

526 P.3d 724
Supreme Court of Nevada.

LAS VEGAS REVIEW-JOURNAL, INC., Appellant,
v.
LAS VEGAS METROPOLITAN POLICE
DEPARTMENT, Respondent.

No. 82460
|
Filed March 30, 2023

Synopsis

Background: Requester news agency filed petition for writ of mandamus to access police department records of investigation of a trooper's potential criminal activity. The District Court, Clark County, Veronica Barisich, J., denied the petition. Requester appealed.

Holdings: The Supreme Court, Cadish, J., held that:

informant privilege did not permit department to refuse to disclose officer's report in its entirety;

informant privilege did not permit department to refuse to withhold property reports;

modification of audio recordings of confidential informant's (CI) voice would not amount to creation of a new record beyond department's obligations under the Nevada Public Records Act (NPRA);

general balancing test did not support department's refusal to disclose records;

burden-shifting test for nontrivial personal privacy interests did not provide basis for department to withhold all information in property reports;

burden-shifting test for nontrivial personal privacy interests did not provide basis for department to withhold all information contained in officer's report; and

trial court abused its discretion by concluding that requester failed to meet its burden to show that access to records advanced significant public interests.

Reversed and remanded with instructions.

Procedural Posture(s): On Appeal; Petition for Writ of Mandamus.

*728 Appeal from a district court order denying a petition for a writ of mandamus seeking to compel production of public records under the NPRA. Eighth Judicial District Court, Clark County; Veronica Barisich, Judge.

Attorneys and Law Firms

McLetchie Law and Margaret A. McLetchie, Las Vegas, for Appellant.

Marquis Aurbach Chtd. and Craig R. Anderson and Jacqueline V. Nichols, Las Vegas, for Respondent.
BEFORE THE SUPREME COURT, EN BANC.¹

¹ The Honorable Justices Patricia Lee and Linda Marie Bell did not participate in the decision of this matter.

OPINION

By the Court, CADISH, J.:

This appeal involves the denial of a records request made pursuant to the Nevada Public Records Act (NPRA). The request, made by a reporter, concerns an investigation into potential criminal activity by a law-enforcement officer. The police department conducting the investigation denied the reporter's request several times, first claiming that the investigation was ongoing, then denying that any public records were available, and finally releasing heavily redacted portions of the investigative files. The reporter's news agency sought relief in the district court, but the district court ultimately denied the petition, concluding that the files

contained confidential and private information not subject to public release.

The news agency now raises several arguments in challenging the district court's decision. Addressing these arguments, we first reject the argument that a governmental entity waives its claims of confidentiality by failing to timely respond to a public-records request because waiver risks harm to third-party interests and thus does not constitute an appropriate remedy for noncompliance with the NPRA's timeliness requirement.

We consider second whether records related to a police investigation into a law-enforcement officer are confidential under NRS 49.335 based on the assertion that the information therein, when provided by a confidential informant, may reveal the informant's identity. We conclude that while the informant privilege in NRS 49.335 provides a basis to deem governmental records confidential, it does not permit the governmental entity to refuse to disclose records where it failed to prove that the withheld information exposes the informant's identity and, more importantly, where selective and narrow redactions of the records would adequately protect the informant's identity.

Also related to confidentiality, we consider third whether, under our balancing tests, the police department met its burden to establish the records as confidential based on assertions that they contain potentially harmful and private information, when weighed against the significant public interests in access to those records. We conclude that, no, the unsubstantiated assertions of harm, stigmatization, and privacy do not justify withholding the investigative records here, particularly when weighed against the significant public interests that access to these records advance. However, to the extent the record supports these concerns, redactions adequately protect against them in this case.

As the district court abused its discretion in denying the NPRA petition, we reverse and remand with instructions to the district court to issue a writ of mandamus compelling production of the investigative files.

**729 FACTS AND PROCEDURAL HISTORY*

A reporter for appellant Las Vegas Review-Journal, Inc. (LVRJ) learned of a 2018 investigation by respondent Las Vegas Metropolitan Police Department (Metro) into a Nevada Highway Patrol (NHP) trooper concerning allegations that the trooper had solicited a confidential informant (CI) to murder or harm his wife. The reporter made a public-records request under the NPRA in December 2019 for the entire case file, including all video and audio recordings, associated with Metro's investigation of the matter. Responding five business days later, Metro withheld the records on the basis that they "pertain[ed] to an open criminal investigation." Unbeknownst to Metro, the reporter had obtained from an undisclosed source an Officer's Report summarizing Metro's investigation, which noted that Metro had closed the investigation over a year earlier in November 2018 after a decision was made not to file criminal charges against the trooper.²

² The report has been made public, as it has been filed with the district court below; it was also included in the record before this court.

According to that report, Metro officers met with and recorded an interview of the CI, whom the trooper had contacted to "take [] care of" his wife. Metro officers surveilled a subsequent meeting between the trooper and the CI from nearby. The trooper, who arrived at the meeting in his NHP vehicle and uniform, again asked the CI to take care of his wife. The CI, who had been outfitted with a covert audio-recording device, gave "numerous" scenarios on how to harm her, and at one point, the trooper asked how much these scenarios cost.

The report also details that Metro officers briefed a lieutenant with NHP and a sergeant with the Office of Professional Responsibility (OPR) immediately after the arranged meeting. NHP permanently relieved the trooper of duty and committed him to a medical evaluation, holding him in the hospital for 72 hours. Officers also notified the trooper's wife of the incident and seized the trooper's firearms from their residence. A detective found a GPS tracking device in the trunk of the vehicle of the trooper's wife. Soon after, the trooper's wife filed a petition for divorce and obtained a temporary protection order, both of which recounted some details of Metro's investigation and the trooper's actions. When Metro officers attempted to serve the

trooper with the temporary protection order at his residence, he fled the scene.

