of Howard's donative intent at trial, thereby rebutting the secondary presumption that the parties did not own the property equally. Accordingly, we affirm the judgment of the district court.

Pickering and Hardesty, JJ., concur.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF NEVADA, a Public Agency, Appellant, *v.* NEVADA POLICY RESEARCH INSTITUTE, INC., Respondent.

No. 72274

October 18, 2018 429 P.3d 280

Appeal from a district court order granting a petition for a writ of mandamus concerning a public records request. First Judicial District Court, Carson City; James E. Wilson, Judge.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied December 24, 2018]

Stiglich, J., with whom Hardesty and Parraguirre, JJ., agreed, dissented.

McDonald Carano LLP and *Adam D. Hosmer-Henner* and *Joshua J. Hicks*, Reno, for Appellant.

Joseph F. Becker, Reno, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Douglas, C.J.:

In this appeal, we consider whether the Nevada Public Records Act (the Act) requires the Public Employees' Retirement System of Nevada (PERS) to disclose certain employment and pension payment information about its government retirees held in its computer database when sought through a public records request. We hold that where the requested information merely requires searching a database for existing information, is readily accessible and not confidential, and the alleged risks posed by disclosure do not outweigh the benefits of the public's interest in access to the records, the Act mandates that PERS disclose the information. Because PERS represents that the computer database may no longer be able to produce the information as it existed when the public records request was

made, we remand for the district court to determine an appropriate way for PERS to comply with the request.

FACTS AND PROCEDURAL HISTORY

Respondent Nevada Policy Research Institute, Inc. (NPRI) submitted a public records request to appellant PERS seeking payment records of its government retirees, including retiree names, for the year 2014. NPRI sought to post this information on their TransparentNevada.com website for the public to view. Despite having previously disclosed the requested information to NPRI for the year 2013, PERS refused to disclose the requested information for the following year. PERS argued that the raw data feed that an independent actuary uses to analyze and value the retirement system did not contain the names of its government retirees, only redacted social security numbers, and it had no duty to create a new document in order to satisfy NPRI's request. NPRI alternatively requested any other records that would contain the following information for the year 2014: retiree name, years of service credit, gross pension benefit amount, year of retirement, and last employer. PERS still refused to disclose the requested information by denying the availability of any such record.

NPRI filed a petition for a writ of mandamus in district court seeking retiree name, payroll amount, date of retirement, years of service, last employer, retirement type, original retirement amount, and COLA increases. NPRI asserted that the requested information is not confidential because it is a public record and is easily accessible through an electronic search of the PERS database. Following an evidentiary hearing, the district court concluded that the requested information was not confidential, that the risks posed by disclosure did not outweigh the benefits of the public's interest in access to these records, and that PERS had a duty to create a document with the requested information. Thus, the district court granted NPRI's petition and ordered disclosure. However, the district court ordered PERS to produce only retiree name, years of service credit, gross pension benefit amount, year of retirement, and last employer.

DISCUSSION

PERS argues that the district court erred by requiring disclosure because the information was confidential, and the risks posed by disclosure outweigh the benefits of the public's interest in access to the records. It also argues that the district court's decision goes against this court's holding in *Public Employees' Retirement System of Nevada v. Reno Newspapers, Inc.* (*Reno Newspapers*), 129 Nev. 833, 313 P.3d 221 (2013), where we held that there is no duty "to create new documents or customized reports by searching for and compiling information from individuals' files or other records," *id.* at 840, 313 P.3d at 225, and that the narrow exception we sub-

sequently created in *Las Vegas Metropolitan Police Department v. Blackjack Bonding, Inc.* (*Blackjack Bonding*), 131 Nev. 80, 343 P.3d 608 (2015), only applies where the records are under the control of a third party, that third party can readily generate a report, and a report has been routinely generated in the past.

Conversely, NPRI argues that the information requested constitutes a public record under the Act because it is information that is stored on a governmental computer and that under *Blackjack Bonding*, PERS is required to disclose the information because the records are readily accessible and PERS has previously disclosed the information sought.

Standard of review

This court generally reviews a district court's decision to grant a writ petition for an abuse of discretion, but when the writ petition raises questions of statutory interpretation, this court reviews the district court's decision de novo. *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003).

The Nevada Public Records Act

The Nevada Legislature enacted the Nevada Public Records Act to "foster democratic principles," NRS 239.001, and "promote government transparency and accountability by facilitating public access to information regarding government activities." *Reno Newspapers*, 129 Nev. at 836-37, 313 P.3d at 223; *Reno Gazette-Journal*, 119 Nev. at 59, 63 P.3d at 1149. To accomplish these goals of transparency and accountability, the Act provides that unless otherwise provided by statute or "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, and may be fully copied . . . ." NRS 239.010(1).

We are cognizant of these important goals and, thus, have held that the Act's "provisions must be liberally construed to maximize the public's right of access," and "any limitations or restrictions on [that] access must be narrowly construed." *Reno Newspapers, Inc. v. Gibbons* (*Gibbons*), 127 Nev. 873, 878, 266 P.3d 623, 626 (2011) (citing NRS 239.001(1)-(3)). In addition, there is a presumption in favor of disclosure, and the governmental entity in control of the requested information bears the burden of overcoming this presumption by demonstrating by a preponderance of the evidence that the requested information is confidential.[1] NRS 239.0113; *Reno Newspapers*, 129 Nev. at 837, 313 P.3d at 223-24. This burden may be met by either showing "that a statutory provision declares the

[1]Neither party disputes that PERS is a governmental entity subject to the Act nor disputes that the requested information is subject to PERS' legal custody or control.

record confidential or, in the absence of such a provision, that its interest in nondisclosure clearly outweighs the public's interest in access." *Reno Newspapers*, 129 Nev. at 837, 313 P.3d at 224 (internal quotation omitted). With this framework in mind, we turn to the parties' contentions.

The requested information was not declared confidential by statute

PERS argues that the district court's order would erroneously require PERS to extract information from government retirees' individual files that are protected by NRS 286.110(3) and NRS 286.117. According to PERS, these statutes would be rendered meaningless if the information contained in government retirees' files could be subject to disclosure. Because individual files of government retirees are confidential, PERS argues, so too should custom reports that are generated exclusively from these files.

As noted above, under the Act, public books and records of government entities are open to the public for inspection, "[e]xcept as otherwise provided" by statute or "otherwise declared by law to be confidential." NRS 239.010(1). In addition, official state records include "[i]nformation stored on magnetic tape or computer." NRS 239.005(6)(b). Among the statutes listed as providing a potential exception is NRS 286.110(3), which specifies that "[t]he official correspondence and records, *other than the files of individual members or retired employees*, and . . . the minutes, audio recordings, transcripts and books of [PERS] are public records and are available for public inspection." (Emphasis added.)[2] NRS 286.117 additionally requires

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[2]PERS draws inapposite analogies to our recent decision in *City of Sparks v. Reno Newspapers, Inc.*, 133 Nev. 398, 399 P.3d 352 (2017), to contend that because NRS 286.110(3) protects the government retirees' individual files from inspection, any report that extracts information from these files is confidential and not subject to disclosure. However, in *City of Sparks*, the applicable statute, NRS 453A.370(5), had conferred upon the agency the authority to protect certain information, and pursuant to this authority, the agency implemented regulations explicitly declaring the requested information to be confidential. 133 Nev. at 401-02, 399 P.3d at 358. Unlike the statute in *City of Sparks*, NRS 286.110(3) does not mandate that PERS affirmatively protect the type of information requested by NPRI. *Compare* NRS 286.110(3) (stating only that "official correspondence and records, other than the files of individual members or retired employees, . . . are public records and are available for public inspection"), *with* NRS 453A.370(5) (stating that the Division of Public and Behavioral Health of the Department of Health and Human Services "*must* . . . [a]s far as possible while maintaining accountability, *protect the identity and personal identifying information* of each person" (emphasis added)). Thus, NRS 286.110(3) does not clearly indicate that the Legislature has conferred upon the agency the authority to grant confidentiality to the requested information. *See Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 227, 19 P.3d 245, 248 (2001) ("[T]he Legislature may authorize administrative agencies to make rules and regulations supplementing legislation *if the power given is prescribed in terms sufficiently definite to serve as a guide in exercising that power*." (emphasis added)).

the individual member or government retiree to submit a waiver in order to review or copy their records. As these latter statutes limit and restrict the public's right of access, we construe them narrowly.[3] NRS 239.001(2)-(3); *Gibbons*, 127 Nev. at 878, 266 P.3d at 626.

This court has previously addressed the scope of NRS 286.110(3). *See Reno Newspapers*, 129 Nev. at 838, 313 P.3d at 224. In *Reno Newspapers*, PERS denied Reno Newspapers' request "for the names of all individuals who are collecting pensions, the names of their government employers, their salaries, their hire and retirement dates, and the amounts of their pension payments" and "assert[ed] that the information was confidential pursuant to NRS 286.110(3) . . . and NRS 286.117." 129 Nev. at 835, 313 P.3d at 222. In opposing Reno Newspapers' writ petition seeking the requested information, "PERS submitted a declaration from its executive officer explaining that all information related to the individual files is maintained as confidential but that PERS provides an annual valuation of its system in aggregate form as a public record." *Id.* at 835-36, 313 P.3d at 223. We held that "NRS 286.110(3)'s scope of confidentiality does not extend to all information by virtue of it being contained in individuals' files" and that "PERS ha[d] not identified any statute, rule, or caselaw that would foreclose production of the requested information." *Id.* at 838, 313 P.3d at 224-25.

In *Reno Newspapers*, PERS released the requested information to a third party for an actuarial evaluation, which made the information clearly available outside of an individual's file. *See id.* at 838, 313 P.3d at 224 ("Where information is contained in a medium separate from individuals' files, including administrative reports generated from data contained in individuals' files, information in such reports or other media is not confidential merely because the same information is also contained in individuals' files."). Following our opinion in *Reno Newspapers*, PERS removed names from the spreadsheet it transmitted to the actuary. Then when NPRI made its public records request, PERS only turned over the spreadsheet consisting of the anonymous profiles. With only the information contained in the spreadsheet, NPRI could no longer match the payroll amounts and other information to the respective recipient of that retirement benefit. And, consequently, NPRI could no longer post the information in profile form, identified by the recipient's name, on its website.

Pointing to our discussion in *Reno Newspapers* of the "confidentiality" of the individual retiree files, and the fact PERS no longer

[3]Contrary to this principle, PERS argues that we should defer to its broad interpretation of these statutes. While we will generally defer to an agency's interpretation of its governing statutes and regulations, we need only do so if its interpretation is *reasonable*. *See Collins Disc. Liquors & Vending v. State*, 106 Nev. 766, 768, 802 P.2d 4, 5 (1990). We reject PERS' contention because, as more fully discussed herein, its interpretation would contravene the very purpose of the Act. *See id.*

generates the report ordered produced in that case, PERS maintains the information NPRI seeks does not exist outside the individual files and so is exempt from public disclosure. This reads our prior opinion and NRS 286.110(3) too broadly. While an individual retiree's physical file, which contains personal information such as social security numbers and beneficiary designations, may not be inspected in its entirety, that does not make all the information kept in that file confidential when the information is stored electronically and PERS can extract the nonconfidential information from the individual files. Indeed, PERS has failed to cite to any rule, statute, or caselaw declaring the information requested to be confidential, and it has previously disclosed the information.

There are, in addition, compelling reasons that PERS cannot evade disclosure on this premise. PERS maintains over 55,000 individual files for its government retirees in its proprietary database, the Computer Automated Retirement System of Nevada (CARSON). To allow PERS to preclude the public by law from inspecting otherwise validly requested government information, particularly information that can *only* be obtained by requesting it from PERS, by virtue of PERS including the information in the individual retiree files that are in an electronic database, would contravene the plain language and purpose of the Act by "functionally plac[ing] [the CARSON] records . . . outside of the public records law."[4] *See Am. Civil Liberties Union*, 377 P.3d at 345; *see also* NRS 239.010(3); *Blackjack Bonding*, 131 Nev. at 84, 343 P.3d at 611 ("If the public record contains confidential information that can be redacted, the governmental entity with legal custody or control of the record cannot rely on the confidentiality of that information to prevent disclosure of the public record."). Thus, PERS has failed to demonstrate that the requested information is confidential by statute.

We next assess PERS' alternative argument that, in the absence of a provision declaring the requested information confidential, its interest in nondisclosure clearly outweighs the public's interest in access.

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[4]The dissent conflates the CARSON with the "individuals' files" to argue that the entire CARSON database is confidential. However, while the CARSON may be proprietary in nature, merely storing information in the CARSON does not render that information confidential. *See* 89-1 Op. Att'y Gen. 1, 3 (1989) ("Computer programs are intellectual property owned or licensed by the State and are not public records. Although most information stored by computer will, as with other forms of agency records, consist of public records, public inspection of particular information will still be subject to the case-by-case analysis . . . .") Additionally, for the reasons outlined herein, adopting the dissent's position would run contrary to our established caselaw interpreting the Act and would undermine the very purpose for which the Act was established.

