IN THE SUPREME COURT OF THE STATE OF IDAHO

BOB HENRY, an individual, Plaintiff-Appellant, vs. JOHN BUJAK, a public official; CANYON COUNTY PROSECUTING ATTORNEY'S OFFICE, a public agency, and CANYON COUNTY, a public agency, Defendants-Respondents.	)))))))))))))	**Supreme Court Docket No. 38016-2010** **Canyon County Case No. CV10-5610**

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Third Judicial District for Canyon County
Honorable Kathryn A. Sticklen, Presiding

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I. INTRODUCTION

In March and April of 2010, Bob Henry ("Henry") made a series of public records requests, seeking documents reflecting how the Canyon County Prosecuting Attorneys Office and the Prosecuting Attorney (collectively "Canyon County") were managing and distributing hundreds of thousands of dollars paid pursuant to the Prosecution Services Term Agreement with the City of Nampa ("Nampa Contract"). Among the records Henry sought were documents evidencing whether Canyon County Prosecuting Attorney John Bujak and others were profiting from the Nampa Contract. In response, Canyon County made no effort to give Henry the core documents. Instead, Canyon County responded with a narrative that misrepresented the nature of the Nampa Contract and misrepresented that Bujak was not profiting personally from the funds. (*See* Appellant's Brief at pp. 11-17).

Because Canyon County did not provide the requested documents and because of Canyon County's misrepresentations, Henry was required to retain a law firm and initiate proceedings to get documents. In response, the Canyon County Prosecuting Attorney issued a series of statements to the press which questioned Henry's integrity and reiterated misrepresentations about the Nampa Contract and misrepresentations that Bujak was not profiting personally.

At the district court level, Canyon County opposed disclosure of the documents at issue here. At the district court, Canyon County asserted that the Nampa Contract was a private contract and that documents should not be disclosed. Based on Canyon County's misrepresentations, the district court erroneously ruled against Henry. After the district court's

ruling, Canyon County again changed its position and asserted that the Nampa Contract was a public contract, not private.

Henry raised seven issues on appeal, including that the Nampa Contract was a public contract and that the records in question are public records. In its response, Canyon County does not challenge a single issue raised by Henry. Instead, Canyon County asks this Court to ignore the merits of Henry's appeal and asserts the appeal is now moot because Canyon County does not have the records sought. Canyon County's strategy is transparent. Canyon County does not want this appeal to revisit positions taken and representations made at the district court that Canyon County is no longer willing to make.

However, Canyon County should not be able to dodge its prior misrepresentations and avoid the merits of this appeal by incorrectly asserting that the issues are now moot because Canyon County supposedly does not have the records in question.

First, the seven issues raised in Henry's appeal should be decided in Henry's favor. By not raising any challenge, Canyon County concedes each of the issues. Henry has met his burden and the issues should be resolved in his favor.

Second, this appeal is not moot. The mere fact that John Bujak has resigned from his position as Canyon County Prosecutor does not mean that the records in question are no longer public records. "The determination of whether a document qualifies as a public record is based on the content of the document and surrounding circumstances as they existed at the time the request was made." *Ward v. Portneuf Med. Ctr.*,--- P.3d ---, 2011 WL 310383, at *3 (Idaho Feb. 2, 2011). Here, Canyon County does not dispute that at the time the request was made the

documents in question were public records. Moreover, Canyon County has not turned over all documents in its possession. Also, the Court should address the conduct of Canyon County in publicly questioning Henry's motives.

Third, even if this Court were to find that the appeal is moot, exceptions related to public interest and matters capable of repetition apply. Open government and the use of $300,000 in public funds are issues of substantial public interest. Further, a public agency's delegation of records to another to avoid production under the Idaho Public Records Act ("IPRA") is capable of repetition.

Fourth, Henry should be awarded his attorneys fees. Canyon County has not opposed this appeal in good faith. Moreover, the positions taken at the district court level were frivolous and in utter defiance of the facts of the case, the IPRA, and other provisions of law.[1] Idaho Code § 9-344(2).

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[1] For just one example, the County completely ignored its duty and authority to supervise, examine, and audit Bujak's collection, safekeeping, management and disbursement of public funds. *See* Appellant's Brief, at p. 25-27. Indeed, the County didn't just ignore its statutory duties, it made light of the subject:

> Yeah, could Mr. Bujak have just left off the term, you know, "prosecuting attorney"? Would it be better? Sure. But the reality is it's still a private arrangement between Mr. Bujak and the -- and we, the County, benefit. We don't have authority -- the County Commissioners don't have authority to say to the prosecutor whether it's in his private capacity or as a prosecutor, here's what you must do with these (inaudible). We don't have the authority. We just don't.
>
> I was joking the other day how do I do this? If Judge Sticklen tells me I have to get this – these documents, how do I do that? Truly, how do I go to the bank and say, "Give me these documents"? I don't know. There's no mechanism because we really are not properly named in this case. We're not custodians. We don't have authority over this arrangement. We're third party two very discrete issues. beneficiaries. We don't belong in the case.

