

1 requires as a duty resulting from an office, trust or station, or to control an arbitrary or
2 capricious exercise of discretion.”)

3 “Mandamus, moreover, is an extraordinary remedy, and the decision to entertain such
4 a petition is addressed solely to [the court’s] discretion. *State ex rel. Masto v. Second*
5 *Judicial Dist. Court ex rel. County of Washoe*, 125 Nev. 37, 43-44, 199 P.3d 828, 832 (2009)
6 (citing *Poulos v. District Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982)).

7 Ultimately, “[a] petition will only be granted when the petitioner has a clear right to the
8 relief requested and there is no plain, speedy, and adequate remedy in the ordinary course
9 of law.” *Halverson*, 124 Nev. at 487, 186 P.3d at 896 (citing *Walker v. Dist. Ct.*, 120 Nev.
10 815, 819, 101 P.3d 787, 790 (2004))¹.

11 III.
12 ARGUMENT

13 Petitioner seeks the extraordinary remedy to have this Court issue a writ of
14 mandamus requiring the COMMISSION to produce “win percentages or payback
15 percentages of slot machines for Clark County casinos with \$1,000,000 in revenue, by both
16 denomination and casino for the last available twelve (12) month period.” Petitioner relies on
17 NRS chapter 239 as forming the basis for some duty imposed on the COMMISSION
18 requiring it to comply with Petitioner’s request.

19 The Petition for Writ of Mandamus should be denied as Petitioner is not entitled to the
20 issuance of a writ of mandate against the COMMISSION. First, the COMMISSION does not
21 have a duty to create the information sought by Petitioner as it is not contained in any
22 document in the custody or control of the COMMISSION. Second, the COMMISSION does
23 not have a duty to provide to Petitioner any documents in the custody or control of the
24 COMMISSION from which slot win percentages could be calculated as the information is
25 confidential pursuant to NRS 463.120 and potentially privileged pursuant to NRS 463.3407.
26 Third, the COMMISSION does not have a duty to provide to Petitioner confidential and
27

28 ¹ While arguably the Petition should be denied given that there is a plain, speedy and adequate
remedy available to Petitioner under the provisions of NRS chapter 239, the COMMISSION is not pursuing that
argument in the interests of efficiency.

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1 potentially privileged information until Petitioner complies with the notice requirements of
2 NRS 463.341 and 463.3407(3)(a).

3 1. THE COMMISSION DOES NOT HAVE A LEGAL DUTY TO CREATE A DOCUMENT CONTAINING
4 THE INFORMATION SOUGHT BY PETITIONER

5 Petitioner seeks information that is not maintained in the normal course by the
6 COMMISSION. The COMMISSION simply does not have a document that identifies the slot
7 win percentages for each individual casino. See Exhibit A, Affidavit of Frank Streshley.
8 Gaming licensees do not specify in any document submitted to the COMMISSION slot win
9 percentages and the COMMISSION has not created a document containing that information
10 on a casino-by-casino basis. Rather, any win percentage by denomination and by casino
11 would have to be calculated using revenue information submitted by gaming licensees in tax
12 related filings. See Exhibit A, Affidavit of Frank Streshley. In fact, the Gaming Control Board
13 (BOARD)² has created publications that contain, to a certain extent, slot machine win
14 percentages, but on a state-wide and region-wide basis. That data is obtained from and
15 compiled using the confidential revenue filings made by casinos using coin-in and gross
16 revenue information. See Exhibit B, NGC-31. Significantly, no BOARD publication contains
17 individual casino revenue related information or even an individual casino's slot win
18 percentage information.

19 Moreover, there is nothing in NRS chapter 239 that imposes a legal duty on the
20 COMMISSION to engage staff in the work of calculating and then documenting, for
21 Petitioner's personal benefit, the slot-win percentages of individual Clark County casinos.
22 Petitioner essentially wants to "fish" through the confidential records of the COMMISSION,
23 which is inappropriate. If Petitioner wants the slot win percentage for particular casinos, he
24 should go to the source for that information. He should request that information from the
25 casinos as that information belongs to them. There is no basis to compel the COMMISSION
26 to use State resources to compile information for Petitioner's personal research projects.

27
28 ² For the benefit of the Court, the COMMISSION and the BOARD are separate state agencies created pursuant to NRS 463.022 and NRS 463.030, respectively. While the COMMISSION is responsible for ensuring the proper reporting and collection of gaming related taxes and fees, the BOARD assists in those functions.

