

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTHONY CLARKE,
Appellant,
vs.
THE STATE OF NEVADA; AND JOHN
L. ARRASCADA, WASHOE COUNTY
PUBLIC DEFENDER,
Respondents.

No. 82903-COA

FILED

MAY 06 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

Anthony Clarke appeals from a district court order dismissing his complaint seeking disclosure of public records under NRS 239.011. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

In the proceedings below, Clarke filed a “Complaint pursuant to NRS 239.011” against respondent John L. Arrascada, in his capacity as Washoe County Public Defender. In his complaint, Clarke stated that he sent approximately nine public records requests to the Washoe County Public Defender’s Office (WCPD) from April 2, 2020, to September 28, 2020, and alleged that the WCPD failed to timely respond to those requests under the provisions of the Nevada Public Records Act (NPRA).

As relevant to this appeal, Clarke admits that the WCPD disclosed some of the requested documentation, but contends that several items were “missing” from the WCPD’s response to his public records requests, including: (1) a “copy of unredacted body and dash cams of all police responders” to Clarke’s arrest; (2) a recording or transcript of the

“citizen call to 911;” (3) copies of all handwritten attorney notes made in relation to Clarke’s criminal case; (4) recordings or transcripts of “sheriff’s kiosk interviews with public defender’s office;” (5) a “copy of the table of contents of the WCPD desk manual, and/or the internal management policies and procedures or any other similarly purposed regulations under some unknown title;” and (6) a “table of contents for the desk manual of operational policies and procedures of the Reno Police Department.”¹

In lieu of filing an answer, Arrascada filed a motion to dismiss, or in the alternative, a motion for summary judgment. In this motion, Arrascada argued, among other things, that the records requested by Clarke in his complaint could be classified into three categories: (1) documents already provided to Clarke, which included over 400 pages of documentation and attorney notes related to the WCPD’s representation of Clarke in his criminal case; (2) documents that do not exist, which included the “WCPD desk manual” or internal management policies; and (3) documents that are not within the WCPD’s legal custody or control because they were created by another entity, including the body and dash camera recordings, the transcript of the 9-1-1 call, any recordings between Clarke and the public defender in the sheriff’s kiosk, and the table of contents for the desk manual of the Reno Police Department. Arrascada further averred, as relevant here, that although the WCPD possessed a copy of the body and dash camera footage, it was not the legal custodian or controller

¹Although Clarke initially requested other records below, he has not raised any issues regarding those additional records on appeal and has therefore waived any argument regarding the same. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (“Issues not raised in an appellant’s opening brief are deemed waived.”).

of those records, and therefore declined to produce that footage in response to Clarke's request.

After full briefing on the matter, the district court entered an eleven-page order granting Arrascada's motion to dismiss.² In its order, the district court adopted Arrascada's arguments and found that the WCPD had already produced over 400 pages of attorney notes and documents related to Clarke's criminal case. The court also found that several of the documents that Clarke requested did not exist or were within the custody of another governmental entity. The court further found that the WCPD merely possessed "restaurant surveillance video and body cam footage from the Reno police department," and adopted Arrascada's argument that possession does not equal legal custody or control. In so doing, the court summarily found that the WCPD was neither the "legal custodian nor legal controller" of such records, stating that "the legal custodian [of records] under the NPRA is the entity that produces, or in other words, creates the record." But notably, the court did not make express findings as to whether the body and dash camera footage were within the WCPD's legal control or whether Arrascada would be able to produce those records. Based on the foregoing, the court denied Clarke's requests for an order compelling

²Although the district court based its order on NRCP 12(b)(1) and (5), the district court should have ruled on the motion under NRCP 56—relief that Arrascada requested in the alternative—as it considered matters outside of the pleadings when making its order. *See Thompson v. City of N. Las Vegas*, 108 Nev. 435, 438, 833 P.2d 1132, 1134 (1992) (holding that a district court must treat a motion to dismiss as one for summary judgment "[w]here materials outside of the pleadings are presented to and considered by the district court"). Accordingly, we review the district court's order as an order granting summary judgment. *Id.* at 438-39, 833 P.2d at 1134.

production of the records at issue in this matter, and it dismissed his complaint. Clarke now appeals.³

