

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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CASE NO. 88680

American Civil Liberties Union  
of Nevada

*Appellant,*

v.

Clark County School District,  
*Respondent/Cross-Appellant,*

District Court Case No. A-23-  
869216-W

Eighth Judicial District Court

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**Appellant American Civil Liberties Union of Nevada's  
Reply Brief**

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**American Civil Liberties  
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## **Statement of Facts and Procedural History**

No party disputes that on February 9, 2023, an incident occurred outside Durango High School involving CCSDPD Officer Elfberg and students M.W. and J.T. 1 App 196. It is also undisputed that the ACLU of Nevada sent a letter on February 21, 2023, requesting “[a]ny logs, documents, and/or files related to the February 9, 2023, incident at Durango High School including but not limited to” certain specific records such as communications between CCSD employees and documentation related to disciplining CCSD employees. 1 App 1-3. To prevent any confusion sincere or feigned, the ACLU defined “the incident” for the purposes of its request as “an incident that occurred at or near Durango High School on February 9, 2023 in which Officer Jason Elfberg and/or other CCSD employees detained multiple students/community members, including but not limited to [M.W.] and [J.T.]” 1 App 1. CCSD refused to disclose records relevant to this request, and the ACLU of Nevada initiated this matter with a petition for writ of mandamus.

On September 21, 2023, CCSD filed a privilege log in this matter. In that log CCSD listed documents responsive to ACLU of Nevada’s public records request, each document’s creation date, and what

privileges CCSD asserted as a basis to withhold the document. 1 App 213-235. The privilege log included the following documents with creation dates either before or on February 21, 2023, that CCSD asserted privilege over pursuant to NRS 289.080(9), and that have not been disclosed to ACLU of Nevada:

- “Anonymous Concern Report regarding Complaint from February 9, 2023 juvenile incident” created February 9, 2023;
- “CAD Notes VM Complaints” created February 17, 18, and 21, 2023;
- Email Correspondence: from J. Mingo to Jason Elfberg “regarding notification of possible disciplinary action” created February 10, 2023;
- Emails between J. Mingo and Brayn Zink regarding the “request[s] for video footage CCSD has received or obtained related to the 2/9/2023 juvenile incident” created on February 10, 2023;
- A “notification of possible disciplinary action” created on February 10, 2023;
- Elfberg’s receipt letter of the “notification of possible disciplinary action” created on February 10, 2023;
- Seven “voicemail[s] regarding [the] 2/9/2023 incident” created between February 17, 2023, through February 18, 2023;
- CAD details of “returned call[s]” in response to the voicemails created on February 21, 2023.

There were other documents which CCSD did not provide a created on date:

- “Elfberg’s personal statement”;
- Audio of a “phone call regarding [the] incident” between a parent and dispatch;
- A “screenshot from social media”;
- A “Tik-Tok Video of [the] 2/9/2023 incident”;
- Eight “news articles from various media outlets”;

*Id.*

CCSD also included records created after February 21, 2023, in its privilege log which are not listed above. *Id.* On September 26, 2023, the ACLU of Nevada filed a motion for leave to file an amended petition in order to foreclose arguments from CCSD that the district court could not order CCSD to disclose relevant records created after the ACLU of Nevada sent its initial public records February 21, 2023, or in the alternative, after ACLU of Nevada's initial petition was filed on April 18, 2023. 2 App 236-243. In accordance with Eighth Judicial District Court Rules 2.30(a), the ACLU of Nevada attached the amended petition to the motion for leave. 2 App 244-260.

The district court granted the motion for leave to amend and immediately set a briefing schedule. 2 App 374-383. The district court did not order the ACLU of Nevada to refile the amended petition. *Id.*

Of the documents listed in CCSD's privilege log filed on September 21, 2023, the district ordered that CCSD disclose with appropriate redactions the body worn camera footage, incident report, CAD log, and citation from the February 21, 2023, public records request. 2 App 394-403. The court found that CCSD could withhold pursuant to NRS

289.080(9) all the other documents listed in the District's privilege log but identified no other basis to withhold these records. 3 App 543-547.