The report continues that Metro officers, after a discussion, concluded the elements of solicitation for murder were not met. They also met with prosecutors at the Clark County District Attorney's Office (CCDA), including Chief Deputy Christopher Lalli. After reviewing the evidence collected by Metro, Lalli and his colleagues agreed that the elements for "any criminal charges" against the trooper were not met. They also concluded that waiting to obtain evidence to support criminal charges presented "too big of a risk to the safety of the family," NHP and OPR continued a separate investigation concerning violations by the trooper of their respective internal policies, the outcome of which is not included within the report. OPR sought to conduct a follow-up interview with the CI; however, the CI refused out of fear of retaliation from NHP. The lead detective and a sergeant involved in the investigation gave recorded interviews to OPR detailing their "opinions of" the trooper, including "how his conduct reflects that of [a] sworn police officer," before ultimately closing the Metro investigation in November 2018.

Relying in part on information obtained from this report, the LVRJ reporter renewed his request for the case file, informing Metro that his probe of the incident found that Metro had, in fact, closed its investigation into the trooper a year earlier. Another four business days later, Metro responded that it had "researched [the] request and determined [that] there [were] no public records available." The reporter replied to clarify whether Metro meant that "no such records exist" or that the existing records qualified as "confidential."

Eight business days later, Metro produced three Property Reports. Within these documents, *730 almost all information had been redacted. Each redaction was accompanied by standardized abbreviations in the redacted space, followed by standard documents purporting to provide (verbatim) rationales for the redactions of each separate document. In this disclosure, Metro neither provided the Officer's Report nor acknowledged its existence. Shortly thereafter, LVRJ through counsel emailed Metro regarding perceived deficiencies in its compliance with the NPRA, including Metro's use of standard explanations to withhold

the redacted information, and renewed LVRJ's request for the records.

After Metro did not respond, LVRJ petitioned the district court for a writ of mandamus to access the requested public records and to impose penalties on Metro. LVRJ filed an opening brief in support of the petition, attaching an unredacted copy of the Officer's Report of the investigation.³ LVRJ argued that Metro had failed to meet its burden to establish the confidentiality of the records; it therefore requested that the district court order disclosure of the records. It also asserted that Metro, by its failure to timely respond to the requests, had waived any assertions of confidentiality that did not implicate third-party interests. It alternatively requested that the district court compel Metro to produce a privilege log identifying the withheld documents and setting forth the specific bases to continue to withhold those documents. Finally, LVRJ requested the court impose penalties on Metro based on several alleged willful failures to comply with the NPRA.

³ Over Metro's objections, the district court declined to seal the report.

Responding to the opening brief, Metro lambasted LVRJ's petition as an "abusive" request for public records. It attached declarations from two officers, both of whom expressed concern that disclosure of the case file would expose investigative tactics, reveal the identities of individuals involved, such as undercover officers, the suspect, the CI, and the victim, thwart future investigations, and subject the suspect to "stigmatization" and "harassment." Citing to Nevada caselaw and the federal Freedom of Information Act (FOIA), Metro argued that it timely responded to the requests, appropriately withheld records, and gave "extensive citations" to withhold the records. It also contended that it had not willfully violated the NPRA based on its proper reliance on several exemptions to disclosure.

Over Metro's objections, the district court ordered Metro to produce a privilege log. The privilege log identified the case file as comprised of the following documents: (1) an Officer's Report (allegedly the same report filed in the lawsuit); (2) three Property Reports; and (3) three recordings of the CI Metro further maintained that the Officer's Report and Property Reports contained "identifying" and "personal"




information regarding the CI, suspect, and undercover officers. For each log entry, Metro provided identical privilege claims and explanations to support withholding the documents, relying on two separate balancing tests and asserting, for the first time, two statutory exemptions.


Following production of the privilege log, LVRJ questioned its completeness and challenged the generalized, identical string citation provided for each log entry as insufficient under the NPRA. It again argued that Metro's confidentiality claims lacked support, also pointing out Metro had raised some of its confidentiality claims for the first time. Further, it renewed its request to impose penalties on Metro, relying on Metro's conduct in this and other NPRA litigation to show a pattern of willful failures to comply with the NPRA.

The district court denied LVRJ's petition. First, the district court concluded that NRS 49.335 justified withholding the entire case file, as the Officer's Report, Property Reports, and recordings revealed the identity of the CI who had participated in the investigation. Second, the district court concluded that two separate balancing tests also supported withholding the entire investigative file. In applying those tests, it reasoned that disclosure jeopardized the privacy interests of and "needlessly" endangered the lives of those involved in the investigation, including the CI, victim, and officers, and that these considerations "substantially outweigh[ed] the *731 public's interest in access." It similarly determined that the requests implicated nontrivial privacy interests of third parties, such as "the name of each victim," an "officer's home address," "a private citizen's alleged infidelity and sexual proclivity," "highly personal medical history," and "personal identifying information of a [CI]." Moreover, the court concluded that the public's interest in access did not outweigh the privacy interests implicated by disclosure because the records did not implicate any "accountability of elected officials," "any, arrest or criminal prosecution," or "any legitimate type of public inquiry." Third, the district court found that redactions of the case file "would constitute a pointless exercise," as almost all of the information contained in the case file would require redaction. In denying the petition, the district court did not address LVRJ's request to apply waiver or penalties. This appeal followed.

