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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

ROBERT A. CONRAD, an individual doing business as, THISISRENO.COM,

Petitioner,

vs.

RENO POLICE DEPARTMENT, a governmental subdivision of the CITY OF RENO, and JOHN DOES I through X, inclusive,

Respondents.
_____/

Case No.: CV21-00875

Dept. No.: 1

ORDER GRANTING MOTION FOR PROTECTIVE ORDER

Currently before the Court is Respondent City of Reno's (the "City" or "Respondent") *Motion for Protective Order* ("Motion") filed March 4, 2024. On March 8, 2024, Petitioner Robert A. Conrad d/b/a THISISRENO.COM ("Petitioner" or "Conrad") filed an *Opposition to Motion for Protective Order* ("Opposition"). On March 11, 2024, the City filed a *Reply in Support of Motion for Protective Order* ("Reply") and submitted the matter to the Court for consideration. Also, on March 8, 2024, Petitioner filed an *Objection to and Request for Hearing on March 5, 2024 Order due to Imposition of Prior Restraint in Violation of 1st Amendment* ("Objection").[1] The parties appeared before the Court on March 26, 2024 and provided oral argument on the Motion and the Objection.

I. Background

The following facts and assertions are set forth in the City's Motion:

[1] With few exceptions, the content of the Objection is nearly identical to the first five pages of the Motion.

1. The above-captioned writ proceeding has been remanded to this Court with instruction to review the investigative file of the Reno Police Department ("RPD") concerning the criminal case (*State v. Carry*, Case No. CR22-1737, Second Judicial District Court ("Carry Case")) against Dennis Carry ("Carry") prior to making a finding that the file, or portions thereof, are not subject to disclosure under the Nevada Public Records Act ("NPRA"). Mot. at 2:1-3:6
2. Following the hearing on December 15, 2023, the Parties conferred and, with the assistance of RPD Lieutenant Trenton Johnson (who conducted the investigation and built the case against Carry), attempted to identify portions of the file for the Court to review in-camera, with the goal of eliminating unnecessary in-camera review of portions of the file in which Conrad has no interest. *Id*.
3. During that meeting, it became clear that Conrad could only meaningfully identify parts of the file that he wanted if he could first review the narrative investigative report assembled by Lt. Johnson (the "Tiburon Report"). This is because the exhibits and supporting materials to the Tiburon Report (i.e., the vast majority of the file) are only comprehensible when contextualized by the Tiburon Report. In other words, the parties realized that without the Tiburon Report as a roadmap to the file, the cart was before the horse. *Id*.
4. The parties stipulated to a modification of the Court's *Order After Hearing* dated December 21, 2023.[2] Thereafter, the Court issued an order on January 18, 2024, that modified the in-camera review process and briefing schedule (the "Modifying Order").[3] Pursuant to the stipulated process, the City provided the Tiburon Report to the Court for in-camera review, along with its proposed redactions and legal justifications therefor. *Id*. [4]
5. Following the Court's review and release of the Tiburon Report, it was anticipated that the City would identify portions of the larger file to file under seal for the Court to review in camera, and ultimately issue an order as to what should be released to Conrad, if anything, pursuant to the writ petition. *Id*.

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[2] *See Stipulated Request for Order*, Exh. 1, which is the proposed order prepared by counsel for both parties setting forth a process that would govern, among other things, release of the Tiburon Report ("Proposed Order").
[3] The Modfying Order adopted, nearly verbatim, the Proposed Order.
[4] On March 5, 2024, the Court issued its *Order After In-Camera Review*.

6. The Modifying Order directed the parties to meet and confer regarding the potential for a protective order as to the Tiburon Report itself, which Conrad will receive for review as a result of the Modifying Order. *Id*.
7. The parties conferred on February 22, 2024, to discuss a possible protective order, and were unable to reach a stipulation. With a forthcoming order regarding the Tiburon Report's release anticipated at any time, the City now moves the Court to order production of the appropriately redacted Tiburon Report only subject to a protective order that will serve the governmental interest in nondisclosure by prohibiting Conrad from publishing the Tiburon Report, or reporting on or discussing it, prior to conclusion of the Carry Case. *Id*.
8. The City's initial and ongoing basis for declining to produce its investigative file in the Carry Case is that the criminal prosecution against Carry was open and remains open. *See* Case No. CR22-1737. *Id*. at 3:8-4:4.[5]
9. Following the first hearing in this case, and pursuant to the balancing test promulgated by the Nevada Supreme Court in *Bradshaw*,[6] this Court agreed with the City's position. However, on appeal, the Nevada Supreme Court held that this result was an error because this Court had not inspected the documents in-camera at issue to verify that the City's balancing analysis was correct. *Id*.
10. At no point did the Nevada Supreme Court declare that the withheld file, or any portion of it, is a record subject to disclosure.
11. The central dispute of this case remains pending as it has been since Conrad first requested the records: Conrad maintains that the public interest in disclosure of the records outweighs any countervailing government interest, and the City maintains that disclosure of any records prior to the conclusion of the criminal proceeding is improper pursuant to the factors stated above. *Id*.