The district court did not err in concluding that the risks posed by disclosure of the requested information do not clearly outweigh the benefits of the public's interest in access

PERS argues that the risks posed by disclosure of the requested information outweigh the benefits. In particular, PERS contends that disclosure of the government retirees' names creates a heightened risk of identity theft and cybercrime against the retirees and that these risks outweigh the marginal benefit to the public. PERS also argues that the district court did not take into consideration the government retirees' privacy interests. Conversely, NPRI contends that PERS' assertion that disclosure would subject its government retirees to a higher risk of fraud or cybercrime is hypothetical and speculative, and thus, the district court did not err in balancing the interests involved in favor of disclosure. We agree with NPRI's contention.

In *Reno Newspapers*, "PERS argue[d] that disclosure of the requested information would subject retired employees to a higher risk of identity theft and elder abuse." 129 Nev. at 839, 313 P.3d at 225. However, "[t]he record indicate[d] that the only evidence presented [below] to support PERS's argument was a PowerPoint presentation with statistics showing that Nevada is the third leading state in the number of fraud complaints . . . and the sixth leading state in the number of identity theft complaints." *Id.* There, we concluded PERS failed to show that disclosure "would actually cause harm to retired employees or even increase the risk of harm," but rather, "the record indicate[d] that their concerns were merely hypothetical and speculative and did not clearly outweigh the public interest in disclosure." *Id.*; *see also Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 218, 234 P.3d 922, 927 (2010) ("A mere assertion of possible endangerment does not 'clearly outweigh' the public interest in access to these records." (internal quotation marks omitted)). Furthermore, "[t]o the extent some public employees may expect their salaries to remain a private matter, that expectation is not a reasonable one." *San Diego Cty. Emps. Ret. Ass'n v. Superior Court*, 127 Cal. Rptr. 3d 479, 489 (Ct. App. 2011) (quoting *Int'l Fed'n of Prof'l & Tech. Eng'rs, Local 21, AFL-CIO v. Superior Court*, 165 P.3d 488, 494 (Cal. 2007)). Indeed, "public employees lack a reasonable expectation of privacy in an expense the public largely bears after their retirement." *Id.*

Here, an expert report PERS provided from a technology and security advisor concluded that the inclusion of the government retirees' names in the raw data feed would create a greater risk for identity theft, fraud, or other cybercrime if the information was publicly released. However, given the limited nature of NPRI's requests, "their concerns [are] merely hypothetical and speculative . . . [and]

[d]o not clearly outweigh the public's presumed right to access [the requested information]." *Reno Newspapers*, 129 Nev. at 839, 313 P.3d at 225. In addition, the government retirees lack a reasonable expectation of privacy in the requested information.

This does not mean that the risk of identity theft, fraud, or other cybercrime can never outweigh the benefits of the public's interest in access. If disclosure of a government retiree's information includes more sensitive personal information, such as birth date, sex, marital status, beneficiary information, and beneficiary birth dates, the balancing test may weigh in favor of nondisclosure. The requested information here, however, is limited in scope and helps promote government transparency and accountability by allowing the public access to information that could reveal, for example, if an individual is abusing retirement benefits. Given the strong presumption in favor of disclosure, PERS fails to demonstrate that the risks posed by disclosure outweigh the important benefit of public access. Thus, the district court did not err in concluding that the alleged risks posed by disclosure do not outweigh the benefits of the public's interest in access.

Having decided that the information is not confidential, we next determine whether requiring PERS to extract the information from the CARSON database is the creation of a new record.

The requested information did not require the creation of a new record

PERS further argues that *Reno Newspapers*, which recognized there is no duty "to create new documents or customized reports by searching for and compiling information from individuals' files or other records," *id.* at 838, 840, 313 P.3d at 224-25, precludes disclosure of the information sought because NPRI's request requires the creation of a new document.

Although PERS correctly notes that a public agency has no duty to create a new record in response to a public records request, it improperly concludes that disclosure in the present case requires the creation of a new record simply because it would involve searching its database for information. Several courts have distinguished between public records requests that simply require an agency to search its electronic database in order to obtain the information requested from those that require the agency to compile a document or report *about* the information contained in the database. For example, in the context of Freedom of Information Act (FOIA) requests, a federal district court held that "[i]n responding to a FOIA request for 'aggregate data,' . . . an agency need not create a new database or [ ] reorganize its method of archiving data, but if the agency already stores records in an electronic database, searching that database does not involve the creation of a new record." *Nat'l*

Sec. Counselors v. CIA (*NSC I*), 898 F. Supp. 2d 233, 270 (D.D.C. 2012); *see also People for Am. Way Found. v. U.S. Dep't of Justice*, 451 F. Supp. 2d 6, 14 (D.D.C. 2006) ("Electronic database searches are thus not regarded as involving the creation of new records." (quoting *Schladetsch v. HUD*, No. 99-0175, 2000 WL 33372125, at *3 (D.D.C. Apr. 4, 2000))). As the *NSC I* court reasoned,

> sorting a pre-existing database of information to make information intelligible does not involve the creation of a new record because . . . computer records found in a database rather than a file cabinet may require the application of codes or some form of programming to retrieve the information. Sorting a database by a particular data field (e.g., date, category, title) is essentially the application of codes or some form of programming, and thus does not involve creating new records or conducting research—it is just another form of searching that is within the scope of an agency's duties in responding to FOIA requests.

898 F. Supp. 2d at 270 (internal quotation marks and citations omitted).

Other jurisdictions have employed similar logic when analyzing an agency's duty of disclosure under their respective public records laws. For example, in *American Civil Liberties Union v. Arizona Department of Child Safety*, the Arizona Court of Appeals held that "[s]earching an electronic database to produce existing records and data is not the same as searching an electronic database to compile information about the information it contains." 377 P.3d 339, 346 (Ariz. Ct. App. 2016). That court reasoned that "[w]hen a public employee fills out a form to obtain public records from, for example, a storage or file room, the employee has created a record to retrieve records that already exist. Creating a query to search an electronic database is functionally the same." *Id.* at 345. Thus, "Arizona's Public Records Law requires a state agency to query and search its database to identify, retrieve, and produce responsive records for inspection if the agency maintains public records in an electronic database." *Lunney v. State*, 418 P.3d 943, 950 (Ariz. Ct. App. 2017) (internal quotation marks omitted). "To hold otherwise would . . . functionally place most records maintained in public agency databases outside of the public records law." *Am. Civil Liberties Union*, 377 P.3d at 345 (internal quotation marks omitted); *see also Commonwealth, Dep't of Envtl. Prot. v. Cole*, 52 A.3d 541, 547 (Pa. Commw. Ct. 2012) ("[D]rawing information from a database does not constitute creating a record under the Right-to-Know Law.").

We agree with these courts and similarly hold that the Act requires a state agency to query and search its database to identify, retrieve, and produce responsive records for inspection if the agency

maintains public records in an electronic database. In doing so, we clarify that the search of a database or the creation of a program to search for existing information is not the "creat[ion] [of] new documents or customized reports," as contemplated by *Reno Newspapers*.[5] This comports with our holding in *Reno Newspapers*,[6] as well as our later holding in *Blackjack Bonding*, where we held that "when an agency has a computer program that can readily compile the requested information, the agency is not excused from its duty to produce and disclose that information." 131 Nev. 80, 87, 343 P.3d 608, 613 (2015). Similarly, if there is confidential information within the requested information, disclosure with the appropriate redactions would not constitute the creation of a new document or customized report. *See* NRS 239.010(3); *see also Stephan v. Harder*, 641 P.2d 366, 374 (Kan. 1982).

Finally, PERS cannot evade disclosure on the basis that satisfying NPRI's public record request would require additional staff time and cost because PERS could charge NPRI for such an incurred fee. *See* NRS 239.052 (stating that "a governmental entity may charge a fee for providing a copy of a public record," and "[s]uch a fee must not exceed the actual cost to the governmental entity to provide the copy of the public record"); *see also* NRS 239.055(1) (stating that "if a request for a copy of a public record would require a governmental entity to make extraordinary use of its personnel or technological resources, the governmental entity may . . . charge a fee not to exceed 50 cents per page for such extraordinary use," and such a fee "must be reasonable and must be based on the cost that the governmental entity actually incurs for the extraordinary use of its personnel or technological resources").

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[5]The dissent argues that the creation of a computer program is not merely drawing information from a database, but rather, improperly requires the agency to conduct research. However, its reasoning ignores the realities of information storage in the digital age. As specifically recognized by the *NSC I* court, "computer records found in a database rather than a file cabinet may require the application of codes or some form of programming to retrieve the information." *See NSC I*, 898 F. Supp. 2d at 270 (internal quotation marks omitted).

[6]The dissent incorrectly suggests that we are overruling our previous holding in *Reno Newspapers*. We merely recognize the case-by-case application required in public records' requests and clarify our earlier holding to reflect the realities of the advancements in technology and to further the purpose underlying the Act. *Reno Newspapers* did not need to address whether the requested information was confidential by virtue of it being contained within the CARSON database, because the information was released to a third party in a report. *See Reno Newspapers*, 129 Nev. at 838, 313 P.3d at 224 ("Where information is contained in a medium separate from individuals' files, including administrative reports generated from data contained in individuals' files, information in such reports or other media is not confidential merely because the same information is also contained in individuals' files."). Thus, this case requires us to answer a different question than *Reno Newspapers*: whether nonconfidential information in the CARSON database must be produced as public record.

The record indicates, however, that the CARSON database is not static, and PERS may not be able to obtain the information as it existed when NPRI requested it in 2014. We, therefore, reverse the district court's order to produce a document with the requested information and remand this case to the district court to determine how PERS should satisfy NPRI's request and how the costs, if any, of producing the information at this time should be split.

CONCLUSION

We conclude that searching PERS' electronic database for existing and nonconfidential information is not the creation of a new record and therefore affirm the district court's order in this regard. But because the record demonstrates that PERS may no longer be able to obtain the requested information as it existed in 2014 by searching the CARSON database, we reverse the district court's order to produce the 2014 information and remand this matter for proceedings consistent with this opinion as to production of information.

Cherry, Gibbons, and Pickering, JJ., concur.

Stiglich, J., with whom Hardesty and Parraguirre, JJ., agree, dissenting:

Five years ago, this court held that PERS had no duty "to create new documents or customized reports by searching for and compiling information from individuals' files or other records." *Pub. Emps.' Ret. Sys. of Nev. v. Reno Newspapers, Inc.*, 129 Nev. 833, 840, 313 P.3d 221, 225 (2013). The majority's decision today cannot be reconciled with that opinion or the Public Records Act as it is written. Before today, an agency's duty under the Public Records Act was limited to disclosing *existing* public records. After today, they will have a duty to *create* records so long as a court determines that the agency has the technology to readily compile the requested information. While I understand the temptation to expand agencies' duties under the Public Records Act, I believe that such an expansion is for the Legislature—not this court—to make. Accordingly, I dissent.

Background

My disagreement with the majority is largely a factual one. To highlight it, I clarify the three categories of documents at issue in this case. First are retirees' individual files contained in the CARSON database. Those files are confidential pursuant to NRS 286.110(3).[1]

[1]The majority relies upon *American Civil Liberties Union v. Arizona Department of Child Safety* for the proposition that declaring the CARSON records confidential places those records "outside of the public records law." 377 P.3d 339, 345 (Ariz. Ct. App. 2016) (internal quotation marks omitted).

But the information contained within those files is not confidential *to the extent* that it appears within some other non-confidential public record. *See Reno Newspapers*, 129 Nev. at 835, 313 P.3d at 222 ("Although . . . individual files have been declared confidential by statute and are thereby exempt from requests pursuant to the Act, other reports that PERS generates based on information contained in the files are not similarly protected by NRS 286.110(3).").

The second category of documents is PERS' monthly payment register reports. Those reports contain both retirees' names and social security numbers. PERS provided at least one such report to NPRI after redacting the social security numbers.

The third and last category of documents are the raw data feeds that PERS produces annually for actuarial purposes. The 2013 data feed contained retirees' names and the pension amount each retiree received. We held in *Reno Newspapers* that PERS had to disclose that report, including the names of retirees. 129 Nev. at 840, 313 P.3d at 225. Possibly, in response to our holding in that case, PERS created its 2014 data feed using numerical identifiers for retirees rather than their names. PERS provided that 2014 report to NPRI.

The upshot is that NPRI now possesses a list of every retiree's name and a separate list of payments to anonymized retirees, but NPRI has no way of linking names to payments. Thus, NPRI cannot update its website with a list of retirees and the amount of pension each received in 2014. The district court solved NPRI's problem by ordering PERS to add retirees' names to the 2014 data feed.

