

<p><b>DISTRICT COURT, DENVER COUNTY, COLORADO</b></p> <p>Court Address: 1437 Bannock Street Denver, CO 80202</p> <hr/> <p><b>Plaintiff:</b> DAVID MIGOYA, reporter at <i>The Denver Gazette</i>, &amp; <i>The Denver Gazette</i></p> <p><b>v.</b></p> <p><b>Defendant:</b> STACY WHEELER, in her official capacity as custodian of records, Denver Public Schools</p> <hr/> <p><b>Attorney for Plaintiff:</b> Rachael Johnson, #43597 Reporters Committee for Freedom of the Press c/o Colorado News Collaborative 2101 Arapahoe Street Denver, CO 80205 Telephone: (970) 486-1085 Facsimile: (202) 795-9310 rjohnson@rcfp.org</p>	<p style="text-align: center;"><b>COURT USE ONLY</b></p> <hr/> <p>Case Number:</p> <p>Division:</p>
<p><b>COMPLAINT/APPLICATION FOR ORDER TO SHOW CAUSE</b></p>	

Plaintiff David Migoya, a senior investigative reporter at *The Denver Gazette*, by and through undersigned counsel, hereby states as follows:

**Introduction**

1. In this civil action under the Colorado Open Records Act (“CORA”), §§ 24-72-201 *et seq.*, C.R.S., Plaintiff seeks access to public records in the possession, custody, or control of Denver Public Schools (“DPS”), namely, final summary memoranda (FRISK) of disciplinary action against any DPS administrator for the 2019-2021 calendar years (hereinafter, the “FRISK records”). Plaintiff seeks an order directing the DPS records custodian to appear and show cause why she should not make these public records available to Plaintiff and the public.

2. The FRISK records are public records that are “made, maintained or kept” by DPS “for use in the exercise of functions required or authorized by law or administrative rule” and the content of those records solely concern the conduct of DPS administrators and employees acting in their official capacity as public school officials. *See* § 24-72-202(6)(a)(I), C.R.S.

3. As more fully set forth below, the FRISK records are not exempt personnel files because the exception only applies to ***personal demographic information***. § 24-72-204(3)(a)(II)(A), C.R.S. Further, section § 24-72-202(4.5), C.R.S. of the CORA defines personnel files to include “home addresses, telephone numbers, financial information, a disclosure of an intimate relationship filed in accordance with the policies of the general assembly, [and] other information maintained because of the employer-employee relationship.” Colorado Courts interpret this provision narrowly and limited ***only*** to the disclosure of “personal demographic information” or information similar in nature. *Daniels v. City of Commerce City*, 988 P.2d 648, 651 (Colo. App. 1999) (interpreting “maintained because of the employer-employee relationship” to be the same type of information as the demographic information that is exempt from disclosure); *Jefferson Cty. Educ. Ass’n v. Jefferson Cty. Sch. Dist. R-1*, 378 P.3d 835, 839 (Colo. App. 2016). Plaintiff seeks the final summary memos of disciplinary action against school administrators; all of which fall outside of the “personnel files” exemption.

4. Accordingly, Plaintiff respectfully requests that the Court enter an Order directing Defendant to allow Plaintiff to inspect and copy the FRISK records, with any necessary redactions of . And, as further set forth herein, the Court should also direct Defendant to waive any costs associated with retrieving the requested records, and award Plaintiff reasonable costs and attorney’s fees associated with this matter, pursuant to § 24-72-204(5), C.R.S. and/or § 24-72-203(3.5)(c), C.R.S.

### **Jurisdiction & Parties**

5. This Court has jurisdiction over the claims herein under section 24-72-204(5) of CORA, §§ 24-72-201 *et seq.*, C.R.S. On information and belief, the FRISK records—the “public records” that are the subject of this action—can be found in this judicial district.

6. Plaintiff David Migoya is a senior investigative reporter employed by *The Denver Gazette*. Mr. Migoya is a citizen of the State of Colorado.

7. Plaintiff *The Gazette* is a Pulitzer Prize-winning daily newspaper with its principal place of business at 30 E. Pikes Peak Avenue, Suite #100, Colorado Springs, CO 80903. *The Denver Gazette* is located at 555 17<sup>th</sup> Street, Suite 425, Denver CO 80202. Both publications are owned by Clarity Media Group LLC, a wholly owned subsidiary of the Anschutz Corporation.

