IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

No. 80267-COA

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 public 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).[1] In particular, Panicaro requested that the SCSO email him records of all arrests made during the Street Vibrations event that was held in Virginia City in 2018 and of any citizens' arrests made in

[1]Following the commencement of the underlying proceeding, the Nevada Legislature adopted numerous amendments to the NPRA, effective October 1, 2019. *See* 2019 Nev. Stat., ch. 612, §§ 1-13, at 4002-08. Those amendments do not affect the disposition of the present case, however, because they only apply to actions filed after their effective date. *See id.* § 11, at 4008; *see also Las Vegas Metro. Police Dep't v. Ctr. for Investigative Reporting, Inc.*, 136 Nev. 122, 126 n.3, 460 P.3d 952, 956 n.3 (2020) (reaching a similar conclusion concerning the application of NRS 239.011(2) in a proceeding filed before the amendments' effective date).

Storey County from January 1, 2008, through the date of his records request. After exchanging correspondence with Panicaro, an administrative assistant with the SCSO, respondent Brandy Gavenda, indicated that although the SCSO made four arrests during the Street Vibrations event, the records relating to three of the arrests were not subject to disclosure because the arrests were still "open with the [District Attorney's] office."[2] Moreover, with respect to the citizens' arrest records, Gavenda indicated that SCSO personnel would be required to manually review records from 2,954 arrests from the relevant period to identify those that were effected by citizens, that Panicaro would be charged $17.43 per hour for the search plus a copy fee of 50 cents per page, and that he would be required to make a good-faith deposit of one half of the anticipated fee.

Shortly thereafter, Panicaro filed a petition for a writ of mandamus against Gavenda; the Storey County Sheriff, respondent Gerald Antinoro; and respondent Storey County, seeking to compel disclosure of the records. Respondents moved to dismiss the petition, arguing that the SCSO properly withheld the Street Vibrations arrest records because the supreme court recognized in *Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990), that records relating to pending or anticipated criminal investigations and proceedings are not subject to disclosure under the NPRA. Respondents further argued that the SCSO was authorized to

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[2]With respect to the remaining record, which was apparently related to a closed criminal investigation or proceeding, Gavenda indicated that the SCSO would provide Panicaro with a copy for a fee of 50 cents per page even though he requested to receive a copy by email. Because respondents eventually submitted the record as an exhibit to one of their filings in the underlying proceeding, we need not address the propriety of the SCSO's effort to charge Panicaro for a copy of the record in the context of this appeal.

charge Panicaro a fee to respond to his request for the citizens' arrest records under NRS 239.055(1) because a response to the request would require an extraordinary use of its personnel and technological resources. Over Panicaro's opposition, the district court agreed with respondents and denied his petition. This appeal followed.

On appeal, Panicaro initially challenges the denial of his writ petition on grounds that respondents waived their assertion of confidentiality with respect to the withheld Street Vibrations arrest records by failing to cite *Bradshaw* for support until their motion to dismiss. 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).

Under NRS 239.0107(1)(d), when a government entity denies a public records request on confidentiality grounds, it must provide written notice of the denial and a citation to the legal authority supporting its decision within five business days. *Republican Attorneys Gen. Ass'n v. Las Vegas Metro. Police Dep't*, 136 Nev. 28, 31, 458 P.3d 328, 331-32 (2020). Although respondents provided Panicaro with written notice of the denial of his records request in their pre-petition correspondence with him, they did not do so within five business days, and they did not cite *Bradshaw* as support for their decision. But in cases where a government entity initially fails to comply with NRS 239.0107(1)(d), but nevertheless provides written notice of a denial and a citation to supporting legal authority before the party seeking disclosure files a writ petition, the Nevada Supreme Court has refused to read a rule into the NPRA that would require a government entity to assert a legal basis for withholding public records in its initial five-

day response to avoid waiving it. *See Clark Cty. Office of the Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 136 Nev. 44, 46-47, 48-50, 458 P.3d 1048, 1051, 1053-54 (2020) (considering whether a government entity waived its legal basis for withholding public records by failing to cite the authority supporting its decision in its initial five-day response to a records request); *Republican Attorneys Gen.*, 136 Nev. at 29-30, 32-33, 458 P.3d at 330-31, 332-33 (doing the same where the government entity failed to respond to a records request within the five-day period for doing so).

While the supreme court has not directly addressed what happens when a government entity identifies a legal basis for denying a records request after the five-day period for responding to the request, but waits to cite supporting legal authority until the requesting party petitions for a writ of mandamus to challenge the denial, as respondents did in the present case, the supreme court's rationale in *Coroner/Medical Examiner* and *Republican Attorneys General* demonstrates that waiver does not apply under such circumstances. Indeed, those decisions were based on the fact that waiver is not an enumerated remedy in the NPRA, that the Nevada Legislature specifically considered adding a waiver provision to NRS 239.0107 and declined to do so, and that it would be inappropriate to require disclosure of Nevadans' private information based on a governmental entity's failure to assert a legal basis for withholding the records within a certain period. 136 Nev. at 48-50, 458 P.3d at 1053-54; 136 Nev. at 31-33, 458 P.3d at 331-333. Thus, we reject Panicaro's argument that respondents waived their ability to assert the confidentiality privilege.