## Argument

**I. As the district court did not identify any other basis to withhold records in this matter, whether NRS 289.080(9) offers an implicit exception to the NPRA is the sole issue presented on appeal.**

The only issue presented in this appeal is whether NRS 289.080(9) creates an implicit exception to the NPRA even though: its plain language makes no reference to the NPRA, it does not expressly authorize an agency to withhold any records, and it does not otherwise use language typically associated with NPRA exceptions such as the label “confidential”. There is no other issue for the ACLU to appeal at this time; after all, NRS 289.080(9) was the only statute the district court relied upon to deny ACLU of Nevada access to records that the ACLU contested. The ACLU of Nevada has not asked this Court to determine whether other privileges may or may not apply to the records at issue since the district court did not consider any other privileges in denying access.

Both CCSD and amici mischaracterize the relief sought by the ACLU of Nevada, claiming that the ACLU of Nevada wants this Court to find that “the public at large should have an unfettered right to review internal records from a law enforcement agency’s investigation into alleged misconduct by one of its officers.” *See* Brief of Amici Curiae in

Support of CCSD at 2. This is untrue. The ACLU of Nevada does not dispute that other confidentiality provisions may apply to the records at issue and only argues here that NRS 289.080(9) does not create any privileges for CCSD or amici to abuse. For example, the ACLU of Nevada does not dispute that student names contained in the “investigative file” would be confidential and subject to redaction even if NRS 289.080(9) does not apply to those records. *See* NRS 392.029. In other words, ACLU of Nevada seeks to maintain the status quo while CCSD and amici ask this Court to read an implied exception to the NPRA into NRS 289.080(9) and empower law enforcement agencies to withhold any records from their most embarrassing and damning incidents by stuffing them into an “investigative file,” whatever that term may mean.

CCSD and amici also misrepresent the scope of the records which will be affected by CCSD’s inaccurate and expansive reading of NRS 289.080(9). Throughout CCSD’s brief CCSD discusses primarily the “Internal Affairs Investigative Report” and the other officer interviews and how these records may contain confidential information. *See* Respondents Answering Brief at 8-11. By focusing only on a narrow set of records, CCSD obfuscates the actual impact of the lower court’s ruling.

CCSD identified over seventy records it considered to be part of the internal affairs investigative file. 1 App 213-235. These are all records the district court deemed to be protected under the court's limitless interpretation of NRS 289.080(9) and they include records such as voicemail complaints, use of force signatures, notices of administrative interviews, photographs, videos of the incident, news reports, tiktok videos, emails that were explicitly sent to Officer Elfberg, and CAD logs of return calls made to concerned parents. *Id.* A brief scan of CCSD's privilege log, which originally included all body worn camera footage, police reports, and CAD logs in the "investigative file", offers a preview for how CCSD and amici intend to abuse NRS 289.080(9) if given the green light to do so by this Court. *Id.* These agencies should not be provided further opportunity to do so.

## **II. This Court has jurisdiction to determine the issue presented.**

CCSD argues that the ACLU of Nevada's appeal should be dismissed because, while the ACLU of Nevada filed its amended petition attached to its motion for leave, it failed to file the amended petition again after the district court granted the motion. *See* Respondent's Answering Brief at 17-18.

First, CCSD offers no legal authority that the ACLU of Nevada needed to file the amended petition separately to vest jurisdiction in the district court when the complete petition was attached to the motion for leave. Unlike local rules and rules of civil procedure of other jurisdictions, Nevada's rules do not require that a party file an amended petition separately from the motion for leave to file once the motion is granted. *Compare* EJDRCR 2.30 *with* Nevada District Court Local Rule LR 15-1 *and* EJDRCR 5.205 (outlining the rules of procedure outlining amending pleadings for family court cases). Under circumstances familiar to this Court, Nevada courts can automatically uncouple a filing from a motion for leave file that has been granted. *See e.g.* Brief of Amici Curiae on file herein (uncoupling the proposed brief of amici curiae from the motion for leave to file said brief). In this particular instance, the district court did not order ACLU of Nevada to file the amended petition separately; instead, the district court ordered additional briefing immediately at CCSD's request which both parties complied with. 2 App 374-383.