II. ARGUMENT

A. CANYON COUNTY IGNORED ALL SEVEN ISSUES PRESENTED ON APPEAL; THE COURT SHOULD RULE IN FAVOR OF HENRY.

In its Brief, Canyon County ignored the seven issues Henry presented on appeal. Given Canyon County's failure to challenge any of the seven issues, each of the issues should be decided in Henry's favor. *Bagley v. Thomason*, 149 Idaho 799, 241 P.3d 972, 978 n.6 (2010) (citing I.A.R. 35(a)(b) and 35(b)(6), both appellant and respondent have the same obligation to present argument on the issues on appeal). While Canyon County's failure to challenge the issues on appeal does not mandate reversal, the failure should prevent Canyon County from presenting argument on these issues. *See Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 745, 9 P.3d 1204, 1211 (2000).

As set out in the Appellant's Brief, Henry has provided legal authority and support in the record justifying rulings in his favor on each of the issues. Appellant's Bf. at 21-42. This Court should find in favor of Henry on the following issues:

- That the district court erred in concluding that the Nampa Contract is a private contract between John Bujak the individual and the City of Nampa (*Id*. at 21-27);
- That even if the Nampa Contract is a "private" contact, the records in question were public records because Canyon County cannot prevent the examination of public records by contracting with a nongovernmental body. (*Id*. at 27-29 citing *Idaho Conservation League, Inc. v. Idaho State Dep't of Ag.*, 143 Idaho 366, 369, 146 P.3d 632, 635 (2006));

Tr Vol. I, p. 72:16-73:7.

- That Canyon County assumed all of the liabilities under the Nampa Contract and was the intended beneficiary of all proceeds from the Nampa Contract (Appellant's Bf. at 21-27);

- That the performance of the Nampa Contract related to the duties of the prosecuting attorney (*Id*. at 32-34);

- That the district court erred in excluding the Affidavit of the Mayor of Nampa and a letter by the Nampa City Attorney (*Id*. at 34-35);

- As Canyon County may require the Canyon County Prosecutor to present his books and accounts for inspection, and must examine and audit the accounts of all officers having care management, collection or disbursement of moneys belonging to Canyon County and because all proceeds of the Nampa Contract belong to Canyon County and all related records reflect public matters, the records and related documents are public records (*Id*. at 25-27);

- Canyon County violated Idaho Code § 9-338 (4)-(5) in attempting to justify its conduct and questioning Henry's motives in both the media and in direct communications (*Id*. at 34).

B. THE MOOTNESS ARGUMENT IS YET ANOTHER ATTEMPT BY CANYON COUNTY TO DODGE THE CORE ISSUE IN THIS CASE. REGARDLESS, THIS CASE REMAINS A LIVE CONTROVERSY AND EVEN IF IT WERE MOOT THE SUBSTANTIVE ISSUES PRESENTED HERE ARE OF SUBSTANTIAL PUBLIC INTEREST AND ARE LIKELY TO EVADE REVIEW.

Canyon County argues this appeal is moot because they "do not have possession of Bujak's private bank records and [they] do not have the power to compel their production." CC Br. at 5. This argument misstates both the factual and legal posture of this case. Contrary to Canyon County's assertion, the appeal does not turn on which records are *currently* in their possession and the individual who *currently* occupies the prosecutor's office. *See id.* ("This appeal has been made moot by Bujak's resignation . . . and his replacement as a party by Taylor . . . "). This Court has clearly stated that the "determination of whether a document qualifies as a public record is based on the content of the document and surrounding

circumstances *as they existed at the time the request was made*." *Ward*, 2011 WL 310383, at *3 (emphasis added).[2] Moreover, at the relevant time, Canyon County had control over the Prosecuting Attorney and a right to the records.

Second, there are other issues which remain to be decided. Canyon County wrongfully focuses solely upon the trust account bank records. Henry does in fact seek documents still in Canyon County's possession, and has all along sought all *public* records regarding *public* moneys in the control of *public* officials including Canyon County Prosecutor. Moreover, Henry has always contested the conduct of the Canyon County Prosecuting Attorney and Canyon County in handling his public records request. For both of the preceding reasons, this appeal is not moot.

Even if it were moot, two of the exceptions to the mootness doctrine apply. First, this case is of substantial public interest. The appeal addresses the alleged malfeasance of a public official and the apparent misfeasance and nonfeasance of those charged with supervising that official which ultimately led to the disappearance of approximately $300,000 in public funds.