I.

My first objection with the majority's decision is that it overrules *Reno Newspapers*. The facts of that case are nearly identical to the present one: A plaintiff requested several categories of information from PERS, including the names of all Nevada state pensioners and the amount of their pensions. 129 Nev. at 834-35, 313 P.3d at 222. Some or all of that information was contained within two documents: retirees' individual files in the CARSON database and the 2013 raw data feed. This court rejected PERS' contention that the information was confidential solely because it was contained within individuals' confidential files. *Id.* at 838, 313 P.3d at 224. We therefore required PERS "to provide the requested information *to the extent that* it is maintained in a medium separate from individuals' files." *Id.* at 839, 313 P.3d at 225 (emphasis added). But we clarified: "However, to the extent that the district court ordered PERS to

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The majority fails to recognize that it is the Nevada Legislature—not I—that exempted CARSON files from the Public Records Act. NRS 286.110(3) (exempting "files of individual members or retired employees"). Curiously, the majority cites and correctly analyzes NRS 286.110(3) but then fails to apply it to the CARSON database.

create new documents or customized reports by searching for and compiling information from individuals' files or other records, we vacate the district court's order." *Id*. at 840, 313 P.3d at 225. That holding was subsequently codified in NAC 239.867: "If a person requests to inspect, copy or receive a copy of a public record that does not exist, a records official or agency of the Executive Department is not required to create a public record to satisfy the request."

Applying *Reno Newspapers* to the present case is straightforward. NPRI requested a record containing pensioners' names and the amount of their pensions for the 2014 fiscal year. *No such record exists*. That is because, unlike the 2013 report at issue in *Reno Newspapers*, the 2014 raw data feed does not contain names. The only way PERS can create such a record—assuming it *can* create such a record[2]—is to extract information from retirees' files contained in the CARSON database. That is precisely what *Reno Newspapers* prohibited. 129 Nev. at 840, 313 P.3d at 225 (holding that PERS cannot be ordered "to create new documents or customized reports by searching for and compiling information from individuals' files"). Yet it is precisely what the majority orders today: PERS is required "to query and search its database to identify, retrieve, and produce responsive records for inspection if the agency maintains public records in an electronic database."

Rather than distinguishing *Reno Newspapers*, the majority cites cases from mostly foreign jurisdictions for the proposition that the district court's order merely requires PERS "to search its electronic database" but does not "require the agency to compile a document or report *about* the information contained in the database." This distinction fails for two reasons.

First, the district court's order goes far beyond requiring PERS "to search its electronic database." Contrary to the majority's conclusory assertion, calling this a "search" does not comport with *Las Vegas Metropolitan Police Department v. Blackjack Bonding, Inc.*, wherein we held that "when an agency has a computer program that can readily compile the requested information, the agency is not excused from its duty to produce and disclose that information." 131 Nev. 80, 87, 343 P.3d 608, 613 (2015). Unlike the agency's contractor in *Blackjack*, PERS does *not* have a "computer program that can readily compile the requested information." *Id*. Rather, to comply with the district court's order, PERS must *create* a computer program to link information from the 2014 data feed to the current CARSON database. Moreover, ordering PERS to add information

[2]The 2013 raw data feed contained retirees' names, so PERS was able to provide the requested information simply by providing an unredacted version of that data feed. By contrast, to add names to the 2014 feed, PERS will have to extract names from the current CARSON database, which has changed since 2014. The majority concedes as much.

to the 2014 raw data feed is tantamount to ordering PERS to create a customized record. The *Blackjack* court did not order the agency to create anything of this sort—it merely required the agency to produce the requested information, which was readily accessible and did not require compiling information from the individual files. *Id.* at 87, 343 P.3d at 613-14. "An agency is not required to organize data to create a record that doesn't exist at the time of the request, but may do so at the discretion of the agency if doing so is reasonable." Nev. State Library, Archives & Pub. Records, *Nevada Public Records Act: A Manual for State Agencies* 5 (2014); NAC 239.869 ("adopt[ing] by reference the *Nevada Public Records Act: A Manual for State Agencies*, 2014 edition").

The cases cited by the majority do not impose such an expansive duty upon agencies. Creating a computer program is not merely "drawing information from a database." *Commonwealth, Dep't of Envtl. Prot. v. Cole*, 52 A.3d 541, 547 (Pa. Commw. Ct. 2012). Rather, such action requires the agency to "conduct research," *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 270 (D.D.C. 2012), and go beyond its duty under the Public Records Act, *see, e.g.*, *People for Am. Way Found. v. U.S. Dep't of Justice*, 451 F. Supp. 2d 6, 14 (D.D.C. 2006) ("It is well-settled that . . . FOIA applies only to records which have in fact [been] obtained . . . not to records which merely could have been obtained." (second and third alterations in original) (internal quotation marks omitted)); *see also Frank v. U.S. Dep't of Justice*, 941 F. Supp. 4, 5 (D.D.C. 1996) (holding that agencies are "not required, by FOIA or by any other statute, to dig out all the information that might exist, in whatever form or place it might be found, and to *create* a document that answers plaintiff's question" (emphasis in original)).

Second, even if this were a mere "search" of the CARSON database, *that database is confidential*, and a court cannot order PERS to "search[ ] for and compil[e] information from individuals' files." *Reno Newspapers*, 129 Nev. at 840, 313 P.3d at 225. Again, the majority's error stems from a factual confusion. The majority is correct that neither 2014 retiree names nor 2014 pension amounts are confidential, because both sets of information are contained within public documents—namely, the monthly payment register report (names) and the 2014 raw data feed (pension amounts). *See Reno Newspapers*, 129 Nev. at 839, 313 P.3d at 225 (holding that retiree information is not confidential "to the extent that it is maintained in a medium separate from individuals' files"). But no public report *links* retiree names to the amount of pension that each retiree receives. That information is contained exclusively within retirees' individual files in the CARSON database. Those files are confidential pursuant to NRS 286.110(3), and PERS cannot be ordered to extract information contained *exclusively* within them. *Reno Newspapers*, 129 Nev. at 840, 313 P.3d at 225.

Further, to the extent that the majority suggests that an agency can now search the CARSON database pursuant to NRS 239.005(6)(b), this suggestion is misplaced as a matter of law. NRS 239.005(6)(b) merely defines "official state record" to include, in pertinent part, "information stored on magnetic tape or computer." NRS 239.005(6)(b) is not in conflict with NRS 286.110(3), because nothing in the statutory scheme suggests that a state record deemed confidential under NRS 286.110(3) would lose its confidential character merely because of the medium in which it is stored.

II.

My second objection to the majority's decision is that it amounts to a judicial transformation of the Public Records Act. The majority of this court agrees with NPRI and the district court that disclosure of that information is in the public interest, and that PERS has the technology to readily compile the requested information, so it imposes a duty upon PERS to create a customized report containing the requested information.[3] But that is not how the Public Records Act is written. *See* NRS 239.010(1) (providing that "all public books and public records of a governmental agency must be open at all times during office hours to inspection"). The Legislature, no doubt, had the option of creating an act along the lines of what the majority holds today—that is, one requiring agencies to create customized reports whenever a court determines that the agency has the technology to readily compile the requested information. The Legislature declined to write such an act, perhaps because it would give an inordinate amount of discretion to courts, who, as this case demonstrates, are not adept at making such technological determinations.

In sum, the majority's opinion today contravenes the plain language of the Public Records Act, it directly violates NRS 286.110(3), it exposes official state records otherwise declared confidential to agency search simply because they are stored on a computer, it inexplicably departs from *stare decisis* by overruling *Reno Newspapers*, and it sets Nevada apart from other jurisdictions that have considered this issue. I see no reason to depart so drastically from these binding and persuasive authorities.

Therefore, I dissent.

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[3]The majority, like the district court below, appears to fault PERS for removing pensioners' names from its 2014 raw data feed following our decision in *Reno Newspapers*. I am perplexed as to why PERS should be faulted for adhering to this court's decision while simultaneously protecting pensioners' information to the greatest extent possible.

AMY MULKERN; AND VIVIAN MULKERN, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE FRANK P. SULLIVAN, DISTRICT JUDGE, RESPONDENTS, AND CLARK COUNTY DEPARTMENT OF FAMILY SERVICES; CLARK COUNTY DISTRICT ATTORNEY'S OFFICE; BABY GIRL W., A MINOR; KENNETH WENDTLAND; AND ASHLEY WENDTLAND, REAL PARTIES IN INTEREST.

No. 76399

October 18, 2018 429 P.3d 277

Original petition for a writ of mandamus or prohibition challenging a district court order regarding an evidentiary hearing on the placement of a minor child in NRS Chapter 432B proceedings.

Petition granted in part.

Willick Law Group and *Marshal S. Willick* and *Lorien K. Cole*, Las Vegas, for Petitioners Amy Mulkern and Vivian Mulkern.

Steven B. Wolfson, District Attorney, and *Tanner L. Sharp*, Deputy District Attorney, Clark County, for Real Parties in Interest Clark County Department of Family Services and Clark County District Attorney's Office.

Hutchison & Steffen, LLC, and *Todd L. Moody*, Las Vegas, for Real Parties in Interest Kenneth Wendtland and Ashley Wendtland.

Legal Aid Center of Southern Nevada, Inc., and *Adrian W. Rosehill*, Las Vegas, for Real Party in Interest Baby Girl W.

Before the Supreme Court, PICKERING, GIBBONS and HARDESTY, JJ.

OPINION

Per Curiam:

Both legislatures and courts across the nation have recognized the importance of sibling relationships, enacting and upholding laws to ensure "siblings enjoy the many advantages of growing up together and the attendant opportunities to forge meaningful, life-long relationships." *In re Carol B.*, 550 S.E.2d 636, 643, 646 (W. Va. 2001) (citing cases). Likewise, as discussed below, the Nevada Legislature has emphasized the importance of maintaining sibling relationships throughout our domestic relations statutes. One of those statutes, NRS 432B.550(5)(a), mandates that when a child is in foster care,

the district court presume that the child's best interest is "to be placed together with the siblings of the child."

In this opinion, we consider whether the NRS 432B.550(5)(a) sibling presumption applies even after one of the siblings has been adopted. Although adoption severs a child's legal relationship with the biological parents and places with the adoptive parents the power of making all parental decisions concerning the child, we conclude that adoption does not preclude application of the legislative presumption that placing siblings together is in a child's best interest. Therefore, we grant in part this petition for extraordinary relief, in which the adoptive family of a young child seeks to have the sibling presumption applied in determining the out-of-home placement of her biological baby sister.[1]

FACTS

Real party in interest Baby Girl W. was born in October 2017 and declared a child in need of protection under NRS Chapter 432B shortly thereafter. As a dependent child, Baby Girl W. was placed into foster care, and adoption was later approved as her permanency plan.

Petitioner Amy Mulkern is the adoptive mother of Baby Girl W.'s 3-year-old biological half-sister, petitioner Vivian Mulkern. They live in Massachusetts. Real party in interest Clark County Department of Family Services (DFS) contacted Amy in January 2018 to see whether she would be interested in becoming an adoptive placement option for Baby Girl W. Amy subsequently completed the interstate placement process and was approved as a placement for Baby Girl W., but DFS determined that the baby had bonded with and should remain with her foster parents, who are also willing to adopt.

Amy sought relief in the district court dependency proceeding, and she and the foster parents were declared persons with a special interest under NRS 432B.457, which entitles them to offer placement recommendations and to testify at the placement hearing. The district court also determined that Amy and the foster parents were not entitled to counsel at the hearing or to file motions, that Vivian was not a person with a special interest, and that Vivian's adoption severed the sibling relationship such that NRS 432B.550(5)(a)'s rebuttable presumption—that a dependent child's placement with a sibling is in the child's best interest—did not apply here. Amy and Vivian then filed this writ petition challenging the district court's order. Real parties in interest timely filed answers, in which Baby Girl W. agreed with Amy and Vivian on the presumption issue, and

[1]We previously granted this writ petition, in part, in an unpublished order. Petitioners filed a motion to publish our order, which we grant. We issue this opinion in place of our prior unpublished order. NRAP 36(f).

DFS and the foster parents argued in support of the district court's order. Amy and Vivian also filed a reply.

