shambie  
11 Singer, *Sutherland Statutes & Statutory Construction* § 21.14 (7<sup>th</sup>  
12 ed. 2009) (noting that "when a list exists, the 'or' between two  
13 subsections makes it necessary to read 'or' as a disjunctive").  
14 In the present case, some of the records were maintained on DCSD's  
15 server while others were maintained on the personal electronic  
16 devices of the individually named Trustees.

17 **1. DCSD Server**

18 It is uncontroverted, and the evidence sufficiently supports,  
19 that DCSD had legal custody or control over its servers and the  
20 records maintained therein. Because the lawsuit was a catalyst  
21 for production of public records maintained on DCSD's servers,  
22 Petitioners are "entitled" to recover from DCSD their "costs and  
23 reasonable attorney fees in the proceeding." NRS 239.011(2).

24 **2. Personal Electronic Devices of Individually Named Trustees**

25 It is uncontroverted, and the evidence sufficiently supports,  
26 that each individually named Trustee had legal custody or control  
27 over records maintained on their own personal electronic devices.  
28 Because the lawsuit was a catalyst for production of public

1 records maintained on Trustees' personal electronic devices,  
2 Petitioners are "entitled" to recover their "costs and reasonable  
3 attorney fees in the proceeding" from each individually named  
4 Trustee NRS 239.011(2).

5 II

6 Civil Penalties (NRS 239.340)

7 "[I]f a court determines that a governmental entity willfully  
8 failed to comply with the provisions of this chapter..., the court  
9 must impose on the governmental entity a civil penalty..." NRS  
10 239.340(1).

11 As already held, the production by DCSD and Trustees of all  
12 responsive records prior to the conclusion of trial obviated the  
13 need for the Court to determine whether DCSD and Trustees violated  
14 NPRA. Requiring courts in this situation to adjudicate whether an  
15 NPRA violation has occurred and whether any such violation was  
16 willful, would force courts to conduct needless trials, waste  
17 judicial resources and increase attorney's fees. No legal  
18 authority has been cited indicating that a legal theory analogous  
19 to the catalyst theory applies in the context of NPRA's civil  
20 penalty provision. Indeed, there would be no need for the  
21 catalyst theory, recently found by the Nevada Supreme Court to  
22 apply to NPRA attorney fee awards, if courts were required to  
23 adjudicate NPRA violations even after there has been full  
24 production. Since the Court has not and does not assess whether  
25 DCSD or Trustees willfully violated NPRA, there is no basis to  
26 assess civil penalties.

27 ///

28 ///

1 III

2 **Trustee Liability and Immunity (NRS 239.012)**

3 In advance of trial, the parties asked the Court to determine  
4 whether, generally speaking, elected school board trustees can be  
5 held liable for attorney fees (NRS 239.011(2)) and civil penalties  
6 (NRS 239.340). The Court ruled in the affirmative. *Order*  
7 *Regarding Individual Liability*, September 16, 2024. The *Order*  
8 *Regarding Individual Liability* is confirmed, incorporated by  
9 reference and not repeated herein.

10 The Court turns to addressing Trustees' claim of immunity  
11 pursuant to NRS 239.012. "A public officer or employee who acts  
12 in good faith in disclosing or refusing to disclose information  
13 and the employer of the public officer or employee are immune from  
14 liability for damages, either to the requester or to the person  
15 whom the information concerns." NRS 239.012.

16 The Court finds that NRS 239.012 immunity is not available to  
17 Trustees as it relates to payment of Petitioners' attorney's fees  
18 and costs (NRS 239.011(2)) or civil penalties (NRS 239.340).

19 First, consistent with NRS 239.012's heading, Immunity for  
20 good faith disclosure or refusal to disclose information, NRS  
21 239.012 pertains to liability for "disclosing or refusing to  
22 disclose information." NRS 239.012. Here, Trustees did not  
23 refuse disclose records known to exist, rather they denied the  
24 existence of additional responsive records. Trustees willingly  
25 produce the records that were subsequently located during forensic  
26 searches of their personal electronic devices.

27 Second, NRS 239.012 affords immunity to a "public officer or  
28 employee." Although NPRA does not define "public officer" or

1 "employee", it is plausible that Trustees may fit a definition of  
2 "public officer" or "employee" found elsewhere in the NRS.  
3 However, in the context of NPRA, Trustees are "governmental  
4 entities" as defined. Governmental entities have a special role  
5 within NPRA and the legislature chose not to extend NRS 239.012  
6 immunity to governmental entities or provide a good faith  
7 exception to paying attorney's fees per NRS 239.011(1).

8 Third, NRS 239.012 confers immunity "from liability for  
9 damages." In the context of NPRA, attorney's fees and costs (NRS  
10 239.011(2)) and civil penalties (NRS 239.340) are sanctions  
11 against governmental entities, not damages against public officers  
12 or employees. Accordingly, "NRS 239.012, as a matter of law,  
13 immunizes a governmental entity from 'damages,' and that term does  
14 not encompass attorney fees and costs." *Clark County Coroner v.*  
15 *Las Vegas Review Journal*, 136 Nev. 44, 61, 458 P.3d 1048 (2020).

16 Fourth, civil penalties are payable to the State General  
17 Fund, NRS 239.340(2), while damages are payable to "the requester  
18 or to the person whom the information concerns." NRS 239.012.

19 Because the Court finds that NRS 239.012 immunity is not  
20 available to Trustees even if they acted in good faith, the Court  
21 refrains from deciding whether Trustees acted in good faith. The  
22 Court's restraint is doubly important considering the issue of  
23 indemnification remains. *See, e.g.,* NRS 41.0349(2). If, after  
24 the Court decides the amount of attorney's fees and costs payable  
25 by DCSD and Trustees, DCSD and Trustees desire a ruling on NRS  
26 41.0349(2) good faith based on the evidence already presented, the  
27 Court will provide a ruling upon written stipulation of DCSD and  
28 Trustees to submit the matter with or without further briefing.

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Conclusion

Petitioners are "entitled to recover" from DCSD and each individually named Trustee their "costs and reasonable attorney's fees in the proceeding." NRS 239.011(2).

Petitioners shall, within fourteen days of this Order, file and serve a brief setting forth the amount of costs and attorney's fees requested with supporting affidavit(s) and exhibits to and including fee agreements and billing statements. The brief shall analyze the *Brunzell* factors and make a suggestions has to how attorney's fees and costs should be apportioned as between Respondents and/or whether the award should be joint and several.

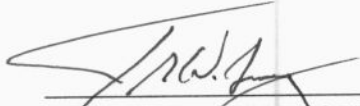
Respondents shall each have fourteen days after service of Petitioners' brief to file and serve a responsive brief, together with any supporting affidavits and/or exhibits, as to the amount of attorney's fees and costs requested and/or the method of apportionment as between Respondents.

Petitioners shall have seven days after service of the responsive briefs to file and serve any reply brief. The matter will then stand submitted.

This is not a final order.

**IT IS SO ORDERED.**

DATED this 10<sup>th</sup> day of October 2024.

  
\_\_\_\_\_  
THOMAS W GREGORY  
DISTRICT JUDGE



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