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[5] Sentencing in the Carry Case has been set for April 2, 2024. *Id*.
[6] *Donrey of Nev. v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990).

II. Legal Authority

A. Motion for Protective Order

As NRCP 26(c)(1) provides:

> A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to an out-of-state deposition, in the court for the judicial district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (A) forbidding the disclosure or discovery;
>
> (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;
>
> (C) prescribing a discovery method other than the one selected by the party seeking discovery;
>
> (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
>
> (E) designating the persons who may be present while the discovery is conducted;
>
> (F) requiring that a deposition be sealed and opened only on court order;
>
> (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
>
> (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

NRCP 26(c)(1) articulates the standard for a protective order stating that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense ...." The United States Supreme Court has interpreted the similar language of FRCP 26(c) as conferring "broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). The *Rhinehart* Court continued, noting that the "trial court is in the best position to weigh fairly the competing needs and interests of the parties affected by discovery." *Id.* "The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders." *Id.* Although NRCP 26(c), like its federal

counterpart, applies to all forms of discovery (including written discovery), the Nevada Supreme Court has defined what constitutes good cause under the rule only in the context of depositions. *See Okada v. Eighth Judicial Dist. Court*, 131 Nev. 834, 842-43, 359 P.3d 1106, 1112 (2015) (articulating factors for courts to consider when determining good cause for a protective order designating the time and place of a deposition). "Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." *Executive Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (internal quotations omitted).

B. NPRA & *Bradshaw*-Balancing

The NPRA, codified as NRS Chapter 239, governs public access to government records. As enumerated in the NPRA, "unless otherwise declared by law to be confidential, all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person." NRS 239.010(a). "The purpose of this chapter is to foster democratic principles. . . ." NRS 239.001(1). Consequently, "[t]he provisions of this chapter must be construed liberally to carry out this important purpose." NRS 239.001(2). Further, "[a]ny exemption, exception or balancing of interest which limits or restricts access to public books and records by members of the public must be construed narrowly." NRS 239.001(3). Generally, a writ of mandamus is the appropriate procedural remedy to compel county-government compliance with the NPRA. *See DR Partners v. Bd. of Cty. Comm'rs of Clark Cty*. 116 Nev. 616, 621 6 P.3d 465, 468 (2000). Further, pursuant to the Nevada Constitution, state district courts have jurisdiction to issue writs of mandamus. *See* Nev. Const. Art. VI, 6; *see also* NRS 34.160. The Second Judicial District Court of Nevada has proper jurisdiction over and is the proper venue to adjudicate controversies involving requests for public records held in Washoe County under the NPRA. *See* NRS 239.011. Petitioners seeking a writ of mandamus are entitled to an expedited hearing. *See* NRS 239.011(2) (mandating that "[t]he court shall give this matter priority over other civil matters to which priority is not given by other statutes").

In *Bradshaw*, the Nevada Supreme Court built the foundation for analyzing claims of confidentiality made in response to NPRA requests. 106 Nev. at 635-36, 798 P.2d at 148. In determining whether public disclosure of a public record is proper, the *Bradshaw* Court held that the