DISCUSSION

A writ of mandamus is available to compel the performance of an act required by law or to control an arbitrary or capricious exercise of discretion. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see* NRS 34.160. Its counterpart, a writ of prohibition, may be warranted when a district court acts without or in excess of its jurisdiction. NRS 34.320; *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). This court has discretion as to whether to entertain a petition for extraordinary relief, *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 475, 168 P.3d 731, 737 (2007), and petitioners bear the burden of demonstrating that extraordinary relief is warranted, *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

Having considered the parties' briefs, we conclude that the district court is required, under NRS 432B.550(5), to apply the rebuttable sibling presumption in determining Baby Girl W.'s placement. NRS 432B.550(5)(a) mandates that the district court, in determining the placement of a child outside the custody of the child's parents, presume that it is in the child's best interest "to be placed together with the siblings of the child." *See also Clark Cty. Dist. Att'y, Juvenile Div. v. Eighth Judicial Dist. Court*, 123 Nev. 337, 346, 167 P.3d 922, 928 (2007) (stating that "the child's best interest necessarily is the main consideration for the district court when exercising its discretion concerning placement" under NRS 432B.550). While no statute defines "sibling" for purposes of placements under NRS Chapter 432B, NRS 432B.550(5)(b) recognizes relative status based on consanguinity, and no party has identified any statute that expressly severs sibling status for placement purposes once one of the siblings is adopted.

Given the Legislature's emphasis on maintaining such relationships whenever possible throughout the domestic relations and dependency statutes, *see* NRS 432B.390(7) (providing that initial protective placements must keep siblings together whenever possible); NRS 128.110(2)(b) (stating that agencies having custody of a child must, upon termination of parental rights, place that child with his siblings if practicable); NRS 127.2825 (mandating that an agency placing a child for adoption must, to the extent practicable, give preference to a placement together with her siblings); NRS 125C.0035(4)(i) (providing that a district court making a custody decision must consider "the ability of the child to maintain a relationship with any sibling"), and without any further direct expres-

sion to the contrary, we cannot conclude that the Legislature intended that the sibling presumption disappear once a child is adopted. *See also In re Valerie A.*, 43 Cal. Rptr. 3d 734, 736 (Ct. App. 2006) (concluding that children remain siblings for purposes of the sibling exception to termination of parental rights even after one of the children is adopted). Accordingly, the NRS 432B.550(5)(a) rebuttable sibling presumption applies to this case.[2]

CONCLUSION

Amy is a willing and approved placement option for Baby Girl W. Because she is the mother of Baby Girl W.'s biological sister, the rebuttable sibling presumption applies. We grant petitioners' petition, in part, and direct the clerk of this court to issue a writ of mandamus instructing the district court to apply the rebuttable sibling presumption under NRS 432B.550(5) in determining the placement of Baby Girl W. All other requested relief is denied as not warranting our extraordinary intervention at this time, as the district court has considered Amy's and Vivian's arguments, included Amy as a potential placement option, and invited Amy to participate as a person with special interest at the upcoming placement hearing under NRS 432B.457.

GREGORY ANTHONY WILLIAMS, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 70868

October 25, 2018 429 P.3d 301

Appeal from a judgment of conviction, pursuant to a jury verdict, of six counts of lewdness with a child under the age of 14 and three counts of sexual assault with a minor under 14 years of age. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Reversed and remanded.

Howard Brooks, Public Defender, and *Audrey M. Conway* and *Kevin Charles Speed*, Deputy Public Defenders, Clark County, for Appellant.

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[2]We note that nothing in this decision affects statutory provisions governing rights to confidentiality, visitation, or inheritance, *see, e.g.*, NRS 127.160; *Bopp v. Lino*, 110 Nev. 1246, 1253, 885 P.2d 559, 563 (1994) (recognizing that adoption severs the *legal* grandparent-grandchild relationship and concluding that, by statute, birth grandparents have no right to seek visitation post-adoption), or requires DFS to go beyond its statutory duties to locate relatives for potential placement under NRS 432B.550(6) and NRS 128.110.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Jonathan VanBoskerck*, Chief Deputy District Attorney, and *Stacy L. Kollins*, Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Pickering, J.:

The United States Constitution prohibits parties from exercising peremptory challenges to exclude jurors on the basis of race. When a defendant claims that the State has removed a potential juror because of the juror's race, the law requires the district judge to conduct a three-step inquiry. If, after conducting the inquiry, the district judge finds no unlawful discrimination occurred, we give great deference to the district court's finding and will only reverse if the district court clearly erred. But where, as here, the court fails to properly engage that inquiry, and it appears more likely than not that the State struck the juror because of her race, we must reverse and remand for a new trial.

I.

Gregory Williams was convicted of lewdness and sexual assault with a minor under the age of 14—six counts in all—for sexual misconduct involving his girlfriend's two daughters. Four of the counts were based on the sexual assault and touching of T.H., a 10-year-old girl, and the other two counts were based on lewdness with A.H., who was 12. T.H. testified at trial that Williams anally and vaginally penetrated her with his penis on three separate occasions, and touched her vagina, butt, and breasts on another. Rectal swabs taken from T.H. contained both sperm material and protein found in semen, and were consistent with Williams's DNA. A.H. also testified that Williams once lifted up her shirt and sucked on her breasts, and that another time Williams lifted up her shirt halfway but then stopped after she began to cry.

On appeal, Williams argues multiple errors in his trial require reversal, but we address only two of his arguments in this opinion. First, Williams argues, and we agree, that the district court clearly erred in denying his *Batson* challenge to the State's use of a peremptory strike to remove an African-American woman from the venire. Second, Williams argues that he should have been allowed to present evidence that the two young girls had the ability to contrive sexual allegations due to exposure to sexual information in the girls' home—or, at the least, that the district court should have let

him question the girls under oath outside the presence of the jury to understand their knowledge of their mother's career in the pornographic film industry and their exposure to sexual information in the home. We agree that Williams should have received a hearing, and set forth the procedure to follow in determining whether to admit evidence to show that a young victim could have contrived sexual allegations.

II.

During jury selection, the State exercised a peremptory strike to remove prospective Juror No. 23, an African-American woman. Williams made a *Batson* challenge to the peremptory strike, claiming that Juror 23 was unconstitutionally removed due to her race. Under *Batson v. Kentucky*, the use of a peremptory strike to remove a potential juror on the basis of race is unconstitutional. 476 U.S. 79, 86 (1986). If established, such discrimination in the jury-selection process constitutes structural error requiring reversal. *Diomampo v. State*, 124 Nev. 414, 423, 185 P.3d 1031, 1037 (2008).

When analyzing a *Batson* challenge at trial, a district court must engage in a three-step process. *See Batson*, 476 U.S. at 93-100; *Kaczmarek v. State*, 120 Nev. 314, 332-35, 91 P.3d 16, 28-30 (2004). First, the opponent of the peremptory strike "must make a prima facie showing that a peremptory challenge has been exercised on the basis of race." *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (quoting *Miller-El v. Dretke*, 545 U.S. 231, 277 (2005) (Thomas, J., dissenting)); *Kaczmarek*, 120 Nev. at 332-33, 91 P.3d at 29. Second, if that showing has been made, the proponent of the peremptory strike must present a race-neutral explanation for the strike. *Snyder*, 552 U.S. at 477; *Kaczmarek*, 120 Nev. at 333, 91 P.3d at 29. Finally, the court should hear argument and determine whether the opponent of the peremptory strike has proven purposeful discrimination. *Id.* at 333-34, 91 P.3d at 29-30. Because the district court is in the best position to rule on a *Batson* challenge, its determination is reviewed deferentially, for clear error. *Id.* at 334, 91 P.3d at 30.

We have repeatedly implored district courts to adhere to this three-step analysis and clearly spell out their reasoning and determinations. *See Libby v. State*, 115 Nev. 45, 54, 975 P.2d 833, 839 (1999) ("We take this opportunity to instruct the district courts of this state to clearly spell out the three-step analysis when deciding a *Batson* . . . issue."); *Kaczmarek*, 120 Nev. at 334, 91 P.3d at 30 ("We have directed Nevada's district courts to 'clearly spell out the three-step analysis' when deciding *Batson*-type issues."); *McCarty v. State*, 132 Nev. 218, 230, 371 P.3d 1002, 1010 (2016) ("Although the three-step *Batson* analysis is firmly rooted in our jurisprudence, we continue to see that analysis not being followed.") (Douglas, J., concurring). Yet district courts continue to shortchange *Batson* chal-

lenges and scrimp on the analysis and findings necessary to support their *Batson* determinations. We take this opportunity to, yet again, urge district courts to follow the three-step *Batson* procedure.

A.

The first step of a *Batson* challenge requires the party challenging the peremptory strike to make a prima facie showing of purposeful discrimination. *Batson*, 476 U.S. at 93. To make a prima facie showing of discrimination, the defendant must do more than point out that a member of a cognizable group was struck. *See Watson v. State*, 130 Nev. 764, 776, 335 P.3d 157, 166 (2014) ("[T]he mere fact that the State used a peremptory challenge to exclude a member of a cognizable group is not, standing alone, sufficient to establish a prima facie case of discrimination under *Batson*'s first step; 'something more' is required."). The defendant must show "that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 94. This showing is not onerous, nor does it require the defendant to meet the ultimate burden of proof. *See Watson*, 130 Nev. at 775, 335 P.3d at 166. The defendant may make this showing by demonstrating a pattern of discriminatory strikes, but a pattern is not necessary and is not the only means by which a defendant may raise an inference of purposeful discrimination. *Id.* at 776, 335 P.3d 166. Other evidence a defendant might present could include "the disproportionate effect of peremptory strikes, the nature of the proponent's questions and statements during voir dire, disparate treatment of members of the targeted group, and whether the case itself is sensitive to bias." *Id.* at 776, 335 P.3d at 167.

Here, Williams argued that Juror 23 was one of eight African-American venire members, that the State used its second peremptory strike on her, and that given her answers in voir dire, she was excused solely because of her race. Before the court determined whether Williams made a prima facie showing of purposeful discrimination, the State interjected, objecting that Williams himself had excused an African-American veniremember for cause, and that there was no pattern of discrimination. The State went on, saying "[t]he State does have a race-neutral reason for excluding that juror, but does not feel that it's required to put on the record right now because no pattern has been shown that we've exhibited." Nonetheless, the State did offer a reason for Juror 23's exclusion before the district court determined whether Williams established a prima facie showing of purposeful discrimination. Thus, while the record indicates the district court intimated that it would ask the State for a race-neutral explanation after Williams completed his argument, the district court never actually determined whether Williams raised an inference of purposeful discrimination. Where, as here, the State provides a race-neutral reason for the exclusion of a veniremember

before a determination at step one, the step-one analysis becomes moot and we move to step two. *See Hernandez v. New York*, 500 U.S. 352, 359 (1991); *Ford v. State*, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006); *Kaczmarek*, 120 Nev. at 332, 91 P.3d at 29.

B.

At step two, the burden shifts to the State to provide a race-neutral reason for the veniremember's exclusion. *Batson*, 476 U.S. at 97. The State's reason cannot be that the veniremember may be biased due to his or her race. *Id.* Nor can the prosecutor rebut the defendant's prima facie showing by denying a discriminatory motive or making general assertions as to his or her integrity and professional reputation. *Id.* at 98. Under this step, the prosecutor's explanation only needs to be race neutral; it does not need to be "persuasive, or even plausible." *Diomampo*, 124 Nev. at 422, 185 P.3d at 1036 (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995)). At this point, the district court should determine only whether the prosecutor has offered an ostensibly race-neutral explanation for the peremptory strike; it should not make an ultimate determination on the *Batson* challenge until conducting the sensitive inquiry required by step three. *See United States v. Rutledge*, 648 F.3d 555, 559 (7th Cir. 2011) ("The analytical structure established by *Batson* cannot operate properly if the second and third steps are conflated.").

In this case, the State said that it struck Juror 23, who is a physician's assistant in neurosurgery, because the juror expressed the opinion that sometimes "science gets it wrong, even though she's a doctor." Additionally, the State claimed that Juror 23's demeanor suggested that she would not "deliberate in the group effectively"; she "was closed off"; "her answers were short, [and] she was unwilling to communicate much more than yes or no answers." Each of these is a race-neutral explanation for the State's exercise of its peremptory challenge. This is the end of the inquiry at step two; the court should not weigh the merit of the State's reason, or the strength of the defendant's prima facie showing at this step. *See Purkett*, 514 U.S. at 768 ("It is not until the *third* step that the persuasiveness of the justification becomes relevant . . . .").

C.

In the final step, the district court must determine whether the defendant has proven purposeful discrimination. *Batson*, 476 U.S. at 98. "The district court 'must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available' and 'consider all relevant circumstances' before ruling on a *Batson* objection and dismissing the challenged juror." *Conner v. State*, 130 Nev. 457, 465, 327 P.3d 503, 509 (2014) (quoting *Batson*, 476 U.S. at 96). Relevant considerations at step three might include:

> (1) the similarity of answers to voir dire questions given by jurors who were struck by the prosecutor and answers by those jurors of another race or ethnicity who remained in the venire, (2) the disparate questioning by the prosecutors of struck jurors and those jurors of another race or ethnicity who remained in the venire, (3) the prosecutors' use of the "jury shuffle," and (4) "evidence of historical discrimination against minorities in jury selection by the district attorney's office."