The challenged conduct at issue here is also likely to evade review and is thus capable of repetition. If Canyon County's evasive behavior goes unaddressed, what they claim has "been going on for years" (*see* Tr Vol. I, p. 72:10-12) will become a tool for public agencies to place what would otherwise be public funds and records beyond the ambit of the IPRA and beyond the

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[2] *Ward* was decided before Respondent's Brief was filed and was cited in Appellant's opening brief.

agency's direct control where both will be at high risk of disappearing and rendering future valid records requests moot.

1. A Live Controversy Is Present Where Public Records Existing At The Time Of the Public Records Request Remain Undisclosed. Because All Of The Records In Question Here Were In Existence In April, 2010, This Case Is Not Moot.

Canyon County ignores a clear statutory duty placed upon it as a public agency and by the express precedent of this Court. Canyon County contends that this "appeal has been made moot by Bujak's resignation." CC Bf. at 5. This argument focuses upon what records are *currently* in Canyon County's possession and what individual *currently* holds the office of Canyon County Prosecuting.

Yet, the "determination of whether a document qualifies as a public record is based on the content of the document and surrounding circumstances as they existed at the time the request was made." *Ward v. Portneuf Med. Ctr*2011 WL 310383, at *3. "It would be irrelevant to make such a determination based on the circumstances that exist months or years after a request," as Canyon County asks the Court to do here, "because agencies could alter the nature of the document or change its location in order to remove the documents from the ambit of the IPRA." *Id.* Instead,

> the agency has an affirmative duty to retain all records during the pendency of a petition to compel production of such records. A public agency "shall keep all documents or records in question until the end of the appeal period, until a decision has been rendered on the petition, or as otherwise statutorily provided, whichever is longer." I.C. § 9-343(2). This duty is triggered at the time a petition is filed, and continues until the petition is resolved. . . . Thus, I.C. § 9-343(2) prevents an agency from altering the

> status of a record by transferring the requested record outside the ambit of its control.

Id.

Ward could not be more clear that this appeal is determined by looking at the circumstances at the time the records request was made. Thus, a petition to compel public records can never be mooted by a change of personnel, a change of the document's status or location, or a change of any other circumstance after the date of the public records request. In short, "the Legislature did not intend for agencies to have the power to alter or prevent their records from being classified as public." *Id.*

Here, it is undisputed that Bujak held the office of Canyon County Prosecuting Attorney in April and May, 2010 when Henry made his public records requests. Thus, this appeal is not moot because even Canyon County recognizes, "[i]f Bujak were still a party, no such mootness argument would be applicable." CC Bf. at 6.

Finally, it was Canyon County's own misfeasance and nonfeasance in gaining control of the public records it entrusted to one of its officers—not to mention stubborn resistance to Henry's public records requests—that lead to the "dramatic events" and disappearance of certain records which Canyon County now asserts moot this appeal. To allow Canyon County's own actions subsequent to the records request to moot this case would reward their stubborn denial of both their statutory duty to inspect and audit those records and statutory duty to keep all documents or records in question.

There can be little doubt that Idaho Code Section 9-343(2) was intended to avoid the situation Canyon County has put themselves in. That is why "[a]ny issues [Canyon county] has in obtaining access to these records are of no concern to this Court because the statute clearly requires public agencies to retain such records until any pending litigation has been resolved." *Ward*, 2011 WL 310383 at *5.

2. Canyon County Had Possession And Control Of Prosecuting Attorney Bujak's Records At The Time The Record Request Was Made.

Canyon County asserts: "none of the respondents have, or ever have had, the documents sought by Henry." CC Bf. at 2; *see also, e.g.* CC Bf. at 6 ("Taylor and Canyon County do not have, nor ever have had, the documents that Henry seeks."); *id.* at 7 ("Respondents do not have, and never have had, the requested documents and cannot produce them.").

Canyon County misstates the reality. When Henry made his requests, the relevant point in time for the inquiry at hand, John Bujak was an officer of Canyon County. By statute, Canyon County had custody, access, and possession of the records at issue:

- The Canyon County Commissioners must "supervise the official conduct of all county officers . . . charged with assessing, collecting, safekeeping, management or disbursement of the public moneys and revenues; see that they faithfully perform their duties; . . . and when necessary, require them to make reports, and to present their books and accounts for inspection." Idaho Code § 31-802 (emphasis added).

- The Commissioners must "examine and audit the accounts of all officers having the care, management, collection or disbursement of moneys belonging to Canyon County, or appropriated by law, or otherwise, for its use and benefit." Idaho Code § 31-809.

- The Canyon County Commissioners "shall cause to be made, annually, a full and complete audit of the financial transactions of Canyon County. Such audit shall

be made by and under the direction of the board of county commissioners as required in section 67-450B, Idaho Code." Idaho Code § 31-1701.