DISCUSSION

Standard of review under and overview of the NPRA

We review a district court's denial of a petition for a writ of mandamus seeking access to public records for an abuse of discretion, except where, as here, the petition implicates questions of law, which we review de novo.  *Clark Cty. Sch. Dist. v. Las Vegas Review-Journal (CCSD)*, 134 Nev. 700, 703-04, 429 P.3d 313, 317 (2018), The NPRA requires governmental entities to make available to the public upon request any public records within their legal custody or control so as to "foster democratic principles." NRS 239.001(1); *see also Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 878, 266 P.3d 623, 626 (2011) ("[T]he provisions of the NPRA ... promote government transparency and accountability."). Public records include any book or record of a governmental entity unless declared confidential by law.  NRS 239.010(1). Records thus qualify as confidential and exempt from disclosure only to the extent that a specific statutory or caselaw exemption applies. *See Gibbons*, 127 Nev. at 880, 266 P.3d at 628 (explaining that limitations on disclosure may be based on "a statutory provision" or "a broad balancing of the interests involved"). The NPRA further imposes several obligations on governmental entities in responding to, and even in denying, requests for public records. *See, e.g., NRS 239.0107(1)(d)(1)-(2)* (requiring entities to provide the requester with a written denial that includes "citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential"). When only portions of a record qualify as confidential, a "governmental entity ... shall not deny a request ... on the basis" of confidentiality "if the governmental entity can redact, delete, conceal or separate, including, without limitation, electronically, the confidential information from the [nonconfidential] information."  NRS 239.010(3).

In reviewing a public-records request, we follow a framework by which to test an entity's "claims of confidentiality under the backdrop of the NPRA's" important principles. *Gibbons*, 127 Nev. at 880, 266 P.3d at 628. We start our "analysis of claims of confidentiality under the [NPR] with a presumption in favor of disclosure."  *Pub. Emps.' Ret. Sys. of Nev. v. Reno Newspapers, Inc. (PERS)*, 129 Nev. 833, 837, 313 P.3d 221, 223-24 (2013). Absent a

statutory exemption, we apply a balancing-of-the-interests test initially derived from our caselaw that is broadly applicable to any claims of confidentiality. *Gibbons*, 127 Nev. at 880, 266 P.3d at 628; *see also* NRS 239.001(3) (directing courts and government agencies to apply the “balancing of interests” narrowly). Consistent with our starting presumption, the governmental entity bears the burden to prove, under a preponderance standard, that the requested records qualify as confidential by showing either that the records remain protected by a statutory exemption or that the entity’s “interest in nondisclosure clearly outweighs the public’s interest in access.” *Gibbons*, 127 Nev. at 880, 266 P.3d at 628; *see also* NRS 239.0113. In neither case does the entity satisfy its burden by making “a non-particularized showing, or by expressing hypothetical concerns.” *Gibbons*, 127 Nev. at 880, 266 P.3d at 628 (citation omitted). Finally, we adhere to the NPRA’s mandate to liberally construe any provisions that facilitate access to public records; conversely, we narrowly construe *732 any exemptions or balancing tests that limit access to public records. NRS 239.001(2)-(3); *see also Clark Cty. Office of Coroner/Med. Exam’r v. Las Vegas Review-Journal (Coroner’s Office)*, 136 Nev. 44, 45, 458 P.3d 1048, 1050-51 (2020) (interpreting a limitation on access to public records “narrowly” and concluding such limitation “applies strictly”).

Waiver is not available to remedy noncompliance with the NPRA’s requirement for a governmental entity to respond to a records request within five business days

Acknowledging that we have previously rejected waiver as a remedy for the failure to timely respond to NPRA requests, LVRJ nevertheless asks this court to apply waiver to several of Metro’s claims of confidentiality for its failure to timely respond to LVRJ’s requests, based on a 2019 amendment that expanded remedies under the NPRA and emphasized prompt access to records.

Although a governmental entity must respond to a records request and include citations to any relevant authority making the requested records confidential within five business days of the request, *see* NRS 239.0107(1)(d), to do so, it must sift through “more than 400 explicitly named statutes, many of which prohibit the disclosure of public records that contain confidential information” to determine whether a specific exemption applies, *Republican Att’y’s Gen.*

Ass’n v. Las Vegas Metro. Police Dep’t (RAGA), 136 Nev. 28, 31, 458 P.3d 328, 331 (2020). Thus, just as we have recognized that “the provisions of the NPRA place an unmistakable emphasis on” prompt disclosure, *see Gibbons*, 127 Nev. at 882, 266 P.3d at 629; NRS 239.001(1) (providing that the NPRA achieves its purpose “to foster democratic principles by providing members of the public with prompt access” to public records), we have also cautioned that the obligation to disclose does not come “without limits,” *RAGA*, 136 Nev. at 31, 458 P.3d at 331.

