PROPOSAL FOR MANDATORY PRESERVATION OF RECORDS SUBJECT TO PUBLIC RECORDS REQUESTS

Policy Proposal and Proposed Legislative Language

I. Purpose

Nevada's public-records law establishes the public's right to inspect and obtain records created, maintained, or held by governmental entities. That right, however, depends upon the continued existence of the records themselves. A legal right to obtain a government record has little practical value if the record can be destroyed while the citizen is exercising that right or while the government and the courts are determining whether the record must be disclosed.

Nevada should therefore establish an explicit statutory preservation requirement for records that may be responsive to a public-records request. The preservation obligation should begin when the request is received and should continue throughout the entire public-records process, including administrative proceedings, judicial review, and all available appeals. The ordinary retention schedule for a government record should not authorize its destruction while the record is subject to that preservation hold.

The proposed rule should also recognize that some government records can have significance beyond the public-records request itself. This is particularly true when records are created, received, maintained, or used in connection with an investigation or enforcement matter that potentially involves a criminal offense. Because investigative and enforcement authority is distributed among numerous governmental entities, a special preservation rule should be in place. It should apply to law enforcement agencies, prosecuting offices, investigative bodies, regulatory agencies, boards, commissions, departments, divisions, and other governmental entities or components acting pursuant to investigative or enforcement authority.

For potential criminal matters, the preservation period should be tied to the statute of limitations applicable to the underlying criminal offense. If the law provides no statute of limitations for the offense, the records should be preserved permanently. If a record potentially relates to multiple criminal offenses, the longest applicable limitation period should control.

The purpose of this proposal is not to change the substantive rules governing disclosure. It does not require the government to disclose records that are otherwise exempt, privileged, confidential, or nonresponsive. It addresses a more basic problem: ensuring that the records remain in existence long enough for the legal question of access to be meaningfully decided and, when appropriate, for records potentially related to criminal matters to remain available for the period established by law.

II. The Problem

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A public-records request does not necessarily end when a governmental entity provides its first response. A requester may believe that records have been improperly withheld, that the search was incomplete, that additional records exist, or that an exemption has been improperly applied. The requester may then pursue whatever administrative and judicial remedies are available under Nevada law.

Those proceedings can take substantially longer than the ordinary retention period for some government records. A record may therefore reach the end of its scheduled retention period while the citizen is still attempting to obtain it through a process established by law. The longer the dispute continues, the greater the possibility that the records at issue will disappear through routine retention and disposition practices.

That creates a problem that is larger than any individual public-records dispute. The government controls the records. The government establishes or follows the retention schedule. The government responds to the public-records request. The citizen, by contrast, does not control how quickly the government responds, how quickly an administrative process proceeds, how quickly a court hears a case, or how long an appeal takes.

If the ordinary retention period continues running throughout that process, the citizen can be placed in the impossible position of having a legal right to pursue records that the government is simultaneously permitted to destroy.

A public-records system should not operate that way. The preservation of a potentially responsive record should be a prerequisite to resolving the question of whether the public has a right to see it.

There is a second problem when the records potentially relate to criminal matters. Government investigations and enforcement activities may generate records long before a criminal prosecution is initiated, if one is ever initiated at all. Those records may be distributed among law enforcement agencies, investigative bodies, regulatory divisions, prosecuting offices, and other governmental entities. If the preservation obligation applies only to the office ultimately responsible for prosecution, records held by the agencies that actually gathered, created, or maintained investigative information may remain vulnerable to ordinary destruction schedules.

The law should not make the preservation of potentially significant criminal records dependent upon which government office happens to possess them.

III. The Proposed Preservation Requirement

This proposal would create a mandatory preservation hold upon receipt of a public-records request. Once a governmental entity receives a request, it would be required to preserve records in its custody or control that are potentially responsive to that request.

The use of the term “potentially responsive” is intentional. Preservation should occur before the governmental entity completes its legal analysis of the request. At the beginning of the process, the government



may not yet know which records will ultimately be determined to be responsive, exempt, privileged, confidential, or otherwise subject to withholding. Requiring a final determination before preservation would defeat the purpose of the rule because the determination itself could occur only after records had already been lost.

The preservation obligation therefore concerns the existence of the record, not its ultimate disclosure. A governmental entity would still be permitted to determine that a particular record is not responsive or is otherwise exempt from disclosure. The preservation hold would simply prevent the record from being destroyed while that determination is being made and, where challenged, while the legal process concerning that determination is continuing.