As relevant here, once a person “who has legal custody or control of a public book or record of a governmental entity” receives a public records request under the NPRA, that person has five business days to allow the requester to inspect or copy the record or provide the requester with a copy of the record, inform the requester that the record is confidential, or, if the governmental entity does not have legal custody or control of the public book or record, provide (1) written notice to the requester that it does not have such custody or control of the record and (2) if known, the name and address of the governmental entity that does have legal custody or control of the record. NRS 239.0107(1). If a governmental entity denies such a request, the person making the request may apply to the district court for an order requiring the person who has legal custody or control of the record to provide a copy to the requester. NRS 239.011(1)(b). The purpose of the NPRA is to provide members of the public with prompt access to public books and records, and therefore the provisions of the chapter “must be construed liberally to carry out this important purpose.” NRS 239.001(1)-

³While Arrascada’s motion was pending, Clarke also filed a countermotion for summary judgment and a motion for an order to show cause, which were not resolved prior to this appeal. To the extent that Clarke contends that the district court abused its discretion by (1) not ruling on these motions and (2) subsequently ruling on the WCPD’s motion to dismiss without oral argument, these contentions are without merit in light of the rules of practice for the Second Judicial District Court. *See* WDCR 12(4) (“Upon the expiration of the 7-day period [to file a reply], either party may notify the filing office to submit the matter for decision by filing and serving all parties with a written request for submission of the motion”); WDCR 12(5) (stating that all decisions “shall be rendered without oral argument unless oral argument is ordered by the court”).

(2). Accordingly, “[a]ny exemption, exception or balancing of interests which limits or restricts access to public books and records by members of the public must be construed narrowly.” NRS 239.001(3).

Whether a government entity has legal custody or control of a record is a question of fact best resolved by the district court in the first instance. *See Comstock Residents Ass’n v. Lyon Cty. Bd. of Comm’rs*, 134 Nev. 142, 148, 414 P.3d 318, 323 (2018). When a district court’s order regarding 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. *Clark Cty. Coroner’s Office v. Las Vegas Review-Journal*, 136 Nev. 44, 48, 458 P.3d 1048, 1052 (2020).

Turning to Clarke’s contested records requests on appeal, we conclude that the district court did not err when it determined that Clarke’s requests for the attorney notes related to his criminal case were moot, as the record demonstrates that the WCPD has already provided him all of the attorney notes in its possession. *See Nat’l Collegiate Athletic Ass’n v. Univ. of Nev., Reno*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981) (“[T]he duty of every judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it.”); *see also Gibellini v. Klindt*, 110 Nev. 1201, 1204, 885 P.2d 540, 542 (1994) (stating that “[a] district court’s findings will not be disturbed on appeal unless they are clearly erroneous and are not based on substantial evidence”). Thus, we affirm the challenged order as to this request.

Likewise, the district court did not err in denying Clarke’s request for an “internal policy manual for the WCPD,” as the record

demonstrates that such a manual does not exist. Thus, the district court appropriately found that the WCPD did not need to create such a record in response to Clarke's request, and we affirm the district court's order as to this record request. *See PERS v. Reno Newspapers, Inc.*, 129 Nev. 833, 840, 313 P.3d 221, 225 (2013) (holding that governmental agencies are not required to create new records in response to a public records request); *Gibellini*, 110 Nev. at 1204, 885 P.2d at 542.

We now turn to Clarke's remaining requests on appeal, namely his requests for: (1) a "copy of unredacted body and dash cams of all police responders" to Clarke's arrest; (2) a recording or transcript of the "citizen call to 911;" (3) recordings or transcripts of "sheriff's kiosk interviews with public defender's office;" and (4) a "table of contents for the desk manual of operational policies and procedures of the Reno Police Department."

As to these records, the district court determined that the recording or transcript of the 9-1-1 call, kiosk recordings, and the table of contents for the desk manual of the Reno Police Department were not within the WCPD's legal custody or control, as it did not possess those documents, and the documents were held and created by another government agency. We agree, as the district court correctly determined that the WCPD is not the creator nor the holder of those records, does not have those records in its possession, and Clarke may request those records through other government agencies. *See* NRS 239.0107. As a result, we affirm the district court's order as to these records requests.