Prior to 2019, the NPRA provided only court-ordered disclosure or inspection of the records to correct a governmental entity’s noncompliance with its requirements and to compel production of public records, 2019 Nev. Stat., ch. 612, § 7, at 4007-08. Starting in 2019, those statutory remedies were legislatively supplemented by “any other rights or remedies that may exist in law or in equity.” *See id.*; NRS 239.011(4). Waiver constitutes an equitable remedy, but we have “adamantly disagree[d]” with the suggestion that waiver, by virtue of the fact that it “exist[s] in equity,” applies to claims of confidentiality as a result of noncompliance with the timeliness requirement.⁴ *RAGA*, 136 Nev. at 32, 458 P.3d at 332. We find no cause to depart from our reasoning in *RAGA* that applying waiver to a governmental entity’s “assertion of confidentiality would lead to an absurd penalty resulting in the public disclosure of Nevadans’ private information solely because of [the entity’s] failure to timely respond.” *Id.* While we sympathize with LVRJ’s frustration at Metro’s delays in responding to records requests, waiver of “an assertion of confidentiality due to Metro’s noncompliance with the response requirement goes far beyond the NPRA’s emphasis on [prompt] disclosure. It undermines the NPRA’s expressly listed exceptions for confidential information.” *Id.*; *see also* NRS 239.340(1) (mandating the district court impose a civil penalty for a governmental entity’s willful failure to comply with the provisions of the NPRA). Therefore, although the district court did not address LVRJ’s waiver request, we perceive no basis for reversal under these circumstances where waiver should not apply to bar Metro’s claims of confidentiality.

⁴ Although we did not apply the 2019 amendment at issue here to the facts in *RAGA*, our discussion of the amendment, in which we acknowledged the newly added language at issue here,

nevertheless remains persuasive under the facts before us. See *RAGA*, 136 Nev. at 29 n.1, 32, 458 P.3d at 330 n.1, 332.

Metro failed to meet its burden to show that the records should be withheld as confidential under NRS 49.335 because the small portions of identifying information may be redacted, without compromising such information
LVRJ argues that, contrary to the district court's conclusion, NRS 49.335 does not justify withholding the records in their entirety *733 simply because some portions of the record identify the CI.

We review statutory interpretation issues de novo and interpret a statute by its plain meaning unless the statute is ambiguous, or the resulting interpretation would lead to an absurd or unintended result. *Young v. Nev. Gaming Control Bd.*, 136 Nev. 584, 586, 473 P.3d 1034, 1036 (2020). “However, when the statute is ambiguous and subject to more than one interpretation,” we construe it “in a manner that conforms to reason and public policy.” *Nev. Att’y for Injured Workers v. Nev. Self-Insurers Ass’n*, 126 Nev. 74, 84, 225 P.3d 1265, 1271 (2010). “[W]henver possible, [the] court ... interpret[s] a rule or statute in harmony With other rules or statutes.” *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999).

The informant privilege permits a governmental entity “to refuse to disclose the identity of a person who has furnished to a law-enforcement officer information purporting to reveal the commission of a crime.” NRS 49.335. It extends to any person, including a CI. See, e.g., *Sheriff of Washoe Cty. v. Vasile*, 96 Nev. 5, 7, 604 P.2d 809, 810 (1980). While the statutory scheme leaves “identity” undefined, it distinguishes between the “identity of the informer” and the “informer's interest in the subject matter of his or her communication.” See NRS 49.355 (“No privilege exists under NRS 49.335 ... if the identity of the informer *or* the informer's interest in the subject matter of his or her communication has been disclosed by a holder of the privilege or by the informer's own action, or if the informer appears as a witness.” (emphasis added)).

As commonly and ordinarily understood, see *Young*, 136 Nev. at 587, 473 P.3d at 1036-37 (enforcing the “commonly

understood meaning” of “patron”), identity means “the qualities and attitudes that a person or group of people have, differentiating them from others,” or “[t]he distinguishing personality or attributes of an individual,” *Identity, Black's Law Dictionary* (11th ed. 2019); see also *State v. Euler*, 314 Kan. 391, 499 P.3d 448, 454 (2021) (“In addition, the word ‘identity’ has a plain and clear meaning today that connotes something that is personally possessed by an individual human being. Merriam-Webster defines identity as ‘the distinguishing character or personality of an individual.’ ” (quoting *Merriam-Webster Collegiate Dictionary* 616 (11th ed. 2003))). Identity includes “any attribute of an individual that *serves to identify* that individual to an ordinary, reasonable viewer or listener, including but not limited to (i) name, (ii) signature, (iii) photograph, (iv) image, (v) likeness, or (vi) voice.” *Nationstar Mortg. LLC v. Benavides*, 446 Ill.Dec. 697, 171 N.E.3d 514, 520 (Ct. App. 2020) (emphasis added) (quoting Illinois's Right to Publicity Act, § 765 Ill. Comp. Stat. Ann. 1075/5 (West 2018)).

Based on this understanding of identity, some circumstances may exist in which the informant privilege extends to “the content of an informant's statements” because the statements, by virtue of their subject matter, “disclose the identity of the informer.” E.g., *People v. Martinez*, 132 Cal.App.4th 233, 33 Cal. Rptr. 3d 328, 333-34 (2005) (quoting in the second quotation *People v. Hobbs*, 7 Cal.4th 948, 30 Cal.Rptr.2d 651, 873 P.2d 1246, 1252 (1994)) (conducting an “independent review of the record and sealed materials” to conclude that the information, “if disclosed, would tend to reveal the identity of the [CI]”). But where the information and the identity remain distinct, no confidentiality violations arise with the disclosure of the underlying information provided by the informant. See, e.g., *Mitrovich v. United States*, 15 F.2d 163, 163 (9th Cir. 1926) (finding no error in the trial court's refusal to allow the defendant to “ask[] the name of the informer,” but noting that the informer testified about the events at issue without disclosing the informer's identity). Combining these authorities, the plain meaning of identity under NRS 49.335 includes any attribute, quality, personality, or character that distinguishes or indicates an individual and encompasses the content of the informant's statements to law enforcement only to the extent such content reveals the identity of the informant.