- "It is the duty of the prosecuting attorney . . . [o]n the first Monday of each month to settle with the auditor, and pay over all money collected or received by him during the preceding month belonging to Canyon County . . . ." Idaho Code § 31-2604(5).

By statute Canyon County had custody, access and possession of the records.

3. A Public Records Case Remains A Live Controversy Where A Government Agency Continues To Withhold Responsive Documents. This Case Is Not Moot Because Canyon County Continues To Withhold Public Documents Requested By Henry

Canyon County erroneously asserts that it is "uncontested" that it has produced all documents except for the requested bank records. CC Bf. at 1-2. It relies on Judge Sticklen's passing statement that "it appears that Canyon County has produced whatever records it has." CC Bf. at 5 (citing R Vol. II, p. 354: 21-22). Yet, Henry does in fact seek documents beyond Bujak's bank records. All along, Henry has sought and been denied access to all documents responsive to paragraphs 1, 2, 3, and 5 of his third records request. *See e.g.,* R Vol. I, p. 14, ¶ 61; *see also id.* at p. 90-91 (Henry's third records request); *id.* at p. 126 (email from Henry to Prosecutor Bujak requesting information regarding Mr. Laugheed's mathematical equation). Nor has he received any "documents relating to payments for Nampa annex overhead or other non-salary expenditures" and "any documents evidencing the arrangement Laugheed had represented in mathematical form." R Vol. I, p. 33, 39 (Petition Pursuant to I.C. § 9-343 To Compel Production of Public Records). Nor has Canyon County ever produced any emails, memos, letters, or other documents regarding its deliberations on how it developed the formula contained in Mr. Laugheed's March 15, 2010 letter (*id.* at p. 67-69) or how to handle the records request.

Apparently Canyon County expects this Court to conclude that there were **no** documents or communications about the accounts or about the decision to withhold documents from Henry. There remains a live controversy as to these records—the case is not moot.

Canyon County also admits it is in the process of obtaining Bujak's bank records. *See, e.g.*, CC Bf. at 2 ("Taylor and Canyon County desire to make the documents public if, and when, they are obtained through the bankruptcy court proceedings."). Canyon County argues that this appeal is moot because it promises to "provide those documents if, and when, they obtain them through the Bujak bankruptcy proceedings or otherwise, and have made that position known to Henry." CC Bf. at 10. But a promise to produce documents Canyon County previously argued it had no obligation to produce and that it in fact previously failed to produce certainly should not moot this appeal. Moreover, given the district court's decision, absent reversal from this Court Canyon County has no obligation to produce the records to Henry—ever.

Finally, this Court should resolve whether the conduct of Canyon County and the Canyon County Prosecuting Attorney in questioning and publicly challenging Henry's motives in making the records request constitutes a violation of IPRA. *See* Appellant's Bf. at 34.

C. OPEN GOVERNMENT AND HOW $300,000 IN PUBLIC MONEY DISAPPEARED ARE BOTH OF SUBSTANTIAL PUBLIC INTEREST. EVEN IF THIS CASE WERE MOOT, THE PUBLIC INTEREST EXCEPTION TO THE MOOTNESS DOCTRINE APPLIES.

While Henry believes that his appeal is not moot, even if the Court disagrees, the appeal should proceed. This Court will decide an otherwise moot issue where the issue "raises concerns of substantial public interest." *Ameritel Inns*, 141 Idaho at 852, 119 P.3d at 627. In *Ameritel Inns*, "the substantive issue presented [was] whether public entities can use public funds to

campaign in an election." *Id.* Similarly, the substantive issue presented here is whether public entities can turn over management and disbursement of public money to a public official and thereby put the related records outside the ambit of the IPRA. As in *Ameritel Inns*, this is an issue of substantial public interest worthy of a substantive decision. *Id.*

Indeed, open government is commonly cited as "a cornerstone of a free society." *See, e.g.*, Idaho Public Records Law Manual, Attorney General Introduction, *available at* www.cascadeid.us/publicrecords.pdf.[3] This is because the "Public Records Law protects each citizen's right to monitor the operations of state and local government entities by providing access to governmental records." *Id.* Thus, in its effort to protect open government, the legislature, through the IPRA, created a "broad presumption in favor of disclosure" of public records, *Ward*, 2011 WL 310383, at * 3, and broadly defines what is a public record. *See, e.g.*, *Cowles Pub. Co. v. Kootenai County Bd. of Comm'rs*, 144 Idaho 259, 262, 159 P.3d 896, 899 (2007) ("[O]ur legislature has broadly defined public records . . . .").

The existence of the IPRA itself and its purpose to protect open government demonstrates that the issues presented by this case are of substantial public interest. The particular and "dramatic" background of this case (*see* CC Bf. at 2) also raises concerns of substantial public interest. This case involves numerous public officials, one of whom was forced to resign after not being able to repay approximately $300,000 in public moneys entrusted to him. It involves significant questions about whether the misfeasance and/or nonfeasance of the commissioners of

[3] This manual was cited in Appellant's opening brief but the internet address included a typo. The address herein is the correct one to access the manual.

