

REC'D & FILED

2017 JAN 24 PM 2: 55

SUSAN MERRIWETHER  
CLERK

BY SW DEPUTY

1  
2  
3  
4  
5  
6 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
7 **IN AND FOR CARSON CITY**  
8

9 **NEVADA POLICY RESEARCH**  
10 **INSTITUTE, INC.,**

11 **Petitioner,**

12 **vs.**

13 **PUBLIC EMPLOYEES' RETIREMENT**  
14 **SYSTEM OF NEVADA, a Public**  
15 **Agency; TINA LEISS, in her official**  
16 **capacity as Executive Officer of the**  
17 **Public Employee Retirement System**  
18 **of Nevada; STATE OF NEVADA,**

19 **Respondents.**

-o0o-

CASE NO. 16 OC 00169 1B

DEPT. 2

**ORDER GRANTING PETITION  
FOR WRIT OF MANDAMUS**

19 **PROCEDURAL BACKGROUND**

20 Nevada Policy Research Institute, Inc. (NPRI) filed a Petition for Writ of  
21 Mandamus seeking to compel Public Employees' Retirement System of Nevada  
22 (PERS) to produce information under the Nevada Public Records Act (NPRA).  
23

24 **ISSUES**

25 Are the records NPRI requested confidential?

26 Does PERS have a duty to create a document that contains the requested  
27 information?  
28

1 Do the alleged cybercrime risks posed by the disclosure of the requested  
2 information outweigh the benefits?

3 If PERS is required to disclose the information is NPRI entitled to  
4 attorney's fees and costs?  
5

### 6 **FACTS**

7  
8 In 2013 the Nevada Supreme Court decided *Public Employees'*  
9 *Retirement System v. Reno Newspapers*, 129 A.O. 88, 313 P.3d 221  
10 (2013)(*Reno Newspapers*). In that case Nevada Newspapers requested PERS  
11 produce "the names of all individuals who are collecting pensions, the names of  
12 their government employers, their salaries, their hire dates, and the amount of  
13 their pension payments." *Id.* 222. PERS opposed the petition on grounds very  
14 similar to those asserted in the present case. The district court concluded that  
15 neither NRS 286.110(3) nor NRS 286.117 declared the requested information  
16 confidential and the privacy concerns did not clearly outweigh the public's right  
17 to disclosure, and ordered PERS to produce a report containing the requested  
18 information. The Nevada Supreme Court concluded PERS had not identified any  
19 statute, rule, or caselaw that would foreclose production of the requested  
20 information and upheld the District court writ except for the portion of the order  
21 which required PERS to create new documents or customized reports.  
22

23 In the present case PERS' Operation Director Cheryl Price testified that as  
24 a result of the *Reno Newspapers* decision PERS "possibly" eliminated retiree  
25 names from the report it sends its actuary. This Court understood this testimony  
26 to mean PERS eliminated retiree names from the report it sends its actuary in  
27

1 part because of the *Reno Newspapers* decision. By eliminating retiree names  
2 from the report for the actuary, PERS can respond to requests for information  
3 that include a request for retiree names by stating no such document exists.

4 After PERS eliminated retiree names from the report it sends to its  
5 actuary, NPRI requested PERS' FY 2014 Retiree Raw Data. PERS complied with  
6 the request, but the FY 2014 Retiree Raw Data does not contain retiree names  
7 because of the change PERS' made in its procedure after the *Reno Newspapers*  
8 decision. Through email exchanges NPRI sought different ways of obtaining  
9 information. On January 13, 2015 NPRI requested "reports or information that  
10 could be provided that would contain the following pieces of information":  
11 retiree name, years of service credit, gross pension benefit amount, year of  
12 retirement, and last employer. Pet. for Writ of Mandamus, Ex. 2. Operations  
13 Director Price responded that PERS did not have, and did not have a duty to  
14 create, a report that contained the requested information. NPRI then filed its  
15 Petition for Writ of Mandamus (Petition) to compel PERS to provide a record of  
16 the information requested in the January 13, 2015 email referenced above, and  
17 additional information, i.e., payroll amount, retirement type, and COLA  
18 increases. Pet. for Writ of Mandamus, p. 6. NPRI did not request the additional  
19 information in the January 13, 2015 email and therefore the request in the  
20 Petition for that information is not proper because there was no specific denial  
21 to produce that information.