*734 Applying this definition, as we must, in light of the NPRA's mandate to "narrowly" construe a public-records exemption, *see* NRS 239.001(3), we conclude that the district court abused its discretion in permitting Metro to withhold all records under this statutory exemption. Turning first to the Officer's Report, we recognize that the report contains attributes and qualities of the CI that make it possible to identify him or her.⁵ While the report does not include the CI's name, instead referring to him or her as "CI" throughout, it includes details about the CI's employment, the CI's familiarity with the NHP trooper through his or her employment, the CI's affiliation with a specific group, and the CI's attorney. Nevertheless, these background details do not justify withholding the Officer's Report in its entirety, as they remain excisable from the remainder of the report, which redaction the NPRA allows for and indeed favors over wholesale withholding. *See* NRS 239.010(3) (prohibiting withholding of public records where redaction, deletion, concealment, or separation of any confidential information in the public records remains possible).

⁵ As noted, LVRJ obtained this report through an undisclosed source, attached the report to a public filing before the district court, and included it in the record on appeal. And the report has not been sealed. While LVRJ has access to the report, we still discuss whether Metro was obligated to produce it under the NPRA, as the act does not limit a governmental entity's obligation to produce public records simply because the requester may have obtained some or all of those records through another source.

Moreover, the district court's conclusion that the report, in full, identified the CI was based on unsubstantiated claims that Metro solely relied on the CI to investigate the trooper and exaggerated assertions that the CI's assistance in the investigation by itself identified the CI. Even if the investigation included no other witnesses besides the CI, such fact does not identify the CI because, from the perspective of an ordinary and reasonable observer, nothing about the CI's involvement in the ensuing investigation includes personal attributes, characteristics, qualities, or personalities of the CI. Nor does the narrative, contained within the report, of how Metro conducted the undercover operation or of how the CI participated in the ensuing

investigation attribute any differentiating detail to the CI. While the trooper already knew the identity of the CI and, presumably, reached out to the CI because of his or her affiliations and connections, we disagree that the trooper's solicitation of the CI and the CI's decision to advise law enforcement of the potential crime differentiates this CI from any other CI in any meaningful way.

Turning second to the Property Reports, we find no evidence in the record that the Property Reports reveal the identity of the CI. While Metro stated, in conclusory fashion, that the Property Reports contained the personal information of the CI, it never explained what personal information was implicated in the Property Reports or even asserted that the personal information was inseparable from other information in the Property Reports, such as the collected evidence. Metro also never supported its assertion that a description of the evidence collected in the investigation would allow an outside observer to ascertain the CI's identity.

Finally, turning third to the recordings, we assume without deciding that the CI's voice constitutes a distinguishing attribute, as the district court concluded. However, Metro offered no explanation, let alone any evidence, for why modification of the CI's voice does not adequately protect the CI's identity. Instead, Metro now claims that modification requires the creation of a new record. While the NPRA does not require a governmental entity "to create new documents or customized reports" to comply with a records request, *PERS*, 129 Nev. at 840, 313 P.3d at 225, modification of a voice in an *existing* record does not amount to the creation of a new record, *Welsh-Huggins v. Jefferson Cty. Prosecutor's Office*, 163 Ohio St.3d 337, 170 N.E.3d 768, 786 (2020). We agree with the Ohio Supreme Court's reasoning, in addressing a provision similar to NRS 239.010(3) under its public-records act, that a record "already exist[s]" if "reasonable computer programming" permits the governmental entity to "produce the requested output." *735 *See id.* Here, Metro provided no support that it lacks the ability to modify the CI's voice or redact the portions of the recordings that distinguished the CI from others.

In sum, we conclude that the district court abused its discretion in denying LVRJ's petition to access the Officer's Report, Property Reports, and recordings. Even though the

district court purported to apply the same plain-meaning definition of identity discussed herein, it abused its discretion in permitting Metro to withhold the case file under NRS 49.335's informant privilege by relying on Metro's unsubstantiated assertions that broad swaths, if not all, of the public records requested by LVRJ revealed the identity of the CI. Having the benefit of the Officer's Report in the record, such assertions ring hollow. Metro provided no evidence that NRS 49.335 supports withholding those documents and recordings in their entirety or that selective redactions or modifications fail to satisfy any legitimate concerns about compromising the CI's identity. The district court further abused its discretion in declining to order redaction, in contravention of the NPRA's preference, of the small, identifying portions of the Officer's Report.⁶

⁶ We decline to address Metro's argument that NRS 289.025, which deems confidential "the home address and any photograph of a peace officer," supports withholding, as Metro cites no authority that NRS 289.025 survives the trooper's termination from NHP or supports wholesale nondisclosure over redaction. See *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider an issue where the party failed to "present relevant authority" or cogent argument).

Metro failed to meet its burden to show that the records are confidential under our court's balancing tests because, when compared to the public's significant interests in the records, Metro's unsubstantiated allegations of potential harm to individuals or privacy from disclosure fail to overcome the NPRA's presumption of disclosure

LVRJ argues that, in applying our balancing tests, the district court improperly deferred to Metro's unsupported claims that law enforcement would face harm and third parties would see their nontrivial privacy interests violated if the records were disclosed. It also contends that the district court failed to give appropriate weight and deference to the public's numerous interests in access to the public records.