district court must balance the interests of the public's right to know with the individuals' rights to privacy. *Id*. (holding "that a balancing of the interests involved is necessary regardless of the case law from other jurisdictions"). Since *Bradshaw*, Nevada jurisprudence has established a framework for testing claims of confidentiality under the backdrop of the NPRA's declaration that its provisions "must be construed liberally" (pursuant to NRS 239.001(2)) to facilitate access to public records, and that any restrictions on access "must be construed narrowly" (pursuant to NRS 239.001(3)). *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011) (citing *Reno Newspapers v. Sheriff,* 126 Nev. 211, 214, 234 P.3d 923, 924 (2010); *DR Partners*, 116 Nev. at 621, 6 P.3d at 468). The district court must begin its analysis with the presumption that all government-generated records are open to disclosure; importantly, however, the state entity bears the burden to prove that its interest in nondisclosure clearly outweighs the public's interest in access. *Id*. (citing *Sheriff,* 126 Nev. at 218, 234 P.3d at 927). "The state entity therefore bears the burden of overcoming this presumption by proving, by a preponderance of the evidence, that the requested records are confidential." *Id*. (citing NRS 239.0113; *DR Partners,* 116 Nev. at 621, 6 P.3d at 468). Next, in the absence of a statutory provision that explicitly declares a record to be confidential, the court should broadly balance the interests involved consistent with *Bradshaw*. *Id.* (citing 106 Nev. at 635, 798 P.2d at 147; *DR Partners,* 116 Nev. at 622, 6 P.3d at 468). As has been held consistently in this line of jurisprudence, the state entity cannot meet this burden with a non-particularized showing, or by expressing mere hypothetical concerns. *Id*. (citing *DR Partners*, 116 Nev. at 627–28, 6 P.3d at 472–73; *Sheriff,* 126 Nev. at 218, 234 P.3d at 927); *see also Clark County School District v. Las Vegas Review-Journal*, 134 Nev. 700, 429 P.3d 313 (2018) (adopting a "burden shifting test to determine the scope of redaction of names of persons identified in an investigative report with nontrivial privacy claims, and remand for further proceedings"); *see also Las Vegas Metro. Police Dep't v. Las Vegas Review-Journal*, 136 Nev. 733, 735, 478 P.3d 383, 386 (2020).

In consideration of whether a district court has erred in denying disclosure of an investigative report under *Bradshaw* and its progeny, the Nevada Supreme Court "review[s] a district court's order denying a petition for a writ of mandamus for an abuse of discretion." *Republican Atty's Gen. Ass'n. v. Las Vegas Metro Police Dep't*, 136 Nev. 28, 30, 458 P.3d 328, 331 (2020) ("*RAGA*"). In *RAGA*,

the Court held the district court abused its discretion in denying a petition made under the NPRA because it had failed to "conduct an individualized exercise of discretion" regarding each requested record. 136 Nev. at 37, 458 P.3d at 335 (internal quotation marks omitted). The district court in that case failed to view every record at issue "or make any specific findings as to whether these records contain[ed] confidential . . . information." *Id*. As most recently confirmed in this line of jurisprudence, there exists no bright-line rule mandating in-camera review of records in every NPRA dispute. *See Conrad v. Reno Police Dep't*, 139 Nev. Adv. Op. 14, 530 P.3d 851, 853 (2023). Further, the *Conrad* Court emphasized the burden remains upon the governmental entity to prove a record is confidential. *Id*. (citing NRS 239.0113(2)). "The government may not avoid a lawful public records request by simply providing a blanket statement of factors." *Id*. (citing *Bradshaw*, 106 Nev. 630, 798 P.2d 144). The *Conrad* Court further reiterated that the 2007 amendments to the NPRA require courts to apply the balancing test in *Bradshaw*—favoring the public's interest in access over the governmental entity's interest in nondisclosure when weighing the respective interests. *Id*. (citing *Las Vegas Review-Journal, Inc. v. Las Vegas Metropolitan Police Department*, 139 Nev., Adv. Op. 8, 526 P.3d 724, 735-36 (2023)).

III. Summary of the Arguments

A. Motion

In the Motion, the City contends the redacted Tiburon Report should not be publicly disclosed until the conclusion of the Carry Case. Mot. at 5:11-28. In support of this assertion, the City focuses on two lines of argument. First, the City contends the balancing test in *Bradshaw* supports a protective order as there exists significant government interest in nondisclosure—primarily because the Tiburon Report (even when redacted) relates directly to investigative findings and evidence associated to the pending case against Carry. *Id*. at 6:1-12:3. Next, in the alternative, the City argues the Court should issue a protective order because the NPRA is unconstitutional as applied to records concerning open and ongoing criminal cases—violating a criminal defendant's due process rights. *Id*. at 12:3-15:28.