8. Defendant is sued in her official capacity as the custodian of records for DPS. The FRISK records are made, maintained or kept by DPS. *See* § 24-72-202, C.R.S.

## FACTS

9. On January 6, 2022, Plaintiff submitted a CORA request, a true and correct copy of which is attached hereto as **Exhibit A** and incorporated by reference herein, seeking:

[E]lectronic copies of any final summary memos (FRISK) of disciplinary action -- including but not limited to letters of wrongdoing, memos to file, letters of placement on leave, suspension, and/or termination -- against any Denver Public Schools administrator, to include assistant principals, principals, and any director/administrator above those positions, for the 2021 Calendar Year.

This request does not include teachers, coaches or staff who would report to anyone at the assistant principal position or higher.

*Id.* (hereinafter “Plaintiff’s Request”).

10. In response to Plaintiff’s Request, on January 7, 2022, Defendant sent an email setting forth DPS’s policy on its response time, reimbursement policy and providing a link to the District’s CORA policy. *Id.* Defendant’s response did not otherwise respond to Plaintiff’s request.

11. On January 10, 2022, Plaintiff received a formal, generated response from the Defendant, seemingly granting his request. A true and correct copy of that email response dated January 10, 2022 is attached hereto as **Exhibit B** and incorporated by reference herein (hereinafter the “January 10 Response”).

12. The January 10 Response indicated that DPS would produce non-exempt public records responsive to Plaintiff’s request, and required a payment of \$1,170 to process the cost of the records. The January 10 Response further stated:

We have reviewed your CORA request related to any final summary memos (FRISK) of disciplinary action -- including but not limited to letters of wrong-doing, memos to file, letters of placement on leave, suspension, and/or termination -- against any Denver Public Schools administrator, to include assistant principals, principals, and any director/administrator above those positions, for the 2021 Calendar Year.

Staff have determined that retrieving will take approximately 40 staff hours. We request that you pay the estimated staff time prior to us beginning the retrieval. If fulfilling the request takes longer, we will request final payment prior to releasing the documents.

In accordance with the [District CORA Policy](#), the first hour of staff time is free. There is a \$30 charge for the additional 39 hours. Please pay \$1,170 to Denver Public Schools.

*Id.*

13. Following the January 10 Response, Plaintiff and Defendant went back and forth via email (and on Google Meets) about Plaintiff's Request. During their discussions, also on January 10, 2022, Defendant continued to provide detailed information about the cost to produce the records, implying that they would be disclosed to Plaintiff. For example, in response to one of Plaintiff's questions concerning whether Defendant could provide the cost difference for the records from calendar year 2019-2021, not just 2021, Defendant responded:

Good Evening - So staff was able to get back to me with their estimate for your request, see below. They revised their estimate for CY 21 due to some of the potential overlap from previous years.

CY21: ~20 employees x 60+ minutes = 1200 minutes

CY20: ~20 employees x 60+ minutes = 1200 minutes

CY19: ~20 employee x 60+ minutes = 1200 minutes

Total: ~3,600 minutes (60 hours).

For reference, it's not a matter of looking into every file. If staff looked into every file, it would be 600 employees x 60 minutes = 36,000 (600 hours). Staff will be looking by year in our discipline files and filtering every AP and above, then referencing their employee files for additional documentation. The pulling of the additional information from the personnel file. I did ask if there was a way to export the discipline information from our system but the system does not have an export function.

*Id.*

14. Plaintiff then sought to expand his original request to include the calendar years 2019-2021. *Id.* He asked if Defendant could provide an estimate of the increased cost, stating, "stay at the \$1170 to start and see how it goes?" Defendant responded, "that works for me, I will have the staff provide 40 hours with (sic) of work on this request and see how many records they can collect in that time. Staff will begin collecting records once payment is received." *Id.*

15. On January 11, 2022, Defendant followed up with Plaintiff again, asking if and when DPS would receive payment for processing Plaintiff's Request. Plaintiff sent a receipt for payment of the \$1,170 to Defendant. *Id.*

16. On January 14, 2022, Defendant informed Plaintiff that a seven-day extension was needed to process Plaintiff's Request. *Id.*

17. Several days later, on January 25, 2022, Defendant unexpectedly informed Plaintiff that no records would be produced in response to his request. A true and correct copy of the email from Ms. Wheeler to Mr. Migoya, dated January 25, 2022, is attached hereto as **Exhibit C** and incorporated by reference herein (hereinafter the "January 25 Denial"). The email states:

Denver Public Schools is in possession of records responsive to your request that are not subject to disclosure pursuant to personnel file exemption, C.R.S. 24-72-204(3)(a)(II) as defined in C.R.S. 24-72-202(4.5) and and [sic] public policy favoring privacy, efficient operation of schools.

