IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 88680
District Court Case No. A-23-869215-W

American Civil Liberties Union
of Nevada,
Appellant

v.

Clark County School District,
Respondent

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Respondent, Clark County School District (CCSD), is a government entity, and it is not owned in whole or in part by any publicly traded company.

CCSD is represented in the District Court and in this Court by Weinberg Wheeler Hudgins Gunn & Dial.

Dated this 5th day of May, 2025.

/s/ Jackie V. Nichols
Jackie V. Nichols, Esq.
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I. STATEMENT OF THE CASE AND SUMMARY OF THE ARGUMENT

The instant case pertains to Clark County School District Police Department's (CCSDPD) Internal Affairs investigation of one of its peace officers for internal policy violations. After reviewing the entire Internal Affairs Investigative File, the district court properly concluded that the file was protected from disclosure under the Nevada Public Records Act (NPRA) pursuant to NRS 289.080(9), which is codified within the Peace Officer's Bill of Rights (POBR), because the CCSDPD did not recommend punitive action against the subject peace officer. The American Civil Liberties Union of Nevada (ACLU) now asks this Court to interpret NRS 289.080(9) by ignoring the plain language of the statute that limits disclosure to particular instances and somehow find the term "investigative file" ambiguous to conclude that all records created for and relied upon in an Internal Affairs investigation—despite lack of discipline—are subject to public disclosure.[1] This Court must reject ACLU's erroneous interpretation of NRS 289.080(9) and affirm

[1] It also appears that ACLU takes a broad approach in its Opening Brief that all Internal Affairs Investigative Files are subject to disclosure. Contrary to its position, this appeal is strictly limited to the interpretation of NRS 289.080(9) and whether disclosure is proper under the NPRA when a law enforcement agency does not recommend punitive action.

the district court's order. Alternatively, this Court can affirm the district court's order on other grounds for the reasons identified below.

Preliminarily, however, the Clark County School District (CCSD) asks that this Court dismiss ACLU's appeal. Below, the district court concluded that ACLU's initial public record request did not seek access to the Internal Affairs Investigative File on the subject peace officer. Nevertheless, the district court permitted ACLU to amend its Writ Petition for Mandamus (Petition) to assert a claim against CCSD under NRS 239.011 for access to the Internal Affairs Investigative File. Despite the district court granting ACLU's motion for leave, ACLU failed to file its Amended Petition seeking access to the Internal Affairs Investigative File. Absent such filing, the district court lacked subject matter jurisdiction to enter an order addressing the Internal Affairs Investigative File because the requirements of NRS 239.011, a request to the district court for access to particular records, were not satisfied. Due to the lack of subject matter jurisdiction, the Court must find that the district court's order denying, in part, the Amended Petition entirely void and dismiss ACLU's appeal.

To the extent the Court does address the merits of the instant appeal, it should find that the plain language of NRS 289.080(9) is not ambiguous and construe the statute to bar disclosure of a peace officer's Internal Affairs Investigative File if no punitive action was recommended by the law enforcement agency. Even construing

the statute as ambiguous, the legislative history and public policy support the withholding of a peace officer's Internal Affairs Investigative File if no punitive action was recommended by the law enforcement agency.

Should the Court reject the district court's interpretation that NRS 289.090(9) limits disclosure of an Internal Affairs Investigative File, the Court should nonetheless affirm the district court's decision based on the culmination of several privileges. First, peace officer Jason Elfberg has a significant, nontrivial privacy interest to be free from stigma, harassment and embarrassment as a government employee in relation to CCSDPD's Internal Affairs Investigative File. Likewise, other CCSDPD employees that gave statements, which are contained within the Internal Affairs Investigative File, also have nontrivial privacy interests. Notably, the Internal Affairs Investigative File does not pertain to a criminal investigation and is strictly limited to whether peace officer Elfberg violated internal CCSDPD policies and/or regulations. To that end, CCSDPD did not recommend any type of punitive action. And, because ACLU is only interested in a single incident, it is clear that there is no significant public interest in wrongdoing by CCSDPD. Any potential public interest into peace officer Elfberg's public interest has already been served with the public disclosure of records relating to the underlying subject incident. Thus, the public interest, if any, is minimal and substantially outweighed by the privacy interests involved.

Second, CCSDPD's interests, as a government employer, substantially outweigh the public's interest in access. As mentioned above, the public's interest regarding an internal policy violation of one employee is minimal. In contrast, CCSDPD has a substantial interest in maintaining discipline and good order within its paramilitary organization. Nevada law expressly excludes an employee from reviewing, accessing, inspecting, or obtaining a copy of an Internal Affairs Investigative File that did not result in punitive action. Concluding that such files are subject to disclosure eviscerates the purpose of these statutes. Moreover, a finding that an Internal Affairs Investigative File resulting in no punitive action is subject to disclosure under the NPRA will permit other employees to bypass the Legislature's intent of prohibiting the dissemination of such information as employees will submit public record requests to their employers for access to the records that are otherwise barred from disclosure. This would have a detrimental effect to CCSDPD as it would erode the effectiveness of law enforcement agencies.

Third, juvenile justice information is contained within the Internal Affairs Investigative File, including facts pertaining to the February 9, 2023 incident and probable cause basis for detaining juveniles as well as citing one juvenile. This information is explicitly barred from disclosure under Nevada law.

Collectively, these interests and privileges render the Internal Affairs Investigative File in its entirety confidential. In that regard, redactions are not

feasible as ACLU would be left with nothing to review. Thus, the Court must affirm the district court's decision and conclude that the withholding of the Internal Affairs Investigative File in its entirety is appropriate.

Finally, if this Court believes that it cannot reach a determination on the merits of ACLU's Amended Petition and the withholding of the Internal Affairs Investigative File, it must remand this matter to the district court with specific instructions in determining whether withholding of the Internal Affairs Investigative Fille is appropriate.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

On February 9, 2023, an incident with juveniles occurred near Durango High School that required police enforcement by CCSDPD (the February 9th Incident). 1 APP 100-101. The ACLU subsequently submitted a public records request seeking a variety of records related to the February 9th Incident. 1 APP 52-55. CCSD denied access to the records due numerous applicable privileges and ACLU filed a Petition under the NPRA for access. 1 APP 57-65; 71-74.

A. FACTS KNOWN TO CCSDPD LEADING UP TO FEBRUARY 9, 2023.

As backdrop for this Court, information known to CCSDPD prior to February 9, 2023 is significant. On February 8, 2023, CCSDPD received a report that a student brandished a firearm and threatened to shoot up the school at or near Durango High School (Durango) (hereinafter referred to as the "February 8th Incident"). 1 APP 100-

101. CCSDPD investigated this incident but was unable to locate the suspect. *Id*. As a result of the February 8th Incident, CCSDPD enhanced patrol and staffing near this location due to the suspect's criminal history. 1 APP 101. The next morning, on February 9, 2023, CCSDPD received another report that a student brandished a firearm at another student at Durango. This event was still being investigated during dismissal of students. *Id.*

B. THE FEBRUARY 9TH INCIDENT.

In the afternoon of February 9, 2023, CCSDPD officers were at and near Durango as part of the enhanced patrol coverage for the dismissal of students. *Id.* While conducting patrol, CCSDPD officers noticed juvenile males engaging in suspicious behavior around the area of Durango. *Id.* CCSDPD officers believed the suspicious behavior may be related to criminal activity especially in light of the recent brandishing reports. *Id.* It is also significant that this was occurring at the same time and same place as the February 8th Incident. *Id.*

During this time, a CCSDPD officer observed circumstances pertaining to a juvenile that demonstrated reasonable suspicion to believe that a crime had occurred or that criminal activity was reasonably afoot. *Id.* As a result of this reasonable suspicion, CCSDPD officers conducted a person stop and detained the juvenile