B. Opposition

In the Opposition, Conrad argues the public right to know details about the Carry Case is anchored in fundamental principles of transparency and accountability—particularly when the case

involves a former public official. Opp. at 2:14-3:9. Conrad submits the charges against Carry are serious, and the alleged crimes occurred during his tenure as a high-level employee at the Washoe County Sheriff's Office, which implies potential misuse of public trust and resources. *Id*. Given that the alleged offenses include bigamy, burglary, invasion of privacy, perjury, and forgery, Conrad alleges there is an inherent public interest in the integrity of law enforcement personnel who are sworn to protect and serve the community. *Id*. Conrad continues, submitting that when an individual in such a position is accused of such "diabolical criminal activities," it raises concerns about the individual's conduct and the broader integrity of the law enforcement agency they represent. *Id*. Moreover, Conrad submits the public has a vested interest in the judicial process and in ensuring that justice is served, which includes knowing whether public officials are accountable for their actions. *Id*. at 3:3-10. Conrad emphasizes that media plays a crucial role in this process by disseminating information about cases at issue in the community, as evidenced by the reporting from "This Is Reno." *Id*. As the sole local news source reporting on Carry's initial not-guilty plea, Conrad argues This Is Reno is providing an essential service by keeping the public informed about the developments of the case. *Id*.

Conrad then turns to procedural arguments—alleging the City's Motion is untimely. *Id*. 4:1-5:4. Conrad notes that, on January 8, 2024, the parties submitted a stipulation to the Court aimed at refining the scope of the Court's in-camera review of the Tiburon Report—submitting that, if an agreement is not reached, they will brief the court on this issue with a motion for a protective order to be filed within 30 days of the proposed order's issuance. *Id*.[7] On January 18, 2024, Conrad notes how this Court issued the Modifying Order indicating it would conduct an in-camera review of the Tiburon Report, filed under seal, including proposed redactions by the City. *Id*. at 4:10-21. Conrad states that the Modifying Order directed the parties to confer and agree on the timing of Conrad's publication or reporting on the copy provided. *Id*. If no agreement was reached, a motion for a protective order regarding the Tiburon Report's content was required to be filed by the City within 30 days. *Id*. As shown in the City's Motion, Conrad submits the City did not contact Conrad to meet and confer regarding the Modifying Order and did not file a motion for a protective order within 30 days, as expressly required by the Modifying Order. Therefore, Conrad argues, the City's March 4,

[7] *See Stipulated Request for Order*, Exh. 1, Proposed Order.

2024, Motion is not timely and should be denied on that basis alone. *Id*. Next, Conrad pursues a First Amendment argument in the Opposition—contending this Court's March 5, 2024, *Order After In-Camera Review*, insofar as it imposes a prior restraint on Conrad's ability to report on the Carry matter and a redacted Tiburon Report not yet released, is an unconstitutional prior restraint and is subject to strict-scrutiny. *Id*. at 5:16-7:18.

C. Reply

In the Reply, the City contends the timing of the Motion is not prejudicial. Reply at 2:3-22. First, as to the requirement to meet and confer within 30 days of the Modifying Order, the City argues that Conrad has not been harmed by further consideration of issues prior to the release of the Tiburon Report, given that the question will be moot after sentencing and a judgment is entered in the Carry Case. *Id*. More significantly, however, the City contends that the Court should not ignore the Motion as it would disregard the due process interests of a third party who is not represented in this action—Carry. *Id*.

Next, the City argues there is no prior restraint implications in this case—arguing the First Amendment does not permit a court to enjoin the press from reporting on a redacted report already in the public domain. *Id*. at 3:23-6:1. Here, the City contends Conrad is not being prevented from publishing any information he obtained or uncovered in the course of his lawful journalistic activities. *Id*. Further, Conrad cannot invoke prior restraint as there is no First Amendment constitutional right implicated in cases where a person seeks only to gather information. *Id*. Finally, the City submits that the Opposition fails to address the *Bradshaw* balancing under state law and fails to address the due process arguments made as to the constitutionality of NPRA as-applied to criminal defendants. *Id*. at 6:2-25.

IV. Analysis

After reviewing the filings and applicable law, this Court finds good cause to grant the Motion. Public disclosure of the redacted Tiburon Report and any other record involved in the Carry investigation and prosecution is not appropriate until after judgment is entered in the Carry Case.

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A. The timing of the Motion is not prejudicial.

Conrad asserts that because the City did not comply with the Modifying Order regarding the timing for (1) the meeting to discuss a stipulation related to the timing of Conrad 's publication or reporting on the Tiburon Report and (2) filing the Motion -- the Motion should be denied. Opp. at 4:13-21. This argument fails for two reasons. First, the Modifying Order, issued January 18, 2024, directed that "[u]pon issuance of this Order, *the Parties* shall promptly confer to explore a stipulation regarding the timing of Conrad's publication and/or reporting on the copy of the [Tiburon] Report that is furnished to Conrad following the court's in-camera review." (Emphasis added.) Modifying Order at 2:8-10. The meeting between the Parties took place on February 22, 2024, which was beyond the thirty days specified in the Modifying Order. Conrad contends that "the City did not contact the Petitioner to meet and confer regarding the order." Opp. at 4:16-20. The obligation to timely meet applied to both parties. Conrad does not assert that he reached out to the City to set the meeting at a time that was in conformance with the Modifying Order. Instead, the parties met at the agreed upon date of February 22, 2024, and it appears that while a stipulation was not reached, the parties endeavored to succeed in compliance with the Modifying Order without objection from Conrad.

