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NORMAN KEITH FLOWERS, AKA NORMAN HAROLD FLOWERS, III, APPELLANT, *v*. THE STATE OF NEVADA, RESPONDENT.

No. 53159

NORMAN HAROLD FLOWERS, III, APPELLANT, *v*. THE STATE OF NEVADA, RESPONDENT.

No. 55759

January 30, 2020 456 P.3d 1037

Consolidated appeals from a judgment of conviction and amended judgment of conviction, pursuant to a jury verdict, of burglary, first-degree murder, and sexual assault, and from an order denying a motion for a new trial. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Senior Judge; Stewart L. Bell, Judge; Linda Marie Bell, Chief Judge.

Affirmed.

JoNell Thomas, Special Public Defender, and *Randall H. Pike* and *Clark W. Patrick*, Chief Deputy Special Public Defenders, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Pamela C. Weckerly* and *Charles W. Thoman*, Chief Deputy District Attorneys, and *Nancy A. Becker*, Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, Pickering, C.J., Parraguirre and Cadish, JJ.

OPINION

By the Court, Pickering, C.J.:

A Clark County jury convicted appellant Norman Flowers of first-degree felony murder, sexual assault, and burglary in connection with the rape and murder of 18-year-old Sheila Quarles. Flowers timely appealed his original and amended judgments of conviction and the order denying the motion for a new trial that followed. The appeals were consolidated, briefed, and argued. Before a decision was reached, we granted Flowers' motion to voluntarily dismiss these consolidated appeals due to a global plea agreement resolving the charges in this and a separate criminal case. Years later, Flowers succeeded in setting aside the plea agreement. This court subsequently granted Flowers' motion to reinstate these consolidated appeals. After supplemental briefing and reargument, we affirm.

I. *FACTS*

At the time of her death, Sheila Quarles shared an apartment with her mother, Debra, in Las Vegas. On March 24, 2005, Sheila stayed home from her job at Starbucks while her mother went to work. Sheila spoke to her mother by phone several times that day, the last time at 1 p.m. Around 3 p.m., Debra returned to the apartment and found Sheila, face-up and nonresponsive, in a bathtub full of hot water. By the time paramedics arrived, Sheila had died.

There were no signs of a forced entry into the apartment. Some items in the bathroom had been knocked over and several valuables were missing, including Sheila's cell phone, her bankcard, and jewelry. Las Vegas Metropolitan Police Department (LVMPD) detectives noted that Sheila had a bruised abdomen and scraped knee but saw no major external injuries.

The Clark County Coroner's Office performed an autopsy. The autopsy report was not admitted into evidence, but some of the photographs documenting it were. The autopsy revealed the following: Sheila had hemorrhages under her scalp, consistent with blunt force trauma to the head; she had suffered vaginal lacerations and tears, consistent with sexual assault; she exhibited petechiae, consistent with asphyxiation; she had hemorrhages on her neck, consistent

with manual strangulation; and her lungs contained froth, consistent with drowning. The lack of swelling in the vaginal lacerations and tears indicated that the sexual assault occurred less than an hour before Sheila died.

LVMPD collected a vaginal swab from Sheila's body at the autopsy and her thong underwear from the crime scene. The crime lab found sperm in both. A forensic scientist in LVMPD's biology/DNA unit, Kristina Paulette, generated DNA profiles from this evidence. The profiles revealed a mixture of Sheila's DNA and that of two unknown males. LVMPD used the DNA profiles to eliminate several possible suspects. The profiles did not initially provide any new leads, though, and the case went cold.

Less than two months after Sheila's death, on May 3, 2005, a second woman, Merilee Coote, was found dead in her Las Vegas apartment, the victim of sexual assault and manual strangulation. The crime scene yielded single-source DNA profiles from the carpet underneath Coote's body and from her vaginal and anal swabs. Flowers and Coote knew one another through a woman Flowers had dated, and a witness placed Flowers in Coote's apartment complex at the time Coote's body was found. As part of the Coote investigation, LVMPD obtained a buccal swab from Flowers. Flowers' DNA profile matched the DNA profile generated from the Coote crime scene, and Flowers was arrested for the Coote sexual assault and murder.

Paulette entered the DNA profiles generated from Sheila's crime scene evidence into CODIS, a DNA database. After receiving Flowers' DNA profile—generated in connection with the investigation into the Coote murder—CODIS alerted Paulette that it had identified Flowers as a potential contributor to the Sheila Quarles DNA profiles. Paulette reworked Flowers' buccal swab and confirmed that, unlike 99.9% of the population, Flowers could not be excluded as one of the two males who contributed to the mixed DNA profiles from Sheila's crime scene.

This new information led detectives to focus on Flowers as a person of interest in Sheila's sexual assault and death. Their investigation revealed that Flowers had dated Sheila's mother, Debra, for several months in late 2004 and met Sheila then. Two weeks before Sheila died, Flowers approached Debra and Sheila, who were sitting outside their apartment. Asked why he was there, Flowers replied that he'd been hired to do maintenance work at the apartment complex. The three spoke for approximately 20 minutes. At trial, the property manager testified that Flowers never worked at the complex. After Sheila's death but before Flowers' arrest in the Coote case, Flowers expressed his sympathy to Debra for Sheila's death, drove her to two grief counseling sessions, and asked Debra for updates on the investigation into Sheila's case.

Eventually, LVMPD identified George Brass as the second contributor to the DNA mix from Sheila's crime scene. Sheila had a casual sexual relationship with Brass, who lived with his mother at the same apartment complex as Sheila and her mother. When interviewed, Brass stated that he had consensual sex with Sheila the morning of the day she died, then drove across town to the Wal-Mart where he worked. Wal-Mart records showed that Brass clocked in at noon, left for lunch at 4 p.m., returned to work at 5 p.m., and left for the day at 7:45 p.m.

In the Sheila Quarles matter, the State charged Flowers with one count each of first-degree murder, sexual assault, burglary, and robbery, and filed a notice of intent to seek the death penalty. The State brought similar charges against Flowers in connection with Merilee Coote's death and sexual assault and the death and sexual assault of a third woman, Rena Gonzalez. The district court denied the State's motion to consolidate Sheila's case with the Coote/Gonzalez case. After an evidentiary hearing, however, the district court granted in part and denied in part the State's motion to introduce evidence relating to Coote's death and sexual assault to establish that Flowers, not Brass or someone else, killed Sheila and to refute Flowers' claim that he had consensual sex with Sheila.

Flowers proceeded to trial in the Sheila Quarles case in October 2008. The jury found Flowers guilty of first-degree murder on a felony-murder theory, sexual assault, and burglary. It found Flowers not guilty of robbery and declined to impose the death penalty, instead returning a verdict of life without the possibility of parole. The district court denied Flowers' motions for a new trial.

II. *TRIAL ISSUES*

Flowers raises eight issues respecting the trial in his case. He urges reversal because the district court (A) erred in admitting evidence related to the Coote sexual assault and murder; (B) accepted testimonial hearsay, violating the Confrontation Clause; (C) admitted the uncounseled statement Flowers gave police about Sheila after being charged and appointed counsel in the Coote case, violating his Fifth and Sixth Amendment rights; (D) unconstitutionally allowed the admission of gruesome autopsy photographs; (E) denied Flowers' constitutional rights by excluding as hearsay an exculpatory statement Sheila made to a third party about having a relationship with "Keith" (the name Flowers went by); and (F) tolerated prosecutorial misconduct; and because the conviction is (G) not supported by sufficient evidence and (H) tainted by cumulative error.

A. *Evidence of the Coote sexual assault and murder*

Flowers argues that the district court erred and violated his constitutional rights when it allowed the State to present evidence of the

Coote sexual assault and murder to prove that Flowers, not Brass or someone else, sexually assaulted and killed Sheila. He sees the crimes as too dissimilar to give the Coote evidence enough nonpropensity probative value to outweigh its undeniably prejudicial effect.

NRS 48.045(2) prohibits the use of "[e]vidence of other crimes, wrongs or acts . . . to prove the character of a person in order to show that the person acted in conformity therewith." Evidence of a defendant's other bad acts "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*; *see Bigpond v. State*, 128 Nev. 108, 116, 270 P.3d 1244, 1249 (2012) (holding that NRS 48.045(2)'s list of permissible nonpropensity purposes is not exclusive). "A presumption of inadmissibility attaches to [other] bad act evidence." *Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006) (quotation omitted). Before admitting other-bad-act evidence, the district court must determine, outside the presence of the jury, that (1) the other bad act is relevant to the crime charged, (2) the State can prove the other bad act by clear and convincing evidence, and (3) the nonpropensity probative value of the other-bad-act evidence "is not substantially outweighed by the danger of unfair prejudice." *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), *modified by Bigpond*, 128 Nev. 108, 270 P.3d 1244; *see Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), *superseded in part by statute as stated in Thomas v. State*, 120 Nev. 37, 44-45, 83 P.3d 818, 823 (2004). "This court reviews a district court's decision to admit or exclude [other]-bad-act evidence under an abuse of discretion standard," *Newman v. State*, 129 Nev. 222, 231, 298 P.3d 1171, 1178 (2013), and will not reverse except on "a showing that the decision is manifestly incorrect." *Rhymes v. State*, 121 Nev. 17, 21-22, 107 P.3d 1278, 1281 (2005).

The district court held the hearing and supportably made the findings that *Tinch* and *Petrocelli* required to overcome the presumption against admitting other-bad-act evidence.[1] The district court deemed the Coote crime relevant to identity and intent because it was close in time and distinctively similar to the Sheila Quarles crime. Important to the district court: Both Coote and Sheila were sexually

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[1]NRS 48.045(3) provides: "Nothing in this section shall be construed to prohibit the admission of evidence in a criminal prosecution for a sexual offense that a person committed another crime, wrong or act that constitutes a separate sexual offense." We do not address this provision because it was added to NRS 48.045 in 2015, after the trial in this case, and so the district court did not consider it. 2015 Nev. Stat., ch. 399, § 21, at 2243; *see Franks v. State*, 135 Nev. 1, 3-4, 432 P.3d 752, 755 (2019) (noting "that NRS 48.045(3) unambiguously permits the district court to admit prior sexual bad acts for propensity purposes in a criminal prosecution for a sexual offense" and applying the statute to a criminal case filed before but tried after its October 1, 2015, effective date).

assaulted and manually strangled in their Las Vegas apartments, less than two months apart; both women knew Flowers, having met him through women he'd dated; and DNA evidence directly implicated Flowers in both cases. These facts, the district court held, tended to show that Flowers, not Brass or someone else, sexually assaulted and killed both women. The district court also found the State could prove the Coote assault and murder by clear and convincing evidence and that the undeniably prejudicial effect of the Coote evidence did not substantially outweigh its probative value.

The jury had to decide who raped and killed Sheila. The identity exception in NRS 48.045(2) applies "where a positive identification of the perpetrator has not been made, and the offered evidence establishes a signature crime so clear as to establish the identity of the person on trial." *Rosky v. State*, 121 Nev. 184, 196-97, 111 P.3d 690, 698 (2005) (quoting *Mortensen v. State*, 115 Nev. 273, 280, 986 P.2d 1105, 1110 (1999)). The DNA from Coote's crime scene solely identified Flowers, while the DNA from Sheila's was mixed. Both victims were African-American. Both were manually strangled, as their internal neck hemorrhages confirmed. The vaginal lacerations and tears each suffered were similar. Both women knew Flowers; both were killed during the day at home in their Las Vegas apartments with no sign of forced entry into the apartment. Several items of personal property were taken from both victims' apartments, which were otherwise left undisturbed. The perpetrator used hot water at both crime scenes to destroy evidence. Though Flowers argues otherwise, these similarities are distinctive and go beyond commonplace evidence in sexual assault/murder cases. We recognize there were dissimilarities, too: Sheila was 18 years old while Coote was 45; Sheila was vaginally penetrated while Coote sustained both vaginal and anal penetrations; and Sheila's body was found in the bathtub, drowned, while Coote's body was found in the living room with burns in her pubic area. Despite these dissimilarities, the similarities do not allow us to say the district court abused its considerable discretion or was manifestly wrong when it deemed the Coote evidence relevant to identity.

The district court also permissibly deemed the Coote assault and murder relevant to intent. Flowers suggested that he had consensual sex with Sheila. Because the two crimes were similar, and because the State found only Flowers' DNA at the Coote crime scene, the Coote assault tended to show that the presence of Flowers' DNA in Sheila meant that he sexually assaulted her too. It seems unlikely that Flowers happened to have consensual sex with two women who each shortly thereafter was sexually assaulted, strangled, and killed by unknown assailant(s). These facts dispositively distinguish *Hubbard v. State*, 134 Nev. 450, 422 P.3d 1260 (2018), on which Flowers relies, where the defendant denied being present at the crime scene and no physical evidence tied him to it.

As noted, the district court found that the State presented clear and convincing evidence of the Coote assault and murder. It weighed the evidence's probative value against its prejudicial effect and gave proper limiting instructions. The district court did not err in admitting the Coote evidence to prove identity and intent. *See Diomampo v. State*, 124 Nev. 414, 429-30, 185 P.3d 1031, 1041 (2008) ("[T]he trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and is to be given great deference.") (quotation omitted).

Flowers makes two additional arguments respecting the Coote evidence. First, he argues the State exceeded certain limits the district court placed on the admission of this evidence. Because Flowers did not object when the State assertedly violated the order in limine, *see BMW v. Roth*, 127 Nev. 122, 135, 252 P.3d 649, 658 (2011) (requiring contemporaneous objection to violation of order in limine), we review for plain error, *see Thompson v. State*, 125 Nev. 807, 816 n.7, 221 P.3d 708, 714 n.7 (2009), and find none. Second, Flowers raises "a very narrow [constitutional] question: 'whether admission of . . . evidence that is both relevant . . . and not overly prejudicial . . . may still be said to violate the defendant's due process right to a fundamentally fair trial.'" *United States v. LeMay*, 260 F.3d 1018, 1027 (9th Cir. 2001) (quoting *United States v. Castillo*, 140 F.3d 874, 882 (10th Cir. 1998)). "[T]o ask the question is to answer it [in the negative]." *Id.* (quoting *Castillo*, 140 F.3d at 882). The Coote sexual assault and murder were relevant to Sheila's sexual assault and murder and admitting this evidence did not violate Flowers' due process right to a fair trial.

B. *Confrontation Clause errors*

Flowers contends that his constitutional right to confront the witnesses against him was violated during the testimony of Dr. Larry Simms from the Clark County Coroner's Office and Kristina Paulette, a forensic scientist with LVMPD's biology/DNA unit. He argues that Simms and Paulette relied on testimonial out-of-court statements from others in their respective offices whom the State did not call as witnesses, and that this violated *Crawford v. Washington*, 541 U.S. 36 (2004). The Confrontation Clause guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford*, the high court held that this guarantee bars the admission of testimonial hearsay unless (1) the declarant is unavailable and the accused either (2) had a prior opportunity to cross-examine the declarant or (3) forfeited his or her right to object by wrongdoing. 541 U.S. at 54, 62; *see People v. Garton*, 412 P.3d 315, 331 (Cal.), *cert. denied by Garton v. California*, 139 S. Ct. 417 (2018).

Flowers did not raise a Confrontation Clause objection to Simms's or Paulette's testimony at trial. The Supreme Court has recognized that "[t]he right to confrontation may, of course, be waived, *including by failure to object to the offending evidence*, and States may adopt procedural rules governing the exercise of such objections." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313-14 n.3 (2009) (emphasis added). But in *Vega v. State*, 126 Nev. 332, 338, 236 P.3d 632, 636 (2010), we extended plain error review to an otherwise forfeited Confrontation Clause objection.

Plain error review is discretionary, not obligatory. *Jeremias v. State*, 134 Nev. 46, 52, 412 P.3d 43, 49, *cert. denied*, 139 S. Ct. 415 (2018). To establish plain error, "an appellant must demonstrate that: (1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Id*. at 50, 412 P.3d at 48. A reviewing court determines "[w]hether an error is 'plain' . . . by reference to the law as of the time of appeal" and "typically will not find such error where the operative legal question is unsettled." *United States v. Weintraub*, 273 F.3d 139, 152 (2d Cir. 2001), *cited approvingly in Gaxiola v. State*, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005). A plain error does not affect a defendant's substantial rights unless "it causes actual prejudice or a miscarriage of justice." *Jeremias*, 134 Nev. at 51, 412 P.3d at 49.

1. *The Simms testimony*

The State presented evidence about Sheila's and Coote's autopsies through the testimony of Larry Simms. Simms did not perform the autopsies or author the autopsy reports on either woman; another forensic pathologist, Ronald Knoblock, did. Simms and Knoblock worked together at the Clark County Coroner's Office until Knoblock left to take another job, shortly after conducting Sheila's and Coote's autopsies. Nothing in the record suggests Knoblock was unavailable at time of trial.

Simms testified as an expert forensic pathologist. He offered opinion testimony based on his training and experience, his examination of the extensive photographs documenting the autopsies, and his review of the autopsy reports. Some but not all of the photographs were admitted into evidence; the autopsy reports were not. Much like the substitute coroner testimony considered in *Garton*, 412 P.3d at 331-32, Simms's testimony fell into three general categories: (1) testimony premised explicitly on the autopsy photographs, (2) testimony relating to statements Knoblock made in the autopsy reports, and (3) testimony expressing Simms's opinions based on his review of the photographs and autopsy reports.