(Juvenile No. 1).[2] *Id.* In the midst of Juvenile No. 1's detention, there was additional reasonable suspicion that a crime had occurred or that criminal activity was reasonably afoot in relation to another juvenile (Juvenile No. 2). 1 APP 102.. Thus, CCSDPD officers detained Juvenile No. 2. *Id.*

During this detention, circumstances developed for the officers to believe that a crime occurred or that criminal activity was reasonably afoot in relation to another juvenile (Juvenile No. 3). *Id.* Juvenile No. 3 was ultimately detained, cited, and referred to the juvenile justice agency as defined in NRS 62H. *Id.* The footage from the six videos from Body Worn Cameras depicts the entire interaction with the juveniles. *Id.*

C. THE INTERNAL AFFAIRS INTERNAL INVESTIGATION OF A CCSDPD PEACE OFFICER.

An internal investigation of a CCSDPD peace officer was opened regarding the February 9th Incident on February 10, 2023. *Id*. CCSDPD Internal Affairs Bureau conducted the investigation regarding the CCSDPD officer's conduct, specifically whether peace officer Jason Elfberg violated any internal CCSD policies and/or regulations. 1 APP 158-159. The Internal Affairs Investigation was

[2] This juvenile was placed in handcuffs.

completed on April 27, 2023. Of note, CCSDPD's internal investigation was not of a criminal nature. 1 APP 102.

Ultimately, the internal investigation resulted in the creation of an investigative report concerning whether peace officer Elfberg violated CCSDPD's internal policies and/or regulations. 1 APP 158-159. As part of the internal investigation, peace officer Elfberg, as well as other CCSDPD officers who had personal knowledge, were interviewed. *Id.* Their statements are summarized and included in the Internal Affairs Investigative File. *Id.*

The Internal Affairs Investigative File further details the depiction of the Body Worn Camera videos, as well as the two incidents that occurred prior to the February 9, 2023 juvenile incident near Durango High School. *Id.* It also includes information relating to juvenile justice information, such as the basis for probable cause related to the issuance of a citation to a juvenile. *Id.* The Internal Affairs Investigative File contains an analysis and opinion as to whether any CCSDPD policies and/or regulations were violated by peace officer Elfberg. *Id.* Internally, the Internal Affairs Investigative Report is confidential and is not subject to review or disclosure to anyone outside of the Internal Affairs Bureau or its chain of command. *Id.*

Peace officer Elfberg was not disciplined, sanctioned, or reprimanded as a result of the internal investigation. *Id.* Specifically, because no punitive action was taken, as described in NRS 289.080(9), peace officer Elfberg has not reviewed,

inspected, or received a copy of the Internal Affairs Investigative File. 1 APP 161-165. Additionally, the other officers who provided a statement have no lawful basis for reviewing, inspecting, or receiving a copy of the Internal Affairs Investigative File or the outcome of the investigation. *Id.* The internal investigation depends on the officers' ability to be truthful and public disclosure of internal affairs investigations would chill officers' candor during the investigation process. 1 APP 158-159. This is specially true in light of Nevada law prohibiting disclosure of Internal Affairs Investigative Files to the subject officer where there is no punitive action taken and limiting disclosure when law enforcement agencies recommend punitive action. 1 APP 158-162.

Public disclosure of an Internal Affairs Investigative File where no punitive action was recommended will stymie government interests as other employees could easily obtain copies of investigative reports in instances where the employee was neither the subject nor the witness of an investigation. *Id*. In turn, this affects morale and will undoubtedly lead to harassment and stigma in the workplace amongst CCSDPD personnel, which is contrary to good order and discipline that is necessary to maintain a paramilitary organization. *Id.*

In addition to these government interests, peace officer Elfberg has a significant, nontrivial privacy interest with respect to the Internal Affairs Investigative File. 1 APP 164-165. First, peace officer Elfberg, especially in light of

the fact that he is not privy to the file, has an interest in ensuring that any statements made by other officers are not inaccurate, defamatory, or entirely false in relation to the February 9, 2023 incident near Durango High School. *Id.* Certainly, this concern implicates peace officer Elfberg's privacy interest and right to be free from being publicly painted in a false light. *Id.* Second, peace officer Elfberg has an interest in ensuring that the investigative report does not contain personal or other personnel information, further invading his privacy interests. *Id.* Third, in accordance with Nevada law and the Collective Bargaining Agreement between CCSD and the Police Administrators Association, the Internal Affairs Investigative File is not part of peace officer Elfberg's personnel file and would not be disclosed to future employers. *Id.* However, publicly disclosing the investigative report ensures that, should peace officer Elfberg seek employment elsewhere, any future employer would have access to, and could take into consideration, a record that would otherwise not be subject to or disclosed as part of an employment process. *Id.* Effectively, public disclosure will hinder and effect peace officer Elfberg's ability for employment outside of CCSDPD. *Id.*

Fourth, in light of the various news articles concerning this February 9, 2023 incident and related protests demanding for an investigation and even peace officer Elfberg's termination, there is an undeniable grave concern that disclosure of the investigative report will result in further harassment and stigma against peace officer

Elfberg, intruding into his personal space and affairs and invading his right to be left alone. *Id.* Finally, public disclosure of the Internal Affairs Investigative File will lead to harassment and embarrassment amongst peace officer Elfberg's peers as all his colleagues and peers will have access to the investigative report. *Id.*

D. THE PUBLIC RECORDS REQUESTS FROM ACLU AND CCSD'S RESPONSES AND CLARIFICATIONS.

On February 21, 2023, ACLU submitted a public records request to CCSD. 1 APP 001-004. Specifically, ACLU sought the following records related to the February 9th Incident, including, but not limited to:

- Video footage;
- Photographs;
- BlueTeam Data;
- Witness statements;
- Reports, notes, or other written materials;
- Communications by CCSD employees discussing the incident;
- Materials describing the disciplining, sanctions, or reprimanding of CCSD employees and students related to the incident.

Id. That same day, CCSD, timely and properly, advised ACLU that it was processing the request. On March 1, 2023, the ACLU of Nevada followed up with CCSD on their requests. *Id.* The same day, CCSD further advised that the records were not readily available. *Id.* CCSD explained that a response would be forthcoming by no

later than March 16, 2023. *Id.* On March 14, 2023, CCSD responded to ACLU's public records request with the basis of confidentiality of the records and citations to the specific statutes and other legal authority that makes the public records confidential pursuant to NRS 239.0107(1)(d). 1 APP 005-008. CCSD also included a detailed description and explanation of why the records were confidential. *Id.* On March 27, 2023, CCSD provided a supplemental response to ACLU including additional citations and explanation of why the records are confidential. 1 APP 012-015.

E. CCSD'S RECORDS RESPONSIVE TO ACLU'S REQUESTS AND PRODUCTION.

CCSD did not have many of the records sought by ACLU, including photographs, witness statements, Use of Force reports, or records describing discipline, sanctioning, or reprimanding of students in relation to the February 9th Incident. 1 APP 075-109. Notably, *at the time of ACLU's request,* and at the initiation of the lawsuit, there was an ongoing, open internal investigation into a CCSDPD peace officer. *Id*. It is CCSDPD's policy and practice not to create a report for discipline, sanctions, or reprimand until the internal investigation of the employee is complete. 1 APP 100-104. Thus, *at the time of the request,* CCSDPD had no record responsive to the request. 1 APP 075-109. Moreover, CCSDPD had no public record of discipline, sanctions, or reprimand of CCSD employees related to the February 9th Incident. *Id.*

CCSD, nevertheless, acknowledged that it did have an Incident Report, Citation, CAD Notes, Six (6) Body Worn Camera videos depicting the scene where reasonable suspicion was developed and juveniles were detained and cited for unlawful conduct, and approximately 10,043 communications. *Id*. The written materials (excluding the communications) and the six Body Worn Camera videos were provided to the juvenile justice system in relation to the prosecution of a juvenile regarding the February 9th Incident. *Id*. The juveniles' detention and submission of these materials to the juvenile justice agency render these materials juvenile justice information. *Id.; see also* NRS Chapter 62H, *generally*. On December 19, 2023, the district court directed CCSD to produce these records with limited redactions. 2 APP 392.