McCarty, 132 Nev. at 226-27, 371 P.3d at 1007-08 (citing *Hawkins v. State*, 127 Nev. 575, 578, 256 P.3d 965, 967 (2011)). "The district court should sustain the *Batson* objection and deny the peremptory challenge if it is 'more likely than not that the challenge was improperly motivated.'" *Id.* at 227, 371 P.3d at 1008 (quoting *Johnson v. California*, 545 U.S. 162, 170 (2005)). Generally, the district court's determination is akin to a finding of fact and is "accorded great deference on appeal." *Walker v. State*, 113 Nev. 853, 867-88, 944 P.2d 762, 771-72 (1997) (quoting *Hernandez*, 500 U.S. at 364).

The district court failed to follow these rules in deciding Williams's *Batson* challenge. Immediately after the State provided its race-neutral reason for excluding Juror 23, the district court made its ultimate decision: "I find it was race-neutral. I don't think it was because of race, but I also noticed that you, [defense counsel], kicked an African American lady off first." The district court was referring to a prospective juror Williams removed for cause, meaning the juror was in some way unqualified to sit on the jury. *See* NRS 16.050 (listing the grounds for challenges for cause). Williams then had to ask for the benefit of the third step of a *Batson* analysis, requesting that the district court allow him to respond to the State's race-neutral explanation.

Williams should not have had to ask the district court to conduct step three of the *Batson* analysis. The "sensitive inquiry" required by step three necessarily includes the district court giving the defendant the opportunity to challenge the State's proffered race-neutral explanation as pretextual. *See Hawkins*, 127 Nev. at 578, 256 P.3d at 967 ("Failing to traverse an ostensibly race-neutral explanation for a peremptory challenge as pretextual in the district court stymies meaningful appellate review . . . ."); *State v. Lamon*, 664 N.W.2d 607, 616 (Wis. 2003) ("As part of this third step, a defendant may show that the reasons proffered by the State are pretexts for racial discrimination."). And where the district court makes its decision before hearing such argument from the defendant, it raises concerns as to the fairness of the proceeding. *Cf. Buchanan v. State*, 130 Nev. 829, 833, 335 P.3d 207, 210 (2014) (predetermining a challenge creates the appearance of improper judicial bias); *Brass v. State*, 128 Nev. 748, 750, 291 P.3d 145, 147 (2012) (requiring reversal when

the district court excused a juror prior to holding a hearing on defense's *Batson* challenge).

Worse, the district court never conducted the sensitive inquiry required by step three. *See Kaczmarek*, 120 Nev. at 334, 91 P.3d at 30 ("At the third step, especially, an adequate discussion of the district court's reasoning may be critical to our ability to assess the district court's resolution of any conflict in the evidence regarding pretext."); *see also McCarty*, 132 Nev. at 229, 371 P.3d at 1009 (same). Instead, all the district court said was this: "I don't find the State based it on race."

This record does not allow meaningful, much less deferential review. The State's race-neutral explanation for striking Juror 23 included two parts: (1) Juror 23's agreement with defense counsel's statement expressing doubt about the infallibility of scientific evidence; and (2) her "closed-off" demeanor. The outcome of a *Batson* challenge often turns upon the demeanor of the prosecutor exercising the strike, and the demeanor of the juror being struck—determinations that lie uniquely within the province of the district judge. *See Hernandez*, 500 U.S. at 365 ("As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'") (quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1985)); *Reynolds v. United States*, 98 U.S. 145, 156-57 (1878) ("[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record."). Because the district court interacts with the juror and the prosecutor, and sees their interactions first-hand, an appellate court defers to the district court's demeanor determinations. *See Walker*, 113 Nev. at 867-68, 944 P.2d at 771-72; *cf. Graves v. State*, 112 Nev. 118, 124, 912 P.2d 234, 238 (1996) ("The cold record is a poor substitute for demeanor observation.").

But where only part of the basis for a peremptory strike involves the demeanor of the struck juror, and the district court summarily denies the *Batson* challenge without making a factual finding as to the juror's demeanor, we cannot assume that the district court credited the State's demeanor argument. *See Snyder v. Louisiana*, 552 U.S. 472, 479 (2008) (not acknowledging the prosecution's demeanor argument where the trial judge was given two explanations for the strike and "simply allowed the challenge without explanation"); *Roach v. State*, 79 N.E.3d 925, 931 (Ind. Ct. App. 2017) ("It is impossible for us to determine which reason the trial court used to deny the *Batson* challenge or if it found both reasons persuasive."). If demeanor had been the only race-neutral explanation the State offered for its strike, and the district court denied the *Batson* challenge, this would be a different case. *Compare, e.g.*, *United States*

v. Thompson, 735 F.3d 291, 300 (5th Cir. 2013) ("*Snyder* does not require a district court to make record findings of a juror's demeanor where the prosecutor justifies the strike based on demeanor alone."), *with United States v. McMath*, 559 F.3d 657, 666 (7th Cir. 2009) ("*Snyder* makes clear that a summary denial does not allow us to assume that the prosecution's reason was credible; rather, the district court's silence leaves a void in the record that does not allow us to affirm the denial."). But where the State offers two explanations for the strike, one of which appears implausible, and the other is a demeanor argument that is disputed by the defendant, there is no basis to assume that the district court based its denial on the State's demeanor argument. *See Snyder*, 552 U.S. at 479. Such is the case here.

The State's non-demeanor argument—that Juror 23 expressed skepticism regarding science—appears pretextual. Juror 23 is a physician's assistant in neurosurgery. During voir dire, Juror 23 acknowledged defense counsel's assertion that sometimes "science gets it wrong" and that the results of a test using technology, for example a pathology report of a tumor, can be incorrect.[1] This seems

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[1]In relevant part, defense counsel's voir dire of Juror 23 reads as follows:

[Defense Counsel]: Sometimes the science gets it wrong, doesn't it?

[Juror 23]: Yes.

[Defense Counsel]: And sometimes even with all the most advanced technology, the most sophisticated instruments, a neurosurgeon relying on those instruments may not see what the instruments are telling you to see?

[Juror 23]: I'm not sure I understand your question.

[Defense Counsel]: With all the advancements in medical science that we have, the ability for a brain surgeon to let's say have a CT scan done on someone, they're trying to detect the presence of a tumor for example and the doctor—the physician's assistant sees something on the scan that indicates yeah, there's probably something there. We might want to take some action quickly. You schedule the person for a hospital visit, you do more tests, you do more exams but you find out there was nothing there. Has that ever happened to you?

[Juror 23]: No. That nothing was there if you saw it there?

[Defense Counsel]: Well, let me ask you this way.

[Juror 23]: That's not really a medical question.

[Defense Counsel]: What you say thinking was a tumor, something exceedingly dangerous, ended up being something benign.

[Juror 23]: That's correct. That can happen.

[Defense Counsel]: And when you're looking at this, what eventually turned out to be a benign mass, the first time that you look at it and you think it's a tumor, the doctor thinks it's a tumor, the examination team all think it's a tumor, you react and respond and behave and take steps to heal that patient, right?

[Juror 23]: Yes.

like a reasonable concession, and several other jurors also expressed similar, and sometimes stronger, concerns.

In the district court, Williams argued that other jurors, particularly Jurors 25 and 36—both white men—shared Juror 23's acknowledgment about the fallibility of science. The State responds that its failure to strike Jurors 25 and 36 proves nothing, because Williams struck those veniremembers, making it impossible to tell whether the State would have struck them if Williams had not. The State also argues on appeal that other jurors' answers "did not convey a skepticism of scientific evidence as much as they reflected an appreciation of the reality that scientific testing can sometimes result in errors." We find the State's argument unpersuasive, and not supported by the record.

At least three other jurors, in addition to the two Williams identified at trial, provided answers similar to Juror 23's. Juror 28 said that "when there's a human element involved, there's a chance that mistakes can be made" and allowed that "there can be instances" where science does not say what humans think it says. Similarly, Juror 46 discussed chemical flaws and reactions in the use of pregnancy tests with defense counsel, and acknowledged that pregnancy tests can sometimes give an incorrect result. And just before the State exercised its peremptory strike on Juror 23, Juror 44 expressed concern about the fallibility of DNA evidence and technological tools. All of these responses were elicited by defense counsel, and the State did not follow up or question jurors along these lines. That the State failed to follow up on this line of questioning with Juror 23, and did not strike other jurors who expressed skepticism similar to Juror 23's, suggests pretext. *See Diomampo*, 124 Nev. at 425, 185 P.3d at 1038; *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."); *Conner*, 130 Nev. at 466, 327 P.3d at 510 ("A race-neutral explanation that is belied by the record is evidence of purposeful discrimination.").

[Defense Counsel]: Because you're relying on your instruments, your tools, right to make the diagnosis?

[Juror 23]: We're relying on pathology to make the diagnosis.

[Defense Counsel]: So in these kinds of case [sic], wouldn't you agree with me—would it be fair to say that when we think we see something on a piece of technology or a tool, it may not be what the tool is saying it is. You've got a little bit more work.

[Juror 23]: That is correct.

[Defense Counsel]: Thank you, [Juror 23], I appreciate it.

Without a finding from the district court, the record by itself does not support the State's demeanor argument. In fact, to the extent the cold record provides any insight into Juror 23's demeanor, it seems to contradict the State's assertions. While the State argued that Juror 23 was "closed off" and gave short answers, the record shows that Juror 23 gave short answers when appropriate and elaborated on other answers when appropriate. At one point during the State's questioning, Juror 23 even offered humor, saying she would not do outside research on the case because she did not want to reopen her biology books from school. Thus, the record does not allow us to credit the State's argument that Juror 23's demeanor indicated that she would not be able to deliberate effectively in a group, as opposed to Williams's argument that many other jurors exhibited the same demeanor as Juror 23.

The human, social, and economic costs of a reversal and retrial are substantial. But *Batson* has been the law for more than 30 years. "The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Foster v. Chatman*, 136 S. Ct. 1737, 1747 (2016) (quoting *Snyder*, 552 U.S. at 478) (internal quotation marks omitted). Given the district court's mishandling of Williams's *Batson* challenge, and the pretextual nature of at least part of the State's race-neutral explanation for striking Juror 23, the district court clearly erred in denying Williams's *Batson* challenge. This constitutes structural error, requiring us to reverse and remand for a new trial.

III.

We turn next to the procedure for admitting or excluding evidence to show that a young victim had the knowledge to contrive sexual allegations, as this issue will recur on retrial. Williams sought to present evidence that the two young girls, 10 and 12 years old, knew enough about sex to have fabricated their allegations. Specifically, Williams sought to present evidence that the girls' mother sold sex toys and performed in pornographic films from their home. The State objected that admitting this evidence would violate the rape shield statute, NRS 50.090, which generally prevents a defendant from using evidence of past sexual conduct to challenge the victim's credibility. Additionally, despite A.H.'s statement that her mother was a "porn star," T.H.'s statement that she had seen pornography, and T.H.'s testimony that she saw "naked pictures" on the television during one of the assaults, the State argues that there was no evidence that the girls knew about their mother's career.

The district court initially scheduled a hearing—where T.H. and A.H. would testify under oath—to determine what the girls knew about their mother's career, if anything. But the day before the hearing, defense counsel went to the girls' school and interviewed A.H. and T.H. without their mother's presence or permission. The district

court found that Williams had prejudiced the hearing and canceled it, noting that Williams could renew his motion later. Williams did not refile his motion until a year later, just 12 days before the date set for trial. Without conducting an evidentiary hearing, the district court denied Williams's motion to admit the evidence on the merits, determining that the evidence lacked relevance unless and until the State opened the door at trial by arguing the girls could not make up a story because they are sexually innocent. This was error.

Under *Summitt v. State*, a defendant may show that an alleged victim has experienced specific incidents of sexual conduct such that the alleged victim has the experience and ability to contrive sexual allegations against the defendant. 101 Nev. 159, 163-64, 697 P.2d 1374, 1376-77 (1985) (construing the rape shield law to create "the least possible interference" with its purpose but also to uphold a defendant's Sixth Amendment right to present witnesses and confront witnesses against him). In *Summitt*, the defendant was accused of sexually assaulting a six-year-old girl and sought to present evidence of the victim's prior sexual experiences to show that she had prior independent knowledge of similar acts. *Id.* at 160, 697 P.2d at 1375. The district court determined that Nevada's "rape victim shield law," which prevents the use of a victim's previous sexual experiences to attack the victim's credibility, barred the evidence. *Id.* (citing NRS 50.090). On appeal, the court held that the evidence of the victim's prior sexual experiences was admissible, because it "was offered to show knowledge of such acts rather than lack of chastity." *Id.* at 163, 697 P.2d at 1377. The court reasoned that the average juror would perceive the six-year-old victim as a sexual innocent, and "it is probable that jurors would believe that the sexual experience she describes must have occurred in connection with the incident being prosecuted; otherwise, she could not have described it." *Id.* at 164, 697 P.2d at 1377 (quoting *State v. Howard*, 426 A.2d 457 (N.H. 1981)).