Second, the Modifying Order provides that "[i]n the event that a stipulation is not reached, Respondent [the City] shall, within 30 days of the issuance of this [Modifying] Order, file a Motion for a Protective Order regarding the contents of the [Tiburon] report." Modifying Order at 2:10-12. Since a stipulation was not reached, the City could file a motion for protective order. *Id.* at 2:10-12. The Motion was filed March 4, 2024, after the expiration of the thirty (30) days contemplated by the Modfying Order. Conrad does not allege substantive prejudice due to the late filing. Instead, he argues that the Motion "is not timely and should be denied on that basis alone." Opp. at 4:19-20. Without a substantiated allegation of prejudice, this Court declines to grant Conrad the relief he seeks for a violation of the thirty-day deadline. *Langford v. State*, 95 Nev. 631, 635, 600 P.2d 631, 635 (1979) (holding "[a] trial court is vested with broad discretion in fashioning a remedy when, during the course of the proceedings, a party is made aware that another party has failed to comply fully with a discovery order"); s*ee e.g., Moore v. Cherry,* 90 Nev. 390, 393, 528 P.2d 1018, 1020 (1974) (holding "[t]he Court *may* dismiss a complaint for failure to prosecute or for violation of a court order") (emphasis

added). Worth noting and presumably in an effort to address the late-filing issues, within five days of the February 22, 2024 meeting, on February 27, 2024, the City filed its Notice advising that "[w]ithout any order yet issuing from the Court as a result of its in-camera review of the [Tiburon] Report, the City submits that the issue of a protective order remains ripe for briefing and intends to file a motion for protective order within seven days of this filing." Notice at 2:2-5. The Motion was filed six days later.

Also worth noting is that the Modifying Order was adopted nearly verbatim from the Proposed Order.[8] The Modifying Order does not specify a deadline by which the Court was to complete its in-camera review, nor did the Proposed Order. At the March 26, 2024 hearing on the Motion (and in the written Motion and Reply), The City has been clear: the only issue concerning the timing of the release of the Tiburon Report and the reason for filing the Motion is ensuring Carry's due process rights prior to the sentencing on April 2, 2024. Thus, the only reason that the Motion remains relevant is that the Court completed its in-camera review prior to the sentencing hearing in the Carry Case, which, under the terms of the Modifying Order, could have occurred well after April 2, 2024. Conrad cannot credibly claim that an April 3, 2024 disclosure of the Tiburon Report is prejudicial when the Modifying Order, the terms of which were jointly agreed to by the parties, did not specify a date for the completion of the in-camera review.

B. Prior-restraint jurisprudence is inapplicable to disclosure of the Tiburon Report.

Conrad misapprehends generations of constitutional jurisprudence on prior restraint of speech. "An individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used.'" *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011); *see also N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971). Conrad has not yet been restrained from publishing any information in his possession; Conrad is not in possession of the Tiburon Report, nor, pursuant to the Modifying Order is he entitled to its disclosure until the in-camera review is completed by the Court and the Court considers a motion for a protective order that may be filed by the City. Modifying Order at 2:8-13. In *Sorrell*, the Vermont legislature passed a law that "prohibited pharmacies, health insurers, and similar entities from selling prescriber-identifying

[8] *See Stipulated Request for Order*, Exh. 1.

information," except to certain groups such as "private or academic researchers," but expressly not to "pharmaceutical marketers." 564 U.S. at 558-59. The U.S. Supreme Court held that the law represents a "case in which the government is prohibiting a speaker from conveying information that the speaker already possesses." *Id*. (quoting *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 40 (1999)). As the *Sorrell* Court highlights, this distinction between restricting access to government information and restricting use of that information in private hands is "significant" and "[a]n individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated." *Id*. (citations omitted).