1 In Petitioner's brief, he asserts that some unspecified "gaming" person informed
2 Petitioner that there is a "sheet that revealed the slot payback percentage by individual
3 casino." Despite what Petitioner asserts he was told or what he heard, he is simply wrong.
4 The COMMISSION focuses the Court on the attached affidavit of Frank Streshley who is the
5 chief of the BOARD's Tax and License Division and responsible for overseeing the collection
6 and reporting of gaming taxes and fees. Through his affidavit, Chief Streshley unequivocally
7 states that the information sought by Petitioner is not maintained in any COMMISSION
8 record. Again, the COMMISSION has the ability to calculate slot win percentages of
9 individual casinos, but it has not done so and it is not required to.

10 Petitioner also seems to think that the BOARD's publication of the Nevada Gaming
11 Abstract somehow bolsters his position. First, the BOARD's publication of this document is
12 irrelevant to the question of whether the COMMISSION is under a legal duty to create and
13 then provide Petitioner with the information he seeks. Second, the Nevada Gaming Abstract
14 contains information that is not specific to any individual casino and therefore does not reveal
15 any confidential information. Third, the Nevada Gaming Abstract, as with other BOARD
16 published information, is a document that is derived from statutory mandates pertaining to
17 the dissemination of information concerning the economic health of the gaming industry.
18 See NRS 463.120(6) and NRS 463.1592(2). See also Nev. Gaming Comm'n Reg. 6.070(3).
19 The BOARD's publication of the Nevada Gaming Abstract, in no way supports Petitioner's
20 theory that the COMMISSION is obligated to provide him with slot win percentages of
21 individual casinos.

22 The COMMISSION has no legal duty to create for Petitioner a document containing
23 slot win percentages by denomination and by individual casino. Therefore, the Petition
24 should be denied.

25 2. THE COMMISSION DOES NOT HAVE A LEGAL DUTY TO DISCLOSE CONFIDENTIAL AND
26 POTENTIALLY PRIVILEGED INFORMATION TO PETITIONER

27 Even if the COMMISSION actually compiled the win percentages of the different
28 denominations of slot machines on a casino-by-casino basis, that information would be

1 protected from disclosure just as are the revenue filings of casinos that contain the data
2 necessary for such a calculation. The information Petitioner seeks is confidential and
3 potentially privileged. Therefore, there is no legal duty on the part of the COMMISSION to
4 disclose that information.

5 a. Petitioner is Seeking Information Made Confidential Pursuant to NRS 463.120

6 Slot win percentages of individual casinos, if calculated and documented, and the data
7 used to determine win percentages is not public or in a public record required to be provided
8 to Petitioner upon request pursuant to the provisions of NRS chapter 239. Instead, the
9 information is unquestionably deemed confidential pursuant to NRS 463.120.

10 NRS 463.120(4)(a) provides in relevant part that:

11 Except as otherwise provided in this section, all information
12 and data:

13 (a) Required by the Board or Commission to be furnished to
14 it under chapters 462 to 466, inclusive, of NRS or any regulations
15 adopted pursuant thereto or which may be otherwise obtained
16 relative to the finances, earnings or revenue of any applicant or
17 licensee;

18
19 →are confidential and may be revealed in whole or in part only in
20 the course of the necessary administration of this chapter or upon
21 the lawful order of a court of competent jurisdiction. The Board and
22 Commission may reveal such information and data to an authorized
23 agent of any agency of the United States Government, any state or
24 any political subdivision of a state or the government of any foreign
25 country. Notwithstanding any other provision of state law, such
26 information may not be otherwise revealed without specific
27 authorization by the Board or Commission.

28 NRS 463.120(4)(a) (emphasis added).

The win percentages associated with different denominations of an individual casino's
slot machines is a number directly related to the finances, earnings and revenue of a casino.
Win percentage simply cannot be determined without revenue information. Specifically, win
percentages are calculated by dividing gross revenue by coin in. Whether it is win
percentages or the tax filings containing the data needed to determine win percentages, it is
confidential pursuant to NRS 463.120.

1 Nothing in NRS chapter 239 imposes a legal duty on the COMMISSION to disclose to
2 Petitioner confidential information. In fact, NRS chapter 239, coupled with NRS 463.120,
3 clearly allows the COMMISSION to refuse to disclose confidential information. Because the
4 COMMISSION has no duty to provide confidential information to the public upon request,
5 there is no basis for the issuance of a writ of mandamus.