Second, even if the ACLU of Nevada needed to file the amended petition again separately for jurisdiction to vest in the district court, the amended petition is not necessary for this Court to consider the issue

presented. The amended writ only clarified that the ACLU of Nevada was seeking records created after the public records request sent on February 21, 2023, and the original petition filed April 18, 2023. However, CCSD has asserted privilege pursuant to NRS 289.080(9) over records that were in existence at the time the ACLU of Nevada made its February 23, 2023, request and were withheld pursuant to the district court's final order. These records include communications between CCSD employees about the incident, complaints made by third parties, and even Officer Elfberg's personal statement about what happened on February 9, 2023.

These records were subject to the ACLU of Nevada's request on February 21, 2023, which requested "[a]ny logs, documents, and/or files related to the February 9, 2023, incident at Durango High School", and provided as specific examples of responsive documents "[a]ny communications by CCSD employees discussing the incident, including but not limited to CCSD administration and police personnel" and "[a]ny materials describing the disciplining, sanctioning, or reprimanding of CCSD employees and students related to the incident." 1 App 1-4. CCSD's own description of these records in its log relate these documents to the February 9, 2023, incident. 1 App 213-235. In turn, the district court

ruled on these records when it determined that NRS 289.080(9) provided a blanket exemption to any records within a government agency's internal investigation file and the records were not disclosed by CCSD to the ACLU of Nevada. 3 App 541-547.

Even if this Court determines that the ACLU of Nevada somehow did not request these records in its initial petition and the organization had to file the amended petition separately from the motion for leave, any error in failing to double-file the amended petition is harmless. Reversal is not warranted in the case of a harmless error that is not prejudicial to any party. *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010); NRCP 61. CCSD has not claimed that it was harmed by the ACLU of Nevada's failure to file a separate amended petition and CCSD was provided full notice of the amended petition and even briefed the issues addressed by the amended petition. That said, if this Court believes a correction of the record is necessary, the ACLU of Nevada will seek leave from this Court to correct the record pursuant to NRCP 60(a).

### **III. CCSD fails to explain why NRS 289.080(9) should be construed as an exemption to the NPRA rather than a discovery provision.**

In its opposition, CCSD never squarely addresses the ACLU of Nevada's contention that NRS 289.080(9) is a discovery provision that imposes an obligation to disclosure, not a provision related to the NPRA empowering an agency to withhold any records it sees fit to slip into an investigative file. *See* Appellant's Opening Brief at 35-36.

As discussed, nothing in the express language of NRS 289.080(9) indicates it is anything other than a discovery statute. The provision does not reference the NPRA, it does not use the term "confidential", nor does it even suggest that it supersedes any other right to access records. Reading an exception to the NPRA into NRS 289.080(9) would not only be counter to the plain language of the statute, it would also violate Nevada law that all statutory exceptions to the NPRA must be explicit and unambiguous. *Reno Newspapers, Inc. v. Haley*, 234 P.3d 922, 923 (2010) ("Although NRS 202.3662 is plain and unambiguous in its declaration that an application for a concealed firearms permit is confidential, we conclude that the identity of the permittee of a concealed firearms permit, and any post-permit records of investigation, suspension, or revocation, are not declared explicitly to be confidential

under NRS 202.3662 and are, therefore, public records under NRS 239.010.”).

CCSD also fails to clarify in its answer what the scope of a privilege under NRS 289.080(9) might look like. CCSD itself has changed its position on the proposed privilege’s scope, first including all of the bodyworn camera, incident reports, and CAD logs from the incident until the district court ruled otherwise. *Compare* 1 App 213-235 *with* 2 App 421-426. Neither CCSD nor amici offer limiting principles to prevent abuse by an agency trying to sweep an incident under the rug by opening up an investigation with a foregone conclusion. *See* Respondent’s Answering Brief at 21-31; Brief of Amicus Curiae. Even the district court acknowledged that it struggled to apply CCSD’s proposed NRS 289.080(9) privilege in a consistent manner. 3 App 514-516.

In its answer CCSD again argues that because NRS 289.080 as a whole is included in the list of exceptions to the NPRA, NRS 289.080(9) must be a confidentiality provision. *See* Respondent’s Answering Brief at 21-31. This is addressed in ACLU of Nevada’s opening brief: unlike other provisions within NRS 289.080, NRS 289.080(9) does not explicitly state that any records are confidential. *See* Appellant’s Opening Brief at 26-29.