22 PERS did not provide any evidence on the time or cost that would be  
23 required to produce the requested information. Instead it focused on the time  
24 and cost to match retiree names to the FY 2014 Retiree Raw Data.  
25  
26  
27

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

## GENERAL LEGAL PRINCIPLES

A writ of mandamus is available to compel the performance of an act the law requires as a duty resulting from an office 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).

### Chapter 239 – Public Records

NRS 239.001 Legislative findings and declaration.

The Legislature hereby finds and declares that:

1. The purpose of this chapter is to foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law;

2. The provisions of this chapter must be construed liberally to carry out this important purpose;

3. Any exemption, exception or balancing of interests which limits or restricts access to public books and records by members of the public must be construed narrowly; ...

NRS 239.010(1) Public books and public records open to inspection ....

... 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, and may be fully copied or an abstract or memorandum may be prepared from those public books and public records.

NRS 239.0113 Burden of proof where confidentiality of public book or record is at issue.

1 Except as otherwise provided in NRS 239.0115, if:

2 1. The confidentiality of a public book or  
3 record, or a part thereof, is at issue in a judicial or  
4 administrative proceeding; and

5 2. The governmental entity that has legal  
6 custody or control of the public book or record  
7 asserts that the public book or record, or a part  
8 thereof, is confidential,

9 the governmental entity has the burden of proving by  
10 a preponderance of the evidence that the public book  
11 or record, or a part thereof, is confidential.

12 NRS 286.110(3) Public Employees' Retirement System : ... public  
13 inspection of records; ...

14 ... records, other than the files of ... retired employees  
15 are public records ....

16 NAC 239.867 No requirement to create public record that does  
17 not exist.

18 If a person requests to inspect, copy or receive a copy  
19 of a public record that does not exist, a records  
20 official or an agency of the Executive Department is  
21 not required to create a public record to satisfy the  
22 request.

## 23 ANALYSIS

### 24 **Are the records NPRI requested confidential?**

25 As it did in *Reno Newspapers*, PERS argued NRS 286.110(3) and NRS  
26 286.117 bar production of the requested information because it is confidential.

27 The information requested in this case is substantially similar to the information  
28 requested in *Reno Newspapers*. This Court concludes, as the Supreme Court did  
in *Reno Newspapers*, that PERS failed to cite any statute, rule, or case that bars

1 production of the information NPRI requested on grounds the information is  
2 confidential.

3  
4 **Does PERS have a duty to create a document that contains the**  
5 **requested information?**

6 PERS cited NAC 239.867 to support its position that there is no duty to  
7 create a document. NAC 239.867 provides:

8 No requirement to create public record that does not  
9 exist.

10 (NRS 239.008, 378.255) If a person requests to  
11 inspect, copy or receive a copy of a public record that  
12 does not exist, a records official or an agency of the  
Executive Department is not required to create a  
public record to satisfy the request.

13 NAC 239.867 does not require an agency to create a public record, but  
14 neither does it does bar an agency from creating a record. PERS quoted in part  
15 Nevada Public Records Act: A Manual for State Agencies 2014 which states in  
16 part: "An agency is not required to organize data to create a record that doesn't  
17 exist at the time of the request." The part PERS left out from that sentence in the  
18 Manual is: "but may do so at the discretion of the agency if doing so is  
19 reasonable." PERS failure to indicate it was quoting only part of the sentence  
20 seems a bit deceptive.

21  
22 The *Reno Newspapers* Court did not cite NAC 239.867 but vacated the  
23 district court's order to the extent is required PERS to create new documents or  
24 customized reports by searching for and compiling information from  
25 individuals' files or other records. But two years later in *Las Vegas Metro. Police*  
26 *Dept. v. Blackjack Bonding, Inc.*, 131 Nev A.O. 10, 343 P.3d 608 (2015)  
27 (*Blackjack*) the Court referenced *Reno Newspapers* and stated that case "did not  
28

1 address the situation where an agency had technology to readily compile the  
2 requested information. Instead, when an agency has a computer program that  
3 can readily compile the requested information, the agency is not excused from  
4 its duty to produce and disclose that information.” Id. 613. (Internal citations  
5 omitted.) The *Blackjack* Court did not discuss NAC 239.867.