F. THE DISTRICT COURT CONCLUDES THAT ACLU'S PETITION DOES NOT INCLUDE A REQUEST FOR THE INTERNAL AFFAIRS INVESTIGATIVE FILE.

In its December 19, 2023 Order, the district court correctly noted that ACLU failed to specifically request access to CCSDPD Internal Affairs investigative report but addressed it in relation to the ACLU's pending request for leave. 2 APP 402. To be sure, after arguments held on August 8, 2023, ACLU sought leave to amend its Petition to include access to the Internal Affairs investigative report and the Internal Affairs Investigative File. 1 APP 236 – 2 APP 287. ACLU, however, failed to ever file its Amended Petition.

G. THE DISTRICT COURT PROPERLY INTERPRETED NRS 289.080(9) AND PRECLUDED THE DISCLOSURE OF THE INTERNAL AFFAIRS INVESTIGATIVE FILE.

After granting ACLU's request for leave to file an Amended Petition and entertain supplemental briefing and oral arguments, the district court denied ACLU access to the Internal Affairs Investigative File pertaining to peace officer Elfberg. 3 APP 536-547. Explaining its denial, the district court ruled that NRS 289.080 deals with the rights that officers receive during an interview interrogation or hearing related to an internal investigation, and in particular, NRS 289.080(9) addresses when a police agency must disclose all records as it relates to an internal affairs investigation. *Id*. In describing NRS 289.080(9), the district court found that it delineates what a law enforcement agency must make available to an officer after punitive action is taken. Under NRS 289.080(9) if an agency does take punitive action against an officer, the officer has a right to inspect any evidence the law enforcement agency has found against the officer. *Id*. The officer has a right to review and copy the entire file concerning the internal investigation, including any evidence, recording, notes, transcripts of interviews and documents contained within the file. *Id*.

Following this interpretation of NRS 289.080(9) the district court correctly noted that peace officer Elfberg had not received any punitive discipline from CCSDPD, nor had CCSD taken any punitive action against him for the incident on

February 9, 2023. *Id*. As such, peace officer Elfberg had also not seen his file regarding this investigation. *Id*. Further supporting its decision that NRS 289.080(9) limited disclosure, the district court recognized that NRS 289.080 was codified within the statutory exemptions of NRS 239.010(1). In sum, the district court concluded that the Internal Affairs Investigative File, which did not result in any recommendation of punitive action, was not subject to disclosure under the NPRA. *Id*.

III. STANDARDS OF REVIEW

Generally, this Court reviews a district court's order resolving a petition for mandamus relief for an abuse of discretion. *DR Partners v. Bd. of Cnty. Comm'rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000). "A manifest abuse of discretion is '[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *State v. Eighth Judicial Dist. Court*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (quoting *Steward v. McDonald*, 330 Ark. 837, 958 S.W.2d 297, 300 (1997)). Questions of statutory construction, including the meaning and scope of a statute, are questions of law, which this Court reviews de novo. *Id*.

IV. LEGAL ARGUMENT

A. THE NEVADA PUBLIC RECORDS ACT.

Under the NPRA, a person may request to inspect or have a copy made of a public record from a governmental entity. *See* NRS 239.010. A governmental agency may deny a public records request if the public record sought is deemed confidential.

NRS 239.0107(1)(d). In doing so, the governmental entity must inform the requester that the requested records are confidential and cite to the legal authority that renders the records confidential. *Id*. Upon denial of a request to inspect or copy records, the requester may apply to the district court for an order requiring the disclosure or inspection of records. NRS 239.011(1). Generally, a court is to presume that all public records are open to disclosure unless either: (1) a statute has expressly created an exemption or exception to disclosure; or (2) after balancing the interests for nondisclosure against the general policy of access, the court determines restriction of public access is appropriate. *See City of Sparks v. Reno Newspapers, Inc.*, 133 Nev. 398, 399–400, 399 P.3d 352, 355 (2017). During a judicial proceeding regarding the confidentiality of records, the governmental entity has the burden of proving by a preponderance of the evidence that the requested record is confidential. NRS 239.0113. The entity meets this burden if it shows that a statutory provision declares the record confidential. *City of Sparks*, 399 P.3d at 355 (citation omitted).

B. ACLU'S APPEAL SHOULD BE DISMISSED OR SIGNIFICANTLY LIMITED.

Preliminarily, this Court should dismiss ACLU's appeal outright as the district court lacked subject matter jurisdiction to issue a ruling on an unfiled Amended Petition. Should this Court permit the appeal to move forward, it must significantly limit the scope of the appeal and ACLU's arguments to what was presented before the district court.

1. The District Court Lacked Subject Matter Jurisdiction to Issue an Order Addressing the Internal Affairs Investigative File.

Subject matter jurisdiction is the authority of the court to render judgment in a particular category of case. *Landreth v. Malik*, 127 Nev. 175, 183, 251 P.3d 103, 168 (2011). A lack of subject matter jurisdiction renders a court order void. *State Indus. Ins. Sys. v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984). A party can raise lack of subject matter jurisdiction for the first time on appeal. *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990), and the existence of subject matter jurisdiction is a question of law subject to de novo review. *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009).

Under the NPRA, a requester may seek a court order to obtain a copy of public records from a governmental entity upon the denial of a request. NRS 239.011. A petition for writ of mandamus is generally the appropriate means to pursue the disclosure of public records. *See City of Sparks*, 133 Nev. at 399–400, 399 P.3d at 355; *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 266 P.3d 623 (2011); *DR Partners v. Bd. of Cty. Comm'rs*, 116 Nev. 616, 6 P.3d 465 (2000).

While ACLU did file its Petition for access to records, it did not initially seek access to the Internal Affairs Investigative File. 2 APP 392-404. Recognizing as much, it subsequently filed a motion for leave to include access to the Internal Affairs Investigative File. 2 APP 236-260. The district court granted ACLU's motion for leave, but ACLU failed to properly file its Amended Petition. Absent the

filing of the Amended Petition, rendering it the operative pleading, the district court lacked subject matter jurisdiction to address the Amended Petition entirely. *See e.g.*, *Mitman v. LA 1, LLC*, 539 P.3d 1177 (Nev. 2023) (recognizing that the first amended complaint was the operative complaint at the time the offer of judgment was filed). Accordingly, this Court should find that the district court's order addressing the Amended Petition is void as no Amended Petition has been filed, resulting in a lack of subject matter jurisdiction.

2. ACLU's Appeal Must Be Limited to the Interpretation of NRS 289.080(9).

In appealing the district court's April 10, 2024 order, the ACLU contended that the district court erred in interpreting NRS 289.080(9) when it determined that the Internal Affairs Investigative File was not subject to disclosure. *See* ACLU's Docketing Statement on file herein. It did not appeal any factual findings made by the district court, including the fact that peace officer Elfberg did not access or copy the Internal Affairs Investigative File. On appeal, ACLU contends that NRS 289.080(9) cannot apply because the evidentiary record contradicts CCSD's representations. However, this argument must be rejected as it does not fall within the scope of ACLU's appeal, which is the interpretation of NRS 289.080(9). Thus, for purposes of ACLU's brief, the Court must strictly focus on the interpretation of NRS 289.080(9) and strike ACLU's arguments attacking the factual findings of the district court.

C. THIS COURT HAS PREVIOUSLY ESTABLISHED THAT THE NPRA EXPRESSLY PROVIDES FOR EXEMPTIONS WITHIN NRS 239.010(1).

The Legislature explicitly recognized the Peace Officer's Bill of Rights as an exemption to the NPRA. *See* NRS 239.010(1). In 2013, the Legislature made significant changes to the NPRA, and specifically to NRS 239.010 based upon recent Supreme Court decisions. *See* Assembly Bill 31, 77 Nev. Leg., *generally*. Today, NRS 239.010 provides:

> Except as otherwise stated in this section and ... NRS 289.080 ... and unless otherwise declared by law to be confidential... all public books and public records of a governmental entity must be [subject to inspection] and may be fully copied... NRS 239.010(1).

