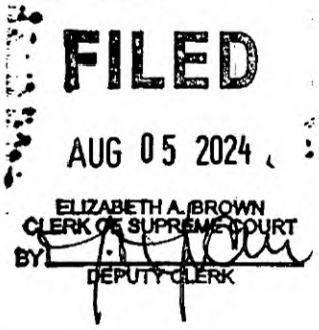
IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT A. CONRAD AN INDIVIDUAL DOING BUSINESS AS THISISRENO.COM,
Appellants,
vs.
CITY OF RENO, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,
Respondent.

No. 86340




*ORDER AFFIRMING IN PART, VACATING IN PART, AND REMANDING*

This is an appeal from a district court order granting in part and denying in part a petition for a writ of mandamus to compel production of public records. Second Judicial District Court, Washoe County; Kathleen A. Sigurdson, Judge.

Robert Conrad d/b/a thisisreno.com regularly submits public records requests under the Nevada Public Records Act (NPRA) to government entities. The City of Reno denied several of Conrad's requests, and he sought a writ of mandamus directing the City to make those records available and to provide updates should records withheld as confidential later become available, citing NRS 239.0107(1). The district court denied Conrad's petition to order the City to provide Reno City Council Member Devon Reese's social media communications with constituents because the City did not have custody or control over Reese's private devices and social media accounts. Further, the district court denied Conrad's petitions regarding several requests for police officer body cam footage that the City deemed confidential because they related to an ongoing criminal investigation. Conrad appeals those denials and also contends

NRS 239.0107(1) requires government entities to update requesters when confidential records later become available.

*Standard of review*

This court reviews a district court order denying a petition for a writ of mandamus under an abuse-of-discretion standard. *Conrad v. Reno Police Dep't* (*Conrad I*), 139 Nev., Adv. Op. 14, 530 P.3d 851, 855 (2023). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Skender v. Brunsonbuilt Constr. & Dev. Co., LLC*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006) (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)). Questions of statutory construction and interpretation receive de novo review. *Conrad I*, 139 Nev., Adv. Op. 14, 530 P.3d at 856.

The NPRA provides that "unless otherwise declared by law to be confidential, all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person . . . ." NRS 239.010(1). Elected officials fall within the NPRA's definition of a governmental entity. NRS 239.005(5)(a). The NPRA's purpose "is to foster democratic principles by providing members of the public with prompt access to inspect, copy or receive a copy of public books and records to the extent permitted by law." NRS 239.001(1).

A governmental entity that seeks to prevent the disclosure of a record in its custody or control as confidential bears the burden of proving confidentiality. NRS 239.0113(2). To meet that burden, the governmental entity must establish either an express statutory basis for withholding the record as confidential or that, on balance, the government's "interest in nondisclosure clearly outweighs the public's interest in access." *Conrad I*, 139 Nev., Adv. Op. 14, 530 P.3d at 855 (quoting *Las Vegas Metro. Police Dep't v. Las Vegas Rev. J.*, 136 Nev. 733, 735, 478 P.3d 383, 386 (2020)). But

for the duty to disclose a public record to arise, the record must be in the governmental entity's legal custody or control. *See* NRS 239.010(5) (2024); *Las Vegas Metro. Police Dep't v. Blackjack Bonding*, 131 Nev. 80, 86, 343 P.3d 608, 613 (2015).

*The district court did not err by concluding that the City did not have custody or control of Councilmember Reese's private devices and social media accounts*

Conrad's mandamus petition named the City as a party and did not include Councilmember Reese as a defendant. The district court found that Reese used social media to communicate with constituents, but because the City did not control Reese's private devices and accounts, the court could not order the City to provide records on those devices. Conrad argues that the district court should have ordered nonparty Reese to provide the records.

With limited exceptions, the NPRA requires the "governmental entity that has legal custody or control of a public book or record" to allow public inspection of the record. NRS 239.010(3). Materials on an elected official's personal devices and social media accounts are not categorically exempt from the NPRA. *See Comstock Residents Ass'n v. Lyon Cnty. Bd. of Comm'rs*, 134 Nev. 142, 147-49, 414 P.3d 318, 322-23 (2018). Elected officials are themselves "governmental entities," NRS 239.005(5)(a), and records in their private possession may be subject to disclosure under the NPRA. *Id.* at 148, 414 P.3d at 323. "Whether the governmental agency had effective control over the requested record is a question of fact." *Id.*

Conrad submitted his requests for Reese's social media communications to the City. In response, the City provided emails and text messages from City-issued devices and accounts Reese used but denied having additional responsive records within its custody or control. Conrad's

petition challenged the completeness of the City's response, quoting a public statement Reese had made about being freely available on social media and attaching two social media exchanges between Reese and constituents that Conrad deemed responsive to his request yet the City had not produced. In its answer, the City denied having additional responsive records within its custody or control. As support, it presented affidavits from the City Clerk and from Reese. The City Clerk's affidavit described her records search, including a meeting with Reese, who told her he did not have any responsive text or email messages on his personal devices or social media platforms. In his affidavit, Reese described the City's public record policy. He averred that, consistent with that policy, he "conduct[s] official City business ***exclusively*** on my City-issued cell phone, and other devices, accounts and systems within the City's legal custody," and that no public records exist on his private cell phone or other personal devices or platforms.