As noted, we apply a balancing test in the absence of a statutory exemption rendering records confidential, which may allow the governmental entity to withhold the records as

confidential. *Gibbons*, 127 Nev. at 880, 266 P.3d at 628; *see also Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 217-18, 234 P.3d 922, 926 (2010); NRS 239.001(3). However, we have distinguished between a general balancing test applicable to any records, as embodied in our decisions in *Gibbons* and *Haley*, and a balancing test applicable to records that implicate nontrivial privacy interests, as embodied in our decisions in *CCSD* and *LVMPD*. *See Las Vegas Metro. Police Dep't v. Las Vegas Review-Journal (LVMPD)*, 136 Nev. 733, 738 & n.8, 478 P.3d 383, 388 & n.8 (2020) (emphasizing "that the *CCSD* test is distinct from the inquiry under *Gibbons*" and clarifying that "*CCSD* supplies a refined framework to analyze privacy claims," while "*Gibbons* applies to claims against disclosure that are unrelated to personal privacy"). As Metro claims that the records were properly withheld because they were confidential based on potential harm to officers and private based on the nontrivial privacy interests of those named therein, both balancing tests apply here, and we address each in turn below.

Our generalized balancing test favors disclosure of the investigative records

In *Haley*, we clarified that we employ the general balancing test first introduced in *Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990), "in accordance with the underlying policies and rules of construction required by the" NPRA, meaning that we narrowly construe exemptions and liberally apply the "policy for an open and accessible government." *Haley*, 126 Nev. at 218, 234 P.3d at 926; *see also* NRS 239.001(1)-(3). And similarly, we recognized that the NPRA, as early as 2007, has required us, in contrast to our application of *736 the balancing test in *Bradshaw*, to favor the public's interest in access over the governmental entity's interest in nondisclosure when weighing the respective interests. *See Haley*, 126 Nev. at 217-18, 234 P.3d at 926. What is more, we explained that the NPRA "requires a narrower interpretation of private or government interests promoting confidentiality or nondisclosure." *Id.* Consistent with the Legislature's mandate, it is the governmental entity's burden to show that its interests in confidentiality or nondisclosure "clearly outweigh[]" the public's interests in access to the records, as this balancing promotes the important purposes of

the NPRA in ensuring government accountability and transparency. *Gibbons*, 127 Nev. at 880, 266 P.3d at 628 (emphasis added); see *Haley*, 126 Nev. at 217-18, 234 P.3d at 926-27.

To the extent the district court's order may be construed as equally weighing the public's interest in access against Metro's interest in nondisclosure, it abused its discretion.⁷ More fundamentally, however, the district court abused its discretion in permitting Metro to support withholding the records in their entirety based on unsubstantiated claims that the release of the investigative records would endanger the lives of those involved in the investigation. For example, Metro did not explain or support its claim that descriptions of evidence contained in the Property Reports would endanger officers, reveal investigative techniques, identify the CI, or implicate the privacy interests of anyone involved. Similarly, contrary to Metro's assertions, the Officer's Report contained generalized descriptions of commonly known police tactics regarding the investigation. Even if the Officer's Report contained confidential techniques and sensitive information, Metro failed to support with evidence its contention that disclosure of such information would jeopardize the health and safety of law enforcement.⁸ As we concluded in *Haley*, a governmental entity's supposition does not overcome "the public's right to access." *Haley*, 126 Nev. at 218-19, 234 P.3d at 927 (agreeing that "[a] mere assertion of possible endangerment does not 'clearly outweigh' the public interest in access to these records" (quoting *CBS, Inc. v. Block*, 42 Cal.3d 646, 230 Cal.Rptr. 362, 725 P.2d 470, 474 (1986))).

⁷ While we discussed in *Bradshaw* some of the interests in nondisclosure that may apply, see *Bradshaw*, 106 Nev. at 636, 798 P.2d at 148, we never intimated that the failure on the part of the requester to prove that these interests were not implicated automatically supports the governmental entity's decisions to withhold the records, as the district court suggested in its order and Metro argues on appeal.

We also reject any suggestion in *Bradshaw* that the balancing test is "virtually identical" to FOIA's Exemption 7, see *id.* at 635 n.4, 798 P.2d at 147 n.4, because, as discussed already, the


Legislature's subsequent amendments to the NPRA altered the balancing test as originally conceived in *Bradshaw*. See NRS 239.001(3).

⁸ The declarations from two officers merely repeat the same vague conjectures about the potential harm to befall officers, the CI, and the NHP trooper. While the Officer's Report includes the names of certain officers, Metro overlooks that the NPRA prefers redaction over withholding in its entirety and that such redaction may be used to protect the identity of undercover officers, to the extent any such officers would otherwise be identified.

Putting aside the lack of evidence in the record to support Metro's arguments against disclosure, the district court also abused its discretion in engaging in only a perfunctory analysis of the public's interest in disclosure. LVRJ identified several compelling interests that the public possesses in these records, such as the oversight of law enforcement, the safety of the community, and the accountability of a law-enforcement officer who uses his position of authority to solicit the commission of a violent crime, yet all of these were summarily dismissed.




The district court instead repeated Metro's refrain that the public lacked any interest because neither was a crime committed nor was a public official accountable to voters involved. However, each of these assertions are belied by the record. The Officer's Report itself directly calls into question the claim that the suspect trooper did not commit a crime. Nevertheless, the assertion overlooks the public's interest in scrutinizing that conclusion. Moreover, the public has a significant interest in determining whether Metro's decision to close the investigation, and its participation, if any, in the fallout of the investigation, was informed and proper. *737 Regarding the alleged lack of involvement of a public official, Metro remains under the supervision of an elected sheriff (who was, at the time of the request, a candidate for governor) and Metro collaborates with the District Attorney's Office, which remains under the supervision of the elected district attorney. And the suspect NHP trooper was a public employee, tasked with ensuring the safety of the community, who allegedly used his position of great authority to undermine safety by attempting to inflict harm on another. In our view, the district court failed to meaningfully examine



and favor these interests in access to the case file, when compared to the weight the court gave to Metro's unsupported claims of harm, and in so doing, it exceeded its discretion. Accordingly, we conclude that the general balancing test does not support Metro's refusal to disclose the requested records.