There is no doubt that the list of statutes now enumerated within NRS 239.010 serve as exceptions to the NPRA's disclosure requirements. In fact, the entire purpose of codifying statutes was to provide clarity to both the public and government in determining what records were exempt from the NPRA. *See* Hearing on AB 31 Before the Assembly Committee on Government Affairs, 77 Leg. (Nev. Feb. 7, 2013).

ACLU's position that AB 31 somehow provides context or explanation as to what the Legislature intended to be kept confidential is inapplicable.[3] Notably, AB

[3] By way of example, NRS 289.080(7) also renders information a representative obtains from a peace officer who is the subject of the investigation confidential, but that is not detailed or specified in the AB 31 chart relied upon by ACLU.

31 and the descriptions of the enumerated statutes occurred well-before the 2020 amendment to NRS 289.080(9). Indeed, prior to the amendment, a peace officer's representative was able to obtain information *before* a hearing, interrogation, or interview of the subject peace officer. NRS 289.080(4)(2019). This provision was repealed and now a subject officer may only access an Internal Affairs Investigate File if punitive action is recommended. Accordingly, ACLU's reliance on the descriptions of AB 31 has no basis given that the amendment occurred nearly a decade after AB 31.

Nevertheless, the exemptions enumerated in NRS 239.010 are not exclusive. Thus, even if this Court were to adopt ACLU's contention that NRS 239.010 does not apply to NRS 289.080(9), despite the fact that it does, NRS 289.080(9) nonetheless limits disclosure of the Internal Affairs Investigative File to certain circumstances. This Court addressed a similar issue in *City of Sparks*. 399 P.3d at 356. There, the government asserted that the Legislature expressly and unequivocally created an exemption or exception from disclosure under NRS 453A.370(5) and NAC 453A.714. *Id*. at 355. One of the arguments made by the Reno Gazette Journal was that NRS 453A.370(5) cannot be construed as authorizing an exception to public disclosure laws because any exceptions to the NPRA can only exist when explicitly provided for under NRS 239.010. *Id*. at 356. This Court concluded that "in addition to the specific exemptions listed in NRS 239.010, the

NPRA also does not apply to records "otherwise declared by law to be confidential." *Id*. As such, even if NRS 289.080(9) was not codified within NRS 239.010(1), the district court nonetheless reached the correct decision because the plain language of NRS 289.080(9) limits dissemination. That is, NRS 289.080(9) expressly and unequivocally limits the disclosure of non-punitive Internal Affairs Investigative Files and, thus, such records are exempt from disclosure under the NPRA. *See City of Sparks*, 399 P.3d at 358 (determining that NAC 453A.714 expressly deemed the information sought confidential; thus, exempting it from disclosure).

D. THE DISTRICT COURT PROPERLY INTERPRETED AND APPLIED NRS 289.080(9) TO THE SUBJECT INTERNAL AFFAIRS INVESTIGATIVE FILE.

1. The Plain Language of NRS 289.080 Limits Disclosure of Non-Punitive Internal Affairs Investigative Files.

The Nevada Peace Officer's Bill of Rights (POBR), codified at NRS 289.010-.120, provides important protections for peace officers. *City of Las Vegas v. Las Vegas Police Protective Ass'n*, 141 Nev. Adv. Op. 1, 561 P.3d 1059, 1061 (2025). Thus, in construing the at issue provision, NRS 289.080(9), the Court is bound to consider the entirety of NRS Chapter 289 when interpreting component provisions thereof. *Smith v. Kisorin USA, Inc.*, 127 Nev. 444, 448, 254 P.3d 636, 639 (2011) ("[T]his court has a duty to construe statutes as a whole, so that all provisions are considered together ...." (internal quotation marks omitted)). The purpose of NRS Chapter 289 and the plain language of NRS 289.080(9) demonstrates that when a

law enforcement agency does not recommend punitive action, a peace officer's Internal Affairs Investigative File is not subject to disclosure.

The POBR permits a law enforcement agency to commence an investigation of a peace officer in response to an allegation for which punitive action may be warranted. NRS 289.057(1). A peace officer being investigated or who will serve as a witness also has a right to written notice of the investigation and representation during any phase of an interrogation or hearing. NRS 289.060(1); NRS 289.080.

Prior to the 2020 amendments to the POBR, NRS 289.080(4) permitted a representative of the subject peace officer to inspect the entire Internal Affairs Investigative File, including any physical evidence, audio recordings, photographs, video recordings, and statements made by or attributed to the subject peace officer. NRS 289.080(4)(2019). Subsequently, that provision was repealed and NRS 289.080(9) was amended to significantly limit when the subject officer, or a representative, may access the Internal Affairs Investigative File. It is also worth noting that the provisions of NRS 289.057 and NRS 289.080 do not apply to criminal investigations.

NRS 289.080(9) provides that an accused police officer and his representatives are only permitted to review the Internal Affairs Investigative File in the event "a law enforcement agency intends to recommend that punitive action be imposed against the peace officer". If the agency so intends, the officer and his

representative(s) are permitted to review all of the evidence and submit a response which must be considered by the agency. In a situation where the accused officer does not face punitive action, as was the case with Elfberg, the accused officer and his representative(s) are simply informed of the disposition of the investigation, but entirely precluded from reviewing or copying any materials within the Internal Affairs Investigative File as the criteria for review under NRS 289.080(9) are not met. This process is not unique to CCSDPD; it is the same at other law enforcement agencies within Nevada, such as Las Vegas Metropolitan Police Department, City of Las Vegas Department of Public Safety, and the Department of Corrections.

If members of the public were permitted to obtain such investigative reports through public records requests, it would create an absurd situation whereby members of the public could obtain that which the accused officer who does not face punitive action cannot. *Butler v. State,* 120 Nev. 879, 892-93, 102 P.3d 71, 81 (2004) (Statutes "must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory." (internal quotations omitted)). That certainly could not have been the intent of the Legislature. Moreover, if such reports were obtainable through public records requests, other police officers on a police department could obtain the investigative reports of their fellow officers. This would likely result in rivalries and disputes between officers which would be contrary to the good order and discipline necessary in a paramilitary organization

such as a police department. *Cowles Pub. Co. v. State Patrol*, 109 Wash. 2d 712, 729–31, 748 P.2d 597, 606–07 (1988) (finding "[e]ffective law enforcement requires a workable reliable procedure for accepting and investigating complaints against law enforcement officers. Such a procedure is necessary to ensure that law enforcement officers do not abuse their authority or engage in unlawful activities. In addition, reliable internal investigation procedures uphold the integrity of the law enforcement agency in the minds of the public and the officers.").

The mere fact that NRS 289.080(9) does not use the term "confidential," is not of consequence. The canon *expressio unius est exclusio alterius*, means the expression of one thing is the exclusion of another, and has been repeatedly confirmed in the state of Nevada. *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967); *see e.g.*, *State v. Javier C.*, 128 Nev. 536, 541, 289 P.3d 1194, 1197 (2012) ("The fact the Legislature specifically deemed juveniles to be prisoners for purposes of the adult criminal escape statutes suggests juveniles are not prisoners for other purposes, including application of NRS 200.481(2)(f)."). Applying this cannon to the plain language of NRS 289.080(9), the Legislature clearly limited disclosure of a peace officer's Internal Affairs Investigative File to instances where law enforcement agencies recommended punitive action. All other instances, such as where there is no recommendation for punitive action (like here) or even public record requests, the Internal Affairs Investigative File is precluded from disclosure.

