

# Nevada Public Records Act (NPRA) Overview

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# AGENDA

1. Overview
2. The Nevada Public Records Act (NPRA) - NRS Chapter 239 - Legislative Intent
3. Legal Authorities
4. Administrative Procedures and Costs
5. Judicial Review
6. Significant Legislative Updates
7. Q & A

# General Premise of NPRA

The NPRA favors:

1. Transparency in government;
  2. Open access to agency records; and
  3. Liberal construction of statutory text in order to maximize the public's right of access to agency records.
- 2019 Legislative Update: The purpose of this chapter is to foster democratic principles by providing members of the public with *prompt* access to inspect, ~~and~~ copy *or receive a copy* of public books and records to the extent permitted by law. NRS 239.001(1).

# What is a Public Record?

1. **Legislative Intent:** All state agency records (documents, reports, memos, files) are public records unless declared confidential by law. NRS 239.010.
  - Under the NPRA begin with the premise that a record is a public record unless specific confidentiality restrictions apply. See *City of Sparks v. Reno Newspapers* (NV Supreme Court 2017).
2. **Medium of Communication:** The NPRA allows both written and verbal requests for public records. See NRS 239.0107(1).
  - E.g. A request for an agenda or supporting material at an open meeting of a public body.
3. **First question to ask:** “Do responsive records exist in the custody of the agency?”
  - If yes → then “public records” exist.

# General Principles of NPRA

1. **Accountable government:** “The Legislature has declared that the purpose of the NPRA is to further the democratic ideal of an accountable government by ensuring that public records are broadly accessible.” *Reno Newspapers, Inc. v. Jim Gibbons, Governor of the State of Nevada*, 127 Nev. Adv. Op. 79, at 5 (2011) (citing NRS 239.001(1)).
2. **Access to records:** Records should be presumed to be public unless a specific statute provides for confidentiality. NRS 239.001(5).
3. **Reasonable requests:** Records requested must be identifiable and requests must not be overbroad.
  - *See Freedom Watch, Inc. v. Department of State* 925 F. Supp. 2d at 62 (D. D.C. 2013) (Court explained that Freedom Watch had not “reasonably described” the records requested because it submitted a request seeking “all” records discussing particular issues and another request seeking “all records” that “refer or relate to” a particular issue. In that context, the court explained that the breadth of “refer or relate to” would require search and production of records anywhere those particular issues were ever, even vaguely, mentioned.).

# Statutory and Regulatory Authority to Withhold Records

1. State statutory restrictions are codified in NRS Chapter 239 and will refer to other specific sections of the NRS.
  - Cite the underlying statute cited in NRS 239.010, not NRS 239 itself.
2. The Legislature may authorize administrative agencies to make rules and regulations supplementing legislation if the power given is prescribed in terms sufficiently definite to serve as a guide in exercising that power." *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 227, 19 P.3d 245, 248 (2001).
  - See *also* NRS 233B.040(1)(a) (providing that reasonable regulations that are appropriately adopted by an agency "have the force of law").

# Nevada Case Law - *Donrey of Nevada*

## Balancing Test

### ➤ *Bradshaw* Balancing Means:

1. "Weighing" the agency's interests in non-disclosure against the general policy in favor of open government and the requestor's "*fundamental right*" to access public records.
2. The burden is upon the agency to explain why the records requested should not be furnished, with specific legal authority that justifies the withholding of the records.
3. Government interest in withholding must outweigh the public interest in disclosure by a "preponderance of the evidence." NRS 239.0113.
  - Note under *Las Vegas Review Journal v. Clark County School District* 134 Nev. Adv. Op. 84 (2018). -> where personal privacy interests are asserted by the government, the burden for showing the public interest in release shifts to the requester.