Conrad sets forth cases in support of his Opposition, but they miss the mark. In *Las Vegas Rev.-J. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, the Nevada Supreme Court struck down a preliminary injunction that prevented a newspaper from publishing a report that it had already obtained, because the First Amendment does not permit a court to enjoin the press from reporting on a redacted autopsy report already in the public domain. 134 Nev. 40, 44, 412 P.3d 23, 24 (2018). The facts in *Las Vegas Rev.-J.* are distinguishable from those here, as the Tiburon Report is not in the public domain or currently within Conrad's possession. Conrad also relies on *Alexander v. United States*, 509 U.S. 544, 113 S. Ct. 2771 (1993). The *Alexander* Court was clear about the distinction regarding what has already been made available in the public domain. The *Alexander* Court noted that the controversy before it—a forfeiture order that an appellant was challenging—was unlike other cases where prior restraint had been found, such as cases where parties were prospectively enjoined from distributing pamphlets of their own creation, and where statutes authorized courts to issue injunctions of indefinite duration prohibiting future exhibitions of films that had not yet been found to be obscene. 509 U.S. at 550, 113 S. Ct. at 2771 (citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575 (1971); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 100 S.Ct. 1156 (1980)).

Further, the *Alexander* Court found that "the RICO forfeiture order in this case does not forbid petitioner from engaging in any expressive activities in the future, nor does it require him to obtain prior approval for any expressive activities. It only deprives him of specific assets that were found to

be related to his previous racketeering violations." In other words, the dealer of sexually explicit materials in that case was not prevented from any future expression; he was simply—and legally—denied the benefit of illegally obtained assets to aid him in doing so. Here, Conrad is not situated so differently. The City is requesting that he be denied the ability to publish a report that he does not yet possess for a very limited period of time (through April 2, 2024), the publication of which may also come at the cost of a third-party's (Carry's) due process rights.[9]

Not every governmental action that may affect future expression is a prior restraint. "Where a protective order is entered on a showing of good cause, is limited to the context of pretrial discovery, and does not restrict the dissemination of the information if it is gained from other sources in addition to the discovery, it does not offend the First Amendment." *Rhinehart*, 467 U.S. at 37, 104 S. Ct. at 2209. In this matter, the City is not asking for Conrad's right to report on the Carry Case (in general) to be proscribed, or that he be prevented from publishing any information he obtained or uncovered during his lawful journalistic activities. *See* Reply *generally*. The Court has already approved the redactions that the City is proposing. The only issue is the timing of the publication which, given that Conrad has not overcome the fact that he does not possess the Tiburon Report, does not offend the First Amendment. *Id.*

Conrad also contends that this *Court's Order After In-Camera Review* ("In-Camera Order"), which directs that the Tiburon Report is to be provided to the Conrad "for the limited purpose of allowing him to identify portions of the larger investigative file pertaining to [the Carry Case] that he seeks to inspect", "insofar as it imposes a prior restraint on Conrad's ability to report on the Carry matter and a redacted report not yet released, is an unconstitutional prior restraint." Opp. at 5:16-25. The Modifying Order at ⁋ 2 provides:

> Following its in camera review of the Report and Respondent's proposed redactions, the Court will provide direction to Respondent to furnish a copy of the Report to Petitioner, including redactions that the Court preliminarily deems appropriate, *for the limited purpose of allowing Petitioner to identify*

[9] In the Reply, the City contends that Conrad is asking the Court to disregard the due process interests of a third party who is not represented in this action, namely Carry, solely because the City did not timely act pursuant to the Modifying Order. Reply at 2:18.20. The City asserts that it would be irrational to find that a criminal defendant's constitutional rights (or statutorily balanced interests) should be abridged by the timing of an unrelated entity's litigation filings. *Id.* at 2:20-22.

> *portions of the larger investigative file pertaining to RPD Case No. 18-26148 that he seeks to inspect,* and portions that he does not seek to inspect, which the Court therefore need not review in-camera. Respondent shall include the legal basis for any redactions to the Report at that time.

The language cited by Conrad in the In-Camera Order, which he contends constitutes an unconstitutional prior restraint, is verbatim from the Modifying Order—again, an order that was proposed to the Court by counsel for both parties. Thus, the very language Conrad now objects to, he sanctioned.