The district court denied Conrad's petition for a writ of mandamus as to the Reese social media requests. It determined that the City did not have "sufficient control" over Reese's personal phone or social media accounts to require further disclosures. Conrad argues that this ruling conflicts with *Comstock*, 134 Nev. at 146, 414 P.3d at 322, which recognized that "records concerning the performance of the public's business are public, and their storage on private devices does not alter that determination," and, relatedly, "that a public record is [not] inherently beyond the control of a governmental entity by virtue of the fact that it exists on a device or server not designated as governmental." *Id.* at 148, 414 P.3d at 323. But this argument misses the differences between *Comstock* and this case. Unlike the district court in *Comstock*, the district court here did not hold that records that are located on a private device or

platform are categorically exempt from the NPRA or inherently beyond the control of a governmental entity. It held that, based on the evidence presented, the City discharged its disclosure obligation when it produced the responsive records it found on Reese's City-issued devices and platforms, asked Reese to provide any responsive records on his personal devices and platforms, and accepted Reese's statement that he had no additional responsive records on his private devices and platforms. *See Toensing v. Att'y Gen.*, 178 A.3d 1000, 1010–11 (Vt. 2017) (holding that records are not off-limits because housed on an official's personal device but noting that this means the governmental entity must "ask the identified employees to turn over any public records responsive to plaintiff's request that are in their personal email or text message accounts," not that the entity "should, or even could, compel individual employees to hand over their smartphones or log-in credentials for their personal email accounts in response to [a] public records request."); *Nissen v. Pierce Cnty.*, 357 P.3d 45, 56–57 (Wash. 2015) (holding that an "employee's good-faith search for public records on his or her personal device can satisfy an agency's obligations under the PRA").

The district court properly treated the issue of the City's ability to provide the public records, if any, located on Reese's private devices and social media accounts as a question of fact. *See Comstock*, 134 Nev. at 148, 414 P.3d at 323. The City does not have the means to control Reese, an elected public official, to the same extent it might contractually control a private contractor or employee. *Cf. Koontz v. State*, 90 Nev. 419, 529 P.2d 211 (1974) (holding that an elected official is accountable to the electorate). As Conrad conceded at oral argument, Reese's private cell phone and social media accounts were beyond the City's control; it could not compel Reese to

turn over his private cell phone or the passwords to his personal social media accounts so it could search them itself. This does not leave Conrad without the means to reach public records on Reese's private devices or platforms, given that Reese is himself a "governmental entity," NRS 239.005(5)(a). On this record, the district court's finding that the City complied with its duty to produce responsive records over which it had custody and control was supported by substantial evidence, compelling us to affirm.

*NRS 239.0107(1)(d) does not require ongoing notice to requesters*

Conrad argues that NRS 239.0107(1)(c)(1) requires government entities to notify requesters when previously confidential materials become available later. NRS 239.0107 provides that:

> (c) Except as otherwise provided in paragraph (d), if the governmental entity is unable to make the public book or record available by the end of the fifth business day [it must] . . . .
>
> (1) Provide to the person, in writing, notice of the fact that it is unable to make the public book or record available by that date and the earliest date and time after which the governmental entity reasonably believes the public book or record will be available . . . . If the public book or record or the copy of the public book or record is not available to the person by that date and time, the governmental entity shall provide to the person, in writing, an explanation of the reason the public book or record is not available and a date and time after which the governmental entity reasonably believes the public book or record will be available . . . .
>
> . . . .
>
> (d) If the governmental entity must deny the person's request because the public book or record, or a part thereof, is confidential, provide to the person, in writing:

(1) Notice of that fact; and

(2) A citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential.

NRS 239.0107(1)(c)-(d).

This statute is unambiguous and internally harmonious. Under NRS 239.0107(c), the duty to notify a requester when a record will become available is expressly excluded from instances where there is a denial of a request based on confidentiality. The Legislature did not include a subsequent notice requirement in subpart (d), so by its plain language, NRS 239.0107(1) does not require government agencies who have sufficiently shown that the requested materials are confidential to further notify requesters if or when the materials later become available. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 156 (2012) (scope of subparts canon). NRS 239.0107(1) therefore does not require government agencies who have sufficiently shown that the requested materials are confidential to further notify requestors. Conrad's interpretation to the contrary would read language into subpart (d) and arguably impose a burden on the government responder, and we reject it for those reasons.

*The order is vacated and the matter remanded for the district court to apply intervening caselaw to the requests for body cam footage*

Conrad argues that in denying his requests for police bodycam footage, the City made "blanket citations" to the balancing factors and that "[m]ore is required." Conrad also argues the district court erred by declining to review the balancing test for each confidential record. *See Donrey of Nev., Inc. v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990) *superseded by statute as recognized in Las Vegas Rev. J. v. Las Vegas Metro. Police Dep't*, 139 Nev. Adv., Op. 8, 526 P.3d 724, 735-36 (2023). These issues

are clarified by our recent decision in *Conrad I*, 530 P.3d at 856, which came down after the district court decided this case. We therefore vacate and remand as to the issue related to body camera footage for the district court to reconsider under *Conrad I*.

Accordingly, we

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

_____, C.J.
Cadish

_____, J.
Stiglich

_____, J.
Pickering

_____, J.
Herndon

_____, J.
Parraguirre

_____, J.
Bell

cc: Hon. Kathleen A. Sigurdson, District Judge
David Wasick, Settlement Judge
Luke A. Busby
Reno City Attorney
Washoe District Court Clerk

[1]The Honorable Patricia Lee, Justice, did not participate in the decision of this matter.