However, a question remains as to whether the district court should have compelled production of the body and dash camera footage related to Clarke's criminal case. In his answering brief, Arrascada acknowledges that the body and dash camera footage is currently in the

WCPD's possession, but asserts that the WCPD has declined to produce these materials as it maintains that it is not the legal custodian or controller of these records. Notably, Arrascada does not deny that the requested footage is a public record subject to the NPRA or assert that this footage is confidential or otherwise protected by law or statute, and therefore we need not address those issues here.

With regard to whether the WCPD had legal custody or control of the records, the district court adopted Arrascada's position that—based on rejected language in the legislative history of the 2019 amendment to the NPRA—an entity's possession of a record does not equate to legal custody or control for the purposes of a public records request. In so doing, the district court found that the WCPD was not the legal custodian of the body and dash camera footage, as the “the legal custodian [of records] under the NPRA is the entity that produces, or in other words, creates the record.” But in rejecting Clarke's request as to these records, the district court did not make any findings to support its summary conclusion that the body and dash camera footage in the WCPD's possession was not in the WCPD's legal control.

This court reviews the district court's interpretation of statutory language de novo. *Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 214, 234 P.3d 922, 924 (2010). “When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it.” *Coast Hotels & Casinos, Inc. v. Nev. State Lab. Comm'n*, 117 Nev. 835, 840, 34 P.3d 546, 550 (2001).

Only governmental entities who have legal custody or control of a requested public record are subject to the disclosure provisions of the NPRA. See NRS 239.010; NRS 239.0107. Consequently, when considering

an application for a court order compelling the disclosure of a public record under NRS 239.011, it is incumbent upon the district court to analyze both whether the requested record is in a government entity's legal custody and whether it is in the entity's legal control. *See Comstock*, 134 Nev. at 148, 414 P.3d at 323 (holding that the district court erred when it only made findings as to whether the governmental entity had legal custody of the requested records without also examining whether the requested records were within its legal control); *see also* 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes & Statutory Construction* § 21.14 (7th ed. 2009) (noting that "when a list exists, the 'or' between two subsections makes it necessary to read 'or' as a disjunctive").

Arrascada argues that the district court appropriately used the 2019 legislative history of the NPRA when finding that the records were not within the WCPD's legal custody or control. But our supreme court has already addressed the issue of legal control in *Las Vegas Metropolitan Police Department v. Blackjack Bonding, Inc.*, 131 Nev. 80, 343 P.3d 608 (2015), and *Comstock*, 134 Nev. 142, 414 P.3d 318, and we conclude that these opinions, rather than the legislative history Arrascada relies on, govern our resolution here.⁴

⁴Given the supreme court's holdings in these opinions, we are unpersuaded by Arrascada's legislative history arguments. *See Coast Hotels*, 117 Nev. at 840, 34 P.3d at 550 (stating that appellate courts will not go beyond the ordinary meaning of a statute if the statute's language is plain and unambiguous); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012) (stating that "[i]f a word or phrase has been authoritatively interpreted by the highest court in a jurisdiction . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation").

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In *Blackjack*, the court considered whether the Las Vegas Metropolitan Police Department (LVMPD) had legal custody or control over inmate telephone records maintained by CenturyLink, a private telephone company that contracted with Clark County to provide phone services for LVMPD. 131 Nev. at 82-83, 343 P.3d at 610-11. LVMPD argued on appeal that it did not have legal custody or control of the records, as they were created or maintained by CenturyLink. *Id.* at 84, 343 P.3d at 611. But the supreme court rejected this argument and held that the contract between the county and CenturyLink “indicates that the requested information could be generated by the inmate telephone system that CenturyLink provides and could be obtained by LVMPD,” and this constituted substantial evidence demonstrating that the requested phone records were in LVMPD’s legal control. *Id.* at 86-87, 343 P.3d at 613. Notably, the court also rejected LVMPD’s attempt to define “legal custody” as used in the NPRA by adopting the definition provided by NAC 239.620 (defining legal custody as “all rights and responsibilities of access to and maintenance of a record which are vested in a state agency and with the head of the state agency charged with the care, custody and control of the record”), as that provision of the administrative code addressed legal custody, but not legal control, and applied only to state agencies. *Blackjack*, 131 Nev. at 87 n.4, 343 P.3d at 613 n.4.