Williams's theory of defense was that the girls fabricated their allegations of sexual conduct because they were upset with Williams and wanted to get him out of the house. To establish that defense, Williams sought to present evidence to rebut any assumption a juror may have that the 10- and 12-year-old girls could not have described the sexual acts they accused Williams of performing without having actually experienced those acts with Williams. *Summitt* does not, as the district court did in this case, require that the State open the door to such evidence by arguing that the victim is sexually innocent. Thus, the district court erred when it categorically excluded evidence of the girls' mother's sex-related activities in the home on the basis that the evidence lacked relevance.

Summitt recognizes that a jury may assume that a young victim is sexually innocent and lacks the knowledge to fabricate sexual al-

legations. *Id.* The girls' exposure to pornographic materials in the home tends to make it more likely that they could fabricate specific details of a sexual encounter without having actually experienced the encounters they described with Williams. *See* NRS 48.015 ("'[R]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."). Williams sought to introduce the evidence to show the girls' knowledge of sexual acts, not to impugn their character or that of their mother.

A legitimate question remains as to whether the probative value of the evidence "is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1). The State notes that Williams's proffered evidence lacks the probative value the evidence did in *Summitt.* At ages 10 and 12, T.H. and A.H. are older than the 6-year-old in *Summitt*, making it less likely a juror would assume sexual innocence. Also, Williams did not seek to introduce evidence of prior sexual assaults as the defendant did in *Summitt*, but just exposure to information about sex generally. Last, the State argues that the introduction of the mother's employment would result in unfair prejudice, trigger the jurors' emotions, and unfairly give the impression that the girls grew up in a depraved environment. Under *Summitt*, and the procedure set forth below, these arguments raise appropriate concerns and form a necessary part of the analysis. The district court should have weighed the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. *See* NRS 48.035.

Summitt recognized that when a defendant moves to admit evidence to show that a young victim has the knowledge to contrive sexual allegations, a district court should afford the defendant an opportunity, outside the jury's presence, to show that "due process requires the admission of such evidence because the probative value in the context of that particular case outweighs its prejudicial effect on the [victim]." *Summitt*, 101 Nev. at 163, 697 P.2d at 1377 (quoting *Howard*, 426 A.2d at 461). In *Guitron v. State*, the Nevada Court of Appeals set forth a procedure for such an opportunity, which we now adopt. 131 Nev. at 215, 228, 350 P.3d 93, 101 (Ct. App. 2015) (setting procedure "for submitting and admitting or denying evidence of a victim's prior sexual knowledge" under *Summitt*).

When seeking to offer evidence to show that a young victim has the knowledge to contrive sexual allegations, the defendant must first make an offer of proof as to the evidence the defendant seeks to admit at trial. *Id.* Next, the district court should conduct a hearing.

At the hearing, the defendant "must present justification for admission of the evidence, detailing how the evidence is relevant to the defense under the facts in the case." *Id.* The State then should be given the opportunity to respond by showing how the evidence lacks sufficient probative value to overcome the risk of unfair prejudice, confusion of the issues, or misleading the jury its introduction will entail. The district court should then determine whether the evidence is relevant and, if so, weigh the probative value of the evidence against its prejudicial effect as required by NRS 48.035. *Id.* In particular, the district court should focus on "whether the introduction of the victim's past sexual conduct may confuse the issues, mislead the jury, or cause the jury to decide the case on an improper emotional basis." *Summitt*, 101 Nev. at 163, 697 P.2d at 1377. Finally, the district court should state, on the record, its findings of fact and conclusions of law as to what evidence is admissible, and what evidence is inadmissible. *Guitron*, 131 Nev. at 228, 350 P.3d at 101. This ensures that there is an adequate record to meaningfully review the issue on appeal. *See id.*

On remand, if Williams attempts to offer this evidence again, the district court should engage in this analysis to determine whether to allow Williams to present evidence to show that T.H. and A.H. had the knowledge to contrive sexual allegations without having experienced the sexual acts with Williams. The district court may find it appropriate to examine the girls under oath to help determine the probative value of allowing Williams to present evidence of the girls' mother's career and the sexual information available to the girls in the home.

* * * *

The district court erred by denying Williams's *Batson* challenge, and in determining whether to admit or exclude evidence to show that the young victims had the knowledge to contrive sexual allegations. Therefore, we reverse the judgment of conviction and remand to the district court for proceedings consistent with this opinion.

Douglas, C.J., and Cherry, Gibbons, Hardesty, Parraguirre, and Stiglich, JJ., concur.

CLARK COUNTY SCHOOL DISTRICT, Appellant, *v.*
LAS VEGAS REVIEW-JOURNAL, Respondent.

No. 73525

October 25, 2018 429 P.3d 313

Appeal from a final order granting a petition for writ of mandamus concerning a public records request. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Affirmed in part, reversed in part, and remanded.

Clark County School District, Office of General Counsel, and *Adam D. Honey* and *Carlos L. McDade*, Clark County, for Appellant.

McLetchie Shell LLC and *Margaret A. McLetchie* and *Alina M. Shell*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Gibbons, J.:

This appeal centers on Clark County School District (CCSD) employee complaints alleging inappropriate behavior, including sexual harassment, by an elected trustee. After the Office of Diversity and Affirmative Action (ODAA) conducted an investigation into the trustee's behavior, CCSD instituted the ODAA's recommended policies and restricted the trustee's access to employees and campuses. Respondent Las Vegas Review-Journal (Review-Journal) began running stories detailing the investigation and the complaints. The Review-Journal made a related records request to which CCSD continually delayed its response. Eventually, the Review-Journal filed a petition, and then an amended petition, for a writ of mandamus under the Nevada Public Records Act, requesting that the district court compel disclosure. The district court granted the first petition and then asserted jurisdiction over the amended petition as well. After holding a hearing on the amended petition and viewing the withheld documents in-camera, the district court filed an order granting the Review-Journal's amended writ petition and ordered disclosure, allowing for limited redaction. CCSD argues that the district court erred by ordering disclosure of CCSD's investigative materials and, alternatively, directing CCSD to provide minimally redacted investigative materials to the Review-Journal. We hold that the district court did not err by ordering disclosure of the records, but adopt a two-part, burden shifting test to determine the scope of redaction of

names of persons identified in an investigative report with nontrivial privacy claims, and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

CCSD officials met with Trustee Kevin Child in March of 2016 after allegations arose regarding his inappropriate behavior, including allegations of sexual harassment. The behaviors included speaking to students about suicide and other inappropriate matters, making suggestive sexual comments and gestures towards employees, including teachers, and engaging in disruptive, threatening, and inappropriate behavior at public events. The ODAA subsequently launched an investigation. The resulting ODAA recommendation states that Child's behavior resulted in what could be considered a hostile work environment under Title VII. The recommendation further concluded that the environment was one in which Child's behavior goes unchecked. This is largely because most employees are unwilling to confront him about his behavior and/or are reluctant to file a formal complaint against him because he is perceived to be "The Boss." Based on these findings, the ODAA recommended severely limiting Trustee Child's access to district properties and employees. CCSD acted on these recommendations on December 5, 2016, implementing strict guidelines for future visits by Trustee Child and distributing those guidelines throughout CCSD via email.

That same day, a Review-Journal reporter made an initial document request. CCSD responded that it had received and was processing the request. A few days later, CCSD responded that it could not get the information requested within five days, as required by NRS 239.0107 of the Nevada Public Records Act (NPRA); however, it would hopefully have the information by December 16, 2016. CCSD then changed that date to January 9, 2017, and then to January 13, 2017. On January 26, 2017, the Review-Journal filed its first petition for writ relief asking the district court to compel CCSD to produce the requested records. CCSD eventually provided some records to the Review-Journal and, on February 9, 2017, the Review-Journal featured one of many articles on Trustee Child.

On February 10, 2017, the Review-Journal made an expanded, amended records request pursuant to NRS 239.010 of the NPRA, based on information learned from the first batch of disclosed records. The district court held a hearing on the writ petition for the initial records request on February 14, 2017. There, counsel for the Review-Journal stated that CCSD had finally provided some records; nevertheless, the issue before the court now was "the scope of redactions." Counsel for the Review-Journal argued that, although it recognized the names of victims and people that have come forward should be protected, CCSD went too far. CCSD had redacted the

names of the administrators, principals, and supervisors addressing those complaints, and the names of schools. The district court granted the Review-Journal's first writ petition and ordered that "any names of students or support staff . . . be redacted and any direct victims alleging sexual harassment." The district court also set a status check for the second records request. The first order was filed February 22, 2017.

On February 17, 2017, CCSD sent a response to the Review-Journal regarding the amended February records request, where it asserted the same privileges addressed in the prior writ hearing. In mid-March, CCSD provided the Review-Journal with a more extensive account of the types of document searches it was doing, the privileges they were asserting, and a more particularized privilege log. CCSD provided approximately 100 pages of documents between February 3, 2017, and March 3, 2017, in response to the records requests. Most of the documents contained employee complaints about Trustee Child.

On May 9, 2017, the parties appeared before the district court for a hearing on the amended request. During the hearing, counsel for CCSD and the district court discussed "what further democratic principle is furthered" by the Review-Journal's request for *all* the documents leading up to the ODAA recommendation. CCSD argued that it had already provided the Review-Journal with the policy and recommendation, as well as many emails outlining the complaints against Child. Thus, it had complied with the principles encouraging disclosure. The district court recognized the important interest in preserving victims' privacy. The district court also reasoned that the overriding policy interest to be weighed was the fact that this matter involves the public actions of an elected official—a trustee—and CCSD's response to that elected official's actions. The district court then ordered CCSD to provide the court with a full privilege log of all responsive documents and an in-camera review of all the withheld records. On July 11, 2017, after reviewing the withheld documents in-camera and CCSD's submitted privilege log, the district court entered an order granting the writ of mandamus regarding the withheld records. That order is the subject of this appeal. CCSD specifically takes issue with disclosing documents that were part of the investigation leading up to the recommendation made by the ODAA. CCSD argues these documents are confidential by law, should be confidential on balance, or alternatively that additional redactions are necessary.

DISCUSSION

NRS 239.010, the NPRA, provides "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." Accordingly, the first relevant inquiry is whether CCSD's withheld documents are confidential by law. *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 60, 63 P.3d 1147, 1149-50 (2003). "The Legislature has declared that the purpose of the NPRA is to further the democratic ideal of an accountable government by ensuring that public records are broadly accessible." *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 877-78, 266 P.3d 623, 626 (2011). In 2007, "the Legislature amended the NPRA to provide that its provisions must be liberally construed to maximize the public's right of access." *Id.* at 878, 266 P.3d at 626 (citing NRS 239.001 (2007)). Moreover, the Legislature ensured that a state entity that wishes to "withhold records, bears the burden of proving, by a preponderance of the evidence, that the records are confidential by law." *Id.* (citing NRS 239.0113). "[I]n the absence of a statutory provision that explicitly declares a record to be confidential, any limitations on disclosure must be based upon a broad balancing of the interests involved." *Id.* at 880, 266 P.3d at 628 (emphasis added) (citations omitted). Further, "the state entity bears the burden to prove that its interest in nondisclosure *clearly outweighs* the public's interest in access." *Id.*

CCSD contends that by ordering disclosure of CCSD's investigative materials, the district court: (1) erred under the Nevada Public Records Act by stripping CCSD employees of the rights afforded them by other confidentiality laws, both federal and administrative; and (2) erred in limiting CCSD's ability to redact. More specifically, CCSD argues that this court should reverse the district court order under: (a) federal law and federal guidelines;[1] (b) CCSD regulations; (c) the deliberative process privilege; (d) the Nevada Administrative Code (NAC);[2] and (e) the common law balancing test set forth in *Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630, 635, 798 P.2d 144, 147 (1990).

A district court's grant or denial of a petition for a writ of mandamus seeking access to public records is generally reviewed for abuse of discretion. *Gibbons*, 127 Nev. at 877, 266 P.3d at 626. However, where "the petition entails questions of law, [this court] review[s]

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[1]CCSD has failed to prove, by a preponderance of evidence, why its investigative materials are confidential under federal law. However, CCSD's arguments regarding federal law are relevant to the balancing of interests discussed in the body of this opinion.