The reference to NRS 289.080 in NRS 239.010 is connected to NRS 289.080(6) and NRS 289.080(7), which expressly talk about confidentiality, rather than implicitly referring to NRS 289.080(9). *Id.*

Amici emphasize law enforcement efficiency throughout their brief as justifying a sweeping NPRA exemption under NRS 289.080(9). *See* Brief of Amicus Curiae. This argument ignores this Court’s previous admonition that statutory language, not agency convenience, controls in the context of the NPRA. *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011).

The legislative history of NRS 289.080(9) also supports the fact that this provision is a discovery provision, not an exception to the NPRA. Legislative history confirms that NRS 289.080(9) was intended as a procedural safeguard for officers, not as a secrecy provision for agencies. *See* Appellant’s Opening Brief at 27-28. The 2020 amendments to NRS 289.080(9) focused on due process for officers facing discipline—not shielding agencies from scrutiny. *Id.* Hearing transcripts of NRS 289.080(9) show no intent to override NPRA’s transparency principles. This silence on confidentiality contrasts sharply with NRS 289.080 (6)-(7), which explicitly bar disclosure.

**IV. Without a fact-driven review of the individual records, this Court cannot determine what, if any, balancing tests apply to the records at issue.**

If NRS 289.080(9) does not create an exemption to the NPRA, CCSD asks this Court to apply the *Gibbons*) and *CCSD* balancing tests to deny access the over 60 records at issue in their entirety. These records vary in regards to how they were created, what they contain, and even their format. Considering that the district court never applied either balancing test these records and CCSD has not provided the individual records to this Court, such a request is inappropriate.

Both the *Gibbons*) and *CCSD* balancing tests are fact and record dependent. *Gibbons*), 127 Nev. at 884, 266 P.3d at 630 (requiring agency to provide a description of record and basis for withholding said record when denying a public records request); *Clark Cty. Sch. Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 708, 429 P.3d 313, 320 (2018) (requiring agency to show that the information to be redacted implicates a nontrivial privacy interest). To accurately determine whether a government's interest in non-disclosure outweighs the public's interest in the records, a court must consider each record individually. *Id.* Furthermore, the court must favor redaction where possible. *Las Vegas Review-Journal, Inc. v. Las Vegas Metro. Police Dep't*, 526 P.3d 724, 728

(2023); NRS 239.010(3). Since the district court has not performed this process and CCSD has not provided the records at issue to this Court, the Court is not positioned to apply the balancing tests from *Gibbons*) or *CCSD* in any capacity let alone using those tests to deny records in their entirety.

If this Court does remand the balancing of interests to the district court to apply either balancing test, the ACLU of Nevada requests that this Court clearly instruct the district court (1) which public records balancing tests to use and when and (2) that the public has a heightened interest in transparency when law enforcement agency properly declined to discipline its officer when the officer undisputably used force against civilians.

First, ACLU of Nevada respectfully requests that this Court clarify the *Gibbons*) and *CCSD* balancing tests. CCSD errs by: (1) not reviewing the records individually, instead viewing the over 60 records as a monolith, and (2) by conflating the two tests and applying the easier to satisfy *CCSD* test to the agency's decision to fully withhold instead of redact records. *See* Respondent's Answering Brief 33-43. This creates conflict between the tests and the plain language of the NPRA which

favours both transparency over secrecy and redaction over fully withholding records. NRS 239.001; NRS 239.010(3)

The *Gibbons*) test is used to determine whether the government has a strong interest in withholding records in the records entirely. *Gibbons*), 127 Nev. at 880, 266 P.3d at 628. This test requires the government agency to show by a preponderance of the evidence, not only that there is a government interest in nondisclosure which “clearly outweighs the public's interest in access” but also that these government interests cannot be satisfied through redaction. *Gibbons*, 127 Nev. at 880, 266 P.3d at 628) (emphasis added) (citations omitted); *Clark Cty. Sch. Dist.*, 134 Nev. at 707, 429 P.3d at 319. If the government fails this difficult test, they must release the records.