Further, Conrad's standing as a member of the media is irrelevant in support of his First Amendment argument. It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972); *see also Pell v. Procunier*, 417 U.S. 817, 834 (1974) ("The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally"); *see also Zemel v. Rusk*, 381 U.S. 1, 16—17, 85 S.Ct. 1271, 1280—1281, 14 L.Ed.2d 179 (1965) (holding "[t]he right to speak and publish does not carry with it the unrestrained right to gather information"); *see also New York Times Co. v. United States*, 403 U.S. 713, 728—730, 91 S.Ct. 2140, 2148—2149, 29 L.Ed.2d 822 (1971), (Stewart, J., concurring). "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." *Houchins v. KQED, Inc.*, 438 U.S. 1, 15, 98 S. Ct. 2588, 2597 (1978). The *Houchins* Court denied any "special right of access to government-controlled sources of information" and rejected the argument that the First Amendment "compels access as a constitutional matter." *Id*. at 7- 8, 98 S. Ct. at 2593. The Ninth Circuit is in accord. *See, e.g., Hrdlicka v. Reniff*, 656 F.3d 942, 943 n.1 (9th Cir. 2011); *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1441 (9th Cir.); *Chavez v. City of Oakland*, 414 F. App'x 939, 940 (9th Cir. 2011) (unpublished). Therefore, Conrad is not entitled to the Tiburon Report (in any form) any more or less because he is a member of the local media in Reno, Nevada.

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C. *Bradshaw*-balancing favors governmental interest in prosecution.[10]

Nevada case law recognizes that a balancing of interests is necessary when the government believes a record to be confidential, and there is not an express statutory provision for its confidentiality. *Bradshaw*, 106 Nev. at 635, 798 P.2d at 147; *Gibbons*, 127 Nev. at 880, 266 P.3d at 628. The government bears the burden, by a preponderance of the evidence, of showing that the record is confidential. *Id*. at 628. To meet its burden, the government can demonstrate that its interest in nondisclosure clearly outweighs the public interest in access. *Pub. Emps.' Ret. Sys. of Nev. v. Reno Newspapers, Inc.* (PERS), 129 Nev. 833, 837, 313 P.3d 221, 224 (2013).

i. Governmental Interests

While the Nevada Supreme Court has clarified the reasoning of *Bradshaw* and the process it requires, neither the case nor the nondisclosure interests recognized in it have been abrogated. The *Bradshaw* court recognized certain characteristics of a law enforcement record that would make it subject to nondisclosure. In that case, the Court ordered the requested criminal records to be released, in part because no criminal proceeding was pending or anticipated, and there was no possibility of denying anyone a fair trial, among other reasons. *Bradshaw*, 106 Nev. at 636, 798 P.2d at 148 (holding "[t]here is no pending or anticipated criminal proceeding; there are no confidential sources or investigative techniques to protect; there is no possibility of denying someone a fair trial; and there is no potential jeopardy to law enforcement personnel").

Here, the Tiburon Report relates directly to investigative findings and evidence associated with the Carry Case. Public disclosure of the redacted Tiburon Report in this case prior to the disposition of the criminal case fundamentally impacts the Sixth Amendment right to a fair trial in that proceeding. At the March 26, 2024 hearing, the City's counsel questioned whether, on appeal, counsel could argue prejudice to Carry because witnesses who would have testified for Carry refused to do so because they were named in the Tiburon Report which was released prior to the sentencing hearing. The final phase of adjudication of the Carry Case—the sentencing hearing—is currently calendared for April 2, 2024. Until then, disclosure of investigative information would unnecessarily threaten to affect the probability of a fair outcome.

[10] Conrad does not endeavor to balance interests under *Bradshaw*. *See* Opposition *generally*.

On balance, disclosure of the Tiburon Report before sentencing generally threatens the significant interest in a fair trial. Even with inherently confidential and sensitive information appropriately redacted, disclosure of any specific details or witness statements from the investigation poses risks, and a criminal case remains pending until sentence is imposed. Criminal defendants have a statutory right to withdraw a plea up to that point (NRS 176.165).[11] Thus, until the Carry sentencing is complete, all risks associated with disclosure discussed above are still applicable.