Photographs are not statements, let alone testimonial out-of-court statements, so no arguable Confrontation Clause violation occurred

as to Simms's category-one testimony. *Id*. at 331 ("It is clear that the admission of autopsy *photographs*, and competent testimony based on such photographs, does not violate the confrontation clause" because photographs are not out-of-court testimonial statements.) (quoting *People v. Leon*, 352 P.3d 289, 314 (Cal. 2015)); *see Jeremias*, 134 Nev. at 54, 412 P.3d at 51 (finding no Confrontation Clause violation "because the substitute coroner testified about independent conclusions she made based on photographs from the victims' autopsies").

Simms's category-three testimony also did not offend the Confrontation Clause. An expert witness may rely on hearsay, including testimonial hearsay, without violating the Confrontation Clause, so long as the testifying expert does not "effectively" introduce the un-cross-examined testimonial hearsay into evidence. *Vega*, 126 Nev. at 340, 236 P.3d at 638. To the extent Simms offered his independent opinions and only conveyed to the jury that he generally relied on the autopsy photographs and reports in reaching his opinions, he did not communicate hearsay to the jury. *See Garton*, 412 P.3d at 332 (finding no Confrontation Clause violation to the extent the substitute coroner made clear she "was exercising her own independent judgment to arrive at her own conclusions" and "only conveyed to the jury in general terms that [she] relied on the autopsy report" without directly presenting statements from the autopsy reports).

Simms's category-two testimony is more problematic. Since the record does not include the autopsy reports, we cannot determine when Simms directly quoted Knoblock, except in a few places where the questions asked and answers given make clear that Simms is quoting from the autopsy report ("Q: As Dr. Knoblock performed this autopsy, did he form an opinion as to the cause of death of Sheila Quarles? A: Yes. Q: What was that opinion? A: Drowning. Q: Did he find anything else to be a contributing factor? A: Yes. Q: What was that? A: Strangulation.").

The State emphasizes that the coroner's office conducts autopsies and prepares autopsy reports pursuant to statutory mandate in a variety of deaths, not just deaths that lead to murder charges and court trials. It argues that, as business records of a public agency, autopsy reports do not constitute testimonial hearsay, so even this testimony did not offend the Confrontation Clause. *See Bullcoming v. New Mexico*, 564 U.S. 647, 664 (2011) ("A document created *solely* for an 'evidentiary purpose,' . . . made in aid of a police investigation, ranks as testimonial.") (emphasis added) (quoting *Melendez-Diaz*, 557 U.S. at 311). This court has not decided "whether autopsy reports constitute 'testimonial evidence' so as to trigger the protections of the Confrontation Clause," and courts elsewhere "have been almost evenly divided in their opinions" on this issue. Kimberly J. Winbush, *Application of Crawford Confrontation Clause Rule to*

Autopsy Testimony and Related Documents, 18 A.L.R. 7th Art. 6 (2017) (collecting cases). The unsettled state of the law prevents us from saying the error, if any, in allowing the category-two Simms testimony, was "plain." *See Gaxiola*, 121 Nev. at 648, 119 P.3d at 1232 ("For an error to be plain, it must, 'at a minimum,' be 'clear under current law.'") (quoting *Weintraub*, 273 F.3d at 152 (quotation omitted)). Nor can we say, at least as to the testimony quoted above concerning the cause and manner of Sheila's death, that the testimony caused "actual prejudice or a miscarriage of justice." *Jeremias*, 134 Nev. at 51, 412 P.3d at 49. The testimony was cumulative; indeed, the defense acknowledged as much when it stated on the record that, "We're not challenging the cause of death." Flowers' Confrontation Clause challenge to Simms's testimony therefore fails.

2. *The Paulette testimony*

Kristina Paulette testified about the DNA testing done on Sheila's and Coote's crime scene evidence. Paulette performed all DNA testing done on Sheila's crime scene samples. A colleague of Paulette's in LVMPD's biology/DNA unit, Thomas Wahl, performed the DNA testing on the Coote samples and Flowers' buccal swab. When CODIS flagged the possible match between Flowers and one of the unidentified males from Sheila's crime, Paulette reworked the Flowers swab to independently confirm the reported hit. Paulette also retested the carpet from the Coote crime scene and verified the semen on it came from Flowers. Paulette did not retest Coote's vaginal and anal swabs, instead relying on Wahl's work. The question presented is whether, to the extent Paulette's testimony relied on Wahl's testing of Coote's vaginal and anal swabs, this violated Flowers' Confrontation Clause rights.

As noted, Flowers did not assert a Confrontation Clause objection to either Simms's or Paulette's testimony. But when the State's questioning of Paulette turned to her opinions about Wahl's work, the defense interposed a hearsay objection. At that point, defense counsel took Paulette on voir dire and proceeded to establish that Wahl's DNA work qualified as a business record, taking it outside the hearsay rule. After completing this brief voir dire, the defense did not reassert the hearsay objection, so the court did not rule on it. Later, the defense DNA expert, George Schiro, relied on Paulette's testimony, including her testimony about Wahl's work, as foundational. ("Q: In your review of the data provided by the [LVMDP], you don't have any dispute that their method of extracting DNA and generating a DNA profile from a particular sample is scientifically valid? A: I have no problem with their work.")

For cases tried pre-*Crawford*, a hearsay objection sometimes sufficed to preserve a Confrontation Clause objection. *Dias v. State*,

95 Nev. 710, 714, 601 P.2d 706, 709 (1979). But post-*Crawford*, a Confrontation Clause challenge asks whether the out-of-court statement is "testimonial," raising a "threshold question" that an ordinary hearsay objection doesn't broach. *See Vega*, 126 Nev. at 339, 236 P.3d at 637. Thus, post-*Crawford*, a "defendant must object on the grounds that admission of the out-of-court statement will violate the defendant's right to confront witnesses; it is not sufficient to object to the statements as inadmissible hearsay." *Delhall v. State*, 95 So. 3d 134, 159 (Fla. 2012). Flowers' trial post-dated *Crawford* by four years. Flowers' seemingly abandoned hearsay objection did not preserve the Confrontation Clause argument he presents on appeal, so plain error review applies.

Reviewed for plain error, Paulette's testimony about the DNA profiles Wahl generated from Coote's vaginal and anal swabs did not violate the Confrontation Clause. Whether a forensic scientist's testimony about a DNA profile a colleague generated is "testimonial" splintered the Supreme Court in *Williams v. Illinois*, 567 U.S. 50 (2012) (4-1-4 decision). And, like the law respecting autopsy reports, the question remains unresolved. *See* Kimberly J. Winbush, *Application of Crawford Confrontation Clause Rule to DNA Analysis and Related Documents*, 17 A.L.R. 7th Art. 3 (2016) ("Courts have been almost evenly divided in their opinions as to whether DNA reports—showing the DNA profiles of samples taken from the crime scene and/or whether those profiles match that of the criminal defendant—constitute 'testimonial evidence' so as to trigger the protections of the Confrontation Clause."). An error is not plain when the law is this unsettled.

Paulette retested both the carpet sample from beneath Coote's body and Flowers' buccal swab, replicating the DNA match Wahl's testing produced. Paulette's testimony about the Coote vaginal and anal swab profiles thus was cumulative and did not affect Flowers' substantial rights. A Confrontation Clause objection to the swab test results would not change the DNA profile evidence tying Flowers to the Coote sexual assault and murder and would likely have brought Wahl to testify in greater detail than Paulette did about them. *Cf. Jeremias*, 134 Nev. at 52, 412 P.3d at 50 (declining plain error review where the defendant's "failure to object could reasonably be construed as intentional"). Flowers' Confrontation Clause challenge to Paulette's testimony fails plain error review.

C. *Flowers' police interview*

LVMPD detective George Sherwood interviewed Flowers in August 2006. By then, Flowers had been arrested, charged, and had counsel appointed to represent him in the Coote case. Before interviewing Flowers, Sherwood read him the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). The detective told Flow-

ers he did not want to discuss Coote but had questions about another case LVMPD was investigating. The interview proceeded after Flowers read and signed a written *Miranda* waiver.

The district court overruled Flowers' objection that admission of the uncounseled interview violated his Fifth and Sixth Amendment rights. The part of the interview transcript that Sherwood read into the record at trial shows that Flowers became evasive when Sherwood tried to ask him about Debra and Sheila Quarles, but then acknowledged having known Sheila by her nickname, "Pooka." After that, Flowers shuts down, stating, "I got my own problems to deal with so I don't want to get involved in anybody else's matters." On cross-examination, defense counsel attempted to introduce a later portion of the transcript, suggesting Flowers might answer more questions but wanted to talk to his attorney first. The State objected and, after conferring with counsel at sidebar, the district court sustained the State's objection, explaining it did so to protect Flowers because him asking to speak to an attorney would suggest to the jury he had something to hide.

Sherwood's interview of Flowers did not violate his Fifth and Sixth Amendment right to counsel. "The Sixth Amendment right . . . is offense specific. . . . [I]t does not attach until a prosecution is commenced." *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). When Sherwood interviewed Flowers, the State had not charged Flowers in Sheila's case, so his Sixth Amendment right to counsel had not attached. True, Flowers had been charged and appointed counsel in the Coote case. But "a defendant's statements regarding offenses for which he had not been charged [are] admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses." *Texas v. Cobb*, 532 U.S. 162, 168 (2001); *accord Kaczmarek v. State*, 120 Nev. 314, 327, 91 P.3d 16, 25 (2004) ("the offense-specific Sixth Amendment right does not require suppression of statements deliberately elicited during a criminal investigation merely because the right has attached and been invoked in an unrelated case"). As for Flowers' Fifth Amendment rights, the *Miranda* warnings he received and waived fully apprised him of his rights against compulsory self-incrimination and to consult an attorney. "[W]hen a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009); *accord McCarty v. State*, 132 Nev. 218, 224, 371 P.3d 1002, 1006 (2016).

Flowers presses us to make an exception to the *McNeil* rule when "an interrogation on a second case for which the defendant has not been charged, but for which it is easily foreseeable, that a conviction in the second case would serve as an aggravating circumstance in the first case for which the defendant has been charged." This exception would contradict *McNeil*, *Kaczmarek*, and *Cobb*, which

emphatically declare the Sixth Amendment right to counsel "offense specific." *See Cobb*, 532 U.S. at 164 ("We hold that our decision in *McNeil* . . . meant what it said, and that the Sixth Amendment right [to counsel] is 'offense specific.'"); *Kaczmarek*, 120 Nev. at 327, 91 P.3d at 25. "Offense," for purposes of the Sixth Amendment "offense specific" right to counsel, means the same thing as "offense" does for purposes of the Fifth Amendment's Double Jeopardy Clause, forbidding putting a person in jeopardy twice for the "same offence," and is determined by *Blockburger v. United States*, 284 U.S. 299 (1932). *Cobb*, 532 U.S. at 173. Under *Blockburger*, 284 U.S. at 304, "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Under this test, Coote's sexual assault and murder do not arguably constitute the same offense. That Flowers' conviction of Sheila's murder could constitute an aggravating factor in a jury's penalty determination in Coote's case—and vice versa—does not turn the charges in the two cases into the same offense.[2]

Flowers also raises as an issue on appeal the district court's ruling that prevented defense counsel from introducing Flowers' statement that he might answer more questions if he talked to his attorney. Whether sound or not, the strategy was for the defense, not the State or the court, to decide. We agree with Flowers that, as a matter of evidence, this ruling was error. NRS 47.120(1) ("When any part of a writing or recorded statement is introduced by a party, the party may be required at that time to introduce any other part of it which is relevant to the part introduced, and any party may introduce any other relevant parts."); *see Domingues v. State*, 112 Nev. 683, 693-94, 917 P.2d 1364, 1372 (1996). Even crediting Flowers' argument that the evidentiary error had a constitutional dimension, *see Chambers v. Mississippi*, 410 U.S. 284, 294 (1973), it was harmless given its scant probative value and the other evidence of guilt, including DNA, Flowers' acquaintance with Sheila and her mother, and evidence of the Coote murder. *See* NRS 178.598; *Domingues*, 112 Nev. at 694, 917 P.2d at 1372.

D. *Autopsy photographs*

Flowers asserts that the district court abused its discretion and violated his due process right to a fair trial by unnecessarily admitting gruesome photographs from Sheila's autopsy. "[E]vidence is

[2]The record does not include the notice of intent to seek the death penalty in Coote's case. According to Flowers' opening brief, it was filed on November 8, 2005, more than nine months before the CODIS match led Sherwood to interview Flowers in connection with Sheila's case. The notice's reported reference to more than one murder conviction as an aggravator, *see* NRS 200.033(12), thus appears to have been referring to the Coote and Gonzalez deaths, not to Sheila's.

not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1); *see Harris v. State*, 134 Nev. 877, 880, 432 P.3d 207, 211 (2018) ("NRS 48.035 requires the district court to act as a gatekeeper by assessing the need for the evidence on a case-by-case basis and excluding it when the benefit it adds is substantially outweighed by the unfair harm it might cause."), *cert. denied*, 139 S. Ct. 2671 (2019).

The State admitted the autopsy photographs through the testimony of Larry Simms from the Clark County Coroner's Office. Simms testified that he reviewed several hundred photographs taken during Sheila's and Coote's autopsies and culled from them those he needed to illustrate his testimony—sixteen photographs from Sheila's autopsy and thirteen from Coote's. Unfortunately, the district court handled part of Flowers' objections at sidebar, so we do not have a record of the specific photographs Flowers objected to and the reasons given, if any, by the court for admitting them. Simms's testimony walks through the photographs and supports that they were chosen to illustrate the similarities between the injuries the two women's autopsies revealed: He showed them to the jury when explaining how each suffered vaginal lacerations and tears, consistent with sexual assault; petechiae consistent with asphyxiation; and hemorrhaging to the front, sides, and back of their necks, consistent with manual strangulation.

"[D]espite gruesomeness, photographs of a victim's injuries are typically admissible in a criminal case. . . . [T]he State is usually entitled to present its case in the manner it believes will be most effective." *Harris*, 134 Nev. at 882, 432 P.3d at 212. With one or two possible exceptions, the photographs in this case—unlike the photographs in *Harris*—had clear probative value to establish that Sheila's and Coote's injuries were so similar the same person—Flowers, whose DNA was found at both crime scenes—likely assaulted and killed both. On this record, we cannot say that the "photographs' probative value was substantially outweighed by the danger of unfair prejudice [such that] the district court abused its discretion by admitting them." *Id.*; *see also Thomas*, 120 Nev. at 43 n.4, 83 P.3d at 822 n.4 ("Appellant has the ultimate responsibility to provide this court with 'portions of the record essential to determination of issues raised in appellant's appeal.'") (quoting NRAP 30(b)(3)).

E. *Admissibility of hearsay*

To explain the presence of his DNA at the crime scene, Flowers sought to introduce testimony from William Kinsey, a boyfriend of Sheila's, that Sheila told him that she had a sexual relationship with "Keith" (Flowers' middle name and the name he went by). Flowers made an offer of proof outside the presence of the jury. Kinsey

was incarcerated from December 2004 until Sheila's death in March 2005, did not know Flowers, and had never seen Flowers and Sheila together. All he could testify to was that Sheila visited him in jail and told him that she had a sexual relationship with "Keith." After hearing argument, the district court sustained the State's hearsay objection and rejected Flowers' argument that Sheila's statement to Kinsey constituted a statement against interest, admissible under NRS 51.345. On appeal, Flowers makes a different argument—that the district court's refusal to allow this hearsay testimony rose to the level of a constitutional violation, citing *Chambers*, 410 U.S. 284.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Id.* at 302. However, "the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id.*; *see also Rimer v. State*, 131 Nev. 307, 328, 351 P.3d 697, 712 (2015). "[P]erhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay." *Chambers*, 410 U.S. at 302; *see* NRS 51.035 (defining hearsay, generally, as an out-of-court "statement offered in evidence to prove the truth of the matter asserted"); NRS 51.065 (providing that hearsay statements are generally inadmissible unless an exception applies). However, "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302; *accord Coleman v. State*, 130 Nev. 229, 239-42, 321 P.3d 901, 908-11 (2014).

Chambers—a fact-intensive case, *see id.* at 303 ("[W]e hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.")—is distinguishable. Chambers' defense focused on an individual, McDonald, who confessed (but later recanted that confession) to the crime for which Chambers was tried. *Id.* at 287-90. Chambers called McDonald as a witness, but due to an antiquated state rule prohibiting a defendant from impeaching his own witnesses, Chambers was unable to effectively cross-examine McDonald about his confession. *Id.* at 291-92. Chambers found three witnesses prepared to testify that McDonald confessed to each of them (on separate, independent occasions). *Id.* at 292-93. Other evidence corroborated these hearsay statements. *Id.* at 300. Under this constellation of facts, Mississippi denied Chambers his right to a fair trial by not allowing the three witnesses to testify. *Id.* at 302-03.

The State did not similarly deny Flowers a fair trial. At issue in *Chambers* were confessions directly exculpating Chambers; at issue here was a far-less-exculpating statement that Sheila told Kinsey she had a sexual relationship with "Keith." Perhaps evidence of a sexual relationship would have suggested it was more likely that Flowers

had consensual sex with Sheila the day she died, but it was not determinative of consent that day. In *Chambers*, three witnesses were prepared to testify, and other evidence corroborated their testimony. Here, Kinsey's testimony was ambiguous and entirely uncorroborated, with no assurance of trustworthiness. Chambers had no opportunity to fully and effectively cross-examine McDonald (due to state law); Flowers had a full opportunity to cross-examine the witnesses against him. McDonald, the hearsay declarant in *Chambers*, was present at trial and *could* have been questioned about the hearsay in the absence of the state law rule; Sheila, the hearsay declarant here, was the victim and was therefore unavailable for testimony. Moreover, in *Chambers*, the confessions fit squarely within a widely recognized category of admissible hearsay, declarations against interest, a robust "exception founded on the assumption that a person is unlikely to fabricate a statement against his own interest at the time it is made." *Id.* at 299. Flowers does not identify any similar exception to the hearsay rule that would apply. Thus, unlike the trial court in *Chambers*, the district court here did not deny Flowers a fair trial by invoking Nevada hearsay rules to exclude the testimony.