Our burden-shifting balancing test under  CCSD favors disclosure of the investigative records


As distinct from the balancing test discussed above, we have adopted a burden-shifting balancing test in cases where the governmental entity asserts nontrivial personal privacy interests in the content of the records. *LVMPD*, 136 Nev. at 733, 737, 478 P.3d at 385, 387. We outlined the test as follows:




It first requires the government to establish a “personal privacy interest stake to ensure that disclosure implicates a personal privacy interest that is nontrivial or more than de minimis. Second, if the agency succeeds in showing that the privacy interest at stake is nontrivial, 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.”





 *CCSD*, 134 Nev. at 707-08, 429 P.3d at 320 (citation and alterations omitted) (quoting  *Cameranesi v. U.S. Dep't of Def.*, 856 F.3d 626, 637 (9th Cir. 2017)). Nontrivial personal privacy interests arise “where disclosure poses a risk of harassment, endangerment, or similar harm.” *LVMPD*, 136 Nev. at 739, 478 P.3d at 389;  *Cameranesi*, 856 F.3d at 638 (“Disclosures that would subject individuals to possible embarrassment, harassment, or the risk of mistreatment constitute nontrivial intrusions into privacy.”).


We have maintained that the governmental entity still bears the initial burden to prove by a preponderance of the evidence that the public records implicate “individual nontrivial privacy rights.” See  *CCSD*, 134 Nev. at 708-09, 429 P.3d at 321 (stating that the  *CCSD* balancing test “coheres with both NRS 239.0113 and *Gibbons*”). However, in meeting that burden, the governmental entity does not need “to wait for a serious harm from an unwarranted intrusion of personal privacy to occur in order to justify nondisclosure.” See *LVMPD*, 136 Nev. at 738, 478 P.3d at

388. While “real risks should not be discounted as ‘hypothetical’ merely because they have not crystallized into actual harm,” the governmental entity “surely” does “not meet its burden, even under  *CCSD*, by merely asserting a speculative or implausible harm.” *Id.* at 738 n.8, 478 P.3d at 388 n.8.


Recently, in clarifying that the  *CCSD* test applies “whenever the government asserts a nontrivial privacy interest,” *id.* at 733, 478 P.3d at 385, we did not retreat from the Legislature's declaration that a significant interest exists in access to information held by governmental entities for its own sake because such access “foster[s] democratic principles,” NRS 239.001(1); see *Gibbons*, 127 Nev. at 878, 266 P.3d at 626; see also *Coroner's Office*, 136 Nev. at 57-58, 458 P.3d at 1059 (concluding that “the public policy interest in disseminating information pertaining to child abuse and fatalities is significant,” but remanding to determine how such information “would advance the public's interest”).

Moreover,  *CCSD* and its progeny establish narrow circumstances in which the presumption in favor of disclosure is overcome. See *LVMPD*, 136 Nev. at 735, 478 P.3d at 386 (recognizing presumption that records are “open to public inspection”). It does not support nondisclosure because some information, in the abstract, is “personal” or “intimate” to an individual; rather, it protects information that, if disclosed, is harmful in some way because of its identifying features *738 to third parties who lack the ability to control the dissemination of such information. See, e.g., *id.* at 739, 478 P.3d at 389 (concluding that the unit assignments “reveal[ed] the locations of officers” and, thus, threatened, to “subject officers to harassment and retaliation”); *Coroner's Office*, 136 Nev. at 56, 458 P.3d at 1058 (permitting the governmental entity to refuse to disclose “private information and personal characteristics” of “medical records and health history” in juvenile autopsy reports, where such information revealed “detailed, intimate information about the subject's body and medical condition” (quoting, in the second clause,  *Globe Newspaper Co. v. Chief Med. Exam'r*; 404 Mass. 132, 533 N.E.2d 1356, 1357 (1989)));  *CCSD*, 134 Nev. at 709, 429 P.3d at 321 (concluding that disclosure of the “names or other information that would identify” witnesses or teachers posed a risk of “stigma or backlash” to those individuals because of

their participation in an investigation). But because selective redaction of this private information eliminates its identifying features and concomitant harms, the  *CCSD* balancing test does not provide a basis to withhold *all* information. See *Coroner's Office*, 136 Nev. at 55-56, 458 P.3d at 1057 (requiring redaction, not denial, of public records under the  *CCSD* balancing test if those records implicate nontrivial privacy interests);  *CCSD*, 134 Nev. at 707, 709, 429 P.3d at 319-20, 321 (specifically noting that the governmental entity requested to “redact ... everything” but allowing, on remand, for the entity to redact names and other identifying information);  NRS 239.010(3).

Applying the  *CCSD* balancing test to the requested records here, the district court exceeded its discretion in permitting Metro to withhold all the records based on the conclusion that *portions* of those documents implicated nontrivial personal privacy interests. Addressing first the Property Reports, Metro identified only three discrete aspects (the names, birth dates, and addresses of the victim and suspect) of the documents that involved personal privacy concerns, which, if disclosed, would subject those individuals to harm. Even accepting the assertions of harm as true, redaction clearly remains available, particularly in light of Metro's failure to show why redaction would fall short of protecting the victim and suspect from such harm.