The parties' next dispute essentially concerns whether the district court could properly make a determination concerning whether the Street Vibrations arrest records 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 or anticipated criminal investigation or proceeding. 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(1). 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 upon [*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, 217-18, 234 P.3d 922, 924, 926 (2010) (examining the legislative amendments that adopted NRS 239.001(2) and (3), reasoning that they require a presumption of openness, and construing *Bradshaw*'s balancing test in light of the amendments). 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 withheld Street Vibrations arrest records involved cases that were "open with the [District Attorney's] office," but they have only offered limited details concerning the proceedings and have not 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 proceeding[s]" 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. *Haley*, 126 Nev. at 219, 234 P.3d at 927; *DR Partners*, 116 Nev. at 621, 6 P.3d at 468. Given this deficiency, we conclude that 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.

Lastly, the parties dispute whether the district court abused its discretion by denying Panicaro's petition insofar as it challenged whether NRS 239.055(1) permitted the SCSO to charge him a fee for any time that its staff would expend in reviewing its arrest records and identifying those that relate to citizens' arrests effected between January 1, 2008, and the date of his request. NRS 239.055(1) provides that, when a government entity must "make extraordinary use of its personnel or technological resources" to satisfy a public records request, it may charge a fee "not to exceed 50 cents per page for such extraordinary use." However, the fee must be reasonable and it "must be based on the cost that the governmental entity actually incurs for the extraordinary use of its personnel or technological resources." *Id.*

Throughout these proceedings, respondents have maintained that the SCSO was entitled to charge Panicaro a fee under NRS 239.055(1) in connection with his request for citizens' arrest records because satisfying

the request would require the SCSO's personnel to manually review records relating to 2,954 arrests to identify those that were effected by citizens, as opposed to deputies. To support this proposition, respondents provided the district court with the email correspondence from Gavenda to Panicaro in which she stated that, based on the foregoing, the SCSO would charge him a fee to respond to his request for the citizens' arrest records. Panicaro, on the other hand, provided an affidavit from a former Storey County Sheriff's Deputy, who averred that the SCSO utilizes a computer software application that would allow it to employ a keyword search to quickly identify all of the arrest records that were responsive to Panicaro's request. Respondents have never specifically addressed this affidavit. And because the district court did not make any findings to support its determination that the SCSO was entitled to charge Panicaro a fee under NRS 239.055(1) in connection with his request for citizens' arrest records, it not clear that the court considered the conflicting evidence on this issue. Consequently, we cannot uphold the denial of Panicaro's petition as it relates to his request for the citizens' arrest records on this basis.[3] *See Jitnan v. Oliver*, 127 Nev.

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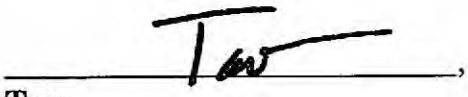
[3]Although not necessary to the disposition of this appeal, we address the specific fees that the SCSO sought to charge Panicaro for responding to his request to provide the district court guidance in evaluating the fees to which the SCSO may be entitled on remand. In particular, the SCSO's effort to charge Panicaro $17.43 per hour for the purported extraordinary use of its personnel plainly violated NRS 239.055(1), which limits the fee that a government entity may charge for such extraordinary use to 50 cents per page. *See Coroner/Med. Exam'r*, 136 Nev. at 59, 458 P.3d at 1060 (concluding that permitting a government entity to charge an hourly rate to review records in connection with a public records request would "flatly ignore the plain language of NRS 239.055(1)"). Aside from the NRS 239.055(1) extraordinary-use fee, the SCSO also sought to charge Panicaro a copy fee of 50 cents per page for any citizens' arrest records that it

424, 433, 254 P.3d 623, 629 (2011) ("Without an explanation of the reasons or bases for a district court's decision, meaningful appellate review, even a deferential one, is hampered because we are left to mere speculation."); *cf. Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015) (stating that "deference is not owed to legal error or to findings so conclusory they may mask legal error" (internal citation and quotation marks omitted)).

Accordingly, for the reasons set forth above, we

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

_____, C.J.
Gibbons



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produces, which is authorized by NRS 239.052(1) if the copy fee does not exceed the SCSO's actual cost. Because Panicaro requested that the SCSO provide the citizens' arrest records to him by email, and the district court did not address whether he could be charged a copy fee under such circumstances pursuant to NRS 239.052(1), we clarify that copy fees are only available for "the direct cost related to the reproduction of a public record," which does not include any costs that the government entity "incurs regardless of whether or not a person requests a copy of a particular public record." *See* NRS 239.005(1) (defining the term "[a]ctual cost" for purposes of the NPRA).

cc: Hon. James Todd Russell, District Judge
Joe Panicaro
Storey County District Attorney
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