F. *Prosecutorial misconduct*

Flowers argues that the State committed two instances of prosecutorial misconduct.

First, Flowers argues that the State engaged in prosecutorial misconduct during closing argument by commenting on his post-*Miranda* silence. But the district court correctly overruled Flowers' objection to the State's comments because Flowers had knowingly and voluntarily waived his rights at the time of the referenced questioning. *See Davis v. United States*, 512 U.S. 452, 458 (1994) ("If the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him."); *see also McNeil*, 501 U.S. at 178 (noting the probative value of evasive conduct following a *Miranda* waiver because "suspects often believe that they can avoid the laying of charges by demonstrating an assurance of innocence through frank and unassisted answers to questions").

Second, Flowers argues, for the first time on appeal, that the State improperly commented on his decision not to testify in his defense. Because Flowers did not object to this assigned error at trial, we review for plain error, *see Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008), and find none. The prosecutor's comments focused on Brass's testimony and only indirectly insinuated that Flowers had "something to hide." "[A]n indirect comment violates the defendant's Fifth Amendment right against self-incrimination only if the comment 'was manifestly intended to be or was of such

a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify.'" *Taylor v. State*, 132 Nev. 309, 325, 371 P.3d 1036, 1047 (2016) (quoting *Harkness v. State*, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991) (quotation omitted)); *cf. Diomampo*, 124 Nev. at 427, 185 at 1039-40 ("[A] 'mere passing reference' to post-*Miranda* silence 'without more, does not mandate an automatic reversal.'") (quoting *Shepp v. State*, 87 Nev. 179, 181, 484 P.2d 563, 564 (1971), *overruled on other grounds by Stowe v. State*, 109 Nev. 743, 746, 857 P.2d 15, 17 (1993)).

G. *Sufficiency of the evidence*

Flowers argues that the State did not offer sufficient evidence to convict him. Substantial evidence is "defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979); *see Vega*, 126 Nev. at 342, 236 P.3d at 639 (reviewing evidence "in the light most favorable to the prosecution" to determine whether "*any* rational trier of fact could have found [proof of the crime] beyond a reasonable doubt") (quotations omitted).

Ample evidence supports the jury's verdict. The State provided DNA evidence. The State also established that Flowers knew Sheila through his prior relationship with Debra. The State bolstered this direct evidence by proving that Flowers committed a similar sexual assault and murder, confirming identity. This evidence was more than sufficient to establish Flowers' guilt.

H. *Cumulative error*

Flowers argues that the cumulative effect of errors in this case deprived him of his constitutional right to due process and a fair trial. *See Chambers*, 410 U.S. at 290 n.3 (accumulated error may rise to a constitutional violation). But here there was only one error: not allowing Flowers to introduce as evidence that he told Sherwood he might answer more questions after talking to his attorney. That error was harmless, and there is no other error to cumulate, so Flowers' cumulative error objection fails.

III. *NEW TRIAL ISSUES*

About a year and a half after trial, Flowers moved for a new trial on the basis of newly available evidence: Brass's subsequent conviction for murder and robbery. Flowers argued that he could have used that conviction to impeach Brass's testimony. The State argued that the defense knew of Brass's pending charges before trial and could have moved for a continuance, but did not. The State also argued that Brass's testimony was not critical to the State's otherwise strong case against Flowers. The district court denied the motion.

"The court may grant a new trial to a defendant . . . on the ground of newly discovered evidence." NRS 176.515(1). This court reviews the grant or denial of a motion for a new trial under an abuse of discretion standard. *Funches v. State*, 113 Nev. 916, 923, 944 P.2d 775, 779 (1997).

The district court did not abuse its discretion in denying the motion. Flowers knew about Brass's pending charges at the time of his trial. While Brass's later conviction could have been used to impeach Brass, the circumstances of his murder conviction did not involve sexual assault or murder of a woman, so the details beyond the fact of the conviction would not have been admissible. That Brass was convicted of murder thus did not dilute the impact of the sole-source DNA tying Flowers to Coote's murder or implicate Brass in Sheila's murder beyond what the DNA mix from Flowers and Brass already showed. The evidence thus did not qualify as newly discovered or establish a basis for granting Flowers a new trial.

For these reasons, we affirm.

Parraguirre and Cadish, JJ., concur.

CRISTINA PAULOS, Appellant, *v.* FCH1, LLC, a Nevada Limited Liability Company; LAS VEGAS METROPOLITAN POLICE DEPARTMENT, a Government Entity; JEANNIE HOUSTON, an Individual; and AARON BACA, an Individual, Respondents.

No. 74912

January 30, 2020 456 P.3d 589

Appeal from a district court summary judgment in a tort action. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Affirmed in part, reversed in part, and remanded.

Lewis Roca Rothgerber Christie LLP and *Abraham G. Smith* and *Daniel F. Polsenberg*; *Blut Law Group, APC*, and *Elliot S. Blut*, Las Vegas, for Appellant.

Marquis Aurbach Coffing and *Craig R. Anderson* and *Kathleen A. Wilde*, Las Vegas, for Respondents Aaron Baca and Las Vegas Metropolitan Police Department.

Brandon Smerber Law Firm and *Justin W. Smerber* and *Lewis W. Brandon, Jr.*, Las Vegas, for Respondents FCH1, LLC, and Jeannie Houston.

Before the Supreme Court, En Banc.

OPINION

By the Court, Hardesty, J.:

In this appeal, we consider the preclusive effect of a qualified-immunity decision where the federal district court's judgment addressed both prongs of the qualified-immunity inquiry but the federal appellate court addressed only one prong to affirm the judgment. To determine the preclusive effect of the federal court judgment, we look to federal common law, which applies the reasoning set forth in the Restatement (Second) of Judgments section 27 comment o (1982) to resolve similar issue preclusion questions. The Restatement provides that when a judgment in the first court resolves two issues, either of which is sufficient to support the result, the judgment is not preclusive for both issues when the appellate court only relies on one issue to affirm the judgment. Rather, issue preclusion attaches only to the issue answered by the appellate court, not to the issue on which the appellate court was silent.

Applying the federal common law here, we conclude that because the federal district court judgment was affirmed only on the ground that the law was not clearly established, the finding that the officer's behavior was reasonable such that he did not violate a constitutional right has no preclusive effect. Therefore, we hold the Nevada district court erred in finding that issue preclusion applied to the question of whether the officer's conduct was unreasonable, and we reverse the district court's summary judgment in favor of respondent Officer Aaron Baca. We affirm the district court's summary judgment in favor of respondent Las Vegas Metropolitan Police Department (LVMPD) because it was entitled to discretionary immunity. Further, we reverse the district court's grant of summary judgment to respondents FCH1, LLC, and Jeannie Houston because the district court provided no factual findings or basis for its conclusion.

I.

In August 2011, appellant Cristina Paulos experienced a mental health episode while driving in front of the Palms Resort and Casino in Las Vegas that led her to cause two car accidents. After the collisions, Paulos left her car and tried to enter the driver's side of the second car she had hit, whose owner was still in the driver's seat. Officer Baca arrived at the scene of the accidents and was informed that Paulos was attempting to steal the second vehicle. Officer Baca approached Paulos, and she walked away from him. Officer Baca then ordered Paulos to stop, and she turned around and lunged at him in an attempt to grab his weapon. Officer Baca pushed Paulos away and attempted to arrest Paulos in a standing position. Paulos resisted and began yelling incoherently. Officer Baca took her to

the ground and attempted to arrest her on the hot asphalt. On the ground, Paulos continued to resist the arrest. Officer Baca called on respondent Houston, a security guard at the Palms, for assistance.

The parties do not contest, and the district court accepted, that Paulos stayed on the ground for at most two minutes and forty seconds after additional officers arrived on scene. The arriving backup officers took Paulos off the asphalt and onto a grassy area. Other LVMPD officers impounded Paulos's vehicle and cited Paulos for driving while intoxicated. Paulos continued yelling and screaming at the officers. Paulos was taken to a hospital, where doctors determined she suffered from second- and third-degree burns.

In August 2012, Paulos filed suit in state court. In her complaint and amended complaints, Paulos asserted claims of negligence and false imprisonment against FCH1[1] and Houston; a claim of negligence against Officer Baca and other LVMPD officers (the LVMPD defendants); a claim of negligent hiring, training, and supervision against LVMPD; a claim of excessive force in violation of the Fourth Amendment under 42 U.S.C. § 1983 (2012) against the LVMPD defendants; and a claim of failure to train, direct, or supervise against LVMPD under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 694-95 (1978). The defendants removed the case to federal district court and moved for summary judgment on the claims against them.

In federal district court, Judge James C. Mahan concluded that Officer Baca was entitled to qualified immunity because he did not violate a clearly established constitutional right. *Paulos v. FCH1, LLC*, No. 2:13-CV-1546 JCM (PAL), 2015 WL 1119972, at *9-12 (D. Nev. Mar. 12, 2015). First, he concluded that Officer Baca had not used excessive force because his "use of minimal force in restraining [Paulos] was appropriate considering the objective threat she posed and her undeniable attempt to resist arrest." *Id*. at *9. Second, Judge Mahan concluded that "there is no clearly established right against being restrained on hot asphalt for a brief period of time." *Id*. at *11. Nor did Judge Mahan find Officer Baca's conduct "so patently violative of [a] constitutional right" as to show that he should have known that restraining Paulos in that manner was unconstitutional. *Id*. at *12 (alteration in original) (quoting *Boyd v. Benton Cty.*, 374 F.3d 773, 783 (9th Cir. 2004)). Judge Mahan further held that because neither Officer Baca nor the other LVMPD officers had violated Paulos's constitutional rights, LVMPD could not be liable under *Monell*. *Id*. Having granted summary judgment to LVMPD and the LVMPD defendants on the two federal claims, Judge Mahan declined to exercise supplemental jurisdiction over

[1]FCH1 is the name of the limited liability company for the Palms Resort and Casino.

the remaining state law claims and dismissed them without prejudice. *Id*. at *3.

Paulos appealed Judge Mahan's order to the Ninth Circuit Court of Appeals. *Paulos v. FCH1, LLC*, 685 F. App'x 581 (9th Cir. 2017). The Ninth Circuit affirmed in an unpublished order, holding that Paulos had not overcome Officer Baca's assertion of qualified immunity. *Id*. at 582. Noting the two-prong showing for overcoming qualified immunity—that (1) the officers violated a constitutional right and (2) the right was clearly established—the Ninth Circuit used its discretion to only answer prong two, concluding "[n]o decision from the Supreme Court or this Circuit clearly establishes that keeping a suspect on hot asphalt for approximately two minutes and forty seconds after backup officers arrive on the scene constitutes excessive force when the suspect does not inform the officers that the pavement is hurting her." *Id*. Additionally, the court held that Paulos had failed to establish a *Monell* claim because "she did not provide sufficient evidence of a pattern of similar, allegedly unconstitutional conduct . . . and [LVMPD's] mere failure to discipline its officers does not amount to ratification of their allegedly unconstitutional actions." *Id*. (internal quotation marks omitted).

Before the Ninth Circuit issued its disposition, but after Paulos appealed Judge Mahan's order, Paulos refiled her state law negligence claims against LVMPD, the LVMPD defendants, FCH1, and Houston, as well as her false imprisonment claim against FCH1 and Houston. LVMPD and the LVMPD defendants moved to dismiss the complaint, or, in the alternative, for summary judgment, arguing that the negligence claim against Officer Baca was precluded because Judge Mahan had already found that Officer Baca acted reasonably and that the negligent hiring, training, and supervision claim was barred by NRS 41.032(2) discretionary immunity. The district court granted in part and denied in part the motion. First, the district court found that issue preclusion did not apply to preclude Paulos's simple negligence claim against Officer Baca because Judge Mahan "did not issue a ruling or a finding that [he] acted reasonably." Rather, Judge Mahan only addressed the issue of qualified immunity. Thus, the district court concluded that the issues were not identical and issue preclusion was not appropriate, and the district court denied the motion with respect to the negligence claim. Second, looking to federal analogues, the district court determined that NRS 41.032(2)'s "discretionary function exception barred negligent hiring and supervision claims" and that LVMPD's alleged failure to adequately train its officers fell within the scope of discretionary immunity. Thus, the district court granted the motion with respect to the claim of negligent hiring, training, and supervision.

The LVMPD defendants asked the district court to reconsider its ruling and to stay its decision pending the disposition from the Ninth

Circuit, which the district court granted. Further, FCH1 and Houston, in joining Officer Baca and LVMPD's motion to reconsider, argued that Houston acted in good faith to Officer Baca's summons for assistance and that NRS 171.132 thus immunized them from the negligence and false imprisonment claims.

After the Ninth Circuit affirmed Judge Mahan's order, the district court lifted its stay. The district court then granted Officer Baca and LVMPD's motion for summary judgment on all claims. First, the district court concluded that issue preclusion applied to the negligence claim against Officer Baca because Judge Mahan had determined that he acted reasonably under the Fourth Amendment and the issue of reasonableness under the Fourth Amendment was identical to that under Nevada negligence law. Thus, the district court found that its previous order denying summary judgment on that claim was erroneous. Second, the district court neither addressed nor reconsidered its previous ruling that discretionary immunity applied to LVMPD but simply granted the summary judgment motion. Third, the district court granted FCH1 and Houston's motion for joinder and subsequently dismissed the negligence and false imprisonment claims without providing its reasoning. Paulos now appeals.

II.

Paulos challenges the district court's order granting summary judgment to Officer Baca because the judgment of the federal court was not final and preclusive as to whether Officer Baca acted reasonably. Further, Paulos argues the district court erred in granting LVMPD's motion for summary judgment on the claim of negligent hiring, training, and supervision of Officer Baca. Finally, Paulos argues that FCH1 and Houston cannot rely on a good-faith immunity defense for the negligence and false imprisonment claims.

III.

A district court's decision to grant summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id*. All evidence must be viewed in a light most favorable to the nonmoving party. *Id*. To withstand summary judgment, the nonmoving party cannot rely solely on general allegations and conclusions set forth in the pleadings, but must instead present specific facts demonstrating the existence of a genuine factual issue supporting the claims. *Id.* at 731, 121 P.3d at 1030-31; NRCP 56.

IV.

This appeal asks us to resolve an issue of first impression. We must determine the issue-preclusive effect of a federal court deci-

sion when the federal district court judgment addressed both prongs of the qualified-immunity inquiry but the federal appellate court decision affirming the judgment addressed only one of those prongs.

Whether issue preclusion applies is a question of law that we review de novo. *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014). We apply federal law to determine the preclusive effect of a federal court decision in a nondiversity case. *Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15, 21, 293 P.3d 869, 873 (2013). Federal issue preclusion applies when:

> (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom [issue preclusion] is asserted was a party or in privity with a party at the first proceeding.

Paulo v. Holder, 669 F.3d 911, 917 (9th Cir. 2011) (alteration in original) (internal quotation marks omitted). Issue preclusion bars the "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (internal quotation marks omitted). Thus, issue preclusion will apply to prevent the relitigation of matters that parties "have had a full and fair opportunity to litigate." *Id*. (internal quotation marks omitted).

The federal court decision here concerned whether Officer Baca was entitled to qualified immunity, which involves two considerations: (1) whether the "officer's conduct violated a constitutional right[,]" and (2) whether the right violated was "clearly established," such that the officer was on notice the conduct was impermissible. *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled in part by Pearson v. Callahan*, 555 U.S. 223 (2009); *see also Pearson*, 555 U.S. at 236 (providing a discretionary choice for courts to choose which prong to analyze first "in light of the circumstances in the particular case at hand"). Both prongs of this qualified-immunity inquiry must be met for the plaintiff to proceed in litigating against the officer. Judge Mahan resolved both prongs, finding that there was no violation of a constitutional right and that the right allegedly violated was not clearly established. Thus, the judgment entered by Judge Mahan was resolved on the merits. However, the judgment did not become final at that time because it was appealed to the Ninth Circuit, which affirmed the judgment only on the ground that the right was not clearly established.

Thus, the issue before us is whether the first prong of the qualified-immunity inquiry, which concerned Officer Baca's reasonableness under the Fourth Amendment, was necessarily decided in a final judgment on the merits where the federal appellate court affirmed the judgment only on the second prong. Because the underlying judgment in this matter was a federal court decision, we look

to federal precedent to determine how federal courts apply issue preclusion in this context. *See Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15, 20, 293 P.3d 869, 872 (2013). Federal appellate courts in a similar procedural posture that we face today have applied the Restatement (Second) of Judgments section 27 comment o (1982) to answer whether an issue is barred. *See, e.g.*, *Dow Chem. v. U.S. Envtl. Prot. Agency*, 832 F.2d 319, 323 (5th Cir. 1987) ("'The federal decisions agree that once an appellate court has affirmed on one ground and passed over another, preclusion does not attach to the ground omitted from its decision.'" (quoting 18 Charles Alan Wright et al., *Federal Practice & Procedure* § 4421 (1981)) (citing Restatement (Second) of Judgments § 27 cmt. o)); *see also Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc.*, 519 F.3d 421, 428 (8th Cir. 2008) (relying on Restatement (Second) of Judgments § 27 cmt. o); *Masco Corp. v. United States*, 303 F.3d 1316, 1329-31 (Fed. Cir. 2002) (applying the Restatement (Second) of Judgments § 27 cmt. o).

