DISTRICT COURT, CITY & COUNTY OF DENVER, STATE OF COLORADO **1437 Bannock Street** **Denver, Colorado 80202** DATE FILED: November 22, 2022 4:14 PM CASE NUMBER: 2022CV32315	
Plaintiff: DAVID MIGOYA and THE DENVER GAZETTE **v.** **Defendant:** STACY WHEELER, in her official capacity as custodian of records, DENVER PUBLIC SCHOOLS. **Intervenor Defendant**: DENVER SCHOOL LEADERS ASSOCIATION.	▲ **COURT USE ONLY** ▲ **Case No: 2022CV32315** **Courtroom: 409**

ORDER REGARDING PLAINTIFFS' REQUEST FOR ACCESS TO PUBLIC RECORDS UNDER C.R.S. §24-72-204(5) (CORA)

THIS MATTER comes before the Court on the request of David Migoya ("Migoya") and the Denver Gazette ("the Gazette") (collectively, "Plaintiffs") for an order directing Defendant Stacy Wheeler, in her official capacity as custodian of records for Denver Public Schools ("DPS") to allow Plaintiffs access to certain discipline records of DPS administrators. Plaintiffs' request is made pursuant to C.R.S. §24-72-204(5) of the Colorado Open Records Act (CORA). Defendant DPS and Intervenor Defendant Denver School Leaders Association ("DSLA") oppose the request. The Court, having reviewed all briefs submitted by the parties, FINDS and ORDERS as follows:

BACKGROUND

This case concerns access to the final summary memoranda (FRISK) of disciplinary action against any DPS administrator for the 2018-2021 calendar years (hereinafter, the "FRISK records"). Plaintiff Migoya, a senior investigative reporter at The Denver Gazette, submitted a

CORA request to DPS seeking to inspect and copy the FRISK records. Specifically, on January 6, 2022, Migoya made the following request:

> [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.

Defendant Stacy Wheeler, the custodian of records for DPS, initially granted Migoya's request and the parties communicated regarding the cost of producing the requested records. DPS later reversed that decision and denied Migoya's request on the grounds that the FRISK records were "personnel files" under C.R.S. §24-72-204(3)(a)(II)(A) and "public policy favoring privacy, efficient operation of schools." Upon an appeal by Migoya to DPS, DPS again denied access citing three grounds for denying inspection: 1) disclosure would result in "substantial injury to the public interest" pursuant to C.R.S. §24-72-204(6)(a); 2) the FRISK records constituted records of sexual harassment, gender discrimination, and retaliation under C.R.S. §24-72-204(3)(a)(X); and 3) DPS is prohibited from disclosing certain "personnel files" under C.R.S. §§24-72-204(3)(a)(II)(A) and 24-72-202(4.5).

On February 4, 2022, Plaintiffs provided DPS with notice of intent to file an Application for an Order to Show Cause under C.R.S. §24-72-204(5), and on August 11, 2022, filed a Complaint and Application for Order to Show Cause. On September 26, 2022, the parties met for a status conference with the Court in which a briefing schedule was set and a date for oral arguments was reserved. The parties completed their briefing on November 14, 2022, and on November 18, 2022, this Court vacated the oral arguments hearing and informed the parties that the Court would rule on Plaintiffs' request based on the parties' written submissions.

LEGAL STANDARD

The general policy of the Colorado Open Records Act ("CORA") is that all public records are open to inspection unless specifically excepted by law. *Carpenter v. Civil Service Com'n*, 813 P.2d 773, 777 (Colo. App. 1990). Such exceptions are to be narrowly construed. *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1154 (Colo. App. 1998). CORA contains no express exception for disclosure of information which would violate an individual's privacy rights. *Todd v. Hause*, 371 P.3d 705, 711 (Colo. App. 2015). However, C.R.S. §24-72-204(6)(a) provides that if a custodian believes that disclosure of an otherwise disclosable record would do substantial injury to the public interest, the custodian may apply to the district court for a determination as to the propriety of its disclosure. Colorado courts have construed C.R.S. §24-72-204(6)(a) to include, "under appropriate circumstances," protection of information collected by the government, the disclosure of which would violate an individual's right to privacy. *Todd v. Hause*, 371 P.3d at 711.

ANALYSIS

CORA provides that "the custodian of any public records shall allow any person the right of inspection of such records or any portion thereof" unless otherwise excepted. C.R.S. §24-72-204(1). As is relevant here, "public records means and includes all writings made, maintained, or kept by the state…or political subdivision of the state…for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds." C.R.S. § 24-72-202(6)(a)(I). The parties do not dispute that the FRISK records are public records.