[2]CCSD argues that some of the investigative materials are "nonrecord materials" under NAC 239.051. However, in *Comstock Residents Ass'n v. Lyon County Board of Commissioners*, we held that the NAC, specifically NAC 239.051, does not limit the scope of the NPRA. 134 Nev. 142, 147 n.1, 414 P.3d 318, 322 n.1 (2018) (holding that NAC 239.091 and NAC 239.051 constitute "administrative regulations pertaining to local records management programs, and do not determine the overall scope of the NPRA . . ."). Accordingly, this argument is without merit.

the district court's decision de novo." *Id.* "[Q]uestions of statutory construction, including the meaning and scope of a statute, are questions of law." *Reno Gazette-Journal*, 119 Nev. at 58, 63 P.3d at 1148. CCSD raises a number of arguments as to why the district court should not have ordered disclosure of its investigative materials. Insofar as CCSD's arguments center around which guidelines, regulations, and administrative codes may declare certain records to be confidential by law, we review this matter de novo. *See id.*

The withheld documents are not confidential by law

CCSD argues that its regulations are laws with legal effect under NRS 386.350 and, under those regulations, the documents that the district court ordered it to disclose are confidential by law. *See* NRS 386.350 ("Each board of trustees is hereby given such reasonable and necessary powers, not conflicting with the Constitution and the laws of the State of Nevada . . . ."). However, we have already indicated that such internal regulations do not limit the NPRA. Quite recently, in *Comstock Residents Ass'n v. Lyon County Board of Commissioners*, 134 Nev. 142, 147, 414 P.3d 318, 322 (2018), we held that the NAC "do[es] not limit the reach of the NPRA, but merely establish[es] regulations for good records management practices of those local programs." Further, we emphasized that, "[t]he best practices for local government record management and what constitutes a public record for purposes of the NPRA are distinct, and we are careful not to conflate them here." *Id.* Under the rationale set forth in *Comstock Residents Association*, CCSD's regulations do not limit the scope of the NPRA. Rather, the regulations merely establish good records management practices for CCSD. Ascribing a force to such regulations that limits the NPRA would create an opportunity for government organizations to make an end-run around the NPRA by drafting internal regulations that render documents confidential by law. While the regulations undoubtedly play an essential role in CCSD's internal operations for sensitive harassment issues, we hold that they do not render the withheld documents confidential by law under the NPRA.

The district court did not abuse its discretion when, after balancing the interests, it determined that the documents should not be withheld

"[I]n the absence of a statutory provision that explicitly declares a record to be confidential, any limitations on disclosure must be based upon a broad balancing of the interests involved, and the state entity bears the burden to prove that its interest in nondisclosure *clearly outweighs* the public's interest in access." *Gibbons*, 127 Nev. at 880, 266 P.3d at 628 (emphasis added) (citations omitted). As CCSD's remaining arguments regarding confidentiality implicate this balancing test, we review this portion of the order for an abuse

of discretion. *Id.* at 877, 266 P.3d at 626; *DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) ("Unless a statute provides an absolute privilege against disclosure, the burden of establishing the application of a privilege based upon confidentiality can only be satisfied pursuant to a balancing of interests . . . .").

Deliberative process privilege

CCSD argues that it is not required to disclose the withheld documents because the documents fall within the protections afforded under the deliberative process privilege. *See DR Partners*, 116 Nev. at 622, 6 P.3d at 469 ("The deliberative process or 'executive' privilege is one of the traditional mechanisms that provide protection to the deliberative and decision-making processes of the executive branch of government."). "It is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly." *Id.* at 621, 6 P.3d at 468. Under the privilege, governmental entities may conceal public records only if the entity can prove that the relevant public records were part of a predecisional and deliberative process that led to a specific decision or policy. *Id.* at 623, 6 P.3d at 469. The agency bears the burden of establishing, with particularity, "the character of the decision, the deliberative process involved, and the role played by the documents in the course of that process." *Id.* at 623, 6 P.3d at 470 (internal quotation marks and citation omitted).

CCSD argues that the withheld documents, which include the investigative file leading up to the ODAA's recommendation, are subject to the deliberative process privilege. However, the central purpose of the privilege is "protecting the decision making processes of government agencies." *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (internal quotation marks and citation omitted). Thus, the deliberative process privilege does not apply in situations where the government's actions are in question, particularly where the records may reveal a potential Title VII violation. *E.g.*, *Anderson v. Marion Cty. Sheriff's Dep't*, 220 F.R.D. 555, 560 (S.D. Ind. 2004) ("If the plaintiff's cause of action is directed at the government's intent, however, it makes no sense to permit the government to use the privilege as a shield. For instance, it seems rather obvious to us that the privilege has no place in a Title VII action or in a constitutional claim for discrimination.") (quoting *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998)). "Moreover, the privilege 'should be invoked only in the context of communications designed to directly contribute to the formulation of *important public policy*.'" *Id.* at 560-61 (emphasis in original) (quoting *Soto v. City of Concord*, 162 F.R.D. 603, 612 (N.D. Cal. 1995)). "To extend the deliberative

process privilege to a recommendation as to a particular personnel matter extends it beyond its present form to protect from disclosure what would otherwise be evidence relevant to plaintiff's complaint of discrimination." *Id.* at 561 (quoting *Waters v. U.S. Capitol Police Bd.*, 216 F.R.D. 153, 163 (D.D.C. 2003)).

Here, while one issue from the Child matter involves Child's behavior, an additional issue involves how CCSD handled the discrimination complaints and the investigation. To allow CCSD to invoke the deliberative process privilege to prevent disclosure of the investigative materials leading up to the ODAA decision would allow CCSD to shield itself from the Review-Journal's inquiry into how CCSD conducted that investigation. Allowing both disclosure, as well as redaction of victims' names, serves the competing purposes of Title VII. Doing so protects the confidentiality of the victims, while allowing inquiry into CCSD's response. Moreover, while Trustee Child is not technically an employee of CCSD, the policy imposes rules and restrictions on how other employees within the district interact with the trustee. Finally, Trustee Child's behavior, and CCSD's investigation into it, are not part of a deliberative process because there is no decision or policy CCSD is making that would invoke this privilege to begin with. Thus, the policy set forth by CCSD is not an "important public policy" but merely a "particular personnel matter" limited to a single individual under specific and isolated facts. *Id.* at 560-61. Accordingly, we hold CCSD has failed to meet its burden to demonstrate why the deliberative process privilege applies and, therefore, the district court did not abuse its discretion by refusing to apply the privilege to this matter.

Common law balancing test

CCSD has failed to demonstrate that the documents are confidential as a matter of law or fall within the deliberative process privilege. We must now determine whether the balancing test, as set forth in *Gibbons*, warrants nondisclosure. A government entity cannot meet its burden for preventing disclosure by "voicing nonparticularized hypothetical concerns." *DR Partners*, 116 Nev. at 628, 6 P.3d at 472-73.

CCSD contends, and presents some evidence, that employees have expressed fear of being identified or retaliated against by Trustee Child. The Review-Journal counters that there is a great public interest in transparency here, particularly in light of the unique facts of this case, where the allegations pertain to a trustee accountable only to the voters, rather than CCSD management. In fact, as the Review-Journal points out, CCSD's purpose, to protect employees, is best served by transparency and any privacy interests can be satisfied by redaction. On balance, the Review-Journal's argument is more persuasive and, while CCSD does give some evidence of in-

dividuals' fears of retaliation, it fails to demonstrate why complete nondisclosure, rather than redaction, is the better solution. Accordingly, we hold that CCSD's argument here is unpersuasive and the district court did not abuse its discretion by refusing to permit CCSD to withhold the documents in their entirety. That part of the district court's order requiring CCSD to disclose the documents is affirmed.

Privacy interests and redaction in public record disclosure

CCSD argues that the district court should have allowed it to redact more information. In essence, CCSD's request to redact spans from withholding everything, because all facts are witness identifiers, to merely withholding names of all complainants and teacher witnesses.

The district court order reads:

> Pursuant to the Court's February 23, 2017 Order,[3] CCSD may redact the names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff. The Court will then provide the documents to the Review-Journal.

Further, the district court indicated that CCSD had not "proven by a preponderance of the evidence that any interest in nondisclosure outweighs the strong presumption in favor of public access." The district court, quoting *Deseret News Publishing Co. v. Salt Lake County*, 182 P.3d 372, 383 (Utah 2008), then listed additional interests weighing against redaction.

In part, CCSD appears to be asking that this court adopt a test similar to that used in the district court's cited case, *Deseret News Publishing Co.*, 182 P.3d at 380; *see also Cameranesi v. U.S. Dep't of Defense*, 856 F.3d 626, 637 (9th Cir. 2017). Nevada has not previously adopted a test that shifts the burden of proof onto the party seeking disclosure to show the interest in the information sought. We are inclined to do so now in cases in which the nontrivial personal privacy interest of a person named in an investigative report may warrant redaction.

The *Cameranesi* test is a two-part balancing test. 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." *Cameranesi*, 856 F.3d at 637. "Second, if the agency succeeds in showing that the privacy interest at stake is nontrivial, the requester 'must show that the pub-

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[3]The referenced February order reads:

> **CCSD may not make any other redactions**, and must unredact the names of schools, all administrative-level employees, including but not limited to deans, principals, assistant principals, program coordinators) [sic], and teachers.

lic interest sought to be advanced is a significant one and that the information [sought] is likely to advance that interest.'" *Id*.

While *Cameranesi* (and *Deseret News*, 182 P.3d at 380-82) interpreted a statute providing an exception to disclosure of public records, 856 F.3d at 637-38, Nevada's common law provides a similar exception. Nevada's common law recognizes the tort of invasion of privacy for unreasonable intrusion upon the seclusion of another. *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 615, 629-36, 895 P.2d 1269, 1279-83 (1995), *overruled on other grounds by City of Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 644, 650, 940 P.2d 134, 138 (1997). The purpose of the tort is to provide redress for intrusion into a person's reasonable expectation of privacy, seclusion, or solitude. *Id.* The Legislature has also recognized privacy interests in a laundry list of areas, NRS 239.010(1), including NRS Chapter 603A, defining personal information (names, social security numbers, etc.) in NRS 603A.040 that must be protected against disclosure under NRS 603A.210. The list in NRS 239.010(1) also includes confidentiality provisions in NRS 200.3771 and NRS 200.3772, confidentiality for victims of sexual offenses. On that topic, the Legislature declared, "The public has no overriding need to know the individual identity of the victim of a sexual offense . . . ." NRS 200.337(5). Given Nevada's established protection of personal privacy interests, we hold that Nevada's common law protects personal privacy interests from unrestrained disclosure under the NPRA, and we adopt the test in *Cameranesi*, 856 F.3d at 637, to balance the public's right to information against nontrivial personal privacy interests. This approach is a logical extension of *Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630, 635, 798 P.2d 144, 147 (1990). In *Donrey*, this court implicitly recognized that unless a statute expressly creates an absolute privilege against public disclosure, limitations on disclosure must be based upon balancing interests of nondisclosure against the general policy of open government. 106 Nev. at 634-36, 798 P.2d at 146-47. The *Cameranesi* balancing test facilitates a court's balancing of nontrivial privacy interests against public disclosure. *See Cameranesi*, 856 F.3d at 637. For example, in this case, this test balances the nontrivial privacy interests of teachers having their names publicly disclosed with bringing attention to an issue with an elected public official within a public school district. Thus, we believe the *Cameranesi* test provides a better way to determine if a government entity should redact information in a public records request.

This test coheres with both NRS 239.0113 and *Gibbons*, 127 Nev. at 877-78, 266 P.3d at 625-26. It is merely a balancing test—in the context of a government investigation—of individual nontrivial privacy rights against the public's right to access public information. *Carlson v. U.S. Postal Serv.*, 2017 WL 3581136, at *28 (N.D.

Cal. Aug. 18, 2017). We explained in *Gibbons* that NRS 239.0113 requires that the state bear the burden of proving that records are confidential. *Gibbons*, 127 Nev. at 878, 266 P.3d at 626. The *Cameranesi* test does that, but also gives the district courts a framework to weigh the public's interest in disclosure, by shifting the burden onto the public record petitioner, once the government has met its burden. This ensures that the district courts are adequately weighing the competing interests of privacy and government accountability.

CONCLUSION

Here, the district court only ordered that the names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff may be redacted. Problematically, this list excludes teachers or witnesses who may face stigma or backlash for coming forward or being part of the investigation. The privacy interest of these persons should be considered before disclosure of their names or other information that would identify them. Accordingly, we reverse the redaction order of the district court and remand for further proceedings consistent with this opinion.

Douglas, C.J., and Cherry, Pickering, Hardesty, Parraguirre, and Stiglich, JJ., concur.

KOFI SARFO, M.D., Appellant, *v*. STATE OF NEVADA, BOARD OF MEDICAL EXAMINERS, Respondent.

No. 73117

November 1, 2018 429 P.3d 650

Appeal from a district court order denying a motion for preliminary injunction in an administrative agency matter. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Affirmed.

Hafter Law and *Jacob L. Hafter*, Las Vegas,[1] for Appellant.

Robison, Sharp, Sullivan & Brust and *Michael E. Sullivan* and *Therese M. Shanks*, Reno, for Respondent.

Before the Supreme Court, Pickering, Gibbons and Hardesty, JJ.