This interpretation further supports the Legislative intent of the POBR and NRS 289.080. "[W]hen examining a statute, this court... ascribe[s] plain meaning to its words, unless the plain meaning was clearly not intended." *A.J. v. Eighth Jud. Dist. Ct.*, 394 P.3d 1209, 1213 (2017). Ambiguity, however, is not always a prerequisite to using extrinsic aids. *Id*. (citing 2A Norman J. Singer & Shambie Singer, STATUTES AND STATUTORY CONSTRUCTION § 48:1, at 554 (7th ed. 2014)). "[T]he plain meaning rule... is not to be used to thwart or distort the intent of [the Legislature] by excluding from consideration enlightening material from the legislative" history. *Id*. at 555-56 (first alteration in original) (internal quotation marks omitted); *see e.g. Clark Cnty. Off. of Coroner/Med. Exam'r v. Las Vegas Rev.-J.*, 136 Nev. 44, 52, 458 P.3d 1048, 1055 (2020) (addressing legislative history of a statute without determining that the statute was ambiguous). As the United States Supreme Court declared, "even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). "And courts even have concluded that statutory interpretation necessarily begins with consideration of the legislative history to uncover any indications of legislative intent." 2A STATUTES AND STATUTORY CONSTRUCTION, supra, § 48:1, at 556 (internal quotation marks omitted). Thus, this Court should consider the Legislature's intent in amending NRS 289.080.

In addressing the amendments to NRS 289.080, Senator Nicole Cannizzaro, the sponsor of Senate Bill 2, explained that, prior to the amendment, a peace officer would be allowed to inspect all evidence *before* giving a statement. *See* Hearing on SB 2 Before the Senate Committee, 32 Sp. Leg. (Nev. August 1, 2020). In an effort to promote transparency while still balancing and protecting the peace officer's rights, the Legislature amended NRS 289.080 to allow the peace officer access to the Internal Affairs Investigative File *only* if punitive action was recommended and permit the peace officer to prepare a response that must be considered by the agency before punitive action is taken. *Id.*

Many groups, including police associations and the ACLU, opposed the amendments. Police associations contended that peace officers were being deprived of due process by not being permitted to have access to information prior to giving a statement. *Id*. Other organizations, like the ACLU, argued that the proposed amendment flew in the face of transparency and accountability. *Id*.

In response to the opposing comments, Sen. Melanie Schieble stated:

> This bill does not apply if a police officer is being investigated for criminal activity. This is only for violations of policy, similar to a human-resources investigation, not a criminal investigation. The ability of law enforcement to review evidence was carefully considered. This is intended to mirror the rights anyone has to face their accuser, given they are not in a criminal setting. We are trying to balance the idea you should never be punished for something without knowing exactly why you are being punished for it. **At the same time, we do not always allow people to review an entire case file**. They are not entitled to

> certain pieces of evidence before they are compelled to make a statement. I wanted to get those clarifications on the record.

See Hearing on SB 2 Before the Senate Committee, 32 Sp. Leg. (Nev. August 1, 2020) (emphasis added).

Indeed, any other interpretation (including ACLU's) would render the provisions with NRS 289.080(9) superfluous. Curiously, ACLU argues that this Court's analysis of NRS 432B.407(6), an entirely different and inapplicable statute, should govern this case dealing with peace officer's rights. *Clark Cty. Office of the Coroner/Medical Exam'r,* 136 Nev. at 50–52, 458 P.3d at 1054–55. There, this Court reviewed the statutory scheme, the legislative history, and the purpose of the statute to determine that it was limited to records within the possession of a multidisciplinary team. Notably, the legislative history and policy of the statute reflected that transparency of child abuse fatalities was a central purpose. Based on this evidence, the Court ruled that the statute did not apply to the coroner and disclosure would promote the legislative history and policy of the statute. In contrast, as demonstrated above, it was clear that the Legislature's intent in amending NRS 289.080, including other provisions of the POBR, was to limit disclosure of records to certain, particular instances. Thus, the analysis in *Clark Cty. Office of the Coroner/Medical Exam'r* carries no weight.

Summarily, the Court should rely on the plain language and Legislature's intent to determine that NRS 289.080(9) limits the disclosure of Internal Affairs Investigative Files only in instances where the law enforcement agency recommends punitive action, thereby precluding disclosure in the instant case.

Even if ambiguous, reason and public policy supports the notion that a peace officer's Internal Affairs Investigative File is confidential if no punitive action is recommended. In addition to the legislative history detailed above, courts across the country recognized the inherent importance of the role Internal Affairs play within police departments. *Cowles Pub. Co. v. State Patrol*, 109 Wash. 2d 712, 729–31, 748 P.2d 597, 606–07 (1988) (finding "[e]ffective law enforcement requires a workable reliable procedure for accepting and investigating complaints against law enforcement officers. . . . In addition, reliable internal investigation procedures uphold the integrity of the law enforcement agency in the minds of the public and the officers.") *Frankel v. Securities & Exchange Commission,* 460 F.2d 813, 817–18 (2d Cir.1972) (disclosure would tend severely to limit the agencies' possibilities for investigation and enforcement); *Montgomery Cty. v. Shropshire*, 23 A.3d 205, 217 (Ct. App. Md. 2011) (recognizing a significant public interest in maintaining confidentiality, both in fairness to the investigated officers and cooperating witnesses, especially when the officer is cleared of wrongdoing); *Hansen v. Soldenwagner*, 19 F.3d 573, 577 (11th Cir. 1994) ("[A] police department is a

paramilitary organization, with a need to secure discipline, mutual respect, trust and particular efficiency among the ranks due to its status as a quasi-military entity different from other public employers."). As indicated by the declarations in this case, public disclosure of an Internal Affairs Investigative File where there was no punitive action will undoubtedly lead to harassment and stigma of the subject officer. In turn, this erodes the effectiveness of a law enforcement agency by destroying trust amongst colleagues and even calling into question a peace officer's superior.

Most importantly, NRS 289.080(9) does not pertain to criminal investigations and is strictly limited to human-resource issues and policy violations. Given the limitation of NRS 289.080(9), ACLU's argument that *Las Vegas Review-Journal, Inc. v. Las Vegas Metropolitan Police Department,* 526 P.3d at 739 (Nev. 2023) requires disclosure in this case is not accurate or persuasive. Aside from the difference of investigating a policy violation in comparison to a significant crime, the instant case is substantially different. Here, the public, including the ACLU, has been provided a copy of the Incident Report and six (6) body worn cameras regarding the incident. The notion that the public is entitled to know about the investigation has been satisfied because it has been provided the underlying facts and documentation relied upon by the Internal Affairs Bureau. The public can reach its own conclusion based on the underlying facts. Thus, the instant matter differs significantly given that it only pertains to an internal policy violation (not a serious

crime) and the underlying facts of the subject incident have been disclosed. Instead, public policy, including both the government's interest in effectiveness and the peace officer's privacy interests, support the district court's interpretation of NRS 289.080(9).

ACLU's contention that a government agency can simply stuff whatever it wants in an Internal Affairs Investigative File for protection is unpersuasive and unsupported. Notably, ACLU does not point out any evidence that the records contained in the subject Internal Affairs Investigative File are improper and should not be contained in the file. The Internal Affairs Investigative File is made up of documents and records relied upon by the investigating officers. As explained to the district court, the particular Internal Affairs Investigative File included information and records from other incidents to provide overall context, including why peace officers were present on February 9, 2023. Furthermore, as noted by ACLU, interrogations and interviews are clearly part of the Internal Affairs Investigative File. NRS 289.080(8). Finally, NRS 289.080(9) explicitly delineates the types of records that are contained in such a file: "any evidence, recordings, notes, transcripts of interviews and documents contained in the file."