Canyon County allowed one of its key officers to embezzle or otherwise walk away with hundreds of thousands of dollars of public money and subsequent complicity in attempting to hide the matter from public disclosure.

Finally, Canyon County's reliance on *Koch v. Canyon County* is misplaced. 145 Idaho 158, 177 P.3d 372 (2008). *Koch* is not an IPRA case. Consequently, *Koch* did not deal with a scenario where the defendant county had a statutory duty to "keep all documents or records in question until the end of the appeal." Idaho Code § 9-343(2). Nor did it deal with a an area of the law where the relevant determination looks to the "surrounding circumstances as they existed at the time the request was made." *Ward*, 2011 WL 310383, at *3. Further, were Canyon County's interpretation of *Koch* accepted, it would reward the elusive behavior perpetrated by Canyon County throughout this case, and will encourage public entities to place key public records outside their direct control where there is significant potential for the records to escape their grasp and effectively nullify Idaho Code § 9-343(2).

In short, the issues presented by this case are of substantial public interest and, in turn, the exception doctrine applies.

D. IF THIS CASE IS DISMISSED AS MOOT, THE SHELL GAME PLAYED BY CANYON COUNTY WILL BE REPEATED WITHOUT REVIEW. EVEN IF THIS CASE WERE MOOT, THE REPETITION EXCEPTION TO THE MOOTNESS DOCTRINE APPLIES.

This Court will decide an otherwise moot case where "the challenged conduct is likely to evade judicial review and thus is capable of repetition." *Webb v. Webb*, 143 Idaho 521, 524, 148 P.3d 1267, 1270 (2006) (quoting *Amerital Inns, Inc. v. Greater Boise Auditorium Dist.*, 141 Idaho 849, 852, 119 P.3d 624, 627 (2005)). Canyon County recognizes this exception but, in a

single sentence, argues it "does not apply because the particular facts of this case, *i.e.* Bujak's resignation, are unlikely to be repeated with regularity so as to cause the issue to evade judicial review." CC Bf. at 6.

In addition to flying in the face of Canyon County's statutory duty to "keep all documents or records in question until the end of the appeal," Idaho Code § 9-343(2), Canyon County's argument mischaracterizes the challenged conduct at issue here. Henry challenges a public agency placing public records in the possession of a public official and then claiming those records are not in the agency's custody or control. Henry also challenges Canyon County's conduct in ignoring its statutory authority and duty to supervise county officials and examine, audit, and inspect records of its officers pertaining to public moneys in order to deny a public records request.

This challenged conduct is likely to evade judicial review because it creates a significant risk that the public records will escape the agency's custody or control pending judicial review. This risk is especially high in the most egregious of cases where the public official entrusted with the documents has committed a breach of the public trust and has significant incentive to dispose of or withhold the records from public view.

This Court's decision in *Webb* applies. There, a dispute arose over whether grandparents could exercise the visitation rights of a divorced father during his military service outside the United States. *Webb v. Webb*, 143 Idaho at 523, 148 P.3d at 1269. The question of mootness arose because the father had returned to Idaho and resumed his visitation with the children. *Id.* at 524, 148 P.3d at 1270. This Court applied the repetition exception on the grounds that "he could

return to active duty" and because "other members of the military are subject to further deployment and the same time constraints." *Id.*

As in *Webb*, the repetition exception applies here because the Bujak bank records could return to Canyon County's possession (*see, e.g.*, CC Bf. at 2) and, regardless of that, other public records requests could be subject to similar shell game tactics where public records are placed in the control of public officials so the public agency can deny custody of the records, delay and otherwise inhibit disclosure, avoid their duty to "keep all documents or records in question until the end of the appeal," Idaho Code § 9-343(2), and then claim the case is moot for that reason. "[B]ecause the challenged conduct is capable of repetition, but likely to evade review," it is appropriate for the Court to "reach the substantive issues raised by the parties." *Webb*, 143 Idaho at 524, 148 P.3d at 1270.

E. CANYON COUNTY IGNORES THE OTHER INDEPENDENT VIOLATIONS OF THE PUBLIC RECORDS ACT.

The Public Records Act provides that "[t]he custodian shall make no inquiry of any person who applies for a public record," except in very limited circumstances such as "to verify the identify of the person requesting a record" or "to ensure that the requested record or information will not be used for purposes of a mailing or telephone list." *See* Idaho Code § 9-338(4); *see also* Idaho Code § 9-338(5) (custodian shall extend "all reasonable comfort. . ."). The district court failed to address Canyon County's repeated violations of this provision of law.