Addressing second the Officer's Report, the district court disregarded that the victim herself disclosed many of the details of the investigation that in its view warranted nondisclosure. While we do not believe the victim's disclosure of such information negates that the records implicated her nontrivial personal privacy interests, we note only that the disclosure here undermines Metro's claims that the information, if disclosed, poses a danger to her or subjects her and the suspect to shame, ridicule, or stigmatization. Even so, a review of the Officer's Report makes clear that redactions of the victim's and suspect's name and address eliminate any identifying aspect without resort to withholding the entirety of the report and, thereby, disassociate the individuals involved from any personal details about them.

Moreover, while the governmental entity's burden under the  *CCSD* balancing test does not require proof of actual harm, Metro in this matter speculated as to the harm,

stigmatization, and harassment that would befall the victim, the suspect, the CI, and the officers. The privilege log Metro produced, as opaque as it was, did not even mention concerns about the personal privacy interests of the victim. It primarily focused on the CI, the identity of whom may be adequately protected from association with or participation in the investigation by redaction. And, importantly, we have never permitted a governmental entity to use individual personal privacy interests as a shield against accountability. Metro's argument here, if adopted, would seem to justify withholding all police reports, as they will almost always involve some embarrassing or identifying information about individuals, including victims, suspects, and witnesses. Accordingly, we conclude that the district court abused its discretion in shifting the burden to LVRJ to prove a significant public interest in the public records where Metro failed to make a plausible showing that disclosure implicated harm to nontrivial, identifying privacy interests *739 that redaction could not otherwise have avoided.

Finally, even if the burden properly shifted to LVRJ, the district court also failed to meaningfully consider the public's significant interests in access and how access to the documents facilitates those interests. The district court's conclusion that the absence of a crime supported Metro's nondisclosure ignores that support for this conclusion remains largely unverifiable because it appears in the very records that Metro refuses to disclose in their entirety. Moreover, the public has a significant interest in determining whether Metro handled the investigation appropriately or whether it treated a fellow law-enforcement officer with more sympathy or leniency than any other offender. To say the least, the incident raises questions about the safety of the public and the accountability of officers. But the public should not and, according to the NPRA does not, have to accept at face value Metro's claims that its actions were lawful and legitimate. And it may only begin to broach these concerns with access to the investigative records. Contrary to legislative directives and the corresponding balancing test, the district court gave little, if any, weight to the public's interest in these records. Thus, the district court abused its discretion in concluding that LVRJ failed to meet its burden to Show that access to the information advances significant public interests.⁹


⁹ LVRJ argues that the district court abused its

discretion by failing to impose civil penalties on Metro under NRS 239.340(1) (“In addition to any relief awarded pursuant to NRS 239.011, if a court determines that a governmental entity willfully failed to comply with the provisions of this chapter concerning a request to inspect, copy or receive a copy of a public book or record, the court must impose on the governmental entity a civil penalty”). As our decision today concludes that Metro has failed to comply with the NPRA's requirements, on remand, the district court must evaluate LVRJ's request for penalties under NRS 239.340(1), including determining whether Metro acted willfully in failing to comply with the NPRA'S requirements as discussed in this opinion.

CONCLUSION

While we conclude that waiver does not apply to any of Metro's claims of confidentiality, based on concerns for third parties, we conclude that the district court abused its discretion in denying disclosure, as none of the three bases offered by Metro support wholesale withholding. First, the informant privilege in NRS 49.335 supports only narrow redaction of details regarding an informant's identity, such as attributes, qualities, personalities, or characteristics that distinguish the CI from others. As Metro never proved that the information given by the informant meaningfully distinguishes him or her from others, NRS 49.335 does not permit Metro to withhold all the requested records.

Second, under the general balancing test, a governmental entity does not overcome the presumption in favor of public access to public records, where, as here, the entity speculates and overstates the sensitivity of the information or the danger of disclosure. And even if Metro had provided evidence of its claims, those risks of disclosure did not overcome the significant public interests in understanding why Metro determined no crime had been committed, what role supervisory elected officials played in that determination, and whether the officer involved faced appropriate accountability, if any.

Third, we emphasize that the  CCSD balancing test protects nontrivial personal privacy interests that, if disclosed, would subject those third-party individuals to harm. But because so little of the requested records contain this personal information and the alleged harm remains unsupported in the appellate record, narrowly tailored redaction adequately protects third parties from any harm that would result from dissemination of this information. Particularly in light of a preference for redaction, we conclude that the public's significant interests in these records overcomes Metro's interests in withholding the records in their entirety.

Concluding, as we do, that Metro failed to meet its burden under the NPRA to establish the requested records as confidential in their entirety under either a statutory or caselaw exemption, we reverse the district court's order denying the petition for writ of mandamus. Because we also conclude that *740 small portions of the documents contain identifying information regarding the CI and implicate nontrivial personal privacy interests of the victim and, potentially, the suspect and officers involved, we remand with instructions to the district court to evaluate the documents for their confidential portions consistent with this opinion, permit narrowly tailored redaction of such aspects, and compel production of the remainder of those documents. Additionally, we remand to the district court to assess the merits of LVRJ's request for penalties under NRS 239.340(1) and, if warranted by the statute, to impose an appropriate penalty on Metro.

The Legislature has, in enacting the NPRA, determined that the public's access to governmental records promotes government transparency and accountability and fosters democratic principles and participation. While the NPRA nevertheless recognizes the importance of safeguarding confidential and sensitive information, it does not permit courts to accept at face value assertions that disclosure of governmental records jeopardizes the safety or eviscerates the personal privacy interests of others. Today, in compelling disclosure, we simply adhere to these important principles.

We concur:

139 Nev. Adv. Op. 8

Stiglich, C.J.

Pickering, J.

Herndon, J.

Parraguirre, J.

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