ii. Public Interest in Disclosure

In evaluating the public interest in disclosure, the jurisprudence in Nevada focuses on the public's significant interest in access to the records. *See Las Vegas Review-Journal, Inc. v. Las Vegas Metro. Police Dep't*, 139 Nev. Adv. Op. 8, 526 P.3d at 735–37 (describing the generalized *Bradshaw* balancing test and the more recently recognized burden-shifting test applied to nontrivial privacy interests). In *Clark County School District v. Las Vegas Review-Journal*, the Nevada Supreme Court adopted the Ninth Circuit approach in *Cameranesi*—clarifying that "the only relevant public interest" to be balanced is "the extent to which the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." 134 Nev. at 707–08, 429 P.3d at 320 (citing 856 F.3d at 639, 640 (9th Cir. 2017));*see also Yonemoto v. Dep't of Veterans Affs.*, 686 F.3d 681, 694 (9th Cir. 2012). The Ninth Circuit has long recognized this standard as a "critical guidepost" in public records cases. *Forest Serv. Emps. for Env't Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1025 (9th Cir. 2008) (holding the court's role in balancing "public interest in disclosure against the interest Congress intended the [e]xemption to protect" as a "critical" guidepost to the analysis) (citing *United States D.O.J. v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 774 (1989)); *see also Rosenfeld v. U.S. Dep't of Just.*, 57 F.3d 803, 811 (9th Cir. 1995) (recognizing the interest to "open agency action to the light of public scrutiny" as "the sole cognizable public interest for FOIA").

Central to this analysis is how RPD carried out its duties—inclusive of how RPD investigates crimes. Conrad frames the public interest in this case as being directly correlated to Carry's function

[11] NRS 175.165 provides that "[e]xcept as otherwise provided in this section, a motion to withdraw a plea of guilty, … may be made only before sentence is imposed or imposition of sentence is suspended. To correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the plea."

as a public officer himself—because of his law enforcement affiliation. Even if a public interest could be identified that implicates the WCSO, RPD's documents do not serve that interest. The public interest must be given even "less weight" if the information sought does not "add significantly to the already available information concerning the manner in which [the agency] has performed its statutory duties." *Cameranesi*, 856 F.3d at 640 (quoting *Prudential Locations LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 739 F.3d 424, 433 (9th Cir. 2013); *see also Forest Serv. Emps.*, 524 F.3d at 1027 (holding that to advance a significant public interest, the requested information must "appreciably further the public's right to monitor the agency's action").

Most importantly, however, there is minimal benefit to public disclosure of the Tiburon Report prior to the Carry sentencing. Years have passed in the development of the case against Carry, and sentencing is currently scheduled for April 2, 2024. When balanced with any tangible or intangible public interest in its disclosure prior to Carry's sentencing, there exists more of a compelling interest to protect the contents of the redacted Tiburon Report—especially as this government interest will expire in less than one (1) weeks' time. Further, any public benefit is hypothetical, as Conrad has not and cannot demonstrate that one more week will harm the public interest in any way. Therefore, disclosure prior to the judgment entered in Case No. CR22-1737 is premature—obstructing important government interests which far outweigh the public benefit to early release of the Court's redacted version of the Tiburon Report. As was highlighted by the City, it agreed to provide a redacted version of the Tiburon to Conrad *prior to* the conclusion of the Carry Case in a good-faith attempt to promote timely review of records and to provide Conrad with a useful tool—allowing him to narrow his records request as to the larger file. *See* Mot. Exh. 2.

Therefore, until the Carry sentencing concludes, the governmental interests in nondisclosure remain applicable and substantial while the public interest in disclosure remain slight. The *Bradshaw* factors weigh in favor of prohibiting publication and public disclosure of the redacted Tiburon Report. Conrad may publish the contents of the redacted Tiburon Report after judgment is entered in the Carry

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Case without harm to the public interest and, importantly, without jeopardizing any influence upon the prosecution of the Carry Case. Further, as this Court has found a proper basis for issuing a protective order upon the redacted copy of the Tiburon Report under the *Bradshaw* balancing test, it need not address the City's alternative argument[12] regarding the constitutionality of the NPRA.

Based upon the foregoing and good cause appearing,

IT IS HEREBY ORDERED that Respondent's *Motion for Protective Order* is GRANTED.

IT IS SO ORDERED.

DATED this 28th day of March, 2024.

KATHLEEN M. DRAKULICH
DISTRICT JUDGE

[12] *See* Mot. at 3:12-5:28. The City argues explicitly that the NPRA is unconstitutional as applied to investigative and discovery records in open prosecutions, and therefore that the redacted Tiburon Report should not be deemed a public record subject to disclosure prior to judgment.

CERTIFICATE OF SERVICE

CASE NO. CV21-00875

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 28th day of March, 2024, I electronically filed the **ORDER GRANTING MOTION FOR PROTECTIVE ORDER** with the Clerk of the Court by using the ECF system.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

Electronically filed with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

ROBERT BONY, ESQ. for CITY OF RENO, RENO POLICE DEPARTMENT

LUKE BUSBY, ESQ. for ROBERT A. CONRAD

MARK DUNAGAN, ESQ. for CITY OF RENO

Deposited to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada: [NONE]

Judicial Assistant