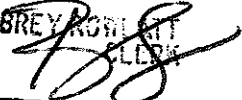


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AUBREY ROBERTS
BY  DEPUTY

**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY**

**NATIONAL COALITION FOR PUBLIC
SCHOOL OPTIONS,**

Petitioner,

vs.

**NEVADA STATE PUBLIC CHARTER
SCHOOL AUTHORITY,**

Respondent.

CASE NO. 19 OC 00050 1B

DEPT. 2

ORDER DENYING PSO'S MOTION FOR CONTEMPT

Before the Court is National Coalition for Public School Option's (PSO) motion to hold Nevada State Public Charter School Authority (SPCSA) in civil contempt for failure to comply with this Court's Order Granting Writ of Mandamus (Writ Order), and for civil penalties under Senate Bill 287.

FINDINGS OF FACT

PSO requested the Court hold SPCSA in civil contempt for violating the Writ Order filed on October 31, 2019. Notice of entry of the Writ Order was served by mail on SPCSA on November 18, 2019.

1 Because a party can only be held in indirect contempt for violating a written, filed
2 order, the bulk of relevant factual issues in determining whether SPCSA violated the Writ
3 Order are SPCSA's acts and/or omissions after service of the notice of entry of the Writ
4 Order on November 18, 2019. SPCSA's acts and/or omissions before November 18, 2019
5 provide context for its post-Writ-Order acts and/or omissions.

6 Unless otherwise specified the following facts were proved by clear and convincing
7 evidence.

8 Rebecca Feiden became SPCSA Executive Director during April of 2019, more than
9 one year after PSO's May 4, 2018 records request, and about six months before the Writ
10 Order was entered. Director Fieden testified at the only deposition taken in the case and
11 was the only witness to testify at the contempt trial. The Court finds all of Director Feiden's
12 testimony credible.

13 The Writ Order ordered SPCSA "to produce all documents responsive to PSO's
14 records requests within 5 business days of being served with notice of entry of this Order,
15 including, without limitation, the email dated October 20, 2016, from E. Westapher, Direct
16 or Authorizer Development for NACSA [National Association of Charter School
17 Authorizers], to various individuals, including P. Gavin, former executive director of
18 SPCSA."

19 In response to PSO's request and before entry of the Writ Order, SPCSA had asked
20 directors and staff—some of whom were suspected of wrongdoing, which wrongdoing
21 might have been evidenced in the requested emails—to search their computers for the
22 requested emails.

23 Director Feiden testified that in her state service experience it is not atypical for a
24 state agency to respond to a record request by asking the person who created the record to

1 search their computer for requested records. Director Feiden explained that SPCSA staff
2 had a practice of saving and not deleting their emails.

3 SPCSA did not timely inform the Department of Administration information
4 technology personnel of the records request or this litigation so the Department could
5 ensure requested records would not be automatically purged based upon the age of the
6 record.

7 Enterprise Information Technology Services (EITS) is a section of the Nevada
8 Department of Administration. EITS has a computer program that can search records
9 stored on state computers. EITS had a procedure that purged SPCSA computer records
10 three years after the records were created.

11 Initially Director Feiden did not know about the EITS system three-year record
12 purge procedure. When she learned of the procedure, she had it changed from 3 years to 99
13 years.

14 During the fall of 2019, SPCSA obtained new tools including Barracuda Message
15 Archiver which is a computer program that directly searches the email server. Barracuda
16 was obtained in part to correct problems SPCSA had with PSO's May 4, 2018 record
17 request.

18 From April 2019 to the fall of 2019 SPSCA had no internal information technology
19 employee.

20 After entry of the Writ Order, SPCSA, for the first time, had EITS search SPCSA's
21 records for emails that were potentially responsive to PSO's public records request. It is
22 unclear why SPCSA failed to have the EITS system searched before Ms. Feiden became
23 executive director.