The hold should apply to electronic and physical records alike. It should encompass records that might otherwise be deleted, overwritten, altered, modified, disposed of, or rendered inaccessible pursuant to an ordinary retention schedule or routine records-management practice.

The preservation requirement should be broad enough to capture the records necessary to determine the scope of the request without requiring the governmental entity to make a final legal determination before preservation occurs. Preservation is the mechanism that protects the integrity of the later determination.

IV. Preservation Must Continue Through the Entire Public-Records Process

The preservation obligation should not terminate merely because the governmental entity has issued an initial response to the request. If the requester challenges that response, the records should remain preserved while the challenge proceeds.

The same principle should apply when the dispute reaches the courts. A requester who seeks judicial review should not lose the protection of the preservation requirement simply because litigation takes longer than the government's ordinary retention period. The preservation obligation should continue throughout the judicial proceeding and through any appeal or other judicial remedy available under Nevada law.

This is particularly important because the length of a legal proceeding is not controlled by the person requesting the records. A requester may diligently pursue every remedy available to them while the matter nevertheless remains unresolved for months or years. The preservation obligation should therefore be tied to the legal status of the request rather than to an arbitrary calendar date established for routine records management.

The proposed rule would remain in effect until all administrative and judicial proceedings concerning the request have been finally resolved and all available administrative and judicial appeals and other remedies concerning the request have been exhausted.

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In practical terms, this means that a government agency could not respond to a request, deny access, wait for the ordinary retention period to expire, and then destroy the records while the requester is still pursuing an appeal concerning whether those records must be produced.

V. The Public-Records Hold and Ordinary Retention Schedules

Nevada's records-retention schedules serve an important administrative purpose. Government cannot retain every piece of paper and every electronic communication forever simply because it once existed. Retention schedules establish orderly rules for managing the enormous quantity of information created by modern government.

A retention schedule, however, should not operate as permission to destroy a record that has become the subject of an active legal dispute. Once a public-records request creates a preservation obligation, the preservation hold should supersede an otherwise applicable ordinary retention period for the records covered by the hold. The government should continue to follow its normal records-management practices for records that are not subject to the hold, while records potentially responsive to the request remain protected.

The existence of a preservation hold would therefore not eliminate Nevada's retention schedules. It would create an exception for records whose continued existence is necessary to preserve the public's ability to exercise its statutory right of access.

The same principle should apply to records subject to the special rule for potential criminal matters. If the applicable criminal preservation period extends beyond the ordinary retention period, the ordinary retention schedule should not authorize destruction of the record before the criminal preservation period expires.

VI. Why the Rule Must Use "Potentially Responsive"

The preservation obligation should be broader than the eventual production obligation.

That distinction is necessary because responsiveness and preservation are different legal questions. Responsiveness asks whether a particular record falls within the scope of the request. Preservation asks whether the record should continue to exist while that question is being determined.

If an agency were required to determine that a record was actually responsive before it had to preserve it, the agency could unintentionally destroy records during the very process of determining whether those records were responsive. A requester could then challenge the adequacy of the search without the underlying records being available to establish what existed.

Using "potentially responsive" avoids that problem. The government would preserve records when there is a reasonable basis to believe that they may fall within the scope of the request. The preservation requirement would not prejudge whether the records ultimately must be disclosed.

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This distinction also prevents the preservation provision from becoming an automatic disclosure provision. A record can be preserved without being produced. The government can still apply every otherwise applicable exemption, privilege, confidentiality provision, or other restriction governing access.

VII. Special Rule for Potential Criminal Matters

Public records can have significance beyond the particular governmental entity that maintains them and beyond the public-records request through which a citizen seeks access to them. This is particularly true when records are created, received, maintained, or used in connection with an investigation or enforcement matter that potentially involves a criminal offense.

Nevada's governmental structure distributes investigative and enforcement authority among numerous offices, departments, divisions, agencies, boards, commissions, and other governmental bodies. A preservation rule that applies only to prosecuting offices would therefore leave a significant gap in the protection of potentially important records.

The special rule should instead follow the nature of the matter rather than the title of the governmental entity. When a governmental entity or governmental component has investigative or enforcement authority and possesses records that potentially relate to a criminal offense, those records should receive an additional preservation period tied to the applicable statute of limitations for that offense.

This should include records held by law enforcement agencies, prosecuting offices, investigative bodies, regulatory agencies, boards, commissions, departments, divisions, and other governmental entities or components acting pursuant to investigative or enforcement authority.

