

# PUBLIC RECORDS UNDER THE NEVADA PUBLIC RECORDS ACT

BY SARAH A. BRADLEY, ESQ.

State agencies frequently receive requests for public records, and public lawyers commonly provide guidance about how these records requests should be handled under the Nevada Public Records Act (NPRA), codified in NRS 239. This article will summarize the statutory and case law in this area and provide a general framework for attorneys to advise their client agencies regarding the proper handling of public records. Often, agencies will already have a clear understanding of the potential public policy or security concerns related to the release of the requested records. As attorneys, our job is often to educate our client agencies about the NPRA in general, while paying particular attention to the specific requirements of the NPRA and the potential risks of improperly denying a records request.

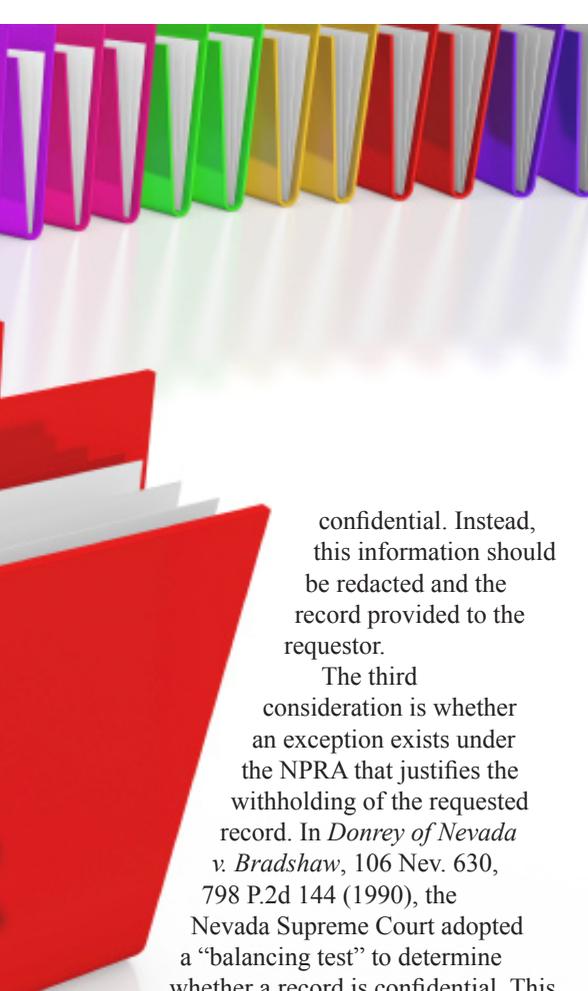
The general premise under the NPRA is that all state agency records are public unless declared confidential by law (NRS 239.010). The NPRA favors transparency in government and open access to agency records, and the provisions of the NPRA must be construed liberally in order to maximize the public's right of access to agency records.<sup>1</sup> Under the NPRA, open government is the rule.

The first consideration when handling a public records request is whether an express provision of law makes the requested document confidential. For many boards and commissions, an open investigation against a licensee and any related documents are confidential by statute unless and until the agency initiates disciplinary proceedings against the licensee (*See* NRS 641.090(4),(5)).

The second consideration when handling a public records request is whether the requested record includes confidential information. If so, this does not necessarily render the entire record

## PRACTICE TIP:

One definition of confidential information is found in NRS 603A.040. This definition may not be exhaustive because some agencies have statutes indicating that a person's home address is confidential (*See* NRS 644.130(2)(b)).



confidential. Instead, this information should be redacted and the record provided to the requestor.

The third consideration is whether an exception exists under the NPRA that justifies the withholding of the requested record. In *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990), the Nevada Supreme Court adopted a “balancing test” to determine whether a record is confidential. This test involves balancing the agency’s public policy interest in withholding the document against the general policy in favor of open government. The court acknowledged that the following public policy concerns may justify the agency’s refusal to disclose requested records:

1. Pending or anticipated criminal proceeding,
2. Confidential sources or investigative techniques to protect,
3. A possibility of denying someone a fair trial, or
4. Jeopardy to law enforcement personnel.

The balancing test articulated in *Bradshaw* was further discussed by the Nevada Supreme Court in *DR Partners v. Board of County Commissioners of Las Vegas*, 16 Nev. 616, 6 P.3d 465 (2000). The court considered whether the deliberative process privilege applied to the requested records and held that when the requested record is not explicitly made confidential by a statute, the balancing test in *Bradshaw* must be employed. The court held that

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for the deliberative process to apply and allow an agency to withhold requested records, the records must be “predecisional” and “deliberative.” Any limitation on the general disclosure requirements of NRS 239.010 must be based upon a balancing or “weighing” of the agency’s interests in non-disclosure against the general policy in favor of open government and the requestor’s “fundamental right” to access public records. The burden is upon the agency to explain why the records should not be furnished, with specific evidence justifying the withholding of the records.