Redaction of personal information under *CCSD* involves a completely different test. This test requires the government to identify individualized and nontrivial privacy rights which the government believes outweighs any public interest in the redacted information. of *Clark Cty. Sch. Dist.*, 134 Nev. at 700, 429 P.3d at 315. The *CCSD* test also only applies to personal and private information to be redacted whereas the *Gibbons*) test only applies to agency-wide justifications for

non-disclosure. *See Las Vegas Metro. Police Dep't v. Las Vegas Review-Journal*, 136 Nev. 733, 738, 478 P.3d 383, 388 (2020) (emphasizing that *Gibbons* applies to claims unrelated to personal privacy and the CCSD analyzes privacy claims). ACLU of Nevada requests that this Court clarify (1) that the *CCSD* test cannot justify withholding any record in its entirety, only minimal redactions to protect an individual's personal identifying information; and (2) that the *Gibbons* test must be analyzed for each record individually.

The ACLU of Nevada also requests that this Court reaffirm that the public has a significant interest in records related to officer wrongdoing and this interest only increases when the officer's employer takes no measures to sanction the officer. *Las Vegas Review-Journal, Inc.*, 526 P.3d at 739. As this Court observed, the public has compelling interests in "oversight of law enforcement, the safety of the community, and the accountability of a law-enforcement officer who uses his position of authority to [engage in misconduct . . .]" *Id.*, 526 P.3d at 736. The public also has the significant interest "in determining whether [a law enforcement agency's] decision to close [an] investigation, and its participation, if any, in the fallout of the investigation, was informed and

proper.” *Id.* CCSD and amici act as if the Court has not spoken on this before, ignoring *Las Vegas Review-Journal* to claim the public has no interest in internal affairs where a law enforcement agency has announced that it letting its employee off scot-free. Respondent’s Answering Brief 28, 38-42; Brief of Amici Curiae 7. ACLU of Nevada asks that this Court firmly foreclose this argument moving forward.

**V. The remaining records do not contain juvenile justice information as the district court properly found that the disclosed records did not contain juvenile justice information.**

Juvenile justice information is privileged under NRS 62H.025, but such information is limited to “information which is directly related to a child in need of supervision, a delinquent child or any other child who is otherwise subject to the jurisdiction of the juvenile court.” NRS 62H.025(6)(b). CCSD has never identified any juveniles involved in the February 9, 2023, incident who were “in need of supervision”, delinquent, or otherwise under the jurisdiction of the juvenile court. *See* Respondent’s Answering Brief 43-46 (arguing the juvenile justice claims). The government did not file any cases in juvenile court related to the February 9, 2023, incident. *See* 2 App 399-402 (the district court acknowledges the juveniles never had a case in front of the juvenile

court). No one was arrested during the incident. *Id.* And to the extent it is relevant, anyone that this privilege theoretically could have applied to filed a waiver with the district court. *Id.* A police officer cannot hide misdeeds by issuing a bogus citation to a juvenile then assert a privilege meant to protect that child.

### **Conclusion**

This Court has jurisdiction over this appeal since this appeal is limited to the district court's ruling that NRS 289.080(9) provides a limitless exception to the NPRA. Because this theory regarding NRS 289.080(9) is not supported in law or common sense, this Court should reverse district court to the extent it relied on the NRS 289.080(9) to withhold records. In addition, this Court should provide clarity to the district court on the proper balancing test as well as emphasize the strong public interest in cases of officer misconduct.

### **Certificate of Compliance**

I certify that this Opening Brief complies with the typeface and type style requirements of Rule 32(a)(4)-(6) as this brief is in proportionally spaced Century Schoolbook 14-point font and is double spaced.

I certify that this Opening Brief complies with page or type-volume limitations of NRAP 32(a)(7) because it is proportionally space, has a typeface of 14 point, and contains 4087 words.

Dated: July 7, 2025

/s/ Jacob Smith Valentine.

Jacob Smith Valentine

NV Bar: 16324

Staff Attorney

ACLU of Nevada



### **Certificate of Service**

I certify that on July 7, 2025, I electronically filed the foregoing Notice of Filing of Request for Transcripts with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system and I served a true and correct copy of the same via the Court's e-service system.

/s/ Jacob Smith Valentine .

Jacob Smith Valentine

NV Bar: 16324

Staff Attorney

ACLU of Nevada