The Restatement's view on finality is that, "[i]f the judgment of the court of first instance was based on a determination of two issues, either of which standing independently would be sufficient to support the result," and "the appellate court upholds one of these determinations as sufficient and refuses to consider whether or not the other is sufficient and accordingly affirms the judgment, the judgment is conclusive as to the first determination." Restatement (Second) of Judgments § 27 cmt. o (1982). This makes sense because only one issue has been finally decided. Furthermore, "[t]his result is supported by the fact that the appellate choice of grounds for decision has made unavailable appellate review of the alternative grounds," and therefore, courts should not give this alternative ground issue-preclusive effect. 18 Charles Alan Wright et al., *Federal Practice & Procedure* § 4421 (3d ed. 2016). Thus, we apply comment o to the present case and hold that Judge Mahan's determination as to the reasonableness of Officer Baca's actions is not entitled to preclusive effect.

Officer Baca argues that we should not "limit issue preclusion to the rulings explicitly addressed in an unpublished memorandum disposition," as Paulos had a full and fair opportunity to challenge every aspect of Judge Mahan's order. We disagree. The Restatement's issue-preclusion rule does not distinguish between published or unpublished dispositions. Furthermore, it is clear that the Ninth Circuit expressly chose to resolve only the second prong of the qualified-immunity inquiry and affirmed Judge Mahan's order because the law was not clearly established; the court did not resolve—either explicitly or implicitly—whether the officer's conduct was unreasonable, such that it amounted to excessive force. *Paulos*

v. FCH1, LLC, 685 F. App'x 581, 582 (9th Cir. 2017). Because the Ninth Circuit was silent on whether Officer Baca violated Paulos's constitutional rights, we conclude that issue was not necessarily decided in a final judgment. Accordingly, the district court erred when it found that Judge Mahan's decision concerning whether the officer's conduct was unreasonable and violated a constitutional right had issue preclusive effect for Paulos's state negligence claim where she argued Officer Baca acted unreasonably. Thus, we reverse the district court's grant of summary judgment to Officer Baca and remand for further proceedings.[2]

V.

Paulos next argues the district court erred in granting LVMPD summary judgment on her negligent hiring, training, and supervision claim because it could not rely on Nevada's discretionary immunity doctrine. We disagree. NRS 41.032(2) states in relevant part that no action shall be brought:

> [b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.

We adopted the *Berkovitz-Gaubert* test enunciated by the United States Supreme Court for determining whether acts fall within the scope of discretionary-act immunity. *Martinez v. Maruszczak*, 123 Nev. 433, 446-47, 168 P.3d 720, 729 (2007); *see also United States v. Gaubert*, 499 U.S. 315, 325 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988). To give rise to discretionary-act im-

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[2]Paulos also argues that the district court erred in finding that the issue of reasonableness under the Fourth Amendment is identical to reasonableness under Nevada's negligence law. Though the district court did not cite any law for its conclusion, LVMPD placed particular reliance on *Belch v. Las Vegas Metro. Police Dep't*, No. 2:10-CV-00201-GMN-VCF, 2012 WL 4610803, at *11 (D. Nev. Sept. 30, 2012), in arguing that reasonableness is the same under both the Fourth Amendment and Nevada negligence law. However, we note that the holding in *Belch* has been called into question by more recent caselaw. *See Correa v. Las Vegas Metro. Police Dep't*, No. 2:16-CV-01852-JAD-NJK, 2019 WL 1639932, at *4-6 (D. Nev. Apr. 15, 2019) (explaining that *Belch* "looked to California law and a Ninth Circuit case applying Washington law" to find Fourth Amendment reasonableness was identical to reasonableness under Nevada negligence law, but the Ninth Circuit recently explained that the "reasonable care" standard to determine police liability in California is "distinct" from the reasonableness standard under the Fourth Amendment). Nevertheless, because we find that the district court erred in giving preclusive effect to the reasonableness determination, we need not reach Paulos's question presented here.

munity, the act "must (1) involve an element of individual judgment or choice and (2) be based on considerations of social, economic, or political policy." *Martinez*, 123 Nev. at 446-47, 168 P.3d at 729. Additionally, *Martinez* provided that "decisions at all levels of government, including frequent or routine decisions, may be protected by discretionary-act immunity, if the decisions require analysis of government policy concerns." *Id.* at 447, 168 P.3d at 729.

In determining whether LVMPD is entitled to discretionary-act immunity from negligent hiring, training, and supervision claims, we look to federal analogues. *See id*. at 444, 168 P.3d at 727 (noting that "discretionary-function immunity under NRS 41.032(2) . . . mirrors the Federal Torts Claims Act" and should be analyzed in the same way). The Ninth Circuit and other federal courts "have held that decisions relating to the hiring, training, and supervision of employees usually involve policy judgments of the type Congress intended the discretionary function exception to shield." *Vickers v. United States*, 228 F.3d 944, 950 (9th Cir. 2000) (citing decisions from the First, Eighth, Ninth, Tenth, and D.C. Circuit Courts of Appeals). For LVMPD "to come within the discretionary function exception, the challenged decision need not actually be grounded in policy considerations so long as it is, by its nature, susceptible to a policy analysis." *Id*. at 950-51 (internal quotation marks omitted); *see also Gaubert*, 499 U.S. at 325 ("The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.").

Here, the district court in its initial order relied on federal cases that recognize Nevada's bar to negligent hiring, training, and supervision claims. *See Neal-Lomax v. Las Vegas Metro. Police Dep't*, 574 F. Supp. 2d 1170, 1192 (D. Nev. 2008), *aff'd*, 371 F. App'x 752 (9th Cir. 2010); *Beckwith v. Pool*, No. 2:13-CV-125-JCM (NJK), 2013 WL 3049070, at *5-6 (D. Nev. June 17, 2013). In its order granting LVMPD's motion to reconsider, the district court granted summary judgment without providing its reasoning. Despite this omission, our evaluation shows the district court did not err. First, LVMPD's decision to hire and train Officer Baca involved an element of choice under prong one of the *Berkovitz-Gaubert* test. *See Vickers*, 228 F.3d at 950. Second, a decision on whether to train officers about getting suspects off the hot asphalt during summer months once it is reasonably safe to do so is subject to policy analysis, thus meeting prong two of the test. *See id*. We therefore affirm summary judgment for LVMPD.[3]

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[3]Paulos cites several cases from the United States District Court for the District of Nevada that have concluded LVMPD is not entitled to discretionary-act immunity for negligent training and supervision of officers. *See, e.g.*, *Wheeler v. City of Henderson*, No. 2:15-CV-1772-JCM (CWH), 2017 WL 2692405,

VI.

Finally, Paulos argues that the district court erred in granting summary judgment to FCH1 and Houston, as they were not state actors entitled to immunity and no court has addressed whether they were negligent or engaged in false imprisonment. Therefore, she argues, it was error for the district court to dismiss her claims against them simply based on their joinder to Officer Baca and LVMPD's motion for summary judgment. We agree. We have previously recognized that governmental immunity does not apply to non-state actors. *See, e.g.*, *Grosjean v. Imperial Palace*, *Inc*., 125 Nev. 349, 361, 212 P.3d 1068, 1077 (2009) (determining that in a 42 U.S.C. § 1983 action, qualified immunity will not apply to non-state actors but "[t]he good-faith defense may apply to private parties who become liable solely because of their compliance with government agents' request or in attempting to comply with the law"). Further, FCH1 and Houston have failed to identify, and the record does not reveal, any analysis by the district court of the claims of negligence or false imprisonment against them.[4] Rather, the district court permitted FCH1 and Houston to join Officer Baca and LVMPD's motion for summary judgment and, without explanation, granted FCH1 and Houston summary judgment dismissing Paulos's negligence and false imprisonment claims. Because the district court's grant of summary judgment is silent as to any findings of fact or conclusions of law on these issues, we are unable to conclude that the decision was legally

at *5 (D. Nev. June 22, 2017) (finding that "the training and supervision of officers is not a discretionary function, but rather an operational function for which [LVMPD] does not enjoy immunity" (internal quotation marks omitted)); *Herrera v. Las Vegas Metro. Police Dep't*, 298 F. Supp. 2d 1043, 1054-55 (D. Nev. 2004) (concluding LVMPD does not enjoy discretionary-act immunity in its training and supervision decisions because "[it] assumes the obligation to ensure that its employees do not pose an unreasonable safety risk to those with whom they come into contact"); *Perrin v. Gentner*, 177 F. Supp. 2d 1115, 1125-26 (D. Nev. 2001) (reasoning LVMPD was not entitled to discretionary-act immunity because its training and supervision of officers were operational functions). However, these cases relied on pre-*Martinez* law and do not alter our analysis and conclusion.

[4]In their motion to join Officer Baca and LVMPD's summary judgment motion and on appeal, FCH1 and Houston argue that NRS 171.132 (providing that "[a]ny person making an arrest may orally summon as many persons as the person making the arrest deems necessary to aid him or her therein") provides them with an affirmative defense for good-faith immunity. However, as Paulos argues, FCH1 and Houston failed to assert this defense in their answer and did not request leave to amend. An affirmative defense that is not pleaded in the answer is waived. *Clark Cty. Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 395 n.25, 168 P.3d 87, 96 n.25 (2007); NRCP 8(c)(1) (stating that "a party must affirmatively state any avoidance or affirmative defense" and listing, without limitation, such affirmative defenses). Therefore, "[a] point not [properly] urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

correct. Accordingly, we reverse the grant of summary judgment to FCH1 and Houston and remand for further proceedings.

VII.

In conclusion, the district court erred in granting summary judgment to Officer Baca based on issue preclusion, and we reverse and remand as to the claim against him. We affirm the district court's grant of summary judgment to LVMPD based on discretionary immunity. Additionally, we reverse and remand the grant of summary judgment to FCH1 and Houston. Accordingly, we affirm in part, reverse in part, and remand this matter to the district court for further proceedings consistent with this opinion.

Pickering, C.J., and Gibbons, Parraguirre, Stiglich, Cadish, and Silver, JJ., concur.

REPUBLICAN ATTORNEYS GENERAL ASSOCIATION, Appellant, *v.* LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Respondent.

No. 77511

February 20, 2020 458 P.3d 328

Appeal from a district court order denying a petition for a writ of mandamus seeking the disclosure of bodycam footage and related records under the Nevada Public Records Act. Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

Affirmed in part, reversed in part, and remanded.

Fox Rothschild LLP and *Colleen E. McCarty* and *Deanna L. Forbush*, Las Vegas, for Appellant.

Marquis Aurbach Coffing and *Jacqueline V. Nichols* and *Nicholas D. Crosby*, Las Vegas, for Respondent.

Before the Supreme Court, Hardesty, Stiglich and Silver, JJ.

OPINION

By the Court, Stiglich, J.:

Although the Nevada Public Records Act (NPRA) generally requires the disclosure of public records, it explicitly yields to the statute barring the release of confidential juvenile justice information.

In this appeal, we consider whether the district court erred in denying appellant Republican Attorneys General Association's (RAGA) petition for a writ of mandamus under the NPRA seeking bodycam footage and other related records regarding juveniles and then-State Senator Aaron Ford's interaction with the police due to the confidentiality of juvenile justice records. Because respondent Las Vegas Metropolitan Police Department (LVMPD) did not waive its assertion of confidentiality and the district court did not err in finding that all portions of the bodycam footage contain juvenile justice information, we affirm the district court order as to the bodycam footage. However, because the district court did not sufficiently assess whether the other requested records contain any nonconfidential material, we reverse the district court order as to the other records and remand for further proceedings consistent with this opinion.

BACKGROUND

LVMPD officers responded to an incident at a property in Las Vegas and arrested numerous juvenile suspects. As a parent of one of the suspects, Ford subsequently arrived at the scene along with other parents.

RAGA requested records from LVMPD related to the incident involving LVMPD officers, the juveniles, and Ford in accordance with the NPRA. LVMPD responded that it was unable to process RAGA's request without additional information. RAGA sent LVMPD a more specific second request for bodycam footage, the police report, witness and victim statements, computer-aided dispatch, and any other statements by officers relating to the incident concerning the juveniles and Ford. LVMPD replied that it was unable to provide any records under the NPRA because the requested records were part of an active criminal investigation. However, LVMPD did not provide a specific legal authority justifying its denial, as mandated in NRS 239.0107(1)(d)(2).[1] RAGA then sent a third, identical request. In response, LVMPD refused to provide any records because the investigation involved juvenile suspects and arrestees, citing NRS 62H.025 and NRS 62H.030 to justify its assertion of confidentiality. RAGA then sent a fourth and final request that did not mention the juveniles, but rather asked only for records relating to or depicting Ford's interactions with LVMPD officers. LVMPD denied RAGA's request, citing the same authority as in its

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[1]In the 2019 Legislative Session, the Nevada Legislature amended the NPRA with the passage of S.B. 287. S.B. 287, 80th Leg. (Nev. 2019). Because S.B. 287's "amendatory provisions . . . apply to all actions filed on or after October 1, 2019" and this action was filed before October 1, 2019, we apply the version of the NPRA in effect at the time the instant action was initiated, not the 2019 amendments. 2019 Nev. Stat., ch. 612, § 11, at 4008.

prior response. LVMPD did not respond to any of RAGA's requests within five business days, as mandated by NRS 239.0107(1).

RAGA petitioned for a writ of mandamus under the NPRA in district court. LVMPD responded that there were six hours of bodycam footage related to the incident, with two hours concerning Ford. LVMPD submitted the relevant bodycam footage concerning Ford to the district court, along with a privilege log. The district court conducted an in camera review of the submitted bodycam footage.

The district court subsequently denied RAGA's petition. It concluded that LVMPD's failure to timely respond to RAGA's requests did not result in it waiving its assertion of confidentiality. It also found that the bodycam footage, including the portions containing Ford, directly relates to the investigation of a juvenile-involved incident because the footage depicts the area where the incident occurred, the arrest of juveniles, and discussions regarding the charges. Moreover, it noted that all communications at the scene, including those involving Ford, directly relate to the juvenile incident and the juvenile justice process, and that the appearance of adults does not remove the records from the protection granted to juvenile justice information. The district court accordingly concluded that the bodycam footage is protected under NRS 62H.025, the statute governing juvenile justice information's confidentiality. Additionally, the district court concluded that records falling under NRS 62H.025 may only be released after a juvenile justice agency is provided with notice under NRS 62H.025(2)(r), but found that the record is devoid of RAGA providing such notice. The district court made no specific findings as to the other records that RAGA requested, but denied RAGA's petition in its entirety. This appeal followed.

DISCUSSION

This court has not previously addressed the interplay between the confidentiality afforded to juvenile justice records and the fact that bodycam footage is generally considered a public record subject to disclosure under the NPRA. In addressing this, we must determine whether LVMPD waived its assertion of confidentiality under NRS 239.0107 or NRS 239.011 when it failed to timely respond to RAGA's requests. We also consider whether the district court erred in finding that all portions of the bodycam footage contain juvenile justice information under NRS 62H.025 and are therefore excluded from NPRA disclosure. *See* NRS 239.010(1). Finally, we assess whether the district court abused its discretion in denying RAGA's petition as to the other related records. We review a district court's order denying a petition for a writ of mandamus for an abuse of discretion. *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003). Questions of statutory construction and interpretation, however, are questions of law reviewed de novo. *Id*.

LVMPD did not waive its assertion of confidentiality

RAGA argues that LVMPD waived its assertion of confidentiality when it failed to timely respond to RAGA's four NPRA requests. The district court found no legal basis for RAGA's argument. We agree with the district court.

The NPRA allows the public to access public records to foster democratic principles such as government transparency and accountability. NRS 239.001(1), 239.010; *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 878, 266 P.3d 623, 626 (2011). "[T]he provisions of the NPRA place an unmistakable emphasis on disclosure." *Gibbons*, 127 Nev. at 882, 266 P.3d at 629.

The obligation to disclose, however, is not without limits. In NRS 239.010(1), the NPRA yields to more than 400 explicitly named statutes, many of which prohibit the disclosure of public records that contain confidential information, including NRS 62H.025 for confidential juvenile justice information. *See City of Sparks v. Reno Newspapers, Inc.*, 133 Nev. 398, 402, 399 P.3d 352, 356 (2017) (regarding the statutes listed in NRS 239.010(1) as specific exemptions to the NPRA). When a governmental entity denies an NPRA request due to confidentiality, it must provide notice of its denial and a citation to relevant authority within five business days. NRS 239.0107(1)(d). LVMPD did not respond to any of RAGA's requests within five business days.

RAGA argues that LVMPD waived its assertion of confidentiality by failing to timely respond to its requests. The NPRA articulates several remedies for noncompliance. After an unreasonable delay or denial by a governmental entity, a requester may apply to the district court and seek an order granting access to the record. NRS 239.011(1). The requester may also recover costs and reasonable attorney fees upon prevailing. NRS 239.011(2). The statute does not mention waiver as a remedy.[2] *See* NRS 239.011.