24

1 The EITS search did not capture all emails responsive to PSO's public records
2 request because, by the time the search was conducted, the rolling three-year purge feature
3 on the EITS system had purged records from November 2016 and earlier.

4 On November 20, 2019 SPCSA produced to PSO 276 emails generated between
5 November 16, 2016 and December 17, 2018 that were retrieved during an EITS search
6 directed at emails of Patrick Gavin who had been the executive director of SPCSA until early
7 November 2018. SPCSA did not produce an October 20, 2016 Patrick Gavin email. PSO
8 knew such an email existed because it had obtained a copy of that email from another
9 source.

10 PSO argued SPCSA's focus on Gavin emails violated the Writ Order, but SPCSA had
11 communicated to PSO three times that SPCSA understood PSO wanted SPCSA to focus on
12 Gavin emails and PSO never indicated SPCSA's understanding was wrong. Instead PSO
13 filed a motion.

14 Based upon perceived deficiencies in the production, PSO filed its Motion for an
15 Order to Show Cause on December 3, 2019.

16 After PSO filed the motion SPCSA made the following productions:

- 17 • December 13, 2019, 652 emails for the period December 10, 2018 through
18 December 1, 2019.
- 19 • December 20, 2019, 1,008 emails for the period December 8, 2016 through
20 December 4, 2018.
- 21 • January 2019.
- 22 • June 8, 2020, 15 emails sent and/or received by SPCSA board members. The
23 emails included only one email from 2016, one from 2018, and the rest were
24 from 2019.

1 Looking at SPCSA's total production to date, the number of emails produced for the
2 period June 1, 2016 through November 15, 2016, contains substantially fewer emails than
3 any other month for which the SPCSA produced responsive records.

4 The period from June 1, 2016 through November 15, 2016 was a time of significant
5 interaction between SPCSA and NACSA, during which NACSA advised SPCSA on critical
6 policy decisions related to Nevada charter schools.

7 SPCSA failed to timely notify the State of Nevada Department of Administration of
8 PSO's records request and this litigation, and the need to preserve records in the EITS
9 system that may be responsive to PSO's requests. As a result, records responsive to the
10 records request were automatically purged by EITS.

11 After the Writ Order, SPCSA did not voluntarily or intentionally fail to search for or
12 provide responsive records to PSO. Rather, the problem was SPCSA personnel's lack of
13 knowledge and/or negligence as a result of the following contributing factors: Gavin's
14 resigning as director with little or notice during November 2018; having no appointed
15 director until April 2019; lack of familiarity with the EITS's search capability and purging
16 procedure; SPCSA's lack of an information technology employee from April to the fall of
17 2019; confusion on SPCSA's part about what records PSO wanted SPCSA to focus on, and
18 PSO's failure to communicate clarification.

19 The Court received no evidence that SPCSA had or has written policies or procedures
20 for handling public record requests or that it violated such policies or procedures.

21 Leadership of the State of Nevada Department of Administration informed Director
22 Feiden there is no way to reconstruct the missing emails. PSO presented no contrary
23 evidence. The Court finds there is no way to reconstruct the missing emails.

24 SPCSA has produced to PSO all requested records in SPCSA's possession or control.

1 SPCSA does not have in its possession or control any PSO requested records that
2 have not been produced to PSO.

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LEGAL PRINCIPLES

Public Records

The purpose of the Public Records Act “is to foster democratic principles by providing members of the public with prompt access to inspect, copy or receive a copy of public books and records to the extent permitted by law.” NRS 239.001(1). The provisions of the Public Record Act “must be construed liberally to carry out this important purpose. NRS 239.001(2). Any “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).

When a governmental entity receives a request for a copy of a public record, the governmental entity that has custody or control of the public record must, within five business days after receiving the request, provide a copy of the record to the requester. NRS 239.0107(1)(a).

If a request for a copy of a public record is denied or unreasonably delayed the requester may apply for a court order requiring the governmental entity that has legal custody or control of the public record to provide a copy to the requester. NRS 239.011(1).