As part of its privilege log, CCSD did not have the benefit of the district court's December 19, 2023 order and preserved its arguments in relation to NRS 289.080(9). However, during the hearing before the district court, CCSD

acknowledged the argument that NRS 289.080(9) might be limited to records and documents created or generated for the Internal Affairs investigation, not simply anything relied upon by the Internal Affairs Bureau. In other words, the records produced in this case such as the Body Worn Camera, CAD Notes, and Incident Report were created outside of the Internal Affairs Investigative File and were therefore subject to disclosure. Furthermore, Body Worn Camera has a separate statute that governs its disclosure. NRS 289.830.

Thus, to the extent this Court does find that the contents of an Internal Affairs Investigative File is ambiguous under NRS 289.080(9), despite the plain language, CCSD asks that this Court construe NRS 289.080(9) to include documents created and/or generated for the purposes of the Internal Affairs investigation.

2. The District Court Did Not Abuse its Discretion in Finding that Peace Officer Elfberg did not access the Internal Affairs Investigative File.

As argued above, ACLU should be precluded from attacking the district court's factual findings as ACLU strictly appealed the district court's interpretation of NRS 289.080(9) in prohibiting disclosure. Nevertheless, the record demonstrates that there is substantial evidence to support the fact that peace officer Elfberg did not review or copy the Internal Affairs Investigative File.

First and foremost, ACLU does not allege or assert that there was, in fact, punitive action recommended by CCSDPD—satisfying the element for non-

disclosure under NRS 289.080(9). Second, Adam Levine, peace officer Elfberg's representative, and peace officer Elfberg provided declarations explicitly stating they had no legal recourse to gain access to the Internal Affairs Investigative File because there was no punitive action recommended.

Despite this clear evidence, ACLU simply surmises, without actual evidence or citation to authority that peace officer Elfberg clearly had access to the records or other legal recourse than NRS 289.080(9). Instead, ACLU suggests that peace officer Elfberg could have easily submitted a public records request (the exact concern raised by CCSD in this brief) to gain access to his own file.

In sum, ACLU has not demonstrated that the district court abused its discretion in reaching the finding, based on several declarations, that peace officer Elfberg did not review, access, or copy his Internal Affairs Investigative File.

E. ALTERNATIVELY, THE COURT SHOULD AFFIRM THE DISTRICT COURT'S DECISION AS IT REACHED THE CORRECT RESULT.

In the event the Court concludes that NRS 289.080(9) does not bar disclosure of the Internal Affairs Investigative File in the instant case, this Court should affirm the district court's decision as it reached the correct result in denying ACLU access to the Internal Affairs Investigative File. *Las Vegas Convention & Visitors Authority v. Miller*, 124 Nev. 669, 689 n.58, 191 P.3d 1138, 1151 n.58 (2008) ("affirm the district court if it reaches the right result, even when it does so for the wrong

reason."). Here, the Court should affirm the district court's Order because the record demonstrates that CCSD satisfied its burden in demonstrating that both privacy and governmental interests substantially outweigh the public's interest in access. In addition, it is well established that juvenile justice information is also deemed confidential and not subject to disclosure. Collectively, these interests and privileges bar the disclosure of the Internal Affairs Investigative File in its entirety.

1. The Involved Privacy Interests Outweigh the Public's Interest.

A government employee generally has a privacy interest in any file that reports on an investigation that could lead to the employee's discipline or censure." *Hunt v. FBI*, 972 F.2d 286, 288 (9th Cir. 1992) (citation omitted); *see also Beck v. Dept of Justice*, 997 F.2d 1489, 1491 (D.C.Cir. 1993) (DEA agents had an "obvious interest in the continued confidentiality of their personnel records"). A privacy interest arises, in part, from the presumed embarrassment or stigma wrought by negative disclosures. *See Simpson*, 648 F.2d at 14.

Disciplinary related records are precisely the sort of information subject to protection. *See, e.g., United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus., Local 598 v. Department of the Army*, 841 F.2d 1459, 1465 n. 1 (9th Cir.1988) (Skopil, J., concurring) ("Courts hesitate to require disclosure if it will cause stigma or embarrassment."). Indeed, "disclosure even of favorable

information may well embarrass an individual or incite jealousy in his or her co-workers." *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984).

In October 2018, the Nevada Supreme Court adopted this two-part balancing test, also known as the *Cameranesi* test, in determining whether disclosure implicates nontrivial privacy interests, warranting the government agency to withhold records. *See Clark Cnty. Sch. Dist. v. Las Vegas Rev.-J.*, 134 Nev. 700, 707, 429 P.3d 313, 319 (2018). Under this balancing test, the government must first demonstrate that "disclosure implicate[s] a personal privacy interest that is nontrivial or more than *de minimus*." *Id*. at 320. If the government meets its burden, 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. *Id*.

Under *CCSD*, the agency need only demonstrate that a nontrivial privacy interest exists. 429 P.3d at 320. Courts have ruled that "disclosure implicates personal privacy if it affects either the individual's control of information concerning his or her person or constitutes a public intrusion long deemed impermissible under the common law and in our cultural traditions." *See Cameranesi*, 856 F.3d at 638. "Disclosures that would subject individuals to possible embarrassment, harassment, or the risk of mistreatment constitute nontrivial intrusions." *Id*. (citations omitted).

a. The Involved Privacy Interests of the Peace Officers are Nontrivial.

Here, the Internal Affairs Investigative File contains two types of significant, nontrivial privacy interests. First, peace officer Elfberg has an inherent, nontrivial privacy interest in the internal investigative report as the subject officer being investigated. Second, the other officers who provided statements to CCSDPD also have a nontrivial privacy interest in the Internal Affairs Investigative File.

The Ninth Circuit's decision in *Hunt v. F.B.I.*, 972 F.2d 286, 288 (9th Cir. 1992) is persuasive and nearly identical to the instant case. There, an individual made a complaint about an FBI agent. *Id.* at 287. After the FBI refused to provide an update on its internal investigation of the agent, the individual submitted a public record request to obtain information pertaining to the internal investigation. *Id.* The FBI denied the request, relying, in part, on the personnel exemption of the Freedom of Information Act (FOIA). *Id.* After review of the investigative file *in camera*, the district court determined that redactions would resolve any concerned privacy interests of the agent—even though the agent's name was well known to Hunt and the detailed contents of the file would make the agent's identity easily traceable to others given access to the file. *Id*. The Ninth Circuit reversed the district court's decision and concluded that withholding of the record in its entirety was warranted. *Id*. at 289-290.

Analyzing the first prong, the Ninth Circuit inherently recognized that government employees generally have a privacy interest in any file that reports an investigation that could lead to the employee's discipline or censure. *Id*. at 28. Additionally, the Ninth Circuit concluded that government employees have a legitimate interest in keeping private matters that could conceivably subject them to annoyance or harassment. *Id*. Specifically, the Court concluded that association of the agent's name with the allegations of professional misconduct would cause great personal and professional embarrassment.

It is undeniable that peace officer Elfberg has a nontrivial privacy interest in the Internal Affairs Investigative File wherein he was the subject officer being investigated for alleged violation of CCSDPD's policies and/or regulations. This is even more true where peace officer Elfberg did not receive any punitive action in relation to the investigation. Rightfully so, peace officer Elfberg has a significant concern regarding embarrassment, harassment and stigma if disclosure occurred based on the recent media reports and related comments. In that respect, this Court has determined that personnel files of the judiciary are inherently confidential. *See Matter of Halverson*, 123 Nev. 493, 169 P.3d 1161 (2007). Nevada also recognizes the importance of maintaining files related to public employees confidential. NRS 286.117 (deeming a public employee's PERS file confidential); NAC 284.718 (recognizing a state employee's personnel file is confidential). Accordingly, Nevada

has established a public policy of recognizing the nontrivial privacy interest inherently involved in such files like the Internal Affairs Investigative File.