Where a statute is clear and unambiguous, this court gives effect to the ordinary meaning of the text's plain language without turning to other rules of construction. *In re CityCenter Constr. & Lien Master Litig.*, 129 Nev. 669, 673-74, 310 P.3d 574, 578 (2013). "If a statute expressly provides a remedy, courts should be cautious in reading other remedies into the statute." *Builders Ass'n of N. Nev. v. City of Reno*, 105 Nev. 368, 370, 776 P.2d 1234, 1235 (1989); *see also State v. Yellow Jacket Silver Mining Co.*, 14 Nev. 220, 225 (1879) ("Where a statute gives a new right and prescribes a partic-

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[2]Effective October 1, 2019, NRS 239.011(4) provides that the remedies recognized in NRS 239.011 are in addition to any other remedies that may exist in law or in equity. 2019 Nev. Stat., ch. 612, §§ 7, 11, at 4008. Also effective October 1, 2019, NRS 239.340 imposes additional civil penalties on governmental entities that willfully fail to comply with NPRA response requirements. 2019 Nev. Stat., ch. 612, §§ 1, 11, at 4002, 4008.

ular remedy, such remedy must be strictly pursued, and is exclusive of any other."), *abrogated on other grounds by Waste Mgmt. of Nev., Inc. v. W. Taylor St., LLC*, 135 Nev. 168, 443 P.3d 1115 (2019).

Waiver is not an enumerated remedy, and we decline to read it into the statute. *See, e.g.*, *Gibbons*, 127 Nev. at 885-86, 266 P.3d at 631 (remanding to the district court after a governmental entity failed to comply with other requirements under NRS 239.0107(1)(d)). NRS 239.011 unambiguously provides a remedy for when a governmental entity fails to comply with response requirements in NRS 239.0107(1)(d): apply to the district court and obtain costs and attorney fees upon prevailing. We do not question that the five-business-day-response requirement is mandatory. *See Leven v. Frey*, 123 Nev. 399, 407-08, 168 P.3d 712, 718 (2007) (reasoning that statutes creating time restrictions are generally construed as mandatory). Rather, while we understand that seeking relief from the district court may not be the remedy RAGA prefers, we determine that it is the specified remedy available to RAGA in this instance.

To the extent RAGA contends that waiver is an appropriate remedy otherwise existing in equity, we adamantly disagree. Waiving LVMPD's assertion of confidentiality would lead to an absurd penalty resulting in the public disclosure of Nevadans' private information solely because of LVMPD's failure to timely respond. *See City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev. 114, 121, 251 P.3d 718, 722 (2011) ("[T]his court will not read statutory language in a manner that produces absurd or unreasonable results." (quoting *Carson-Tahoe Hosp. v. Bldg. & Constr. Trades Council of N. Nev.*, 122 Nev. 218, 220, 128 P.3d 1065, 1067 (2006))). We are sympathetic to RAGA's desire for LVMPD to comply with the five-business-day-response requirement, but we cannot imply a remedy that would punish innocent actors such as the juveniles here by potentially infringing on their confidentiality and exposing their private information. Additionally, refusing to allow an assertion of confidentiality due to LVMPD's noncompliance with the response requirement goes far beyond the NPRA's emphasis on disclosure. It undermines the NPRA's expressly listed exceptions for confidential information.

While our analysis could end here, we find it worthy to note that the legislative history also supports our determination. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)); *see also Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes

limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."); *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 732-33, 100 P.3d 179, 194 (2004). The Legislature added NRS 239.0107 to the NPRA during the 2007 legislative session. 2007 Nev. Stat., ch. 435, § 4, at 2061-62. Section 4(2) of the bill as introduced provided for an explicit waiver. S.B. 123, 74th Leg. (Nev., Feb. 20, 2007). However, the waiver provision was later stricken by Amendment No. 415. S.B 123, Amendment no. 415, § 4, 74th Leg. (Nev., Feb. 20, 2007); *see also* Hearing on S.B. 123 Before the Subcommittee of the Senate Comm. on Gov't Affairs, 74th Leg. (Nev., Apr. 9, 2007) (expressing concern that the Department of Corrections would not have time to address inmates' requests for confidential records). Accordingly, we hold that LVMPD did not waive its assertion of confidentiality by failing to timely respond to RAGA's requests.

The district court did not err as to the bodycam footage

RAGA argues that the district court erred in finding that the bodycam footage constitutes juvenile justice information and therefore denying its mandamus petition. RAGA contends that (1) bodycam footage is not subject to the confidentiality provisions listed in the NPRA, (2) information on juvenile arrests does not constitute juvenile justice information, (3) not all portions of the bodycam footage contain confidential juvenile justice information, and (4) any confidential portions of the bodycam footage could have been redacted. We affirm the district court's denial of RAGA's mandamus petition as to the bodycam footage.

1.

RAGA asserts that bodycam footage is not subject to the confidentiality provisions listed in NRS 239.010(1) because the bodycam footage statute, NRS 289.830, trumps such provisions. The district court found that bodycam footage is subject to a confidentiality provision, NRS 62H.025, which protects juvenile justice information from disclosure. RAGA points to NRS 289.830(2), which states:

> Any record made by a portable event recording device[3] pursuant to this section is a *public record* which may be:
> (a) Requested only on a per incident basis; and
> (b) Available for inspection only at the location where the record is held if the record contains confidential information that may not otherwise be redacted.

[3]Bodycam footage is made by a portable event recording device.

(Emphasis added.) RAGA posits that NRS 289.830(2)(b) allows for all bodycam footage, even confidential portions, to be available for inspection. We disagree.

We take this opportunity to clarify that, as a public record, bodycam footage is subject to the NPRA. NRS 239.010(1), 289.830(2). The NPRA, however, expressly yields to confidentiality provisions. *See* NRS 239.010(1) (listing statutes exempted from the NPRA and providing that records "otherwise declared by law to be confidential" are not subject to the NPRA). We note that the NPRA also yields to NRS 289.830 such that bodycam footage, while a public record that is ordinarily subject to disclosure, may only be disclosed under the parameters of NRS 289.830(2). *See id.* NRS 289.830(2) limits how and when bodycam footage may be disclosed. Specifically, it allows the public only to *inspect* bodycam footage containing confidential information that may not otherwise be redacted, *at the location* where the record is held. In addition to these restrictions, bodycam footage, as a public record, is also subject to the other numerous provisions listed in NRS 239.010(1) that guarantee confidentiality, such as the provision protecting juvenile justice information, NRS 62H.025.

To the extent that NRS 289.830(2)(b) conflicts with the confidentiality provisions listed in the NPRA, such as NRS 62H.025, the more specific confidentiality provisions control. *See Piroozi v. Eighth Judicial Dist. Court*, 131 Nev. 1004, 1009, 363 P.3d 1168, 1172 (2015) ("Where a general and a special statute, each relating to the same subject, are in conflict and they cannot be read together, the special statute controls." (quoting *Laird v. State Pub. Emps. Ret. Bd.*, 98 Nev. 42, 45, 639 P.2d 1171, 1173 (1982))). To hold otherwise would undermine over 400 confidentiality provisions and unreasonably allow the public to access otherwise confidential records solely because such records are contained within bodycam footage. Without the Legislature's express direction otherwise, we are unwilling to subject Nevadans to possibly having their statutorily protected information disclosed because it was captured on a police officer's bodycam. Bodycam footage, like all other public records, is subject to the confidentiality provisions listed in the NPRA.

2.

RAGA argues that the statute governing juvenile justice information, NRS 62H.025, does not apply when a juvenile is arrested but not brought before a juvenile court. We disagree.

The NPRA expressly yields to NRS 62H.025, which mandates that "[j]uvenile justice information is confidential and may only be released in accordance with the provisions of this section or as expressly authorized by other federal or state law." NRS 62H.025(1). " 'Juvenile justice information' means any information which is di-

rectly related to a child in need of supervision, a delinquent child or any other child who is otherwise subject to the jurisdiction of the juvenile court." NRS 62H.025(6)(b).

We hold that NRS 62H.025 unambiguously does not require juveniles to be brought before the juvenile court for information to be considered "juvenile justice information." *See In re CityCenter*, 129 Nev. at 673-74, 310 P.3d at 578 (providing that, when a statute is unambiguous, the court will apply its plain meaning). Indeed, NRS 62B.330(1) explicitly provides that "the juvenile court has exclusive original jurisdiction over a child . . . who is *alleged* . . . to have committed a delinquent act." (Emphasis added.) The district court found that the bodycam footage, including the portions containing Ford, contains juvenile justice information in part because the footage directly relates to a juvenile-involved incident and the arrest of juveniles. When juveniles are handcuffed and under the physical supervision of the police, as here, they are under the direct authority of law enforcement. Even if never brought before a juvenile court, at the time of arrest there is an allegation that the juveniles committed a delinquent act and they are presumed by the officers to be in need of supervision. *Cf.* NRS 62C.010(1). Any information directly related to the arrest of juveniles therefore constitutes juvenile justice information.

3.

RAGA next argues that the district court erred in finding that all portions of the bodycam footage contain confidential juvenile justice information. Findings of fact are given deference and will not be set aside unless they are clearly erroneous or not supported by substantial evidence. *Sowers v. Forest Hills Subdivision*, 129 Nev. 99, 105, 294 P.3d 427, 432 (2013). "[T]he governmental entity has the burden of proving by a preponderance of the evidence that the public book or record, or part thereof, is confidential." NRS 239.0113. LVMPD provided the district court with the relevant portions of the bodycam footage and a privilege log so that the district court could conduct an in camera review, and the district court subsequently found that all portions of the bodycam footage contain confidential juvenile justice information.

After reviewing the bodycam footage, we hold that substantial evidence supports the district court's finding that all portions of the footage contain juvenile justice information. The district court correctly found that the bodycam footage, including the portions with Ford, directly relates to the investigation of an incident involving a juvenile alleged to have committed a delinquent act, rightfully explaining that the footage depicts the area where the incident occurred, the arrest of juveniles, and discussions regarding the charges and juvenile justice process. Moreover, the district court properly

noted that all communications at the scene, including those involving Ford, directly relate to the juveniles and the juvenile justice process. We therefore conclude that the district court did not err.

4.

RAGA posits that LVMPD could have redacted the bodycam footage to remove any confidential juvenile justice information. NRS 239.010(3) (2017) provides that a governmental entity shall not deny a request for public records "on the basis that the requested public book or record contains information that is confidential if the governmental entity can redact, delete, conceal, or separate the confidential information from the information included in the public book or record that is not otherwise confidential." This court has recognized, however, that a governmental entity has 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).

We determine that redaction is not possible because all portions of the bodycam footage contain confidential juvenile justice information, even those portions depicting Ford. We are aware that RAGA has not seen the bodycam footage, and we understand that the circumstances of this case require RAGA to trust this court's determination of confidentiality. Under a different set of facts, a governmental entity may be able to separate confidential periods of bodycam footage from substantial nonconfidential periods or blur the occasional juvenile's face to redact or otherwise edit out confidential material. But that is not the case here. Ford's depiction and any communications he makes are inextricably commingled with the confidential juvenile justice information. Had Ford communicated or acted in a manner beyond that which directly related to the juveniles, NRS 239.010(3) would have required disclosure of that portion of the bodycam footage. To require LVMPD to redact the confidential bodycam footage here, however, would leave RAGA with no footage left to view. In light of the foregoing, we hold that the district court did not abuse its discretion in denying RAGA's mandamus petition as to the bodycam footage.

The district court abused its discretion as to the other related records

There is a remaining question of whether the district court abused its discretion in denying RAGA's mandamus petition as to the related records, including the police report, witness and victim statements, computer-aided dispatch, and other statements by officers.[4] A

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[4]LVMPD's argument that RAGA failed to preserve its NPRA request as to the other related records on appeal is misguided. While we do not consider points not urged in the district court, *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52,

district court abuses its discretion when it fails to conduct an "individualized exercise of discretion" in the context of analyzing issues in a writ petition or fails to consider such a petition "upon its own merits." *Willmes v. Reno Mun. Court*, 118 Nev. 831, 835, 59 P.3d 1197, 1200 (2002); *cf. Patterson v. State*, 129 Nev. 168, 176, 298 P.3d 433, 439 (2013). Because the district court did not view these records or make any specific findings as to whether these records contain confidential juvenile justice information, we conclude that it abused its discretion.[5] We therefore reverse the district court's order as to the related records and remand for the district court to properly determine whether the related records are subject to NPRA disclosure.

CONCLUSION

Having concluded that LVMPD did not waive its assertion of confidentiality by failing to timely respond to RAGA's NPRA requests and that the district court did not err in finding that all portions of the bodycam footage contain juvenile justice information, we affirm the district court order denying RAGA's NPRA petition for a writ of mandamus as to the bodycam footage. However, we reverse as to the other related records and remand for further proceedings consistent with this opinion.

Hardesty and Silver, JJ., concur.

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623 P.2d 981, 983 (1981), we conclude that RAGA sufficiently raised the issue of LVMPD's denial of all the records it requested in its district court petition, in part by attaching those requests as exhibits to its petition. RAGA's second request specifically asked for the police report, witness and victim statements, computer-aided dispatch, and other statements by officers. Furthermore, in its reply brief in support of its petition, RAGA explained that it asked for other related records in addition to bodycam footage and that its statutory construction arguments apply to both. Therefore, RAGA preserved the entirety of its NPRA request.

[5]We need not address LVMPD's argument that RAGA failed to provide notice to a juvenile justice agency as required under NRS 62H.025(2)(r) because the district court did not evaluate whether the records even contain any juvenile justice information.

CAROLYN STARK, AN INDIVIDUAL, DBA NDOW WATCH KEEPING THEM TRANSPARENT, APPELLANT, *v.* CARL LACKEY, RESPONDENT.

No. 74449

February 27, 2020 458 P.3d 342

Appeal from a district court order denying a special motion to dismiss pursuant to NRS 41.660. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Reversed and remanded with instructions.

Winter Street Law Group and *Stephanie R. Rice* and *Richard A. Salvatore*, Reno, for Appellant.

Gerber Law Offices, LLP, and *Zachary A. Gerber* and *Travis W. Gerber*, Elko; *Durney & Brennan, Ltd.*, and *Thomas R. Brennan*, Reno; *Rose Law Office* and *Sean P. Rose*, Reno, for Respondent.

Before the Supreme Court, EN BANC.

OPINION

By the Court, HARDESTY, J.:

Third-party comments posted to appellant Carolyn Stark's public Facebook page criticize respondent Carl Lackey for his handling of bears in his official capacity as a Nevada Department of Wildlife (NDOW) biologist. Lackey sued based on these comments, and in response, Stark filed a special motion to dismiss the action under Nevada's anti-SLAPP (strategic lawsuit against public participation) statutes. The district court denied the motion, concluding that not all of the comments were related to a matter of public interest or were shown to be true or made without knowledge of any falsehood, such that they constituted good-faith communications entitled to anti-SLAPP protections.

On appeal from the order denying the anti-SLAPP motion to dismiss, we hold that Stark met her burden of showing that the action was "based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern," thus satisfying prong one of the anti-SLAPP analysis set forth in NRS 41.660. Because the comments were directly connected with an issue of public concern, and because Stark submitted an affidavit that, in the absence of conflicting evidence, satisfies the requirement of showing that the comments were true or made without knowledge of any falsehood, the district court erred in finding that she failed to satisfy prong one so as to shift the burden to Lackey to demonstrate that the claims should be

allowed to proceed. Therefore, we reverse and remand with instructions to the district court to address prong two of the anti-SLAPP analysis.

FACTS AND PROCEDURAL HISTORY

Stark created and administers a public Facebook page entitled "NDOW Watch Keeping Them Transparent" (NDOW Watch). NDOW Watch serves as a forum for Stark and other NDOW Watch followers to comment on NDOW's treatment of wildlife. Lackey, a biologist with NDOW, manages the bear population in the state. At issue here are comments made by third-party followers on the NDOW Watch Facebook page that criticize Lackey and his actions concerning the Northern Nevada bear population.

Lackey brought suit against Stark based on these third-party comments. He alleged claims of defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, and civil conspiracy. Stark sought to dismiss these claims pursuant to both an anti-SLAPP special motion to dismiss under NRS 41.635-.670 and a motion to dismiss under NRCP 12(b)(5). In her motions, Stark contended that she cannot be held liable for statements made by third parties on the NDOW Watch Facebook page on the sole basis that she administers the Facebook page. In addition, Stark affixed affidavits to her motions in which she affirmed that she has only made true statements on NDOW Watch and that she believes that the statements made by others on the Facebook page are either statements of opinion or contain substantial truth.

The district court denied Stark's motions. In denying the anti-SLAPP motion, the district court determined that several of the comments on the NDOW Watch Facebook page were not related to a matter of public interest, and that, even if they were, Stark's affidavit attesting to the veracity of the posts did not conclusively establish that the third-party posts were true or otherwise made without knowledge of their falsehood. In ruling on the Rule 12(b)(5) motion to dismiss, the district court determined that only one of the five alleged defamatory statements was not actionable. Stark appeals the district court's denial of the anti-SLAPP motion as to the remaining actionable statements, maintaining that the district court erred in its analysis.[1]

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[1]While Stark does not specifically challenge the district court's denial of her NRCP 12(b)(5) motion to dismiss, Lackey asked us to affirm the same in his answering brief. Because Stark does not actually challenge the ruling, and because the denial of a motion to dismiss under NRCP 12(b)(5), unlike a special motion to dismiss under the anti-SLAPP statutes, is not independently appealable, we do not address it. *Compare Kirsch v. Traber*, 134 Nev. 163, 168, 414 P.3d 818, 822 (2018) (stating an order denying a motion to dismiss is not appealable), *and* NRAP 3A(b) (listing the appealable determinations), *with* NRS 41.670(4) (providing for interlocutory review of an order denying an anti-SLAPP special motion to dismiss).