Because we are withholding the requested documents, we will be refunding you your payment.

*Id.*

18. On January 26, 2022, Plaintiff appealed Defendant's January 25 Denial. In the appeal, Plaintiff pointed out binding rulings from the Colorado Court of Appeals that limit the "personnel files" exemption to "personal demographic information" such as one's "home address, home phone number and personal financial data," which is wholly unrelated to the disciplinary records that were compiled as part of the discharge of official government functions. Plaintiff's appeal also noted that CORA's presumption of access to public records is not overcome by the "public policy favoring privacy [or the] efficient operation of schools." *Id.*

19. Defendant denied Plaintiff's appeal on January 31, 2022. A true and correct copy of that denial, which is attached hereto as **Exhibit D** and incorporated by reference herein, states, in part, that the request was denied on the ground that disclosure of the FRISK records would result in "substantial injury to the public interest"; that the DPS is prohibited from disclosing certain "personnel files", and records of sexual harassment, gender discrimination, and retaliation.

20. On February 4, 2022, Plaintiff provided Defendant with notice of intent to file an Application for an order to Show Cause under § 24-72-204(5), C.R.S. A true and correct copy of that notice is attached hereto as **Exhibit E** and incorporated by reference herein (hereinafter the "Notice of Intent").

21. Subsequently, on July 18, 2022, after several attempts by Plaintiff to meet and confer with Defendant, pursuant to 24-72-204(5), C.R.S., undersigned counsel and counsel for the Defendant met. After the requisite meet and confer, Plaintiff filed the ensuing application.

### Applicable Law

22. The Colorado Open Records Act (“CORA”), §§ 24-72-201 *et seq.*, C.R.S., declares that it is the public policy of the State of Colorado that “all public records shall be open for inspection by any person at reasonable times,” unless specifically excepted by statute, and that there is a general presumption in favor of public access to records. *See Daniels v. City of Commerce City*, 988 P.2d 648, 650–51 (Colo. App. 1999); § 24-72-203(1)(a), C.R.S.

23. Under CORA, any person may request access to inspect and obtain a copy of any public record. *See* § 24-72-203(1)(a), C.R.S.

24. Under CORA, a public record “means and includes *all writings* made, maintained, or kept by the state, any agency, institution, a nonprofit corporation incorporated pursuant to section 23-5-121(2), C.R.S., or political subdivision of the state, or that are described in section 29-1-902, C.R.S., and held by any local-government-financed entity for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.” § 24-72-202(6)(a)(I), C.R.S. (emphasis added).

25. “Writings” are defined under CORA to include “all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics.” § 24-72-202(7), C.R.S. Writings also includes “digitally stored data, including without limitation electronic mail messages, but does not include computer software.” § 24-72-202(7), C.R.S.

26. If the custodian of public records denies access, and the requesting entity seeks a court order directing the custodian to allow access, the custodian under CORA *must* pay the requesting party’s reasonable costs and attorney’s fees unless the court determines that denial of access was proper. § 24-72-204(5)(a)–(b), C.R.S.

27. Under § 24-72-204(3)(a)(II)(A), C.R.S. of the CORA, the personnel files exception applies *only to personal demographic information*.

28. Section § 24-72-202(4.5), C.R.S. defines personnel files to “mean and include home addresses, telephone numbers, financial information, a disclosure of an intimate relationship filed in accordance with the policies of the general assembly, [and] other information maintained because of the employer-employee relationship.”

29. Colorado Courts interpret this provision narrowly and limited *only* to the disclosure of “personal demographic information” or information similar in nature. *Daniels v. City of Commerce City*, 988 P.2d 648, 651 (Colo. App. 1999) (interpreting “maintained because of the employer-employee relationship” to be the same type of information as the personally demographic information that is exempt from disclosure); *Jefferson Cty. Educ. Ass’n v. Jefferson Cty. Sch. Dist. R-1*, 378 P.3d 835, 839 (Colo. App. 2016).

30. Colorado courts have thus held that disciplinary records *are non-exempt public records under CORA*. *Daniels*, 988 P.2d at 651; *Jefferson Cty. Educ. Ass’n*, 378 P.3d at 837-838.