6 b. Petitioner is Seeking Information that may be Privileged Pursuant to
7 NRS 463.3407.

8 Those documents in the custody of the COMMISSION that would enable Petitioner to
9 calculate "win percentages" for slot machines at the large Clark County casinos may, in
10 addition to being confidential, be privileged pursuant to NRS 463.3407.

11 NRS 463.3407 provides:

12 1. Any communication or document of an applicant or
13 licensee, or an affiliate of either, which is made or transmitted to the
Board or Commission or any of their agents or employees to:

14 (a) Comply with any law or the regulations of the Board or
Commission;

15 (b) Comply with a subpoena issued by the Board or
Commission; or

16 (c) Assist the Board or Commission in the performance of
their respective duties,

17 →is absolutely privileged and does not impose liability for
defamation or constitute a ground for recovery in any civil action.

18 2. If such a document or communication contains any
19 information which is privileged pursuant to chapter 49 of NRS, that
20 privilege is not waived or lost because the document or
communication is disclosed to the Board or Commission or any of
its agents or employees.

21 3. Notwithstanding the provisions of subsection 4 of NRS
22 463.120:

23 (a) The Board, Commission and their agents and employees
24 shall not release or disclose any information, documents or
25 communications provided by an applicant or licensee, or an affiliate
26 of either, which are privileged pursuant to chapter 49 of NRS,
27 without the prior written consent of the applicant, licensee or
28 affiliate, or pursuant to a lawful court order after timely notice of the
proceedings has been given to the applicant, licensee or affiliate.

(b) The Board and Commission shall maintain all privileged
information, documents and communications in a secure place
accessible only to members of the Board and Commission and their
authorized agents and employees.

1 (c) The Board and Commission shall adopt procedures and
2 regulations to protect the privileged nature of information,
3 documents and communications provided by an applicant or
licensee, or an affiliate of either.

4 NRS 463.3407 (emphasis added).

5 Pursuant to the provisions of NRS 463.3407, the COMMISSION is barred from
6 disclosing any information provided by a licensee which is privileged pursuant to NRS
7 chapter 49 without the licensee's consent. NRS chapter 49 includes an "accountant and
8 client" privilege pursuant to NRS 49.125-49.205, and that privilege, if it exists between any of
9 the gaming licensees and their accountants, would remain intact despite submitting the
10 privileged information to the COMMISSION. See NRS 463.3407(3)(a). Thus, the

11 information sought by Petitioner conceivably encompasses privileged communications.

12 Accordingly, Petitioner does not have a clear right to the relief he seeks as the
13 information that is the subject of his Petition is potentially privileged. Therefore, there is no
14 basis for issuing a writ against the COMMISSION.

15 3. THE COMMISSION DOES NOT HAVE A LEGAL DUTY TO DISCLOSE CONFIDENTIAL AND
16 POTENTIALLY PRIVILEGED INFORMATION AS PETITIONER HAS NOT COMPLIED WITH THE PROVISIONS
17 OF NRS 463.341 AND NRS 463.3407(3)(A)

18 Given that Petitioner is seeking an order from this Court requiring the COMMISSION
19 to release information that is confidential pursuant to NRS 463.120(4) and potentially
20 privileged pursuant to NRS 463.3407, Petitioner must first comply with the notice
21 requirements contained in NRS 463.341 and NRS 463.3407(3)(a).

22 NRS 463.341 provides:

23 An application to a court for an order requiring the Board or
24 the Commission to release any information declared by law to be
25 confidential shall be made only upon motion in writing on 10 days'
26 written notice to the Board or Commission, the Attorney General
and all persons who may be affected by the entry of such order.
Copies of the motion and all papers filed in support of it shall be
served with the notice by delivering a copy in person or by certified
mail to the last known address of the person to be served.

27 NRS 463.341.

28

1 A prerequisite to a court order requiring the COMMISSION to release any confidential
2 information is "notice to all persons who may be affected by the entry of such order."

3 Again, Petitioner seeks the release of "slot win percentages for Clark County casinos
4 with \$1,000,000 in revenue, by both denomination and casino for the last available twelve
5 (12) month period." Given that every Clark County casino with \$1,000,000 or more in
6 revenue may be affected by releasing confidential information that is also proprietary to them,
7 Petitioner is required to notify those casinos that he is seeking a court order mandating that
8 the COMMISSION release the information. There is nothing in the Petition to suggest that
9 such notice has been provided.