Contempt

Contempt may be direct or indirect. An act or omission made in violation of a court order and outside the presence of the court is indirect contempt. Indirect contempt can be committed only if there is a written, filed order. *State, Division of Child & Family Services*

1 *v. District Court*, 120 Nev. 445, 454, 92 P.3d 1239, 1245 (2004). The contempt alleged in
2 this matter is indirect contempt.

3 Contempt may be civil or criminal. Civil contempt is designed to coerce compliance
4 with an order. A civil contempt order must contain a purge clause that specifies the
5 contempt ends when the contemner complies with the order. *Matter of Water Rights of*
6 *Humboldt River*, 118 Nev. 901, 909, 59 P.3d 1226 (2002). Criminal contempt is used to
7 punish disobedience to an order. Criminal contempt is punitive, unconditional, and
8 unaffected by a contemner's future action. *Id.* PSO wants PSCSA to be held in civil
9 contempt.

10 Inability of a contemner to obey an order is a complete defense to a contempt charge,
11 unless the contemner voluntarily or contumaciously brought on himself the disability to
12 obey the order. *McCormick v. Sixth Judicial Dist. Court*, 67 Nev. 318, 326, 218 P.2d 939,
13 942 (1950).

14 15 **CONCLUSIONS OF LAW**

16 SPCSA's mishandling of PSO's request defeated the purpose of the Public Records
17 Act as set out in NRS 239.001(1): to foster democratic principles by providing members of
18 the public with prompt receipt of requested public records.

19 SPCSA did not timely produce any records to PSO and never produced to PSO all
20 responsive records in its possession or control at the time PSO's request was made.

21 SPCSA failed to ensure responsive records were not automatically purged under a
22 three-year rolling purge procedure and as a result public records were purged and cannot
23 be reconstructed.

24

1 SPCSA's acts and/or omissions before the Writ Order cannot be the basis for a
2 finding of contempt of the Writ Order.

3 Because SPCSA has produced all requested records in its possession or control, and
4 there is no way to reconstruct emails purged from the EITS system, SPCSA has no ability
5 to produce any requested records in its possession or control that have not already been
6 produced.

7 SPCSA did not voluntarily or contumaciously bring on itself the inability to obey the
8 Writ Oder.

9 Because SPCSA did not voluntarily or contumaciously bring on itself the inability to
10 obey the Writ Oder, SPCSA did not commit contempt.

11 PSO's request for civil penalties under Senate Bill 287 lacks merit because the bill
12 does not apply to public records litigation commenced before October 1, 2019 and this
13 action was commenced on March 12, 2019.

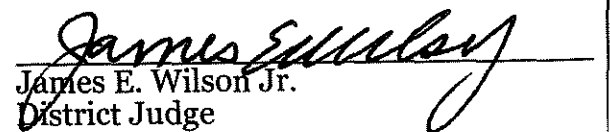
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ORDER

THE COURT ORDERS:

SPCSA'S motion for indirect civil contempt for alleged violations of the Writ Order
is denied.

December 21, 2020


James E. Wilson Jr.
District Judge


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CERTIFICATE OF SERVICE

I certify that I am an employee of the First Judicial District Court of Nevada; that on the 21 day of December 2020, I served a copy of this document by placing a true copy in an envelope addressed to:

Joel E. Tasca, Esq. Joseph P. Sakai, Esq. 1980 Festival Plaza Drive Suite 900 Las Vegas, NV 89135	Ryan W. Herrick, Esq. General Counsel State Public Charter School Authority 1749 North Stewart Street, Suite 40 Carson City, NV 89706
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the envelope sealed and then dePSOited in the Court's central mailing basket in the court clerk's office for delivery to the USPS at 1111 South Roop Street, Carson City, Nevada, for mailing.



Billie Shadron
Judicial Assistant