# Nevada Case Law - *Cameranesi* Two Part Balancing Test

➤ *Cameranesi* two party balancing test:

1. First requires government to establish a “personal privacy interest stake to ensure that disclosure implicates a personal privacy interest that is nontrivial or ... more than de minimis.”  
*Cameranesi*, 856 F.3d at 637.
2. “Second, if the agency succeeds in showing that the privacy interest at stake is nontrivial, the requester must show that the public interest sought to be advanced is a significant one and that the information [sought] is likely to advance that interest.” *Id.*

# Search and Review of Potentially Responsive Records

- Example of process for handling public record requests\*:
  1. Search for potentially responsive records;
  2. Review potentially responsive records for applicable confidentiality restrictions per NRS statute or NAC regulation;
  3. Review potentially responsive records for applicable attorney-client privileged information;
  4. Confer with agency counsel regarding other potential legal restrictions on public release based on case law (e.g. personal privacy interests); and
  5. Consider public interest in release of the records where specific privileges or confidentiality statutes are applicable;
  6. Release records (with redactions if necessary), and cite the applicable legal authority for withholding records (if necessary).

**Note that each agency should develop agency specific protocols in coordination with counsel.**

# Acknowledgment and Response

1. Written communications are REQUIRED;
2. An agency must respond in writing to records requests by not later than the end of the *fifth business day* after the request is received. NRS 239.0107(1); and
3. If a public book or record is readily available, in lieu of a written response the agency shall allow the requestor to inspect or copy or receive a copy of the record.
  - Do you have a public records policy and procedure to ensure that you are meeting this timeframe?

# 5th Business Day Requirement

## ➤ Three Options:

1. Full Response (Release): Provide the records requested either by giving a copy to the requester or allowing the requester to inspect the records;
2. Full Response (No Responsive Records/Potential Referral): Inform the requester that the agency does not have the requested records, and provide the name and contact information for the government entity that does have the records, if known; or
3. Acknowledgment: Provide the date when the records will be available.
  - **-2019 LEGISLATIVE UPDATE:** THE DATE AND TIME PROVIDED TO THE REQUESTER MUST REFLECT THE EARLIEST DATE AND TIME AFTER WHICH THE AGENCY REASONABLY BELIEVES THE RECORD WILL BE AVAILABLE. NRS 239.0107(1)(c)(1).

# Denying a Request or Withholding Records

- Statutory or regulatory confidentiality provisions:
  1. State Statutes
    - See NRS 239.010
  2. State Regulations
    - See applicable agency NAC
  3. Federal Statutes
  
- Case law authorities:
  1. *Bradshaw* balancing test; and
  2. *Cameranesi* personal privacy test.

# Denying the Request and/or Withholding the Record

1. **Citation:** The agency must provide a written response and a citation to statute or other legal authority making the record confidential. NRS 239.0107(d).
2. **Log or Index Case Law:** “We therefore conclude that after the commencement of an NPRA lawsuit, the requesting party generally is entitled to a log *unless*...the state entity withholding the records demonstrates that the requesting party has sufficient information to meaningfully contest the claim of confidentiality without a log. *Gibbons*, 127 Nev. Adv. Op. at 12.
  - **Note:** The Supreme Court of Nevada declined to spell out an exhaustive list of what such a log must contain or the precise form that this log must take because, depending on the circumstances of each case, what constitutes an adequate log will vary. See *Keys v. U.S. Dept. of Justice*, 830 F.2d 337, 349 (D.C. Cir. 1987).

# Recover Actual Costs

1. An agency may recover its actual costs in providing a copy of a public record to the requestor. NRS 239.052.
2. Providing copies of public records to the public is deemed part of the agency's regular duties.
3. Costs generally may include only actual costs incurred in responding to the records request, such as those for toner, paper, and postage, and not employee time in responding to the request, unless the request is extraordinary.

**NOTE: THESE COSTS MUST BE EXACT.** As such, it may be difficult to ascertain these costs unless your agency has a dedicated public records unit.

# No Charge for Minutes and Recordings of Meetings

- Minutes of public meetings are public records. Minutes or audiotape recordings of the meetings must be made available for inspection by the public within 30 working days after the adjournment of the meeting and a copy of the minutes or audio recordings must be made available to a member of the public upon request at no charge. NRS 241.035(2).
- All agencies must have five years of minutes; the remainder may be sent to State Archives. See NRS 241.035(2).



# List of Fees

- The agency must prepare and maintain a list of its fees for providing public records, which should be posted in a conspicuous place in each of its offices. NRS 239.052(3).
- If applicable, the agency's list of fees must also include per page fee for court reporter transcripts. NRS 239.053(2).