First, Canyon County inquired of Henry's motives through statements to the media. *See, e.g.*, R Vol. II, p. 259 ("Bujak said Henry is acting as a 'stalking horse' for the Nampa law firm

Hamilton, Michaelson and Hilty, which lost the Nampa contract."). Bujak committed an even more egregious violation when he wrote emails directly to Henry attempting to justify Canyon County's position and questioning Henry's motives and issued press releases challenging Henry. R Vol. I, p.126-27. The district court erred in failing to consider or address these blatant violations of the spirit and the law of the Public Records Act.

F. JUDICIAL NOTICE IS APPROPRIATE.

Canyon County instructs this Court that it "must" ignore the certified copies of the bankruptcy materials attached to Appellant's Brief. CC Bf. at 3. Canyon County represents that an appellate court can never take judicial notice of factual materials. *Id.* To the contrary, "[t]his Court may take judicial notice of adjudicative facts, those not subject to reasonable dispute in that they are either generally known within the territorial jurisdiction of the trial court or are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. I.R.E. 201. *This notice may be taken at any stage in the proceeding, at the trial or appellate level . . . .*" *Trautman v. Hill*, 116 Idaho 337, 340, 775 P.2d 651, 654 (Ct. App. 1989) (cited with approval for this proposition in *Crawford v. Dep't of Corrs.*, 133 Idaho 633, 991 P.2d 358 (1999)) (emphasis added). Furthermore, this Court has taken judicial notice of materials from bankruptcy proceedings. *See Burgess v. Salmon River Canal Co., Ltd.*, 127 Idaho 565, 903 P.2d 730 (1995) ("[T]his Court entered an order taking judicial notice of the bankruptcy court's order . . . ."). Notably, Canyon County does not, nor could it, dispute that those certified materials filed in federal bankruptcy court are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Canyon

County cites the *Wattenbarger* case to support its position. CC Bf. at 3. That case is inapposite to the question of judicial notice. In fact, the *Wattenbarger* decision does not even use the phrase "judicial notice" let alone address the statute or rule cited by Henry in support of judicial notice—specifically, Idaho Code § 9-101(2) and Idaho Rule of Evidence 201. *Wattenbarger v. A.G. Edwards & Sons, Inc.*, --- Idaho ---, 246 P.3d 96 (2010). *Wattenbarger* is irrelevant.

The records are judicially noticeable and further illustrate the frivolous nature in which Canyon County has pursued this entire case.

G. HENRY SHOULD BE AWARDED FEES AND COSTS.

1. Canyon County Continues To Pursue Its Frivolous Defense Of Henry's Record's Request.

Henry set forth in detail the frivolous nature of Canyon County's defense to his records requests before the district court. *See* Appellant's Bf. at 36-43. Canyon County continues to pursue the same flawed argument, that Henry should not prevail because Canyon County does not currently possess the documents. Canyon County's position (1) does not address the fundamental issue on appeal—whether the records at issue are public or private; (2) sets up a false distinction between Canyon County and the Canyon County Prosecutor; (3) continues to rely on reasoning in *Derting* that was abrogated years ago by the Legislature; and (4) attempts to distinguish this Court's precedent directly on point by ignoring its statutory duties and obligations.

If the documents qualif[y] as public records and [are] not subject to an exemption, "the judicial inquiry is at an end." *Ward*, 2011 WL 310383, at *4. As discussed above, Canyon County does not address whether the records at issue here are public records. In fact they

disclaim the position that then Canyon County Prosecutor, John Bujak, took in the district court that the records are not public records. CC Bf. at 8. Canyon County fails to address the clear statutory duty to supervise, examine, and audit the records of its officers, and when necessary require them to make reports, and to present their books and accounts for inspection. And its is beyond dispute that Canyon County has never asserted an exemption under the Public Records Act. The continued obfuscation and willing ignorance of the facts and of the law, compels an award of attorney fees and costs in this case. *See* Idaho Code §§ 9-344(2), 12-117 and 12-121.

2. Canyon County Sets Up A False Distinction—The Canyon County Prosecutor and Canyon County Are The Same Agency For Purposes Of the Public Records Act.

The distinction Canyon County tries to make between Canyon County and the Canyon County Prosecutor is meaningless for purposes of the Public Records Act. The IPRA provides that "[e]very person has a right to examine and take a copy of any public record of this state." Idaho Code § 9-338 (1). A public record "includes, but is not limited to, any writing containing information relating to the conduct or administration of the public's business prepared, owned, used or retained by any . . . local agency regardless of physical form or characteristics." Idaho Code § 9-337(13). The term "local agency" is defined broadly to mean "a county . . . or any agency thereof, or any committee of a local agency, or any combination thereof." Idaho Code § 9-337(8).