Likewise, the other employees that, while not the subject of the investigation, were interviewed by CCSDPD as witnesses have nontrivial privacy interests in their statements contained in the Internal Affairs Investigative File. Specifically, disclosure could subject employees interviewed as part of the investigation "to unwarranted questioning concerning the . . . investigation, subpoenas issued by private litigants in civil suits, and harassment from co-workers or other individuals." *Croskey v. U.S. Office of Special Counsel*, 9 F. Supp. 2d 8, 12 (D.D.C. 1998), *aff'd*, No. 98-5346, 1999 WL 58614 (D.C. Cir. Jan. 12, 1999). Further, "an employee will feel more free to talk . . . about possible employer violations if he feels his name will not be attached to his statements." *L & C Marine Tramp., Ltd. v. United State*s, 740 F.2d 919, 922-23 (11th Cir. 1984) (abrogated on other grounds) (discussing witnesses' privacy interests in context of law enforcement investigation into a work-related accident).

Thus, this Court must conclude that the Internal Affairs Investigative File implicates two sets of privacy interests—peace officer Elfberg, as a subject of the investigation; and the other officers, who were interviewed and gave statements in relation to the investigation. In reaching that conclusion, this Court should rule that CCSD demonstrated that the privacy interests are non-trivial.

b. There is no public interest in the Internal Affairs Investigative File and any public interest is outweighed by the privacy interests involved.

ACLU contends that the public has an interest in ensuring that government agencies properly investigate misconduct. The Ninth Circuit in *Hunt* rejected similar arguments when it was clear that the requester only sought a single incident for his own purpose. 972 F.2d at 288-89. Much like the ACLU, *Hunt* argued that there was a significant interest in public disclosure of the records, including disclosure of the details of the FBI investigation. *Id*. Disclosure of this file could reveal whether this particular investigation was properly conducted, whether one FBI agent was guilty of wrongdoing, and whether discipline, if needed, was adequate and properly imposed. *Id.* at 288. Rejecting this argument, the Ninth Circuit recognized that the request was for a single isolated investigation. *Id*. The Court reasoned that a single file will not shed light on whether FBI investigations are comprehensive or whether misconduct by agents is common. *Id*. Going one step further, the Court compared the request to other instances where requests sought numerous disciplinary files. *Id*. at 289 (citing *Department of Air Force v. Rose*, 425 U.S. 352 (1976). The Ninth Circuit recalled the Supreme Courts' affirmance of the notion that the public interest in disclosure of the summaries was significant because conclusions could be drawn concerning the efficacy and fairness of Air Force disciplinary procedures. *Id*. And, in that case, summaries were to be disclosed with all "personal references or other

identifying information deleted." *Id*. (citing *Rose*, 425 U.S. at 380). In contrast, as recognized by the Ninth Circuit, *Hunt* requested one investigative file, focused completely on the conduct of one agent. *Id*. Based on this difference, in *Hunt*, the Court ruled that the file cannot be redacted and disclosed without the risk of subjecting that agent to undeserved embarrassment and attention.

Upon an *in camera* review, the Ninth Circuit concluded that:

> The contents of the file requested by Hunt, reveal that a thorough investigation into the alleged incident was conducted by the FBI. The file was internally consistent and contained credible evidence that the misconduct had not occurred. Hunt's everchanging summary of what had happened lent support to the agent's claim that the story was fabricated. Where there is no evidence that the government has failed to investigate adequately a complaint, or that there was wrongdoing on the part of a government employee the public interest in disclosure is diminished.

Id.

Like *Hunt*, ACLU failed to sufficiently articulate a significant public interest that would be advanced by disclosure of the single Internal Affairs Investigative File pertaining to internal policies and/or regulations. The subsequent media coverage also has no effect on these interests. Courts have expressly rejected similar arguments and held that the public's knowledge does not lessen an individual's privacy interest. *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 770 (1989); *Kimberlin v. Dep't of Justice*, 139 F.3d 944, 949 (D.C.Cir.1998).

This privacy interest exists even when some portion of the requested information is or has been available to the public: "[T]he fact that an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information." *Reporters Comm*., 489 U.S. at 770; *see also Kimberlin*, 139 F.3d at 949 (holding that despite attorney's statement to the press indicating "who he is, what he was accused of, and that he received a relatively mild sanction," the attorney "still has a privacy interest, however, in avoiding disclosure of the details of the investigation, of his misconduct, and of his punishment-and perhaps, too, an interest in preventing hitherto speculative press reports of his misconduct from receiving authoritative confirmation from an official source") (citing *Bast v. Dep't of Justice*, 665 F.2d 1251, 1255 (D.C.Cir.1981)); *Massey v. FBI*, 3 F.3d 620, 624 (2d Cir. 1993) ("Persons can retain strong privacy interests in government documents containing information about them even where the information may have been public at one time.") (citing *Reporters Comm.*, 489 U.S. at 762-63).

ACLU's asserted public interests would not be furthered by disclosure of the requested information because it "does not provide information about the agency's own conduct," *Beck*, 997 F.2d 1493, and more specifically, "will not shed any light on whether all such ... investigations are comprehensive or whether ... misconduct by [officers] is common," *Hunt*, 972 F.2d at 289. The Ninth Circuit's decision in

Lane a decade after *Hunt* is equally instructive. *Lane v. Dep't of Interior*, 523 F.3d 1128, 1138 (9th Cir. 2008). The *Lane* Court concluded that the requester failed to present any evidence, outside of her own suggestion, that the investigation was not sufficiently thorough. *Id.* Relying on *Hunt*, the Court reiterated that because Lane only sought a report of one isolated incident it was highly unlikely that disclosure would increase public understanding of government activities, because the information she sought would, at most, about one individual's actions on one day and the government's investigative procedures in this instance— will reveal nothing about the activities of the agency as whole. *Id.*; *see also Boyd v. Dep't of Justice*, 475 F.3d 381, 388 (D.C.Cir. 2007) ("[A] single instance of [government misconduct] ... would not suffice to show a pattern of government wrongdoing...."); *Janangelo v. Treasury Inspector Gen. for Tax Admin.*, No. 216CV906JCMGWF, 2017 WL 1179944, at *4 (D. Nev. Mar. 29, 2017), *affd*, 726 F. App'x 660 (9th Cir. 2018) (concluding that a request into a single file did not satisfy the public's interest prong and could not defeat the privacy interest of the individual). The ACLU neglected to demonstrate any significant public interest that would be served by the request of a single Internal Affairs Investigative File. Moreover, the public's interest in peace officer Elberg's alleged misconduct is satisfied in light of the production of the Body Worn Camera and other documents specifically related to the subject incident.

There is nothing else that would serve the public's interest by disclosing the Internal Affairs Investigative File.

As demonstrated in detail above, it is unequivocally understood that peace officer Elfberg's, and the other officers identified in the Internal Affairs Investigative File, have significant, nontrivial privacy interests at stake in relation to disclosure of the Internal Affairs Investigative File. If disclosure of these records would be permitted, any other employee of CCSD would be able to request and obtain personnel records of their peers. Undoubtedly, this would cause embarrassment, harassment, and jealousy amongst co-workers and affect morale amongst employees.

2. CCSDPD's Interest Substantially Outweighs the Public's Interest in Access.

"[I]n the absence of a statutory provision that explicitly declares a record to be confidential, any limitations on disclosure must be based upon a broad balancing of the interests involved, and the state entity bears the burden to prove that its interest in nondisclosure clearly outweighs the public's interest in access." *Gibbons*, 127 Nev. at 880, 266 P.3d at 628 (citations omitted).

CCSD requests that this Court find the Legislature's intent to protect such information from employees renders Internal Affairs Investigative Files not resulting in punitive action not subject to production as disclosure would eviscerate the purpose of those statutes. Absent a statute rendering a record confidential, the Court

must balance the interests of the governmental agency in nondisclosure against the public's interest in access. *Clark Cty. Sch. Dist. v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 84, 429 P.3d 313, 317 (2018) (citing *Reno Newspapers v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011)). Here, the Court should weigh CCSD's interest in maintaining confidentiality of its Internal Affairs Investigative Files not leading to punitive action against the public's interest in access.