DISCUSSION

The district court erred in finding that Stark failed to satisfy prong one of the anti-SLAPP analysis

"A SLAPP suit is a meritless lawsuit that a party initiates primarily to chill a defendant's exercise of his or her First Amendment free speech rights." *Stubbs v. Strickland*, 129 Nev. 146, 150, 297 P.3d 326, 329 (2013). Nevada's anti-SLAPP statutes provide defendants with a procedural mechanism whereby they may file a special motion to dismiss the meritless lawsuit before incurring significant costs of litigation. NRS 41.660(1); *see also Coker v. Sassone*, 135 Nev. 8, 10, 432 P.3d 746, 748 (2019). We review the denial of an anti-SLAPP motion de novo. *Coker*, 135 Nev. at 10-11, 432 P.3d at 748-49.

Our anti-SLAPP statutes posit a two-prong analysis to determine the viability of a special motion to dismiss. *See Coker*, 135 Nev. at 12, 432 P.3d at 749. First, the district court must "[d]etermine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a). Second, if the district court finds the defendant has met his or her burden, the court must then "determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b).

The showing required by the defendant to satisfy prong one has two components. The first component is that the comments at issue fall into one of the four categories of protected communications enumerated in NRS 41.637. *See Delucchi v. Songer*, 133 Nev. 290, 299, 396 P.3d 826, 833 (2017). The category at issue in this case is "[c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum." NRS 41.637(4). The second component is that the communication "is truthful or is made without knowledge of its falsehood." NRS 41.637; *see Delucchi*, 133 Nev. at 299, 396 P.3d at 833.

Here, the district court found that Stark failed to meet her burden because not all of the comments on the NDOW Watch Facebook posts were sufficiently related to the stated public interest and because her affidavit failed to establish that the third-party posts were true or otherwise made without knowledge of their falsehood. We disagree.

But before discussing the district court's error, we note that throughout briefing and oral argument, Stark argues that she is immunized from liability in this matter by the Communications Decency Act (CDA), 47 U.S.C. § 230 (2012), because she did not author any of the third-party posts and served only as a provider or

user of an interactive computer service. However, the first prong of the anti-SLAPP analysis does not require that the comments at issue actually be made by the defendant, and instead focuses only on whether the comments constituted protected communication made in good faith. *See* NRS 41.660(1) (setting forth the procedure for when "an action is brought against a person *based upon a good faith communication* in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" (emphasis added)). The issue of whether the defendant may be held liable for the communication only becomes a consideration in the second prong of the anti-SLAPP analysis, when the burden shifts to the plaintiff to demonstrate "a probability of prevailing on the claim." NRS 41.660(3)(b). In this case, because the district court never reached the second prong and did not go beyond the allegations in addressing it in relation to the NRCP 12(b)(5) motion, we do not address Stark's immunity argument but instead, as provided below, instruct the district court to consider the argument on remand.

The statements were "made in direct connection with an issue of public interest . . . in a public forum"

Regarding the first required showing under prong one,[2] Stark claimed that the statements were made in connection with an issue of public interest—namely, the treatment of wildlife in Lake Tahoe and, specifically, concerns stemming from NDOW's trapping and euthanizing bears in the Lake Tahoe region. In determining whether an issue is in the public interest, we use the guiding principles that we adopted from California:

> (1) "public interest" does not equate with mere curiosity;
> (2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest;
> (3) there should be some degree of closeness between the challenged statements and the asserted public interest—the assertion of a broad and amorphous public interest is not sufficient;

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[2]We note that the parties do not dispute, and we agree, that NDOW Watch Facebook page is a public forum. *See Barrett v. Rosenthal*, 146 P.3d 510, 514 n.4 (Cal. 2006) ("Web sites accessible to the public . . . are 'public forums' for the purposes of the anti-SLAPP statute."); *Cross v. Facebook, Inc.*, 222 Cal. Rptr. 3d 250, 258 (Ct. App. 2017) (agreeing with the trial court's determination that "[i]t cannot be disputed that Facebook's website and the Facebook pages at issue are 'public forums,' as they are accessible to anyone who consents to Facebook's Terms" (internal quotation marks omitted)). Thus, our analysis here focuses on whether the comments were made in direct connection with an issue of public interest.

> (4) the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and
>
> (5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

Shapiro v. Welt, 133 Nev. 35, 39-40, 389 P.3d 262, 268 (2017) (quoting *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957, 968 (N.D. Cal. 2013), *aff'd*, 609 F. App'x 497 (9th Cir. 2015)).

Applying these factors here, we conclude that the treatment of Nevada wildlife, and specifically bears in the Tahoe Basin, surpasses mere curiosity and is a concern to many people throughout the state. *See Shapiro*, 133 Nev. at 39, 389 P.3d at 268. Furthermore, each of the four comments at issue expresses a critique of NDOW's handling of the bear population or a critique of Lackey in his role as an NDOW biologist, demonstrating sufficient closeness to the asserted public interest.[3] For example, one comment (statement q) states that "if we can establish that he or his family benefits financially from selling bear parts or selling the location where he recently released a bear—he should go to jail." The district court erroneously found that this comment did not relate to the stated public interest because its "main focus concerns potential benefits Lackey may receive, and hypothesizes that Lackey should go to jail if they can prove he sells bear parts." In fact, this comment directly relates to the stated public interest of the treatment of bears in Nevada because it questions Lackey's activities in his role as an NDOW biologist. Just because the comment presented a hypothetical about Lackey's conduct, it does not follow that it was not directly related to the public interest.

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[3]The four statements from the first amended complaint at issue on appeal are as follows:

> q. "He and his family directly benefit by him moving bears to a hunting area if they are issued a license and the killing of them in the name of public safety must simply be something that excites him—all of it in conflict with NDOW's mission. Additionally, if we can establish that he or his family benefits financially from selling bear parts or selling the location where he recently released a bear—he should go to jail."
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> r. "Yes he should go to jail! The treatment of our bears is paramount cruelty. Moving mothers without their cubs, moving them to hunt zones, moving them great distances knowing full well there are no food sources or water and that they will try to return home! Animal cruelty is a felony in all 50 states. Him and his NDOW murderers need to go to jail and stay there."
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> s. "It's time for the NV ENGINEERED bear hunt."
>
> y. "Lackey is such an incompetent asshole!! Fire his ass!!"

We reiterate our conclusion that each comment directly concerns the asserted public interest in critiquing either NDOW or its employees in their handling of the bear population.

We conclude that all four comments concern the handling of bears by NDOW or Lackey and thus directly relate to the stated public interest of the treatment of bears in Nevada. *See Coker*, 135 Nev. at 14, 432 P.3d at 751 (defining an issue of public interest broadly for purposes of the anti-SLAPP statutes).

Stark's affidavit, in the absence of evidence to the contrary, met her burden of showing that the communications were truthful or made without knowledge of falsity

With respect to the second required showing under prong one of the anti-SLAPP analysis, the defendant bears the burden of establishing by a preponderance of the evidence that the communication "is truthful or is made without knowledge of its falsehood." NRS 41.637; NRS 41.660(3)(a). In Stark's affidavit, attached to her anti-SLAPP motion, she stated that she has only made true statements on NDOW Watch and that she believes that the statements made by others on NDOW Watch are either statements of opinion or contain substantial truth. The district court determined that Stark failed to meet her burden because her affidavit did not specifically address the individual factual allegations in each comment. We conclude this finding was clearly erroneous.

Though the affidavit did not address the individual factual allegations in the statements or specifically attest to the truthfulness of the speaker who made the statements, we have previously held that a sworn declaration like Stark's is sufficient evidence that the statements were truthful or made without knowledge of their falsehood. *See Delucchi*, 133 Nev. at 300, 396 P.3d at 833. We acknowledge that our holding in *Delucchi* involved the pre-2013 version of NRS 41.660, which imposed a summary-judgment burden of proof on the defendant rather than the preponderance of the evidence burden required in the current version of the statute. *See Coker*, 135 Nev. at 10, 432 P.3d at 748 ("In 2013, the Legislature removed the language likening an anti-SLAPP motion to dismiss to a motion for summary judgment and set forth a specific burden-shifting framework."). Despite this change in evidentiary burden, we now hold that even under the preponderance standard, an affidavit stating that the defendant believed the communications to be truthful or made them without knowledge of their falsehood is sufficient to meet the defendant's burden absent contradictory evidence in the record. *Cf. Davis v. Cox*, 351 P.3d 862, 867 (Wash. 2015) (contrasting the more exacting summary judgment standard, which requires "a legal certainty" that can be defeated by a dispute of a material fact, with a preponderance of the evidence burden, which examines "whether the evidence crosses a certain threshold of proving a likelihood of prevailing on the claim"), *abrogated on other grounds by Maytown Sand & Gravel, LLC v. Thurston Cty.*, 423 P.3d 223, 248 n.15 (Wash. 2018), *abro-*

gated in part by Yim v. City of Seattle, 451 P.3d 694, 704-05 (Wash. 2019). Because Stark's affidavit made it more likely than not that the communications were truthful or made without knowledge of their falsehood, and there is no evidence in the record to the contrary, we conclude that she met her burden of showing that the third-party comments were made in good faith, so as to satisfy prong one.

CONCLUSION

The district court erred in determining that the comments at issue were not in the public interest and were not made in good faith. Because Stark's affidavit established that the comments were protected communications and were truthful or made without knowledge of their falsehood, Stark met her burden under the first prong of the anti-SLAPP analysis. Therefore, we reverse the district court's order denying Stark's special motion to dismiss and remand this matter to the district court with instructions for it to address prong two of the anti-SLAPP analysis. Specifically, we instruct the district court to consider the applicability of the Communications Decency Act, 47 U.S.C. § 230 (2012), in determining whether Lackey can demonstrate "a probability of prevailing on the claim."[4] NRS 41.660(3)(b).

Pickering, C.J., and Gibbons, Parraguirre, Stiglich, Cadish, and Silver, JJ., concur.

CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Appellant, *v.* LAS VEGAS REVIEW-JOURNAL, Respondent.

No. 74604

CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Appellant, *v.* LAS VEGAS REVIEW-JOURNAL, Respondent.

No. 75095

February 27, 2020 458 P.3d 1048

Appeal from a district court order requiring the Clark County Office of the Coroner/Medical Examiner to disclose unredacted juvenile autopsy reports under the Nevada Public Records Act (Docket No. 74604), and appeal from a post-judgment district court order

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[4]Because the CDA precludes liability where applicable, and because the second prong of the anti-SLAPP analysis asks whether the plaintiff's claims will likely succeed, we decline to address these arguments, as they are more properly considered under the second prong. We further advise the district court to permit discovery to the extent necessary to determine whether the CDA immunizes Stark from liability in its consideration of prong two.

awarding attorney fees and costs (Docket No. 75095). Eighth Judicial District Court, Clark County; James Crockett, Judge.

Affirmed in part, reversed in part, and remanded (Docket No. 74604); vacated (Docket No. 75095).

Steven B. Wolfson, District Attorney, and *Laura C. Rehfeldt*, Deputy District Attorney, Clark County; *Marquis Aurbach Coffing* and *Micah S. Echols* and *Jacqueline V. Nichols*, Las Vegas, for Appellant.

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

McDonald Carano LLP and *Kristen T. Gallagher*, Las Vegas, for Amici Curiae the Reporters Committee for Freedom of the Press and 11 media organizations.

Before the Supreme Court, En Banc.

OPINION

By the Court, Parraguirre, J.:

These appeals require us to interpret various provisions of the Nevada Public Records Act (NPRA) and other statutory provisions addressing public access to information concerning the deaths of children and juveniles. Specifically, we are asked to review a district court order requiring the Clark County Coroner's Office to produce unredacted juvenile autopsy reports under the NPRA. We are also asked to review the district court's award of attorney fees and costs to the Las Vegas Review-Journal (LVRJ), which had petitioned the district court to compel production of the autopsy reports after the Coroner's Office refused.

The Coroner's Office argues that it may refuse to disclose a juvenile autopsy report once it has provided the report to a Child Death Review (CDR) team under NRS 432B.407(6). We disagree. Because NRS 432B.407(6) limits access to public information, particularly information that the Legislature has determined should be generally available to the public, we interpret NRS 432B.407(6)'s confidentiality provision narrowly and conclude that it applies strictly to the CDR team as a whole and may not be invoked by individual agencies within a CDR team to limit access to information the agency holds outside of its role on the team.

We agree, however, with the Coroner's Office's argument that juvenile autopsy reports may include sensitive, private information and that such information may be properly redacted as privileged. In this regard, we conclude that the district court erred when it ordered the production of unredacted juvenile autopsy reports. We therefore

remand for the district court to assess whether any such information that may be contained in the requested autopsy reports should be redacted under the test adopted in *Clark County School District v. Las Vegas Review-Journal*, 134 Nev. 700, 707-08, 429 P.3d 313, 320-21 (2018), and we explain the amount the Coroner's Office may collect for expending resources to provide any such redaction.

In addition, we reject the Coroner's Office's argument that NRS 239.012 immunizes a governmental entity from an award of attorney fees when the entity, in response to a records request, withholds public records in good faith. We conclude instead that NRS 239.012's immunity provision applies explicitly to damages and should be interpreted independently from NRS 239.011, which entitles a prevailing records requester to recover attorney fees and costs regardless of whether the government entity withholds requested records in good faith. Thus, a governmental entity is not immune from an attorney fees award to which a prevailing records requester is entitled under NRS 239.011. We vacate the district court's award of attorney fees to LVRJ because it is premature to determine here whether the LVRJ is the prevailing party in the underlying NPRA action.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2017, the LVRJ submitted to the Coroner's Office a public records request under the NPRA. LVRJ sought autopsy reports, notes, and other documentation for all autopsies the Coroner's Office performed between January 2012 and April 2017 on decedents under the age of 18 at the time of death. The Coroner's Office timely responded and informed LVRJ that the requested juvenile autopsy reports would not be produced because they contained confidential medical information. The Coroner's Office initially based its response on Attorney General Opinion 82-12 (AGO 82-12) and provided LVRJ with a spreadsheet identifying juvenile deaths that occurred in Clark County from January 2012 to the date of the request. The spreadsheet identified each decedent's name, age, race, and gender, as well as the cause, manner, and location of death.

Dissatisfied with the Coroner's Office's response, LVRJ contacted the Clark County District Attorney's Office, asserting the Coroner's Office lacked any legal authority to withhold the juvenile autopsy reports. The district attorney's office informed LVRJ that autopsy reports are released only to a decedent's next of kin, basing its response on AGO 82-12 and then-pending legislation. *See* A.B. 57, 79th Leg. (Nev. 2017). The district attorney's office further explained that A.B. 57 as proposed would codify in statute the Coroner's Office's policy of releasing autopsy reports only in limited circumstances.

LVRJ reporters and Coroner's Office representatives met to further discuss LVRJ's records request. The discussion led Clark Coun-

ty Coroner John Fudenberg to determine that LVRJ sought autopsy reports and records pertaining to the deaths of children who were involved with the Clark County Department of Child and Family Services. The Coroner's Office then expanded its legal basis for withholding records to include NRS 432B.407(6), which renders confidential any records or information acquired by a CDR team. The district attorney's office offered to review and redact responsive reports not considered confidential under NRS Chapter 432B, provided LVRJ was willing to pay a fee to cover the extraordinary use of personnel for redacting the reports.

LVRJ filed a petition for a writ of mandamus, requesting that the district court compel the disclosure of all juvenile autopsy reports generated between January 2012 and the date of LVRJ's April 2017 request. The district court granted LVRJ's petition and ordered the Coroner's Office to produce all records without redaction, rejecting the Coroner's Office's argument that the reports could be categorically withheld as CDR records and concluding that there was no other basis for withholding or redacting the reports. The district court further determined that because the Coroner's Office did not claim that the records were confidential under NRS Chapter 432B in its initial response, the Coroner's Office waived that argument and could not raise it later.

LVRJ thereafter moved for an award of attorney fees and costs, and the Coroner's Office opposed the motion. The Coroner's Office argued that it was immune from an award of attorney fees by virtue of NRS 239.012, which provides immunity from "damages" for disclosing or withholding records in good faith. The district court rejected the Coroner's Office's immunity argument and awarded LVRJ attorney fees and costs. These appeals followed and challenge both the district court's order compelling the Coroner's Office to produce unredacted juvenile autopsy reports (Docket No. 74604) and the district court's award of attorney fees and costs to LVRJ (Docket No. 75095).

DISCUSSION

Primarily at issue here are questions related to the interpretation of the NPRA, NRS 239.001-.030,[1] and NRS 432B.407(6), the former generally requiring access to public records and the latter explicitly designating certain information as confidential for specific purposes relating to the review of child fatalities. We must also address whether the NPRA immunizes a governmental entity from an

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[1]We acknowledge that during the recent 2019 Legislative Session, the Nevada Legislature unanimously adopted numerous amendments to the NPRA with the passage of S.B. 287. S.B. 287, 80th Leg. (Nev. 2019). Because S.B. 287's "amendatory provisions . . . apply to all actions filed on or after October 1, 2019," we interpret in this opinion the version of the NPRA in effect at the time the instant actions were initiated. 2019 Nev. Stat., ch. 612, § 11, at 4008.

award of attorney fees when responding to a public records request in good faith.