The Canyon County Prosecutor's Office is an agency of Canyon County, as is the Canyon County Auditor's office and the Canyon County Treasurer's office. Thus, by the IPRA's very terms, Canyon County has a duty to disclose all public records held by the "county .

. . or any agency thereof, or any committee of a local agency, or any combination thereof." Idaho Code §§ 9-337(8), 9-337(13), 9-338(1). Any suggestion to the contrary conflicts with the IPRA and would create a system where every person making a public records request would only have the right to examine public records s/he could track to a specific subagency or officer holding the document. As this case illustrates, such a system is inconsistent with the purpose and policy of the IPRA.

Furthermore, the IPRA does not make any distinction as to the individual holding a given public office such as Canyon County Prosecutor. Regardless of who is the elected prosecutor, the IPRA places the disclosure obligation on the office, not the individual. Canyon County's continued reliance on the absence of Bujak from this case is disingenuous, frivolous and not a legitimate basis to defend against Henry's records request. This is particularly so where the reason for naming Canyon County, the Canyon County Prosecutor's Office, and the Canyon County Prosecutor was Canyon County's initial response to Henry where it told him to go ask a different subagency of Canyon County. *See, e.g.,* R Vol. I, p. 74 (you may wish to contact the Canyon County Treasurer or Clerk for other records . . ").

3. Canyon County Continues To Ignore That The Reasoning In *Derting* Has Been Abrogated By The Legislature.

Canyon County does not dispute Henry's statement of the facts of this case. Canyon County also does not dispute Henry's statement of the facts of *Derting*. Canyon County, instead, suggests that the factual difference between these two cases is of no import because monies collected under a contract to prosecute city nonconflicting misdemeanors are not received for the

"performance of 'duties' of the office of the prosecuting attorney." *See* CC Bf. at 9 (quoting *Derting*, 112 Idaho 1057, 739 P.2d at 356).[4] It argues that all such contracts must be, as a matter of law, contracts with the "prosecuting attorney" as an individual. The district court made this same misstatement of the law twice, in holding that the records at issue "are not documents that relate to the duties of the CCPA" and that "the records do not related to the duties of the prosecuting attorney." R Vol. II, p. 344.

Henry addressed this misstatement of law in his opening brief. And Canyon County did not respond. When this Court decided *Derting*, it was not a statutory "duty" of a prosecuting attorney to prosecute misdemeanors and infractions of municipalities if there was a contract in place between a county prosecutor and a city within Canyon County. *See* Appellant's Bf. at 37-34. In *Derting* the majority if this Court quoted Idaho Code § 31-2604 entitled "Duties of prosecuting attorney" and noted the absence of any duty to prosecute misdemeanors and infractions of municipalities. *See* 112 Idaho at 1056-57, 739 P.2d at 356-57. Section § 31-2604 as amended, however, specifically states that when there is a written contract between the prosecuting attorney and a city to prosecute violations of state misdemeanors and infractions it is a "duty" of the prosecuting attorney to prosecute those infractions. *See* Idaho Code § 31-2604. A prosecuting attorney enters into this type of contract not as an individual, as Canyon County argues, but as an officer, agent, and employee of Canyon County.

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[4] Henry described three specific errors made by the district court through its reliance on *Derting*. Canyon County did not directly respond to any of the three arguments. Henry will not restate the arguments here, and instead will cite the Court to its opening brief. *See* Appellant's Bf. at 29-34.

Canyon County also argues that a previous version of Idaho Code § 31-3113 contained a "full time devotion" requirement and that the current § 31-3113 does not contain the same language. Canyon County says it is therefore more likely that Bujak, the individual, entered into the contract with Nampa. CC Bf. at 9-10. This argument also ignores the amendment to § 31-2604 described above, and is contrary to the plain language of the Nampa Contract.

As set forth in his opening brief:

> The Nampa Contract is a public contract between public agencies. The Nampa Contract is "made between CANYON COUNTY, IDAHO, a political subdivision of the State of Idaho, and the CANYON COUNTY PROSECUTING ATTORNEY, hereinafter referred to as "Firm", and the CITY OF NAMPA, a municipal corporation." R Vol. II, p. 200. The Nampa Contract confirms that two of the parties—Canyon County and the City of Nampa—are "public agencies within the definitions provided in Idaho Code, Section 67-2327" and the other is "the Canyon County Prosecuting Attorney . . . an Idaho Constitutional public officer." Id. The Nampa Contract specifically states it is a public contract made "pursuant to Idaho Code Section 67-2332, which authorizes counties and cities to enter into interagency agreements." Id.
>
> The Nampa Contract goes on to require each party to "independently maintain at least the minimum insurance coverage required by the Idaho Tort Claims Act"; the Idaho Tort Claims Act ("ITCA") by its own terms applies only to governmental entities. *Id.* at p. 201, § 2.1; *see also* Idaho Code § 6-903(a) ("every governmental entity . . ." (emphasis added)). Finally, the Nampa Contract is executed by six city and county officials. Id. at 205. No person, acting in an individual capacity, signed the Nampa Contract.