# District Court Review

- Pursuant to NRS 239.011, if a public records request is denied by the agency, the requestor may apply to the district court in the county where the book or record is located for an order:
  - Permitting the requestor to inspect or copy the book or record; or
  - Requiring the agency who has legal custody or control of the public book or record to provide a copy to the requestor.

# Record Retention and Archiving

- At the appropriate time according to your Records Retention Schedule:
  - Destroy securely; or
  - Send to State Library and Archives
- For more information:
  - <http://nsla.nv.gov/>, click on “Records Management” at the top, then “State Agencies,” and then look for the retention schedule you need.

# Legislative Updates 2019

➤ Section 1. Chapter 239 of NRS is hereby amended by adding thereto a new section to read as follows:

*1. In addition to any relief awarded pursuant to NRS 239.011, if a court determines that a governmental entity willfully failed to comply with the provisions of this chapter concerning a request to inspect, copy or receive a copy of a public book or record, the court must impose on the governmental entity a civil penalty of:*

*(a) For a first violation within a 10-year period, \$1,000.*

*(b) For a second violation within a 10-year period, \$5,000.*

*(c) For a third or subsequent violation within a 10-year period, \$10,000.*

*2. A civil penalty imposed pursuant to subsection 1 must be deposited in and accounted for separately in the State General Fund. The money in the account may be used only by the Division of State Library, Archives and Public Records of the Department of Administration to improve access to public records, and is hereby authorized for expenditure as a continuing appropriation for this purpose.*

*3. The rights and remedies recognized by this section are in addition to any other rights or remedies that may exist in law or in equity. 20*

# Legislative Updates 2019

## Prompt Access and Copy of Record

- NRS 239.001(1): The purpose of this chapter is to foster democratic principles by providing members of the public with *prompt* access to inspect, ~~and~~ copy *or receive a copy* of public books and records to the extent permitted by law.
- Also amended NRS 239.008 for uniformity.

# Legislative Updates 2019

## Earliest Date of Availability and Reasonable Efforts to Assist

- NRS 239.0107(1)(c)(1):
  - The date and time provided to the requester must reflect the earliest date and time after which the agency reasonably believes the record will be available.
  
- NRS 239.0107(1)(c)(2):
  - The agency must make a reasonable effort to assist the requester to focus the request in such a manner as to maximize the likelihood the requester will be able to inspect, copy or receive a copy of the public book or record as expeditiously as possible.

# Legislative Updates 2019

## Actual Costs

- NRS 239.005 amended to read as follows:
  1. “Actual cost” means the direct cost related to the **reproduction** *incurred by a governmental entity in the provision* of a public record-, *including, without limitation, the cost of ink, toner paper, media and postage.* The term does not include a cost that a governmental entity incurs regardless of whether or not a person requests a copy of a particular public record.

# Legislative Updates 2019

## Electronic Medium and Electronic Format

➤ NRS 239.010 amended to read as follows:

4. ~~{A person may request}~~ *If requested, a governmental entity shall provide a copy of a public record in ~~{any}~~ an electronic format by means of an electronic medium. ~~{in which the public record is readily available.}~~ Nothing in this subsection requires a governmental entity to provide a copy of a public record in an electronic format or by means of an electronic medium if:*

*(a) The public record:*

*(1) Was not created or prepared in an electronic format; and*

*(2) Is not available in an electronic format; or*

*(b) Providing the public record in an electronic format or by means of an electronic medium would:*

*(1) Give access to the proprietary software; or*

*(2) Require the production of information that is confidential and that cannot be redacted, deleted, concealed or separated from information that is not otherwise confidential.*



# ~~Extraordinary Use Fee~~

## NRS 239.055 REPEALED IN THE 2019 LEGISLATIVE SESSION

- ~~All extraordinary requests must be in writing. See NRS 239.055.~~
- ~~These charges are in addition to actual costs.~~
- ~~The fee for extraordinary use may not exceed 50 cents a page.~~
- ~~You must define "extraordinary use" in your public records policy to recover extraordinary use costs when responding to a public records request.~~

# Q & A