Moreover, even if we did consider the legislative history, Arrascada’s interpretation is undercut by the full context of the legislative history he relies on, which indicates that, even if a public record was not created by a governmental agency, the NPRA “does not prevent [an agency] from providing a record that is not within their legal custody,” which is consistent with our conclusions below. *Hearing on S.B. 287 (1st Reprint) Before the Assemb. Comm. on Gov’t Affairs*, 2019 Leg., 80th Sess. 5 (Nev. 2019) (statement of Sen. Melanie Scheible, S. District No. 9).

And in *Comstock*, the court considered whether public records maintained on county commissioners' private cell phones and email accounts constituted public records subject to disclosure under the NPRA. 134 Nev. at 146, 414 P.3d at 321. In that case, the Board argued that the definition of legal custody found in NAC 239.041, which defines legal custody as "all rights and responsibilities of access to and maintenance of a record which are vested in an office or department of a local governmental entity and with the official or head of the department charged with the care, custody and control of that record," should guide the determination of whether a record was under their legal custody or control. 134 Nev. at 147, 414 P.3d at 322. In line with that definition, the Board argued that it did not have legal custody or control of the records under the facts of the case. *Id.* The district court declined to order production of the records and adopted the Board's argument that "because the Board is not charged with maintaining records of the private emails and phone communications of its commissioners . . . the county does not have legal custody or control of the records in question." *Id.* But the supreme court rejected that rationale and held that (1) the definition in NAC 239.041 did not apply, and (2) the district court erred by examining legal custody but not legal control. *Id.* at 147-48, 414 P.3d at 322-23. In making this latter determination, the *Comstock* court emphasized that the fact that a public record is in the possession of another entity does not necessarily mean the record is beyond the government entity's control so long as, among other things, it can be obtained by the entity. 134 Nev. at 147-48, 414 P.3d at 323. Thus, the supreme court remanded the matter to the district court for determination of whether the governmental entity had "effective control" over the requested records. *Id.* at 148, 414 P.3d at 323.

While the facts of these cases are somewhat different than the situation at issue here, Arrascada acknowledges that the WCPD has possession of these records, and simply argues that possession of the records alone is insufficient to compel disclosure. But as *Blackjack* and *Comstock* demonstrate, public records can be subject to disclosure under the NPRA even when the records were not created, maintained or possessed by the government entity in question. See *Comstock*, 134 Nev. at 147-48, 414 P.3d at 322-23; *Blackjack*, 131 Nev. at 86-87, 343 P.3d at 613.

As detailed above, the district court resolved Clarke's request for the body and dash camera footage based solely on its definition of legal custody,⁵ and only summarily concluded that the records were not within the WCPD's legal control. In so doing, the court failed to address *Blackjack* and *Comstock*, much less make the factual findings regarding legal control required by these decisions. Thus, we conclude that the district court erred in resolving Clarke's request for these records, and we therefore reverse the challenged order with regard to the body and dash camera footage. Because the supreme court has held that the determination of whether a governmental entity had effective control over a requested record is a question of fact for the district court to resolve in the first instance, we remand this matter with instructions for the district court to determine whether the WCPD has legal control of, and is able to produce, the body and

⁵We recognize that the district court's definition of legal custody—"that the legal custodian [of records] under the NPRA is the entity that produces, or in other words, creates the record"—is substantially similar to the NAC definitions rejected in *Comstock* and *Blackjack*. But given our resolution of this matter, we need not address this issue.

dash cam footage.⁶ See *Comstock*, 134 Nev. at 148, 414 P.3d at 323 (stating that the determination of whether a record is within a governmental entity's effective control should be left to the district court in the first instance).

It is so ORDERED.⁷


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Kathleen M. Drakulich, District Judge
Anthony Clarke
Washoe County District Attorney
Washoe District Court Clerk

⁶Should the district court determine that the body and dash camera footage is within the WCPD's legal control, it must then apply the balancing-of-competing-interests test, which "weighs the fundamental right of a citizen to have access to the public records against the incidental right of the agency to be free from unreasonable interference." *Blackjack*, 131 Nev. at 88, 343 P.3d at 614 (internal quotation marks and citations omitted).

⁷Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.