The rule should apply whether the records were created during a formal criminal investigation, received from another governmental entity, generated during an enforcement investigation, or otherwise came into the custody or control of an entity exercising investigative or enforcement authority. The question should be whether the records potentially relate to a criminal matter, not whether the governmental entity has formally classified the matter as a criminal investigation.

This distinction is important because governmental investigations do not always begin with a neat legal classification. An agency may receive a complaint, conduct an investigation, refer information to another agency, consult with law enforcement, or exercise administrative enforcement authority before it becomes clear whether conduct may constitute a criminal offense. Records should not become vulnerable to destruction simply because the government has not yet decided what legal category to place the matter into.

The proposed rule therefore does not require a governmental entity to determine that a crime occurred. It does not require the government to determine that a particular person committed a crime. It does not require



prosecution, and it does not establish a presumption that prosecution will occur. It establishes a preservation obligation based upon the potential relationship between the records and a criminal offense.

The preservation period should be determined by the law governing the potentially applicable criminal offense. If the offense has a statute of limitations, the records should be preserved until that statute of limitations expires.Where a record potentially relates to multiple criminal offenses, the longest applicable statute of limitations should control. If any potentially applicable offense has no statute of limitations, the records should be preserved permanently.

This approach creates a clear rule without requiring a governmental entity to predict whether a particular offense will ultimately be charged.

VIII. Crimes With No Statute of Limitations

The law should expressly address criminal offenses for which there is no statute of limitations.

If a record potentially relates to an offense for which the law provides no statute of limitations, there is no statutory expiration date that can serve as the endpoint for the preservation obligation. In those circumstances, the proposed rule would require permanent preservation. This provision is necessary to prevent an artificial expiration date from being created through records management when the law itself has established that the offense is not subject to a limitation period.

The rule should also address situations in which a record potentially relates to more than one criminal offense. If the potentially applicable offenses have different limitation periods, the record should be preserved until the longest applicable period expires. If any potentially applicable offense has no statute of limitations, the record should be preserved permanently.

The preservation rule does not require a governmental entity to determine that any particular offense occurred. It simply establishes the preservation period based upon the criminal offenses to which the records potentially relate.

IX. The Two Preservation Periods Should Operate Independently

The public-records preservation period and the special preservation period for potential criminal matters should operate independently of one another.

A record may therefore be subject to a public-records preservation hold for the duration of the request and all related appeals while simultaneously being subject to a longer preservation period because it potentially relates to a criminal offense. The longer period should control. For example, if a public-records dispute is completely resolved after two years but the applicable criminal statute of limitations has not yet expired, the governmental entity subject to the special criminal-matter rule would continue to preserve the potentially related records until that criminal limitation period expires.

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Conversely, if the public-records litigation continues beyond the applicable criminal limitation period, the public-records preservation hold would continue until the public-records proceedings and all available appeals have been exhausted. If the underlying offense has no statute of limitations, the criminal-matter preservation requirement would remain permanent regardless of when the public-records dispute concludes. This creates two separate legal triggers rather than treating the end of one proceeding as automatically terminating the other obligation.

X. Preservation Does Not Mean Automatic Disclosure

An important feature of the proposal is that preservation and disclosure remain separate.

The proposed preservation requirement would not create a rule that every record potentially responsive to a public-records request must ultimately be produced. A record could still be withheld if a valid statutory exemption applies. A privileged record could remain privileged. A confidential record could remain protected. A record that is not responsive could remain outside the scope of production. The preservation requirement simply prevents destruction or other loss of the record while those legal questions are being resolved.

This is a necessity because the purpose of preservation is to protect the integrity of the public-records process, not to eliminate the government's legitimate authority to withhold records when the law permits or requires withholding. The public should be able to challenge a government's decision concerning a record without simultaneously having to worry that the record itself may disappear before the challenge is resolved.

Likewise, the special rule for potential criminal matters does not create a right to disclosure. It creates a preservation obligation. Whether the records may ultimately be disclosed remains governed by the applicable public-records law and any other applicable law.

XI. The Public Should Not Lose a Record Because the Legal Process Takes Time

The fundamental problem this proposal addresses is not complicated. A citizen cannot control how long it takes the government to respond to a request. The citizen cannot control how long an administrative appeal takes. The citizen cannot control the court's schedule. The citizen cannot control the length of an appeal. Yet under an ordinary retention system, the citizen can potentially bear the consequence of every delay.