As explained above, ACLU's request for a single file does not shed light on CCSD's investigations or its officers. Rather, the request is clearly intended to harass, embarrass, and stigmatize peace officer Elfberg and prepare ACLU's lawsuit against CCSD and Peace officer Elfberg. ACLU's reliance on the NPRA cannot be used to undermine CCSD's significant government interest, as recognized by the Legislature, in maintaining confidentiality of Internal Affairs Investigative Files not leading to any punitive action. Thus, CCSD asks that this Court conclude that the government interests at stake substantially outweigh any public interest regarding a single file that pertains to internal policies and regulations that did not result in any recommendation of punitive action against the employee.

3. The Internal Affairs Investigative File Contains Juvenile Justice Information.

The February 9, 2023 incident concerns juvenile justice information pertaining to juveniles that were detained and one that was issued a citation. The

Legislature explicitly recognized the Juvenile Justice Act as an exemption to the NPRA. *See* NRS 239.010(1).

NRS 62H.025 provides, in pertinent part:

> Juvenile justice information is confidential and may only be released in accordance with the provisions of this section or as expressly authorized by other federal or state law.

NRS 62H.025(1). Juvenile justice information is further defined as "any information which is directly related to a child . . . subject to the jurisdiction of the juvenile court." NRS 62H.025(6)(b). A cursory review of the Juvenile Justice Act demonstrates that a juvenile court case need not be open for a juvenile court to have jurisdiction over a juvenile. *See* NRS 62B.330 (child alleged to have committed a delinquent act is subject to jurisdiction of juvenile court). To that end, NRS 62B.330, provides in relevant part:

> NRS 62B.330 Child alleged or adjudicated to have committed delinquent act; acts deemed not to be delinquent.
> 1. Except as otherwise provided in this title, the juvenile court has exclusive original jurisdiction over a child living or found within the county **who is alleged** or adjudicated to have committed a delinquent act.
> 2. For the purposes of this section, a child commits a delinquent act if the child:
> (a) **Violates a county or municipal ordinance** other than those:
> (1) Specified in paragraph (f) or (g) of subsection 1 of NRS 62B.320;
> (2) Concerning an offense related to tobacco; or
> (3) Relating to the consumption or possession of alcohol or the possession of 1 ounce or less of marijuana that are punishable pursuant to paragraph (a) of subsection 1 of NRS 62E.173.
> (b) **Violates any rule or regulation having the force of law**; or

> (c) Commits an act designated a criminal offense pursuant to the laws of the State of Nevada.

(emphasis added). Interpreting this statute, this Court expressly acknowledged that NRS 62H.025 unambiguously does not require juveniles to be brought before the juvenile court for information to be considered juvenile justice information. *Republican Att'ys Gen. Ass 'n v. Las Vegas Metro. Police Dep't*, 136 Nev. 28, 35, 458 P.3d 328, 334 (2020). While *RAGA* particularly dealt with an arrest, nothing in *RAGA* limits jurisdiction of the juvenile court to arrests. *Id*.

In *RAGA*, the Supreme Court agreed with the Las Vegas Metropolitan Police Department when it withheld body worn camera videos related to the arrest of juveniles. *Id*. This Court agreed with the lower court that because the video related to a juvenile-involved incident and the arrest of juveniles, it was protected by NRS 62H.025. *Id*. To be sure, the Court concluded that "[w]hen juveniles are handcuffed and under the physical supervision of the police, as here, they are under the direct authority of law enforcement . . . they are presumed by the officers to be in need of supervision." *Id*.

While the Internal Affairs Investigative File in its entirety is not limited to the facts and circumstances pertaining to juvenile justice information and includes analyses and opinions regarding peace officer Elfberg's conduct, the portions of the Internal Affairs Investigative File that discuss the scene of the incident, the underlying facts for the probable cause basis for detention, and information about

the juveniles and juvenile process are all protected from disclosure under NRS 62H.025, consistent with *RAGA*.

Accordingly, any information and facts regarding the February 9, 2023 incident pertaining to the juveniles inherently contains juvenile justice information and cannot be disclosed.

4. The Internal Affairs Investigative File in Its Entirety Must be Withheld.

Collectively, the privacy interests, CCSDPD's interests, and NRS 62H.025 operate to justify withholding the Internal Affairs Investigative File in its entirety. The underlying facts of the investigation involve the basis for Peace officer Elfberg's presence on scene, including the probable cause for detaining several juveniles and issuing a citation, and it describes the scene and incident that placed the juveniles within the jurisdiction of the juvenile court. The analysis and opinions by CCSDPD within the report involve the nontrivial privacy interests of the individuals. Furthermore, the CCSDPD's interest in nondisclosure is significant given various statutes protecting such information in the workplace.

"Identifying information" is not limited to names, social security numbers, and other discrete pieces of information. *See Nat'l Whistleblower Ctr. v. Dep't of Health & Human Servs.*, 849 F. Supp. 2d 13, 30-31 (D.D.C. 2012). "[W]hile the redaction of an individual's name may be sufficient to protect his identity and privacy from the public, it may not be sufficient to protect him in the smaller

community of his school or work." *Id*. at 30. For example, in *Nat '1 Whistleblower*, the court held that the Office of the Inspector General properly withheld the entirety of interview reports, handwritten notes taken during witness interviews, and witness statements because the identity of the individuals could easily be identified. Likewise, in *Dep't of Air Force v. Rose*, the Supreme Court held that case summaries of honor and ethics hearings at a service academy may need to be withheld under the privacy exemption because "what constitutes identifying information regarding a subject cadet must be weighed not only from the viewpoint of the public, but also from the vantage of those . . . familiar . . . with other aspects of his career at the Academy." 425 U.S. at 380.

Here, the information withheld concerns a small group of individuals, less than five officers, who are known to each other and to the public and who are easily identifiable from the details contained in the withheld information. Redacting only an individual's name would be insufficient to protect the privacy interests of the individuals, especially peace officer Elfberg as it is publicly known he was the subject peace officer. *Horvath v. United States Secret Serv.*, 419 F. Supp. 3d 40, 47-48 (D.D.C. 2019) (permitting redaction of facts related to event to protect identity). Finally, disclosure of any portion of the Internal Affairs Investigative File eviscerates the purpose of NRS 289.080, which recognizes an employer's right to keep confidential from the subject officer and other employees any Internal Affairs

Investigative File that does not result in punitive action. Accordingly, redactions are insufficient to protect the asserted interests and privileges and withholding of the Internal Affairs Investigative File in its entirety must be affirmed.

V. ALTERNATIVELY, THE DISTRICT COURT SHOULD VACATE THE ORDER AND REMAND WITH INSTRUCTION TO THE DISTRICT COURT.

Should the court reject the district court's interpretation that NRS 289.080(9) bars production of the entire Internal Affairs Investigative File, the Court should construe NRS 289.080(9) to prohibit disclosure of all records created or generated for the purpose of the Internal Affairs investigation and remand with instructions to the district court that it review each document contained in the Internal Affairs Investigative File and determine whether NRS 289.080(9), as interpreted by this Court applies. And, for any records not generated for purposes of the Internal Affairs investigation, the Court should instruct the district court to review and apply the privileges and interests previously asserted by CCSD.

CONCLUSION

For the foregoing reasons, CCSD asks that this Court to affirm the district court's order. Alternatively, this Court should remand with specific instructions.

Dated this 5th day of May, 2025.

/s/ Jackie V. Nichols
Jackie V. Nichols, Esq.
Counsel for Respondent

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 12,900 words; or

☐ does not exceed ____pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of May, 2025.

/s/ Jackie V. Nichols
Jackie V. Nichols, Esq.
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CERTIFICATE OF SERVICE

I hereby certify that **RESPONDENT's ANSWERING BRIEF** was filed electronically with the Nevada Supreme Court on May 5, 2025. Electronic service of the foregoing Docketing Statement shall be made in accordance with the Master Service List as follows:

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