31. Section § 24-72-204(3)(a)(X), C.R.S. declares as non-disclosable “Any records of sexual harassment complaints and investigations, whether or not such records are maintained as part of a personnel file . . .” Plaintiff’s CORA request does not seek disclosure of any “records of sexual harassment complaints and investigation.” Instead, he seeks disclosure of records revealing the imposition of any disciplinary action by DPS on any school principal, assistant principal, or any of their superiors, regardless of the grounds for imposition of such disciplinary sanction.

32. Further, the substantial injury to the public interest exemption of § 24-72-204(6)(a), C.R.S. is inapplicable to Plaintiff’s Request, and, it is well-established that, it is only to be used in “*extraordinary situations* which the General Assembly could not have identified in advance.” (Emphasis added). In such cases, “[t]he custodian of records has the burden to prove an extraordinary situation and that the information revealed would do substantial injury to the public.” *Id.*; see also *Freedom Newspapers, Inc. v. Bowerman*, 739 P.2d 881 (Colo. App. 1987); *Denver Publ’g Co. v. Dreyfus*, 520 P.2d 104 (Colo. 1974).

### **Claim for Relief**

#### Request for Access to Public Records under CORA (§ 24-72-204(5), C.R.S.)

33. Paragraph Nos. 1 through 32 above are incorporated herein by reference and made a part hereof with the same force and effect as if fully set forth herein.

34. The FRISK records are “writings” under CORA and therefore constitute public records. See § 24-72-202(6)(a)(I), C.R.S.; § 24-72-202(7), C.R.S. as described under statute.

35. The FRISK records were made and are maintained and kept by the DPS (or on its behalf by an outside vendor) for use in the exercise of Defendant’s official function of documenting disciplinary action taken against DPS administrators. The FRISK records solely concern the conduct of DPS administrators and employees acting in their official capacity as public school officials.

36. All of the public records responsive to Plaintiff’s Request fall outside the “personnel files” exemption to CORA’s public access requirements. Plaintiff’s Request does not seek exempt records concerning “sexual harassment complaints and investigations.” And Defendant cannot meet its burden of showing that providing access to the FRISK records would cause “substantial injury to the public interest.” The FRISK records are not otherwise exempt from disclosure under any of the statutory exemptions set forth in the CORA or in any other state or federal statute.

37. Because Defendant has denied a valid request under the CORA for inspection of the requested public records, Plaintiff is entitled to an Order from the Court directing Defendant to show cause “at the earliest practical time” why they should not provide access to the FRISK records. *See* § 24-72-204(5), C.R.S.

38. Plaintiff provided Defendant with written notice, pursuant to § 24-72-204(5), C.R.S., prior to filing this Complaint and Application for Order to Show Cause.

39. Plaintiff is entitled to an award of his reasonable attorney’s fees and costs in enforcing his right of public access to these public records, pursuant to § 24-72-204(5)(b), C.R.S., should the Court find that Defendant’s denial of access was improper.

**Prayer for Relief**

WHEREFORE, pursuant to § 24-72-204(5), C.R.S., Plaintiff prays that:

- a. The Court enter an Order directing Defendant to provide Plaintiff access to all of the FRISK records in the format requested by Plaintiff; or, alternatively, in a searchable and sortable format, at no cost; and
- b. The Court enter an Order awarding Plaintiff his costs and reasonable attorney’s fees associated with the preparation, initiation, and maintenance of this action, as mandated by § 24-72-204(5)(b), C.R.S.; and
- c. The Court award such other and further relief as the Court deems proper and just.

Respectfully submitted this 11th day of August 2022.

By /s/Rachael Johnson\_\_\_\_\_

Rachael Johnson  
Reporters Committee for Freedom of the Press  
*Attorney for Plaintiff, The Denver Gazette & David  
Migoya*



**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of August 2022, a true and correct copy of the foregoing **COMPLAINT/APPLICATION FOR ORDER TO SHOW CAUSE** as served on the following counsel through the Colorado Courts E-File & Serve electronic court filing system, pursuant to C.R.C.P. 121(c), § 1-26:

Brent Case, Esq.  
Semple, Farrington, Everall & Case, P.C.  
1120 Lincoln Street, Suite 1308  
Denver, Colorado 80203  
Direct: 720.974.9737  
[bcase@semplelaw.com](mailto:bcase@semplelaw.com)

*/s/Rachael Johnson* \_\_\_\_\_  
Rachael Johnson