IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOE PANICARO,
Appellant,
vs.
ANNE M. LANGER; GERALD ANTINORO; BRANDY GAVENDA; AND STOREY COUNTY,
Respondents.

No. 80266-COA

FILED

JUL 12 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Joe Panicaro appeals from a district court order denying a petition for a writ of mandamus that sought to compel disclosure of records. First Judicial District Court, Storey County; James Todd Russell, Judge.

Panicaro submitted a records request to the Storey County Sheriff's Office (SCSO) pursuant to NRS Chapter 239—the Nevada Public Records Act (NPRA). In particular, Panicaro sought any body camera footage captured by SCSO personnel of the arrest and booking of a nonparty to this appeal, as well as the name of the SCSO personnel involved in the incident. The Storey County District Attorney, respondent Anne M. Langer, responded on behalf of the SCSO, indicating that Panicaro's request was denied because the records related to a "pending criminal case," and, therefore, were not subject to disclosure pursuant to the supreme court's decision in *Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990). Langer also explained that Panicaro could obtain records relating to the criminal case that were not confidential from the Virginia Township Justice Court.

Panicaro filed a petition for a writ of mandamus against Langer; the Storey County Sheriff, respondent Gerald Antinoro; an administrative assistant with the SCSO, respondent Brandy Gavenda; and respondent Storey County, seeking to compel disclosure of the records. Respondents moved to dismiss the petition, asserting that the records were part of an "open, active investigative file" and that *Bradshaw* recognizes that investigative records are confidential if they relate to anticipated or pending criminal proceedings. Over Panicaro's opposition, the district court agreed with respondents and denied his petition. This appeal followed.

On appeal, the parties essentially dispute whether the district court could properly make a determination concerning whether the records at issue here were subject to disclosure under NRS 239.010(1) based merely on respondents' representations concerning *Bradshaw* and assertions that the records related to a pending criminal investigation or proceeding. This court generally reviews a district court's denial of a writ petition for an abuse of discretion, but when a petition involves questions of law, we review the district court's decision de novo. *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 877, 266 P.3d 623, 626 (2011).

As a preliminary matter, under NRS 239.010(1), "all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person," provided that such records are not "otherwise declared by law to be confidential." Respondents have never asserted that any statute expressly makes the records sought by Panicaro confidential. For such circumstances, *Bradshaw* sets forth the test that courts must apply to evaluate whether a public record is nevertheless confidential and not subject to disclosure under NRS 239.010. 106 Nev. at 634-36, 798 P.2d at 147-48 (addressing whether a criminal investigative

report was subject to disclosure under NRS 239.010(1) where no statute expressly made the report confidential); *see also DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 622, 6 P.3d 465, 468 (2000) (clarifying that "any limitation on the general disclosure requirements of NRS 239.010 must be based on [*Bradshaw*'s] balancing [test]"). In particular, *Bradshaw* provides that courts must weigh the "privacy or law enforcement policy justifications for nondisclosure against the general policy in favor of open government." 106 Nev. at 636, 798 P.2d at 148. In reaching this conclusion, the supreme court recognized that withholding law enforcement records containing investigative information may be justified based on policy considerations relating to "pending or anticipated criminal proceeding[s]" and the need to protect "confidential sources or investigative techniques," to prevent the "possibility of denying someone a fair trial," and to prevent "jeopardy to law enforcement personnel." *Id.* at 635-36, 798 P.2d at 147-48.

But *Bradshaw*'s balancing test is part of a broader framework for analyzing claims of confidentiality in NPRA litigation. Within this framework, courts are first required to presume that public records are open to disclosure, NRS 239.001(2), (3) (providing that the NPRA's provisions favoring disclosure must be liberally construed and that "[a]ny exemption, exception or balancing of interests" that restricts disclosure must be narrowly construed); *Reno Newspapers v. Haley*, 126 Nev. 211, 214, 234 P.3d 922, 924 (2010) (examining the legislative amendments that adopted NRS 239.001(2) and (3), and reasoning that they require a presumption of openness). To overcome this presumption, the government entity resisting disclosure must prove, by a preponderance of the evidence, that the records at issue are confidential. NRS 239.0113 (providing that, when a government entity disputes whether a public record is subject to disclosure,

it "has the burden of proving by a preponderance of the evidence that the public book or record, or a part thereof, is confidential"); *DR Partners*, 116 Nev. at 621, 6 P.3d at 468. This means that when *Bradshaw*'s balancing test applies, the government entity must show that its interest in nondisclosure "clearly outweighs the public's right to access." *Haley*, 126 Nev. at 219, 234 P.3d at 927. The government entity cannot rely on hypothetical concerns to meet this burden, but rather, must make a particularized showing that the competing interests weigh in its favor. *DR Partners*, 116 Nev. at 628, 6 P.3d at 472-73 (concluding that the respondent failed to meet its burden of establishing that public records were confidential where it failed to offer any proof to assist the district court in applying *Bradshaw*'s balancing test, but instead, relied on "non-particularized hypothetical concerns").

Throughout the proceedings in the present case, respondents have asserted that the records sought by Panicaro were part of an "open, active investigative file" or related to a "pending criminal case," but they have never offered any details concerning the investigation or criminal proceeding, much less submitted affidavits or other materials to support this contention. *See Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 957, 338 P.3d 1250, 1255 (2014) ("Arguments of counsel . . . are not evidence and do not establish the facts of the case."). Similarly, although respondents have consistently maintained that the records are confidential under *Bradshaw* because the supreme court recognized in that decision that "pending or anticipated criminal proceedings" may justify nondisclosure, 106 Nev. 635-36, 798 P.2d at 147-48, they have never offered any particularized explanation as to how disclosure would be harmful and why a complete denial of Panicaro's

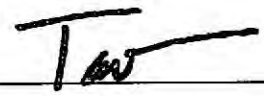
request was necessary to prevent that harm. *See* NRS 239.010(3) (stating that a government entity shall not deny an NPRA request on the basis that the record sought contains confidential information if it is possible to "redact, delete, conceal or separate . . . the confidential information from the [nonconfidential information]"); *cf. In re Execution of Search Warrants*, 134 Nev. 799, 806-07, 435 P.3d 672, 678-79 (Ct. App. 2018) (providing that, when considering a motion for the return of seized property, "the district court may choose to permit the government to supply its evidence [in opposition to the motion] in camera to preserve the secrecy and integrity of any ongoing investigation"). Indeed, respondents have never even indicated what records they withheld from Panicaro that were responsive to his request, or argued or explained why they were not required to state what records were being withheld. *See Gibbons*, 127 Nev. at 881-83, 266 P.3d at 628-29 (concluding that, after an NPRA lawsuit is commenced, the requesting party is typically entitled to a log with a general factual description of the materials withheld by the party resisting disclosure and a specific explanation for the nondisclosure to preserve a "fair adversarial environment," and explaining that an in camera review is not a substitute for a log in such circumstances).

Under these circumstances, we cannot conclude that respondents satisfied their burden of proving that their interest in nondisclosure clearly outweighed the public's right to access. *DR Partners*, 116 Nev. at 621, 6 P.3d at 468; *Haley*, 126 Nev. at 219, 234 P.3d at 927. Given the foregoing, the district court did not properly apply *Bradshaw*'s balancing test, and as a result, it abused its discretion by denying Panicaro's

petition. *See Gibbons*, 127 Nev. at 877, 266 P.3d at 626. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[1]

_____, C.J.
Gibbons



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cc: Hon. James Todd Russell, District Judge
Joe Panicaro
Storey County District Attorney
Lemons, Grundy & Eisenberg
Storey County Clerk

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[1]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.