When a district court's order granting a petition to compel access to records under the NPRA entails questions of law and statutory interpretation, we review the district court's order de novo. *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 877, 266 P.3d 623, 626 (2011). Similarly, an attorney fee award based on an interpretation of a statute providing for attorney fee eligibility presents a question of law subject to de novo review. *In re Estate & Living Tr. of Rose Miller*, 125 Nev. 550, 552-53, 216 P.3d 239, 241 (2009). Thus, we review both orders at issue here de novo, and we begin with foundational principles informing our interpretation of the NPRA and NRS 432B.407(6).

When a statute's language is clear on its face, we must adhere to the plain meaning of such language. *City of Sparks v. Reno Newspapers, Inc.*, 133 Nev. 398, 402, 399 P.3d 352, 356 (2017). When a statute is ambiguous, however, meaning "it is capable of being understood in two or more senses by reasonably informed persons," *Chanos v. Nev. Tax Comm'n*, 124 Nev. 232, 240, 181 P.3d 675, 680-81 (2008) (citations omitted) (internal quotation marks omitted), or when it does not speak to the particular matter at issue, we will construe it by considering reason and public policy to determine legislative intent. *Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 1168, 14 P.3d 511, 514 (2000), as amended (Dec. 29, 2000). We "assume[ ] that, when enacting a statute, the Legislature is aware of related statutes." *City of Sparks*, 133 Nev. at 402, 399 P.3d at 356 (citation omitted) (internal quotation marks omitted). "The meaning of the words used may be determined by examining . . . the causes which induced the legislature to enact it." *McKay v. Bd. of Supervisors of Carson City*, 102 Nev. 644, 650-51, 730 P.2d 438, 443 (1986).

If possible, this court will "interpret a rule or statute in harmony with other rules or statutes." *Watson Rounds, P.C. v. Eighth Judicial Dist. Court*, 131 Nev. 783, 789, 358 P.3d 228, 232 (2015) (internal quotation marks omitted). "[T]his court has a duty to construe statutes as a whole, so that all provisions are considered together and, . . . will seek to avoid an interpretation that leads to an absurd result." *Smith v. Kisorin USA, Inc.*, 127 Nev. 444, 448, 254 P.3d 636, 639 (2011) (internal quotation marks omitted).

A governmental entity does not waive a legal basis for withholding records by failing to cite the legal authority in its initial five-day response to a records request, if it provides some legal basis in its first response

A governmental entity that denies a public records request for confidentiality reasons must provide, in writing, a citation to authority for its denial. NRS 239.0107(1)(d) (providing that the written

notice of denial must include "[a] citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential"). The district court concluded that because the Coroner's Office did not initially base its decision to withhold juvenile autopsy reports on NRS 432B.407(6), it could not thereafter rely on that provision to withhold the reports. We disagree with the district court's conclusion and hold that the NPRA does not provide that a governmental entity waives a legal argument it omits from its initial five-day response to a records request.

As we recently explained in *Republican Attorneys General Association v. Las Vegas Metropolitan Police Department*, 136 Nev. 28, 458 P.3d 328 (2020), the NPRA is silent as to forfeiture or waiver of a legal basis for withholding records. The NPRA simply requires the governmental entity to provide to the requester *some* legal authority for denying access to a record on the basis that the record is confidential. Because the statute is silent as to whether an omitted legal basis for withholding records is waived, we turn to legislative history to determine legislative intent.

The NPRA's legislative history indicates that the Legislature rejected a proposal providing for a governmental entity's waiver of a legal basis for withholding records when the citation was not included in the initial response to a records request. In particular, the Legislature amended the NPRA in 2007 with the passage of Senate Bill 123. *See* S.B. 123, 74th Leg. (Nev. 2007); 2007 Nev. Stat., ch. 435, § 4, at 2061-62. As introduced, section 4(2) of the bill provided that if a governmental entity denies access to a public record based on confidentiality, but in doing so "the governmental entity fails to comply with the provisions of paragraph (d) of subsection 1, the governmental entity shall be deemed to have waived its right to claim that the public . . . record is confidential." S.B. 123, 74th Leg., § 4(2) (Nev., as introduced on February 20, 2007). Senator Terry Care, the bill's sponsor and a former journalist, testified that section 4(2) was drafted to ensure that "if the governmental entity responds by citing a statute, it is stuck with the original position and cannot come up with another position if the requestor petitions the court later." Hearing on S.B. 123 Before the Senate Governmental Affairs Comm., 74th Leg. (Nev., February 26, 2007) (testimony of Senator Terry Care). Section 4(2) was later removed from the bill through Amendment No. 415, and as enacted, the waiver provision was omitted in its entirety. 2007 Nev. Stat., ch. 435, § 4, at 2061-62. The Legislature thus considered and rejected the waiver provision that LVRJ urges us now to read into the NPRA.

In light of the Legislature's rejection of the waiver amendment to the NPRA, the district court incorrectly concluded that the Coroner's Office waived its reliance on NRS 432B.407(6). The NPRA does not impose such a waiver requirement; the Legislature declined

to adopt it when it was proposed. Interpreting the NPRA to prohibit a governmental entity from expanding on its initial legal reasoning for withholding records would be rewriting the NPRA in a manner squarely contradicting legislative intent. We decline to do so. *See Gibbons*, 127 Nev. at 882, 266 P.3d at 629 (declining to adopt a requirement that a *Vaughn* index be provided in every NPRA dispute where such a requirement "would essentially be rewriting the NPRA because it imposes no such unqualified requirement"); *see also Century Sw. Cable Television, Inc. v. CIIF Assocs.*, 33 F.3d 1068, 1071 (9th Cir. 1994) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." (quoting *Russello v. United States*, 464 U.S. 16, 23-24 (1983))).

NRS 432B.407(6)'s confidentiality provision, narrowly interpreted, does not trump the NPRA's provisions generally favoring access to public records

The NPRA provides that "unless otherwise declared by law to be confidential, all public books and public records of a governmental entity must be open at all times . . . to inspection by any person, and may be fully copied." NRS 239.010(1) (2017). The NPRA serves "to foster democratic principles" and furthers the goals of "government transparency and accountability." *PERS v. Nev. Policy Research Inst.*, 134 Nev. 669, 671, 429 P.3d 280, 283 (2018) (internal quotation marks omitted); *see* NRS 239.001(1) (2017). The NPRA's provisions must be liberally construed in favor of the public's right to access government records, and "any limitations or restrictions on [that] access must be narrowly construed." *PERS*, 134 Nev. at 671, 429 P.3d at 283 (alteration in original) (quoting *Gibbons*, 127 Nev. at 878, 266 P.3d at 626); *see* NRS 239.001(3) (2015).

NRS 432B.407 is included among several hundred other statutory exceptions to the NPRA that declare certain public records to be confidential or otherwise exempt from disclosure. NRS 239.010(1) (identifying at least 461 statutory exceptions to the NPRA). Where, as here, a statute "clearly and unambiguously creates an exception" to disclosure of a public record, and provides an "affirmative grant of confidentiality," the exception or grant of confidentiality must be interpreted narrowly. *Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 215-16, 234 P.3d 922, 925-26 (2010) (narrowly interpreting the confidentiality provisions of NRS 202.3662(1)).

As its title makes clear, NRS Chapter 432B generally addresses the protection of children from abuse and neglect, and NRS 432B.403-.4095, in particular, establish the creation, organization, composition, and duties of "multidisciplinary teams to review the deaths of children." NRS 432B.403. These multidisciplinary entities are referred to as CDR teams, which are formed to "[r]eview

the records of selected cases of deaths of children under 18 years of age . . . [a]ssess and analyze such cases[,] . . . [m]ake recommendations for improvements to laws, policies and practice[,] . . . [s]upport the safety of children . . . and . . . [p]revent future deaths of children." NRS 432B.403(1)-(6). A CDR team is made up of representatives from a variety of public agencies, including law enforcement, medical care providers, educational agencies, child welfare agencies, district attorney offices, and notably here, coroner's offices. NRS 432B.406(1)(a)-(f). A CDR team may also include "such other representatives of other organizations concerned with the death of the child as the agency which provides child welfare services deems appropriate." NRS 432B.406(2).

In furtherance of its duties, NRS 432B.407(1)(a)-(d) authorize a CDR team to access certain investigatory records and information regarding a case involving the death of a child. Specifically, a CDR team may access, among other things, "[a]ny autopsy and coroner's investigative records relating to the [child's] death." NRS 432B.407(1)(b). NRS 432B.407(6) provides that "information acquired by, and the records of, a [CDR team] . . . are confidential, must not be disclosed, and are not subject to subpoena, discovery or introduction into evidence in any civil or criminal proceeding."

The Coroner's Office argues that by virtue of NRS 432B.407(6), any juvenile autopsy reports provided to a CDR team are exempt from the NPRA's disclosure requirements. More specifically, the Coroner's Office maintains that, as a representative of a CDR team, it may invoke the CDR privilege and categorically deny access to juvenile autopsy reports on behalf of the CDR team.

Because NRS 432B.407(6) limits the disclosure of records obtained by a CDR team and designates such records as confidential, the provision must be interpreted narrowly. NRS 239.001(3) ("Any exemption, exception or balancing of interests which limits or restricts access to public books and records . . . must be construed narrowly . . . ."); *Haley*, 126 Nev. at 214-17, 234 P.3d at 924-26. By its plain language, NRS 432B.407(6) makes confidential only the records or information "acquired by" the "team." The statute's language makes no mention of the authority of individual agencies to invoke the confidentiality privilege on the team's behalf. The statute's language further applies explicitly to records or information "acquired by" the team, not to records or information held by an agency regardless of any CDR team activity. Moreover, NRS 432B.4075 refers to the "access and privileges granted to a [CDR] *team*." (Emphasis added.) The statute applies exclusively to a CDR "team," not to the broad categories of individual public agencies that may be part of a CDR team. Narrowly interpreting the plain language of NRS 432B.407(6), as we must, we conclude that only a CDR team may invoke the confidentiality privilege to

withhold information in response to a public records request, and NRS 432B.407(6) makes confidential only information or records "acquired by" the CDR team.

Our conclusion is reinforced by the CDR team's unique and essential role of obtaining and assessing information that may otherwise be withheld from it on the basis of confidentiality. In reviewing the death of a child, the CDR team must be able to access sensitive information from a variety of entities, including medical, educational, social services, and law enforcement agencies. To enable a CDR team to access such information, NRS 432B.407(6) designates any records *acquired by the CDR team* as confidential. This is to ensure that agencies do not withhold information from the CDR team, *not* to authorize a government agency to withhold information from the public.

In addition to NRS 432B.407(6)'s plain language, the statutory scheme of NRS Chapter 432B as a whole reflects a clear legislative intent to make certain information concerning child fatalities publicly available. As noted, we are bound to consider the entirety of NRS Chapter 432B when interpreting component provisions thereof. *Smith v. Kisorin USA, Inc.*, 127 Nev. 444, 448, 254 P.3d 636, 639 (2011) ("[T]his court has a duty to construe statutes as a whole, so that all provisions are considered together . . . ." (internal quotation marks omitted)).

NRS 432B.175(1) explicitly provides, with some exceptions, that "[d]ata or information concerning reports and investigations thereof made pursuant to this chapter must be made available pursuant to this section to any member of the general public upon request if the child who is the subject of a report of abuse or neglect suffered a fatality or near fatality." The Legislature adopted this provision in 2007 with the passage of Assembly Bill 261, a bill generally requiring public agencies to share and disclose information regarding abused, neglected, or missing children. A.B. 261, 74th Leg. (Nev. 2007). In her introductory remarks as a sponsor of the legislation, then-Assemblywoman Barbara Buckley testified that A.B. 261 addressed "the disclosure of records, and *the purpose is to provide as much disclosure as possible* with regard to children who suffer fatalities or near fatalities while in the care of the child welfare system." Hearing on A.B. 261 Before the Assembly Health and Human Servs. Comm., 74th Leg. (Nev., March 14, 2007) (testimony of Assemblywoman Barbara Buckley) (emphasis added). Assemblywoman Buckley testified that records concerning child deaths should be accessible to "a member of the public, a relative of the child, a member of the media, or a member of a child welfare organization." *Id.* This legislative history indicates that A.B. 261 codified the Legislature's intent to make information pertaining to the deaths of children in the custody of child welfare agencies available to the public, and

that the Legislature specifically contemplated ensuring the media's access to this specific category of information.

Additional testimony during the Legislature's consideration of A.B. 261 indicates the measure was intended to ensure the state's continued compliance with the Child Abuse Prevention and Treatment Act (CAPTA), federal legislation that provides grant funds to states in order to assist in improving child protective service systems.[2] To qualify for federal grant funds made available through CAPTA, states must ensure "public disclosure of the findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality." 42 U.S.C. § 5106a(b)(2)(B)(x) (2012). In his testimony supporting A.B. 261, then-Director of the Nevada Department of Health and Human Services Michael Willden stated that the legislation was introduced because the state was "underreporting child fatalities to the federal government" and in order "to bring our statutes into clearer compliance with [CAPTA]." Hearing on A.B. 261 Before the Senate Human Res. & Educ. Comm., 74th Leg. (Nev., May 2, 2007) (testimony of Michael J. Willden, Director, Department of Health & Human Services); *see McKay v. Bd. of Supervisors of Carson City*, 102 Nev. 644, 650-51, 730 P.2d 438, 443 (1986) (explaining that a statute's meaning "may be determined by examining the context and the spirit of the law or the causes which induced the [L]egislature to enact it").

NRS Chapter 432B's legislative history demonstrates the Legislature's intent to make reports about, and information pertaining to, child fatalities publicly accessible as a matter of policy favoring transparency and as a matter of compliance with federal law requiring disclosure as a condition for child services grant funds. We must construe NRS 432B.407(6)'s confidentiality provision in light of NRS Chapter 432B's statutory scheme as a whole, and the Coroner's Office's argument undermines the scheme's obvious commitment to public transparency with regard to information concerning child deaths. Accordingly, we reject the Coroner's Office's broad

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[2]*See generally* Emilie Stoltzfus, Cong. Research Serv., R40899, *The Child Abuse Prevention and Treatment Act (CAPTA): Background, Programs, and Funding*, at 17 (2009) ("In general, states must maintain the confidentiality of all records and reports related to their child abuse and neglect investigations. At the same time, a state *must* have procedures to release information from these confidential records to any federal, state, or local government entity, or an agent of these entities, that needs this information to carry out its responsibilities under law to protect children from abuse and neglect. Two of these entities, child fatality review panels and citizen review panels, are specifically named in the statute and must be given access to confidential information needed to perform their work. Further, the state is *required* to release to the public information concerning a child abuse and neglect case when it resulted in the death or near death of a child.").

assertion that it may invoke NRS 432B.407(6) to withhold juvenile autopsy reports on the basis that the report was provided to a CDR team.

We therefore conclude, based on the plain language of NRS 432B.407(6) and the expressed purposes behind NRS Chapter 432B, that the CDR team confidentiality provision is not intended to categorically exempt records held by an individual CDR agency, such as the Coroner's Office, from the NPRA's disclosure requirements. Instead, we interpret NRS 432B.407(6)'s language narrowly as applying only to records acquired by the CDR team, not held by the team's constituent agencies, for the purpose of allowing the team to access the records and information it needs to review a child fatality. Nothing in this opinion precludes a governmental entity from withholding or redacting records on some other basis of confidentiality, as discussed below. We hold simply that the Coroner's Office may not rely on NRS 432B.407(6) to withhold juvenile autopsy reports or claim that such reports are categorically exempt from disclosure by virtue of a confidentiality designation applicable only to the CDR team.

The Coroner's Office has identified nontrivial privacy interests in personal medical information contained in juvenile autopsy reports

The Coroner's Office also argues that it may withhold juvenile autopsy reports in their entirety in order to protect sensitive personal medical information of child decedents. The Coroner's Office relies on several authorities for this proposition, including the federal Health Insurance Portability and Accountability Act (HIPAA),[3] NRS 629.021, Assembly Bill 57, a measure the Nevada Legislature passed in 2017, and Attorney General Opinion 82-12. We disagree that these authorities justify withholding juvenile autopsy reports in their entirety.

First, as the district court concluded, coroners and medical examiners are not defined as covered entities subject to HIPAA's prohibitions against disclosing medical information. *See* 45 C.F.R. § 160.103 (identifying and defining covered entities subject to HIPAA). Similarly, NRS 629.021 applies only to records "received or produced by a provider of health care." NRS 629.031, in turn, includes an exhaustive list defining "providers of health care" that does not include coroners or forensic pathologists, whose duties instead are governed by NRS Chapter 259. While we conclude that the Coroner's Office was correct to invoke HIPAA and NRS 629.021 in identifying a nontrivial privacy interest in medical information, as discussed *infra*, these authorities do not justify categorically withholding juvenile autopsy reports in their entirety.

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[3]42 U.S.C. § 1320d-7 (2012); 45 C.F.R. § 164.502(f)-(g) (2013).