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[1]This court is aware that appellant's attorney was suspended and has since passed away. Since a disposition in this matter has already been filed, and this opinion is being issued in response to a motion to publish, this court need not address the failure of the parties to give notice to this court following his death.

OPINION[2]

By the Court, Hardesty, J.:

In this appeal, we must determine whether a physician's due process rights attach at the investigation stage of a complaint made to the Nevada State Board of Medical Examiners (the Board). When a complaint against a physician is filed with the Board, a committee of Board members investigates the complaint. Because NRS 630.352(1) prevents members in the investigative committee from later participating in adjudicating claims stemming from the investigation, we extend the holding in *Hernandez v. Bennett-Haron*, 128 Nev. 580, 287 P.3d 305 (2012), and conclude that a physician's due process rights do not attach to the administrative agency's fact-finding role.

FACTS AND PROCEDURAL HISTORY

Appellant Kofi Sarfo, M.D., received a letter from respondent Nevada State Board of Medical Examiners (the Board) informing him that a complaint had been filed against him. The Board did not identify the complainant or specify the claims, only noting that it would not determine whether there had been a violation of the Medical Practice Act until it completed its investigation. The letter accompanied an order for Dr. Sarfo to produce medical records for several of his patients to enable the Board's investigative committee (IC) to investigate the complaint filed against Dr. Sarfo. Dr. Sarfo refused to comply. He then filed a writ petition and a motion for injunctive relief in the district court, arguing that the Board violated his due process rights by keeping the actual complaint and identity of the complainant confidential.

The district court denied Dr. Sarfo's request for injunctive relief, concluding that his due process rights were not violated, and thus, his underlying petition could not succeed on the merits. The district court found that under NRS 630.140(1), NRS 630.311(1), and NRS 630.336(4), the Board "is empowered to issue the order of which Dr. Sarfo complains, the investigation itself is confidential, and the Board is prohibited from disclosing to Dr. Sarfo the identity of the person who filed the complaint, or the actual complaint disclosing such." In issuing this order, the district court relied on *Hernandez v. Bennett-Haron*, 128 Nev. 580, 287 P.3d 305 (2012), to find that the IC's investigation did not invoke due process protections because the IC "has no authority to adjudicate any legal rights," since it is only "tasked with gathering facts and investigating whether there is

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[2]We originally affirmed in an unpublished order. Respondent has moved to publish the order as an opinion. We grant the motion and publish this opinion in place of our earlier order. *See* NRAP 36(f).

any merit to a complaint filed with the Board against a physician." The Board then moved for attorney fees and costs, which the district court granted.

Dr. Sarfo now appeals the district court order, arguing that (1) the Board's investigative procedures violate his due process rights, (2) the Board improperly interprets NRS 630.336(4) to allow the Board to refuse to disclose the actual complaint and complainant, and (3) the district court abused its discretion in awarding the Board attorney fees and costs.

DISCUSSION

The district court did not abuse its discretion in denying Dr. Sarfo's motion for a preliminary injunction

A district court may issue a preliminary injunction if the plaintiff can show "(1) a likelihood of success on the merits; and (2) a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy." *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004) (internal quotation marks omitted). "Determining whether to grant or deny a preliminary injunction is within the district court's sound discretion . . . , and the district court's decision will not be disturbed absent an abuse of discretion or unless it is based on an erroneous legal standard." *Id.*

Dr. Sarfo first argues the merits of his underlying petition, contending that physicians must have due process protections during the discipline process. Dr. Sarfo argues that his interest in practicing medicine is a property right in Nevada, and that the Board's procedures were not constitutionally sufficient because keeping the complaint and complainant confidential fails to provide adequate notice and a meaningful opportunity to respond. Further, Dr. Sarfo argues that because the IC also prosecutes administrative discipline cases brought before the Board, its functions exceed mere fact-finding and are an extension of the adjudication process.

The Board argues that the district court did not abuse its discretion in denying Dr. Sarfo's motion for preliminary injunction because Dr. Sarfo cannot prevail on the merits of his underlying petition. Specifically, the Board argues that due process has not been implicated because there is no property interest at stake during the preliminary investigation, due process does not attach to the fact-finding portion of the investigation, and the Board is statutorily prohibited from providing Dr. Sarfo with a copy of the complaint. The Board further argues that Dr. Sarfo's motion was properly denied since he cannot show irreparable harm resulting from the IC's order to produce records, because irreparable harm does not exist when there is no actual or threatened injury and merely the possibility of an injury.

Lastly, the Board argues that the public interest in regulating medical professionals and protecting the public from potentially unsafe or incompetent practitioners outweighs any potential harm to Dr. Sarfo.

There are two types of complaints that come before the Board: a complaint initially generated by a member of the public and a formal complaint generated by the IC following the completion of its investigation. *See* NRS 630.311. Upon receipt of the initial complaint filed by a member of the public against a physician, the Board must designate an IC to "review each complaint and conduct an investigation to determine if there is a reasonable basis for the complaint." NRS 630.311(1). The IC has no disciplinary powers and can only file a formal complaint with the Board if it concludes that a complaint from a member of the public has a reasonable basis. NRS 630.311(2). Once a formal complaint has been filed, the adjudicative process begins, and the physician is provided with notice and an opportunity to be heard at a formal hearing. *See* NRS 630.339. Here, Dr. Sarfo is alleging a due process violation stemming from an initial complaint, not a formal complaint.

The Nevada Constitution requires that "[n]o person shall be deprived of life, liberty, or property, without due process of law." Nev. Const. art. 1, § 8(5). The district court, relying on *Hernandez v. Bennett-Haron*, 128 Nev. 580, 287 P.3d 305 (2012), found that Dr. Sarfo could not prevail on the merits because due process was not implicated in this matter, as the IC was merely performing investigatory fact-finding with no power to deprive Dr. Sarfo of his liberty interest. In *Hernandez*, we determined that the county coroner's fact-finding investigation of whether police officers used excessive force did not implicate due process rights because the county coroner was only tasked with fact-finding and not with adjudicating formal disciplinary proceedings. 128 Nev. at 591-93, 287 P.3d at 313-14. In fact, due process protections "need not be made available in proceedings that merely involve fact-finding or investigatory exercises by the government agency." *Id.* at 587, 287 P.3d at 311 (citing *Hannah v. Larche*, 363 U.S. 420, 442 (1960)). Here, the IC is tasked with "conduct[ing] an investigation to determine if there is a reasonable basis for the complaint." NRS 630.311(1).

Dr. Sarfo challenges the district court's application of *Hernandez*, contending that the IC is distinguishable from a county coroner because the IC, unlike the county coroner, is able to file a formal complaint with the Board. However, NRS 630.352(1) mitigates the due process danger of an entity serving in both an investigatory and adjudicatory role, stating that

> [a]ny member of the Board, *other than a member of an investigative committee of the Board who participated in any determination regarding a formal complaint in the matter* or

> any member serving on a panel of the Board at the hearing of the matter, may participate in an adjudication to obtain the final order of the Board.

Thus, the IC fact-finders are statutorily prohibited from participating in the adjudication of any subsequent formal complaint. Extending our holding in *Hernandez* to an administrative agency engaged solely in an investigation role is in accordance with the law across the country that recognizes the distinction between an agency's fact-finding and adjudicatory roles. *See, e.g.*, *United States v. E. River Hous. Corp.*, 90 F. Supp. 3d 118, 136-37 (S.D.N.Y. 2015) (holding that due process rights do not attach during a Housing and Urban Development Department discrimination investigation, but do attach if the agency initiates a formal adjudicatory proceeding); *S.E.C. v. OKC Corp.*, 474 F. Supp. 1031, 1041 (N.D. Tex. 1979) (holding that due process protections do not attach during an SEC investigation, but may be implicated by the SEC's filing of a complaint); *Alexander D. v. State Bd. of Dental Exam'rs*, 282 Cal. Rptr. 201, 204-05 (Ct. App. 1991) (holding that a dentist's due process rights do not attach during the California Board of Dental Examiner's investigation of a complaint against the dentist); *Smith v. Bd. of Med. Quality Assurance*, 248 Cal. Rptr. 704, 710 (Ct. App. 1988) (holding that a physician's due process rights do not attach during the California Board of Medical Quality Assurance's investigation of a complaint); *In re Petition of Att'y Gen. for Investigative Subpoenas*, 736 N.W.2d 594, 602 (Mich. Ct. App. 2007) (holding that subpoenas issued pursuant to the department of public health's investigation do not implicate due process unless and until the department files a formal complaint); *Humenansky v. Minn. Bd. of Med. Exam'rs*, 525 N.W.2d 559, 566 (Minn. Ct. App. 1994) (holding that due process does not attach during the investigatory proceedings of the Minnesota Board of Medical Examiners).

Accordingly, we conclude that the district court appropriately applied *Hernandez* to find that the IC's investigation did not require due process protection because it did not also adjudicate the complaint. An agency or board being tasked merely with investigatory fact-finding and filing a formal complaint, which they are then statutorily prohibited from later adjudicating themselves, does not implicate procedural due process protections. As such, Dr. Sarfo has failed to show how he would be irreparably harmed at this investigatory stage of the administrative process.

Because the district court correctly found that Dr. Sarfo could not prevail on the merits because no due process rights were implicated and Dr. Sarfo has failed to show irreparable harm, we conclude that the district court did not abuse its discretion in denying Dr. Sarfo's motion for a preliminary injunction. *Univ. & Cmty. Coll. Sys. of Nev.*

v. Nevadans for Sound Gov't, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004).

The Board's interpretation of NRS 630.336 is reasonable and within the plain language of the statute

Dr. Sarfo next argues that the Board incorrectly interprets the statute to mean that the complaint and complainant may be kept confidential from the licensee. NRS 630.336(4) states:

> Except as otherwise provided in subsection 5 and NRS 239.0115, a complaint filed with the Board pursuant to NRS 630.307, all documents and other information filed with the complaint and all documents and other information compiled as a result of an investigation conducted to determine whether to initiate disciplinary action are confidential.

Dr. Sarfo argues that this statute should be interpreted to mean that all documents related to the investigation should be kept confidential from non-related parties only, because the statute is meant to protect licensees from reputational damage from baseless complaints. He supports this position by pointing to the legislative history where the statute was amended to make only formal complaints public to prevent frivolous complaints from becoming public record. Dr. Sarfo also draws a comparison to judicial discipline proceedings, which require confidentiality with regard to the public rather than the target of the proceedings.

The Board argues that keeping the complaint and complainant confidential from the licensee is a reasonable interpretation of the statute. The Board further argues that if it is required to disclose the identity of the complainant to the licensee, members of the public would be more hesitant to file complaints against their doctors, which would undermine the Board's duty to regulate the medical profession.

We review questions of statutory interpretation de novo. *Dykema v. Del Webb Cmtys., Inc.*, 132 Nev. 823, 826, 385 P.3d 977, 979 (2016). "[W]hen the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *Id.* (internal quotation marks omitted). We will "nonetheless defer to an agency's interpretation of its governing statutes or regulations if the interpretation is within the language of the statute." *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008).

We conclude that NRS 630.336(4) is unambiguous and that the Board's interpretation falls "within the [plain] language of the statute." *Id.* The statute requires that complaints and complainants be kept confidential. Dr. Sarfo's argument appears to be that the Board

is keeping the investigation more confidential than he believes the statute requires. However, nothing in the statute says that the complaint and complainant must be disclosed to the licensee in the investigatory phase. Keeping the complaint fully confidential, even from the licensee, is a reasonable interpretation of the statute's plain language. Additionally, the record demonstrates that Dr. Sarfo indicated in his declaration that he questioned all five of his patients, whose records were requested by the Board, to determine which one filed the complaint. This supports the Board's basis for its interpretation of the statute—that disclosing the complaint and complainant may make patients hesitant to report malpractice without the protection of confidentiality.

We lack jurisdiction to consider the district court's order awarding attorney fees and costs to the Board

Dr. Sarfo argues that the district court abused its discretion in awarding attorney fees and costs to the Board. The Board first argues that the district court's award of attorney fees and costs is not properly before this court because Dr. Sarfo is required to separately appeal such an order. The district court's order denying the preliminary injunction was entered on May 12, 2017, and Dr. Sarfo filed his notice of appeal on May 25, 2017. The district court's order awarding attorney fees and costs was not entered until November 15, 2017, and no separate notice of appeal or amended notice of appeal of that order has been filed. We therefore lack jurisdiction to entertain Dr. Sarfo's arguments regarding the attorney fees order.[3] *See* NRAP 3(a)(1); NRAP 4(a)(1).

Accordingly, for the reasons set forth above, we affirm. However, on the issue of attorney fees and costs, we conclude that we lack jurisdiction to consider Dr. Sarfo's arguments regarding the special order.

Pickering and Gibbons, JJ., concur.

[3]We make no determination concerning the substantive appealability of the interlocutory attorney fees order when no final judgment has been entered.