10 Similarly, NRS 463.3407(3)(a) requires timely notice to a licensee of any proceedings
11 that may result in the release of their privileged information. Again, all of those Clark County
12 casinos that may be impacted by a court order requiring the COMMISSION to release
13 information that may be privileged must be given notice of this matter.

14 Petitioner's evident failure to comply with NRS 463.341 and 463.3407(3)(a) forms yet
15 another basis for denial of his Petition. Again, Petitioner is unable to establish that he has a
16 clear right to the relief he seeks.

17 **IV.**

18 **CONCLUSION**

19 Petitioner does not have a clear right to the relief he seeks. Petitioner seeks
20 information that the COMMISSION does not regularly maintain. Regardless, slot win
21 percentages of individual casinos and the data supporting those calculations are confidential
22 and potentially privileged.

23 Petitioner is seeking an extraordinary remedy to obtain access to extraordinarily
24 sensitive proprietary information that ultimately belongs to Nevada gaming licensees. The
25 COMMISSION has historically deemed the type of information Petitioner seeks as sensitive
26 and confidential pursuant to the provisions of NRS chapter 463. Ultimately, Petitioner's
27 convoluted arguments are not sufficient to meet his burden. There is no duty on the part of
28 the COMMISSION to disclose confidential and potentially privileged information to Petitioner

1 necessitating this Court issue a writ of mandamus. Therefore, the COMMISSION requests
2 that the Petition be denied.

3 Dated this 8th day of April, 2013.

4 Submitted by:

5 CATHERINE CORTEZ MASTO
6 Attorney General

7 By: /s/ Michael P. Somps
8 MICHAEL P. SOMPS
9 Senior Deputy Attorney General
10 Gaming Division
11 Attorneys for Respondent

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 8th day of April 2013, I served a copy of the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS by United State Mail, first-class, postage prepaid, addressed to the following:

Brandon L. Phillips, Esq.
Brandon L. Phillips, Attorney at Law, PLLC
3960 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169

/s/ Melissa Mendoza
An Employee of the State of Nevada

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Attorneys for the Respondent

**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

MICHAEL SHACKLEFORD, as an Individual,)	Case No.: A12-671998-W
)	
Petitioner,)	Dept. No.: XIII
)	
vs.)	
)	
NEVADA GAMING COMMISSION, a Nevada Government Entity,)	
)	
Respondent.)	

AFFIDAVIT OF FRANK STRESHLEY

STATE OF NEVADA)
CARSON CITY) ss:

I, FRANK STRESHLEY, do hereby swear under oath that the assertions of this Affidavit are true and correct to the best of my knowledge and belief.

1. I am currently employed by the State Gaming Control Board (Board) as Chief of the Tax and License Division, and as such, my duties include the supervision and administration of the Board's and Nevada Gaming Commission's (Commission) collection of all gaming taxes and fees, including all reporting related to such collections.

2. That I make this Affidavit for use in the Petition for Writ of Mandamus (Petition) filed in the above-captioned matter, and know the matters set forth herein on personal knowledge and am competent to testify thereto if called upon to do so.

Exhibit A

1 3. That I am aware that the Petition seeks a court order requiring the Commission to
2 disclose "Gaming Revenue Information, specifically win percentages or payback percentages
3 of slot machines for Clark County casinos with \$1,000,000 in revenue, by both denomination
4 and casino for the last available twelve (12) month period."

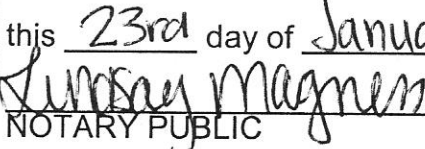
5 4. That the Commission does not maintain a record of the information sought by the
6 Petition in the requested format. Rather, any win percentage by denomination and by casino
7 would have to be calculated using revenue information submitted by gaming licensees in tax
8 related filings, which is confidential pursuant to NRS 463.120.

9 Further affiant sayeth not.

10 DATED this 23rd day of January, 2013.

11
12 
FRANK STRESHLEY, Chief
State Gaming Control Board
Tax and License Division

13
14 SUBSCRIBED AND SWORN to before me
15 this 23rd day of January, 2013.

16 
NOTARY PUBLIC