The Coroner's Office also relied on Assembly Bill 57, adopted in 2017, which amended NRS 259.045's provisions requiring coroners to notify the next of kin of a decedent's death. The Coroner's Office argues that A.B. 57, by authorizing a coroner to release an autopsy report to certain persons who are not a decedent's legal next of kin, indicates the Legislature's tacit endorsement of the Coroner's policy restricting access to autopsy reports. A.B. 57, however, makes no mention whatsoever of confidentiality of autopsy reports or of withholding autopsy reports in response to a public records request. The bill also made no mention of other classes of parties that Clark County Coroner Fudenberg, in a sworn declaration in the proceedings below, identified as entitled to autopsy reports, including, for example, administrators or executors of an estate and law enforcement officers performing their official duties. Under the Coroner's Office's reasoning, these parties would be precluded from receiving autopsy reports because they are not identified in A.B. 57. We are not persuaded that such a result was intended. Instead, the bill appears to have been intended to *expand* rather than restrict access to autopsy reports in specific circumstances where a next of kin is the suspect in the decedent's death. 2017 Nev. Stat., ch. 108, § 3(2), at 475; *see also* Hearing on A.B. 57 Before the Assembly Governmental Affairs Comm., 79th Leg. (Nev., March 8, 2017) (testimony of John Fudenberg, Clark County Coroner) ("[A.B. 57] will ensure that coroners statewide will be allowed to release reports to someone who is not necessarily the legal next of kin when the legal next of kin is a suspect in the death.").

While the authorities the Coroner's Office invokes do not authorize categorically withholding juvenile autopsy reports, they do implicate a significant privacy interest in medical information such that the reports may contain information that should be redacted. The NPRA forbids a governmental entity from denying a public records request on the basis of confidentiality "if the governmental entity can redact, delete, conceal or separate the confidential information from the information . . . that is not otherwise confidential." NRS 239.010(3) (2017).

We have adopted the two-part test articulated in *Cameranesi v. United States Department of Defense*, 856 F.3d 626, 637 (9th Cir. 2017) (the *Cameranesi* test) for "determin[ing] if a government entity should redact information in a public records request." *Clark Cty. Sch. Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 707-08, 429 P.3d 313, 320-21 (2018). The first step in a *Cameranesi* analysis requires the government to establish that disclosure implicates a personal privacy interest that is nontrivial or more than de minimis. If the government shows that the privacy interest at stake is nontrivial, the requester must then show that the public interest sought to be advanced is a significant one and the information sought is likely to

advance that interest. If the second prong is not met, the information should be redacted. The *Cameranesi* test thus balances "individual nontrivial privacy rights against the public's right to access public information." *Id.* at 708, 429 P.3d at 321. This balancing test approach "ensures that the district courts are adequately weighing the competing interests of privacy and government accountability." *Id.* at 709, 429 P.3d at 321; *see also Accuracy in Media, Inc. v. Nat'l Park Serv.*, 194 F.3d 120, 123 (D.C. Cir. 1999) (explaining that the Freedom of Information Act (FOIA) protects against "unwarranted 'invasions' of privacy" and that such invasions "trigger[ ] a weighing of the public interest against the private harm inflicted," and concluding that "the release of photos of the decedent at the scene of his death and autopsy qualifies as such an invasion").

Here, the Coroner's Office has demonstrated that a nontrivial privacy interest is at stake in the potential disclosure of juvenile autopsy reports. In his sworn declaration, Clark County Coroner John Fudenberg explained that an autopsy requires a complete physical examination of the decedent, including a review of blood samples and lab results. Fudenberg explained that an autopsy may incorporate review of medical records and health history completed prior to the physical examination, and that an autopsy report will generally include "detailed descriptions and medical evaluations of the condition" of the decedent and "references to specific medical records, specific medical or health information and personal characteristics about the decedent." Such private information and personal characteristics, according to Fudenberg, may include the decedent's sexual orientation, preexisting medical conditions, drug or alcohol addiction, and various types of diseases or mental illness, as well as other personal information that the decedent or the decedent's family might wish to remain private. Fudenberg's declaration comports with a general understanding that autopsy reports may "yield detailed, intimate information about the subject's body and medical condition," *Globe Newspaper Co. v. Chief Med. Exam'r*, 533 N.E.2d 1356, 1357 (Mass. 1989), and may "reveal volumes of information, much of which is sensitive medical information, irrelevant to the cause and manner of death," *Penn Jersey Advance, Inc. v. Grim*, 962 A.2d 632, 638 (Pa. 2009) (Eakin, J., concurring and dissenting).[4]

Aside from Fudenberg's declaration, the authorities the Coroner's Office invokes to withhold the autopsy reports reflect a clear public policy favoring the protection of private medical and health-related information. In its first response to LVRJ's records request,

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[4]*See also* Jeffrey R. Boles, *Documenting Death: Public Access to Government Death Records and Attendant Privacy Concerns*, 22 Cornell J.L. & Pub. Pol'y 237, 279 (2012) ("[P]rivacy concerns regarding autopsy reports are heightened due to the significant volume of highly sensitive medical information routinely contained within the reports.").

the Coroner's Office explained that its decision to withhold the reports was based on the rationale set forth in AGO 82-12, discussing the "[s]trong public policy of confidentiality of medical records." *See* 82-12 Op. Att'y Gen. 37 (1982). AGO 82-12 identified "a strong public policy that the secrets of a person's body are a very private and confidential matter upon which any intrusion in the interest of public health or adjudication is narrowly circumscribed." *Id.* at 40. Although we are not bound by AGO 82-12's conclusions of law, *see Univ. & Cmty. Coll. Sys. of Nev. v. DR Partners*, 117 Nev. 195, 203, 18 P.3d 1042, 1048 (2001), for purposes of the first step of a *Cameranesi* analysis, the Coroner's Office appropriately relied on AGO 82-12's public policy pronouncements, *Cannon v. Taylor*, 88 Nev. 89, 91-92, 493 P.2d 1313, 1314 (1972) ("While the Attorney General's opinions are not binding on [this court] . . . [o]ne of the duties of the Attorney General is to issue written opinions upon questions of law to guide public officials."). AGO 82-12 shows that there is a personal privacy interest in medical information that is neither trivial nor de minimis.[5]

The Coroner's Office also correctly points out that NRS 432B.4095 imposes a civil penalty of up to $500 if any CDR team member, a team organized to oversee a CDR team, or the Executive Committee to Review the Death of Children discloses "any confidential information concerning the death of a child." NRS 432B.4095(1). While this provision does not render juvenile autopsy reports confidential in their entirety, it does reinforce the Coroner's Office's assertion that juvenile autopsy reports may include confidential information that should be redacted before disclosure. The NPRA contemplates that any such information should be redacted, concealed, or otherwise separated from nonconfidential information in the report. NRS 239.010(3). Accordingly, we conclude that the Coroner's Office met its burden under *Cameranesi*, and LVRJ must show that the public interest it seeks to advance is significant and that the information sought will advance that interest.

As discussed *supra*, the public policy interest in disseminating information pertaining to child abuse and fatalities is significant.

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[5]To the extent the district court's order concluded that an Attorney General opinion cannot be used as a legal basis for withholding records, we disagree. AGO 82-12 did not specifically address the distinct issue here related to juvenile autopsy reports, which, in light of NRS Chapter 432B as a whole, implicates a specific policy issue that AGO 82-12 did not contemplate. We need not address the substance of the opinion beyond concluding that it sufficiently identifies a nontrivial privacy interest in confidential medical information. We further note, however, that while Attorney General opinions are not binding legal authority, they are of persuasive legal significance and may elucidate legal questions for the purpose of guiding public agencies. This court, for instance, has found Attorney General opinions useful in determining whether records are available for inspection under the NPRA. *PERS v. Nev. Pol'y Research Inst.*, 134 Nev. 669, 674 n.4, 429 P.3d 280, 285 n.4 (2018).

What is unclear, however, is the nature of the information contained in the juvenile autopsy reports that LVRJ seeks and how that information will advance a significant public interest. The Coroner's Office initially provided a spreadsheet to LVRJ identifying the case number; the decedent's name, gender, age, and race; and the cause, manner, and location of death for juveniles who were the subject of autopsies, and the Office also provided heavily redacted sample autopsy reports for cases not handled by a CDR team. Moreover, the CDR teams exist in part to provide information that is used to "[c]ompile and distribute a statewide annual report, including statistics and recommendations for regulatory and policy changes." NRS 432B.409(2)(f); *see, e.g.*, Exec. Comm. to Review the Death of Children, Nev. Div. of Child & Fam. Servs., *2016 Statewide Child Death Report* (2016). It is unclear what *additional* information LVRJ seeks to glean from the requested juvenile autopsy reports that, in unredacted form, would advance the public's interest.

Accordingly, we remand for the district court to determine, under the *Cameranesi* test, what autopsy report information should be disclosed under the NPRA and what information should be redacted as private medical or health-related information.

The NPRA explicitly limits an "extraordinary use" fee to 50 cents per page

The Coroner's Office argues that it is entitled to charge a fee for the "extraordinary use" of personnel who must review and redact the juvenile autopsy reports before disclosing them. *See* NRS 239.055(1). The Coroner's Office estimated that it would require two employees to spend 10 to 12 hours reviewing and redacting the reports, and it requested that LVRJ pay $45 per hour for the staff review. The district court concluded that the Coroner's Office could not charge the $45-per-hour fee and limited any recoverable costs to the actual costs of producing electronic copies on a CD. We conclude that the Coroner's Office is not entitled to charge a fee for the privilege review in excess of the 50 cents-per-page cap imposed by the NPRA for extraordinary use of personnel.

The NPRA provides that a governmental entity may recover a fee for providing a copy of a public record, not to exceed 50 cents per page. NRS 239.052(4). In 2017, the NPRA also provided for an additional fee to be charged for "extraordinary use" of resources:

> [I]f 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, in addition to any other fee authorized pursuant to this chapter, *charge a fee not to exceed 50 cents per page for such extra-*

> *ordinary use*. Such a request must be made in writing, and upon receiving such a request, the governmental entity shall inform the requester, in writing, of the amount of the fee before preparing the requested information. The fee charged by the governmental entity 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. The governmental entity shall not charge such a fee if the governmental entity is not required to make extraordinary use of its personnel or technological resources to fulfill additional requests for the same information.

NRS 239.055(1) (2013) (emphasis added) (repealed 2019); *see* 2019 Nev. Stat., ch. 612, § 13, at 4008. The NPRA, by its plain language, limits any fee recoverable for the "extraordinary use" of personnel to "50 cents per page." NRS 239.055(1) is a specific provision dealing precisely with the topic of a governmental entity's "extraordinary use" of personnel to "prepar[e] the requested information" in response to a public records request. It is unmistakable from the plain language that the 50-cent cap applies to a fee "for such extraordinary use." Such a provision, applying specifically to fees for "extraordinary use," must control over any other provision providing generally for permissible fees associated with producing a public record. *In re Resort at Summerlin Litig.*, 122 Nev. 177, 185, 127 P.3d 1076, 1081 (2006) ("[W]here a general statutory provision and a specific one cover the same subject matter, the specific provision controls."); *State, Div. of Ins. v. State Farm Mut. Auto Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000) (explaining that statutory language that is "plain and unambiguous" leaves "no room for construction" (internal quotation marks omitted)).

In this instance, to permit the Coroner's Office to charge $45 per hour for staff to review the requested reports before disclosing them, and to allow such costs as "extraordinary use" costs, would be to flatly ignore the plain language of NRS 239.055(1) explicitly limiting fees that may be assessed specifically for "extraordinary use" of personnel. The Coroner's Office may charge a fee for extraordinary use of personnel or technological services, and it may inform a requester, in writing, of the amount of such a fee "before preparing the requested information." NRS 239.055(1). But the fee is expressly limited to 50 cents per page, it "must be reasonable," and it "must be based on the cost[s] [the Coroner's Office] actually incurs for the extraordinary use of its personnel." *Id*. This court is not at liberty to set aside, disregard, or rewrite the NPRA's explicit limitations on fees recoverable for a governmental entity's extraordinary use of personnel.

The NPRA does not immunize a public entity from an award of attorney fees

The Coroner's Office argues that it is immune from an award of attorney fees because it withheld the requested autopsy reports in good faith. Specifically, the Coroner's Office contends that NRS 239.011(2) and NRS 239.012 must be interpreted together, such that NRS 239.012's immunity from "damages" provision must be read to encompass NRS 239.011's attorney fees provision. Interpreting NRS 239.011(2)'s language as "explicit and plain," the district court concluded that LVRJ was entitled to attorney fees as a prevailing party in its NPRA action. We review the district court's conclusions of law de novo. *Logan v. Abe*, 131 Nev. 260, 264, 350 P.3d 1139, 1141 (2015) (holding when eligibility for a fee award depends on interpretation of a statute or court rule, the district court's decision is reviewed de novo). We affirm the district court's order insofar as it correctly interpreted NRS 239.011(2) as entitling a prevailing records requester to attorney fees regardless of whether the governmental entity responds in good faith to a public records request.

NRS 239.011(2) provides that in an action to obtain access to public records, "[i]f the requester prevails, the requester is *entitled* to recover . . . costs and reasonable attorney's fees in the proceeding from the governmental entity whose officer has custody of the book or record." (Emphasis added.) NRS 239.012 provides that "[a] public officer or employee who acts in good faith in disclosing or refusing to disclose information and the employer of the public officer or employee are immune from liability for damages, either to the requester or to the person whom the information concerns." The plain language of both provisions compels reading them independent of one another, such that eligibility for attorney fees does not depend on the good-faith response of the governmental entity, but solely on whether the requester is a prevailing party.

As defined by *Black's Law Dictionary*, the term "entitle" means "[t]o grant a legal right to or qualify for," *Entitle, Black's Law Dictionary* (11th ed. 2019), and an "entitlement" is defined as "[a]n absolute right to a (usually monetary) benefit . . . granted immediately upon meeting a legal requirement," *Entitlement, Black's Law Dictionary* (11th ed. 2019). The statute's language plainly provides that if LVRJ is the prevailing requester, it has met the sole legal requirement which qualifies it for, or makes it "entitled to," reasonable attorney fees and costs. *See also Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 82, 343 P.3d 608, 610 (2015) (holding a records requester "was a prevailing party and thus entitled to recover attorney fees and costs pursuant to NRS 239.011").

NRS 239.012, on the other hand, by its plain language deals with governmental immunity from civil "damages" for good-faith disclosure of information. We have interpreted "damages" in other gov-

ernmental immunity statutes to exclude an award of attorney fees. *See Las Vegas Metro. Police Dep't v. Yeghiazarian*, 129 Nev. 760, 768-69, 312 P.3d 503, 509 (2013) (allowing recovery of attorney fees in addition to damages subject to NRS 41.035's cap); *Arnesano v. State, Dep't of Transp.*, 113 Nev. 815, 821, 942 P.2d 139, 143 (1997). Because NRS 239.012 relates specifically to governmental immunity, "damages" as used in this provision must be interpreted consistently with our interpretation of "damages" as used in other governmental immunity statutes. *See Savage v. Pierson*, 123 Nev. 86, 94, 157 P.3d 697, 702 (2007) ("[W]hen the same word is used in different statutes that are similar in respect to purpose and content, the word will be used in the same sense, unless the statutes' context indicates otherwise . . . .").

The Coroner's Office argues that interpreting "damages" independently would yield an absurd result, because other than the attorney fees provided for in NRS 239.011(2), there is no other type of "damages" that could flow from a governmental entity withholding a public record or other information in good faith. In light of the Coroner's Office's privacy argument, with which we partly agree, it is not difficult to conclude that "damages" as used in NRS 239.012 contemplates civil damages, not attorney fees. As we discussed in *Clark County School District v. Las Vegas Review-Journal*, "Nevada's common law recognizes the tort of invasion of privacy for unreasonable intrusion upon the seclusion of another. The purpose of the tort is to provide redress for intrusion into a person's reasonable expectation of privacy . . . ." 134 Nev. at 708, 429 P.3d at 320 (citations omitted). We decline to speculate as to whether the Legislature conceived of specific privacy-based or other causes of action when enacting NRS 239.012's immunity provision. A prevailing requester's entitlement to attorney fees and costs does not depend on whether the government withheld the requested records in good faith. Here, however, it is premature to conclude whether LVRJ will ultimately prevail in its NPRA action. The district court must decide the extent to which the juvenile autopsy reports contain private information that the Coroner's Office should redact. We conclude that NRS 239.012, as a matter of law, immunizes a governmental entity from "damages," and that the term does not encompass attorney fees and costs.[6]

CONCLUSION

We conclude that the Coroner's Office has not demonstrated that NRS 432B.407(6), or any other authority, authorizes it to withhold juvenile autopsy reports in their entirety in response to a public re-

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[6]In light of our decision to reverse and remand for further proceedings, we leave to the sound discretion of the district court the determination of whether LVRJ is entitled to attorney fees as the prevailing party in this action.

cords request. To the extent that the requested reports may contain private information or confidential medical information, we remand for the district court to evaluate under *Cameranesi* the scope of information that should be redacted from the reports. While NRS 239.012 does not immunize the Coroner's Office from an award of attorney fees as a matter of law, we nonetheless vacate the district court's award of attorney fees because it cannot yet be determined whether LVRJ is a prevailing party in its underlying NPRA action.

In light of the foregoing, we affirm the district court's conclusion that the Coroner's Office may not rely on NRS 432B.407(6) to withhold juvenile autopsy reports in their entirety in response to a public records request. We further affirm the district court's conclusion that NRS 239.012 does not immunize a governmental entity from an award of attorney fees to which a prevailing records requester in a public records action is entitled. We reverse the district court's order requiring production of unredacted juvenile autopsy reports, and we remand for the district court to assess the extent to which the reports may contain private information and medical or other health-related information that should be redacted. Finally, because it is not yet determined what information LVRJ will ultimately obtain as a result of its petition, we cannot yet conclude whether LVRJ is a prevailing party, and we accordingly vacate the district court's order awarding attorney fees to LVRJ.

Pickering, C.J., and Gibbons, Hardesty, Stiglich, Cadish, and Silver, JJ., concur.