That is an unreasonable allocation of risk. The party seeking access to the record should not be placed at risk of losing the record because the legal process necessary to determine access takes longer than the ordinary retention period. The preservation requirement corrects that imbalance by placing the responsibility on the governmental entity that possesses and controls the records. The government does not have to agree that the requester is entitled to the record. It does have to preserve the record while the question is being decided.

The same principle applies to potential criminal matters. A governmental entity should not be able to destroy a potentially relevant investigative or enforcement record simply because no prosecution has yet



occurred or because another governmental entity, rather than that entity, may ultimately make the charging decision. Preservation does not decide the case. It preserves the ability of the legal system to decide the case.

XII. Proposed Legislative Language

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

1. Preservation of records subject to public-records request.

Upon receipt of a request for a public book or record pursuant to this chapter, a governmental entity shall preserve all records in its custody or control that are potentially responsive to the request.

2. Scope of preservation obligation.

For purposes of this section, a record is potentially responsive if, based upon information reasonably available to the governmental entity at the time the request is received, the record may contain information within the scope of the request. A governmental entity is not required to determine the ultimate responsiveness, exemption status, privilege, confidentiality, or disclosability of a record before preserving the record.

3. Prohibition on destruction or alteration.

A governmental entity shall not destroy, alter, overwrite, modify, dispose of, or otherwise render unavailable a record subject to a preservation obligation imposed by this section while that obligation remains in effect.

An otherwise applicable records-retention schedule or records-disposition policy does not authorize the destruction, alteration, overwriting, modification, disposal, or other disposition of a record subject to a preservation obligation under this section.

4. Duration of public-records preservation obligation.

The preservation obligation imposed by this section begins upon receipt of the public-records request and remains in effect until all administrative and judicial proceedings concerning the request have been finally resolved and all administrative and judicial appeals and other remedies available under Nevada law concerning the request have been exhausted.

5. Preservation during judicial proceedings and appeals.

A record subject to a preservation obligation under this section remains subject to that obligation during any action for judicial review concerning the public-records request and during any appeal or other judicial proceeding arising from or relating to that action.

6. Special rule for potential criminal matters.

If a record subject to a preservation obligation under this section is maintained by, created by, received by, or otherwise held by a governmental entity or governmental component that possesses investigative or



enforcement authority, and the record potentially relates to a criminal offense, the record must be preserved until the expiration of the applicable statute of limitations for prosecution of that offense.

For purposes of this subsection, a governmental entity or governmental component that possesses investigative or enforcement authority includes, without limitation, a law enforcement agency, prosecuting office, investigative body, regulatory agency, board, commission, department, division, or other governmental entity or component acting pursuant to authority to investigate or enforce laws or regulations.

7. Offenses for which there is no statute of limitations.

If the law provides no statute of limitations for prosecution of the criminal offense to which a record potentially relates, the record must be preserved permanently.

8. Records potentially relating to multiple criminal offenses.

If a record potentially relates to more than one criminal offense and the applicable offenses have different periods of limitation, the record must be preserved until the expiration of the longest applicable period of limitation.

If any potentially applicable criminal offense has no statute of limitations, the record must be preserved permanently.

9. Independent preservation obligations.

The preservation obligation relating to a public-records request operates independently of the preservation obligation established by subsection 6.

A record subject to both obligations must be preserved for the longer of:

(a) The period beginning upon receipt of the public-records request and ending upon the exhaustion of all available administrative and judicial appeals and other remedies concerning the request; or

(b) The applicable preservation period established by subsections 6, 7, or 8.

10. Denial or completion of request does not terminate independent preservation obligation.

The denial, partial denial, closure, completion, or other disposition of a public-records request does not terminate a preservation obligation imposed by this section when another provision of this section independently requires the record to be preserved.

11. Other preservation requirements.

Nothing in this section limits or supersedes any longer preservation period or other preservation obligation imposed by federal law, state law, court order, litigation hold, criminal-investigation requirement, or other applicable legal authority.

12. No requirement of disclosure.

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A preservation obligation imposed by this section does not create a right to disclosure of a record that is otherwise exempt from disclosure under this chapter or other applicable law. Preservation and disclosure are separate obligations.

XIII. Practical Effect of the Proposed Legislation

The proposed legislation would establish two complementary preservation protections.