In *Reno Newspapers v. Sheriff*, 126 Nev. \_\_\_, 234 P.3d 922, 923 (2010), the Nevada Supreme Court again looked at the NPRA and held that the identity of a holder of a concealed firearms permit and records of any post-permit investigations, suspensions or revocations of such permits are public records subject to disclosure and that any confidential information in the records should be redacted before disclosure. The court also held that the legislature’s 2007 amendments to the NPRA affected the *Bradshaw* balancing test, requiring a narrower interpretation of private or governmental interests promoting nondisclosure to be weighed against the policy for an open and accessible government. The court indicated that the agency’s burden is to prove its interest in nondisclosure

## PRACTICE TIP:

Withholding a requested record under Bradshaw is the exception. When in doubt, the record should be provided when requested and redacted if necessary to protect confidential or proprietary information.

“clearly” outweighs the public’s right to access, and the agency cannot meet this burden with hypothetical concerns.

Once an agency receives a public records request,<sup>2</sup> it must respond in writing to records requests by not later than the end of the fifth business day after the request is received (NRS 239.0107). At this time, the agency must allow the requestor to inspect the record or, if the agency is not able to make the record available

by the end of the fifth business day, state in writing when the record will be available to the requestor for review. If the record is not in the custody of the agency, the agency must provide the requestor with written notice of that fact and provide the name and address of the government agency that has custody of the record, if known. The NPRA allows agencies to have a verbal discussion with the requestor about the records request to clarify or otherwise discuss the request. However, the final notification pursuant to NRS 239.0107(1) about the status of the record *must* be in writing. The agency should keep a copy of this notification for its records.

## PRACTICE TIP:

Talk to your client agency about the five-day requirement in NRS 239.0107(1) now to ensure that the agency is aware of the timeline required and to avoid any future problems. In addition, the agency should document in writing, e.g., by letter to the requestor, any verbal discussions that it has with the requestor that clarify, narrow or otherwise alter the original records request.

If the agency is not going to provide the requested record, the agency must provide a written response and a citation to statute or other legal authority making the record confidential (NRS 239.0107(d)). The agency generally must provide a log to the requestor describing each individual withheld record.<sup>3</sup> This log

should contain “a general factual description of each record withheld and a specific explanation for nondisclosure.”<sup>4</sup> The explanation should include specific authority supporting the nondisclosure of the record and a statement stating why this authority supports the agency’s claim of confidentiality. “[A] string of citations to a boilerplate declaration of confidentiality” does not satisfy the agency’s requirements under the NPRA.<sup>5</sup> Internal agency policies that do not have the force and effect of law do not constitute specific authority justifying withholding the requested record under the NPRA.

An agency may recover its actual costs in providing a copy of a public record to the requestor (NRS 239.052). Providing copies of public records to the public is deemed part of the agency’s regular duties. Thus, these costs generally may include only actual costs incurred in responding to the records request, such as those for toner, paper and postage, and not employee time in responding to the request, unless the request is extraordinary. To recover its costs, the agency must prepare and maintain a list of its fees for providing public records, which should be posted in a conspicuous place in each of its offices (NRS 239.052(3)).<sup>6</sup> Should an agency wish to waive a portion or all of its fee for providing records, the agency must adopt a written policy and post notice of this policy in a conspicuous place in each of its offices (NRS 239.052(2)).

If a state agency decides not to disclose requested records and the issue is litigated and the agency loses, the requestor is entitled to recover costs and reasonable

## PRACTICE TIP:

A possible format for a log when an agency withholds requested records may be found in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), although the Nevada Supreme Court has not adopted or required such a format in Nevada, and this format may not be appropriate in every case.

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## PRACTICE TIP:

Encourage your client agency to develop a public records policy now delineating its policy and procedure related to the handling of public records requests, including its fees for records requests.

attorney's fees in pursuing the court action (NRS 239.011). Thus, it is important that the agency and its decision maker recognize that an incorrect decision to withhold requested records may be costly.

Finally, the NPRA provides immunity from damages for disclosure or refusal to disclose information as long as the public officer or employee

is acting in good faith (NRS 239.012). If the agency and its decision maker discloses or fails to disclose requested information in "good faith," even if the decision is later found to be incorrect, the agency and the decision maker are immune from liability for damages incurred by either the requestor or the person whom the information concerns. ■

- 1 NRS 239.001; *Reno Newspapers, Inc. v. Jim Gibbons, Governor of the State of Nevada*, 127 Nev. Adv. Op. 79, at 5 (2011)
- 2 It is important to note that the NPRA allows both written and oral public records requests NRS 239.0107(2). Thus, it is important

to ensure that the agency has appropriate procedures in place such that oral requests for records are logged and/or handled appropriately under the NPRA.

- 3 *Gibbons*, 127 Nev. Adv. Op. at 12. The agency may be exempt from providing a log to the requestor if the agency can demonstrate that the requestor has sufficient information to meaningfully contest the claim of confidentiality without a log. *Id.*
- 4 *Id.* at 13.
- 5 *Id.* at 16.
- 6 In lieu of posting the list of fees for providing public records request, the agency may post the location at which a list of each fee that the agency charges to provide a copy of a public record may be obtained.

## PRACTICE TIP:

Not all requested records should be released. It is important to ensure that the client agency understands there are potential risks in denying a records request and such requests should not be denied arbitrarily or without careful consideration and a solid legal position supporting the denial.

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