6  
7 NPRI tried to avoid the issue by arguing its request does not require  
8 PERS to create new records because PERS produced a record with the requested  
9 information in the past, and PERS would only need to collate data it already has.  
10 The Court finds these arguments lack merit. The old report does not provide the  
11 current information requested and collating documents would result in  
12 something new and different than existed before – a new document.

13 Considering the purpose of the NPRA, to foster democratic principles by  
14 providing members of the public with access to public books and records; the  
15 legislative mandate that courts construe the NPRA liberally to carry out this  
16 important purpose; the legislative mandate that any exemption, exception or  
17 balancing of interests which limits or restricts access to public books and records  
18 by members of the public must be construed narrowly; the lack of evidence that  
19 producing the requested information, retiree name, years of service credit, gross  
20 pension benefit amount, year of retirement, and last employer would require  
21 unreasonable demands or costs on PERS; and the fact that PERS altered its  
22 procedure in providing information to its actuary to eliminate the names of  
23 retirees in part because of the *Reno Newspapers* decision, the court concludes  
24 that PERS does have a duty to create a document that contains the requested  
25 information.  
26  
27  
28

1 **Do the alleged cybercrime risks posed by the disclosure of the**  
2 **requested information outweigh the benefits?**

3 PERS' argument that the risk of cybercrime against retirees posed by  
4 disclosure of the requested information outweigh the benefits, suffers from the  
5 same fatal defect its argument had in *Reno Newspapers* – there is no convincing  
6 evidence that the concerns are anything other than hypothetical and speculative.  
7 The testimony provided by PERS did not limit the opinions to the information  
8 requested in this case. Instead the opinions are based upon the inclusion of  
9 information not requested by NPRI like sex, birth date, and address.

10 Like in *Reno Newspapers* PERS failed to provide sufficient evidentiary  
11 support for its position that disclosure of the requested information would  
12 actually cause harm or even increase the risk of harm to retired employees.  
13

14  
15 **If PERS is required to disclose the information is NPRI entitled to**  
16 **attorney's fees and costs?**

17 Under NRS 230.011(2) if the requester prevails, the requester is entitled  
18 to recover its costs and reasonable attorney's fees from the governmental entity  
19 whose officer has custody of the records. NPRI has prevailed and is therefore  
20 entitled to recover its costs and reasonable attorney's fees from PERS.  
21

22 **CONCLUSIONS OF LAW**

23 The information NPRI requested is not confidential.

24 PERS does have a duty to create a document that contains for FY 2014,  
25 retiree name, years of service credit, gross pension benefit amount, year of  
26 retirement, and last employer.  
27  
28



1 The alleged cybercrime risks posed by the disclosure of the requested  
2 information do not outweigh the benefits.

3 NPRI is entitled to attorney's fees and costs from PERS.

4 Any arguments of the parties not addressed in this order lack merit.

5  
6 **ORDER**

7  
8 IT IS ORDERED:

9 The Petition for Writ of Mandamus is granted.

10 PERS is ordered to produce the following information to NPRI within five  
11 business days:

- 12 a) Retiree name;  
13 b) Years of service credit;  
14 c) Gross pension benefit amount;  
15 d) Year of retirement; and  
16 e) Last employer  
17

18 NPRI will file a memorandum of costs and an affidavit for attorney's fees  
19 that complies with FJDCR 15(13) within five business days.

20 Under NRS 239.052 PERS may charge a fee for providing a copy of the  
21 ordered public record. The fee must not exceed the actual cost to PERS to  
22 provide the copy of the public record.

23 January 23, 2016.

24  
25   
26 District Judge

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of the First  
Judicial District Court of Nevada, that on this 24 day of January, 2017, I:

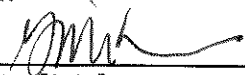
deposited for mailing at Carson City, Nevada

Joshua Hicks, Esq.  
Andrew Hosmer-Henner, Esq.  
100 W. Liberty Street, 10<sup>th</sup> floor  
Reno, NV 89505

Joseph Becker, Esq.  
75 Caliente Street  
Reno, NV 89509

- caused to be delivered by messenger service
- faxed to: Joseph F. Becker, Esq. 775-201-0225; and Joshua J. Hicks, Esq. 775-788-2020

a true and correct copy of the above order.

  
\_\_\_\_\_  
Judicial Assistant