The first would apply to every public-records request. Once a request is received, potentially responsive records would be preserved through the complete administrative and judicial process. If the requester challenges the government's response, the records would remain preserved while that challenge proceeds. If the matter reaches court, the preservation obligation would continue through judicial review and any available appeals.

The second would operate as a special rule for potential criminal matters. When a governmental entity or governmental component exercising investigative or enforcement authority possesses records that potentially relate to a criminal offense, those records would receive an additional preservation period tied to the applicable criminal statute of limitations. This would encompass law enforcement, prosecuting offices, investigative bodies, regulatory entities, and other governmental components exercising investigative or enforcement authority.

If the applicable criminal offense has a statute of limitations, the records would be preserved until that limitation period expires. If the offense has no statute of limitations, the records would be preserved permanently. If a record potentially relates to multiple offenses, the longest applicable limitation period would control, and any potentially applicable offense without a statute of limitations would require permanent preservation.

The result is that an ordinary records-retention schedule could not defeat either the public-records process or the longer preservation period applicable to a potential criminal matter.

XIV. Public Confidence

Public-records laws exist because the public has a legitimate interest in knowing what its government does and how government decisions are made. That system depends upon records being available for examination. When a citizen is required to use an administrative or judicial process to obtain government records, the legal system is effectively being asked to determine what access the citizen is entitled to have. That determination is meaningful only if the underlying records continue to exist while the process is taking place.

A preservation requirement would provide a basic procedural safeguard. It would not decide who is right in a particular public-records dispute. It would not require an agency to release records that the law protects from disclosure. It would not determine whether an allegation is true or false, whether a prosecution should



occur, or whether government conduct was proper or improper. It would simply ensure that the evidence needed to answer those questions is not destroyed while the questions are still legally alive.

The same principle applies to potential criminal matters. When government has exercised investigative or enforcement authority and possesses records that may relate to a criminal offense, the public has an interest in ensuring that those records do not disappear merely because the matter has not yet reached a particular procedural stage. The rule does not presume guilt, innocence, wrongdoing, or prosecution. It preserves the records and leaves those questions to the appropriate legal processes.

XV. The Principle in Plain Language

The principle behind this proposal is simple enough that it should not require a lawyer to explain it.

If a citizen asks for a government record, preserve the records that may be responsive. If the government denies the request and the citizen appeals, keep preserving them. If the dispute goes to court, keep preserving them. If the citizen appeals the court's decision, keep preserving them until the available appeals and remedies concerning the request have been exhausted.

If those records potentially relate to a criminal matter and are held by a governmental entity or component with investigative or enforcement authority, preserve them until the statute of limitations for the potentially applicable offense expires. If the law provides no statute of limitations for that offense, preserve the records permanently. If the records potentially relate to multiple criminal offenses, preserve them for the longest applicable limitation period. If any potentially applicable offense has no statute of limitations, preserve them permanently.

The government can still say no when the law permits it to say no. What the government should not be permitted to do is allow the record to disappear while the citizen is still legally entitled to ask whether the government was allowed to say no.

And when a potential criminal matter is involved, the government should not be permitted to allow potentially relevant investigative or enforcement records to disappear simply because the matter has not yet reached a particular procedural stage.

XVI. Conclusion

Nevada's public-records system should protect not only the public's right to request government records, but also the existence of the records necessary to exercise that right.

A citizen should not have to race an administrative retention schedule to obtain a record. A citizen should not lose access to a potentially responsive record because a court proceeding takes longer than the record's ordinary retention period. And records potentially related to criminal matters should not be destroyed

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simply because the public-records proceeding has ended, because no prosecution has yet occurred, or because the records happen to be held by an investigative or enforcement body rather than a prosecuting office.

The proposed preservation requirement addresses that problem by creating a clear legal duty to preserve potentially responsive records and by extending that protection through the complete public-records process. The special rule for potential criminal matters provides an additional preservation period based upon the applicable statute of limitations, regardless of which governmental entity exercising investigative or enforcement authority possesses the records.

The principle is simple:

A right to obtain a record is meaningless if the record can disappear before the right can be fully exercised.

The public-records process should determine whether a record may be disclosed. It should not determine whether the record survives long enough for that question to be answered.

Likewise, the absence of an immediate prosecution should not determine whether potentially relevant investigative or enforcement records survive. Where the law provides a period of limitation, the records should survive for that period. Where the law provides no statute of limitations, the records should be preserved permanently.

The government should not be allowed to win a public-records dispute by outlasting the record.

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