Henry Bf. at 22-23.

Canyon County does not dispute the facts. And its continued reliance on *Derting* to conclude that the contract as a matter of law must be a private contract is a frivolous argument that should be rejected.

4. Canyon County's Attempt To Distinguish *Idaho Conservation League* and *Ward* Demonstrate the Frivolous Nature Of Its Defense.

Canyon County attempts to distinguish *Idaho Conservation League, Inc. v. Idaho State Department of Agriculture,* 143 Idaho 366,146 P.3d 632 (2006), and *Ward v. Portneuf Medical Center, Inc.*, 2011 WL 310383, _ Idaho _ (2011). Its effort only confirms the frivolous nature of its conduct since Henry's first request. Canyon County argues that in both in both cases the "governmental entity at one time had possession." CC Bf. at 10. And under those circumstances "[i]t is axiomatic that a governmental entity [cannot] avoid the responsibilities of the public records act by divesting itself of public records." CC Bf. at 10. Then Canyon County contradicts itself and says, "[i]f Bujak were still as party, no such mootness argument would be applicable. An order of the Court finding the documents to be public would have compelled Bujak to produce them." CC Bf. at 6. By this statement, Canyon County is acknowledging that it has divested itself of the public records.

Just as it did in the district court, Canyon County failed to address the statutory authority giving it control of the records of its public officers. Canyon County had possession of the records at the time Henry made his public records request. Canyon County's defense to the statutory provisions cited by Henry, as was the case in district court, is to completely ignore them.

This case is factually similar to both *Idaho Conservation League* and *Ward*. For example, Ward made a public records request of Porteneuf Regional Medical Center. The hospital responded that the records were exempt from disclosure pursuant to a number of subparts of the Public Records Act. Ward then filed a petition in the district court to compel the production of the records. While Ward's petition was pending, the residents of Bannock County voted to sell the hospital to a private entity. The hospital thereafter responded to the petition arguing that they no longer had possession of the records because of the sale. The district court denied the petition. The court reasoned that the records would likely have been subject to disclosure when the hospital was still a public agency, but the sale of the hospital to a private entity removed the records from the reach of the IPRA. *Ward*, 2011 Wl 310383, at *1.

This Court reversed. It noted the "Legislature's broad presumption in favor of disclosure." *Id.* at *3. It also said that there "is no exemption for documents that are under the control of a public agency at the time of a request but subsequently transferred to a private entity." *Id*. The Court continued, "[u]nder I.C. § 9-338(1), the public's right to inspect is conditioned solely on whether the document is a public record that is not expressly exempted by statute." *Id*. (quoting *Idaho Conservation League*, 143 Idaho at 369, 146 P.3d at 635).

The facts of this case are like those in *Ward*. Here Canyon County defended against Henry's public records requests arguing that it had no obligation to produce certain records. During that time, Canyon County had custody of the records by statute, and the authority to take direct possession of the records. *See, e.g.*, Idaho Code §§ 31-802; § 31-809; § 31-1701; § 31-2604(5). And Canyon County has the statutory obligation under Idaho Code § 9-343(2) to

maintain the records until the petition and any appeal is resolved. *Ward* 2011 WL 310383, at *3. But Canyon County neglected its statutory powers, duties, and obligations. Canyon County's defense before the district court was frivolous, and Canyon County's defense here remains frivolous.

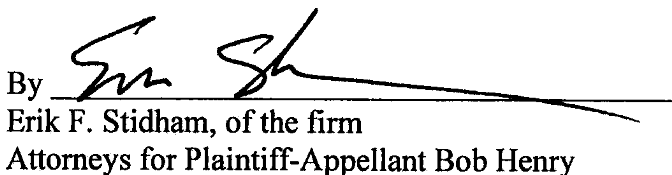
III. CONCLUSION

Canyon County refused to respond to any of Henry's issues on Appeal, conceding that the records are public records and that no exemption applies. The inquiry should end there.

Moreover, this appeal is not moot. Canyon County has additional documents requested by Henry that it simply has failed to turn over. Canyon County had custody of the trust account documents at the time Henry made his public records requests—the time this Court uses for its analysis. Finally, even if this case was moot, two of the three mootness exceptions apply. The facts of this case are clearly capable of repetition, and this case is of substantial public interest.

DATED this 8th day of April, 2011.

HOLLAND & HART LLP



By ______________________
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Samuel Laugheed
Carlton R. Ericson
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- [x] U.S. Mail
- [ ] Hand Delivered
- [ ] Overnight Mail
- [ ] Telecopy (Fax)

for HOLLAND & HART LLP

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