I. Exceptions to CORA

a. The FRISK Records Are Not Subject to the Personnel Files Exemption

C.R.S. §24-72-204(3)(a)(II)(A) provides that the custodian shall deny the right of inspection for personnel files. C.R.S. §24-72-202(4.5) defines personnel files as follows:

> "Personnel files" means and includes home addresses, telephone numbers, financial information, a disclosure of an intimate relationship filed in accordance with the policies of the general assembly, other information maintained because of the employer-employee relationship, and other documents specifically exempt from disclosure pursuant to this part 2 or any other provision of law. "Personnel files" includes the specific date of an educator's absence from work. "Educator" has the same meaning as set forth in section 18-9-313(1)(b.5). "Personnel files" <u>does not</u> include applications of past or current employees, employment agreements, any amount paid or benefit provided incident to termination of employment, performance ratings, final sabbatical reports required pursuant to section 23-5-123, or any compensation, including expense allowances and benefits, paid to employees by the state, its agencies, institutions, or political subdivisions. (emphasis added)

As reflected above, C.R.S. §24-72-202(4.5) lists several discrete examples of personnel files, and then includes a general qualifier, "other information maintained because of the employer-employee relationship." DPS and DLSA argue that this phrase requires the conclusion that FRISK records are personnel files because the FRISK records are incident to the employer-employee relationship. However, this argument runs contrary to relatively recent decisions construing C.R.S. §24-72-202(4.5) which have interpreted the definition of "personnel files" to be limited to personal demographic information. Applying the cannon of *ejusdem generis*, and coupled with the admonition that exemptions under CORA must be construed narrowly, Colorado courts have construed the general qualifier to be limited to the types of information similar in kind to the specific preceding examples (*i.e.* personal demographic information). *Jefferson Cty. Educ. Assoc. v. Jefferson Cty. School. Dist. R-1*, 378 P.3d 835, 839 (Colo. App. 2016); *Daniels v. City of Commerce City, Custodian of Records*, 988 P.2d 648, 651 (Colo. App. 1999). Courts have also held that a custodian cannot shield a document from disclosure simply by placing it in an employee's personnel file. *Daniels*, 988 P.2d at 651.

DPS and DSLA argue that recent legislative changes indicate a repudiation of the *Jefferson Cty. Educ. Assoc.* and *Daniels* holdings. However, this Court finds that the language of the recent legislative changes reflects a legislative intent to maintain the principle that personnel files are limited to demographic information. Specifically, in 2022, rather than changing the primary definition of personnel files, the general assembly added a separate sentence addressing one additional, narrow class of information to be included in the definition of personnel files, namely "the specific date of an educator's absence from work." There was no other statutory amendment enacted which otherwise expanded the general definition of personnel files. Including one narrow expansion of the definition of personnel files contradicts the arguments of DPS and DSLA that there has been some legislative intent to create a broader definition of personnel files which would encompass discipline records. The Court finds that discipline records are more akin to "performance ratings" than "demographic information", and performance ratings are expressly carved out from the definition of personnel files.

For the foregoing reasons, the Court FINDS that the FRISK records are not properly considered personnel files under C.R.S. §24-72-202(4.5).

b. FRISK Records Containing Information Regarding Sexual Harassment Complaints and Investigations Are Not Subject to Inspection

DPS also argues that some of the requested FRISK records pertain to sexual harassment complaints and investigations and thus are exempt from disclosure pursuant to C.R.S. §24-72-204(3)(a)(X)(A). Plaintiffs argue that this exemption is inapplicable to the FRISK reports because they are records of final disciplinary action, not "records of sexual harassment complaints and investigations."

While the Court is mindful of its obligation to construe exceptions to the disclosure requirement narrowly, the C.R.S. §24-72-204(3)(a)(X)(A) exception nonetheless applies to "any" record of sexual harassment complaints and investigations. "Any," in this context, means "all." *See, e.g.*, *Donohue v. Zoning Bd. of Appeals of Town of Norwalk*, 235 A.2d 643, 646 (Conn. 1967) ("The word 'any' has a diversity of meanings and may be employed to indicate 'all' or 'every' as well as 'some' or 'one.'").

There is little in the way of case law interpreting C.R.S. §24-72-204(3)(a)(X)(A), but those few which discuss it, such as *In re Bd. of Cty. Com'rs of Cty. of Arapahoe*, 95 P.3d 593 (Colo. App. 2003), *rev'd in part on other grounds,* 121 P.3d 190 (Colo. 2005), support the conclusion that discipline memos that relate to sexual harassment qualify as records of sexual harassment complaints and investigations. There, the Court of Appeals considered whether a "subreport" on sexual harassment and hostile work environment complaints contained within a larger report concerning not only the aforementioned issues, but also allegations of violations of open meetings law, the Campaign Practices Act, and the misuse of county property, met the statutory exception. *Id*. at 596. The Court of Appeals, in cursory fashion, simply noted that "the plain language of the statute prohibits disclosure of the 'sexual harassment/hostile work environment' subreport." *Id*. at 598.

Other cases concerning this section of the statute (or a version of this section similar to the extant provision), including *Pierce v. St. Vrain Valley School Dist. RE-1J*, 981 P.2d 600 (Colo. 1999) and *Daniels v. City of Commerce City, Custodian of Records*, 988 P.2d 648 (Colo. App. 1999), offer little guidance. First, in *Daniels*, while the custodian relied on C.R.S. §24-72-204(3)(a)(X)(A) to deny inspection, it apparently did so because it considered the privacy interests of the victims and accused to be superior to the public's interest in inspecting the requested

documents. *Daniels*, 988 P.2d at 650. The Court of Appeals reviewed only the trial court's decision under the personnel file exemption and the public interest exemption and did not discuss the applicability of C.R.S. §24-72-204(3)(a)(X)(A). *Id*. at 651-52. *Pierce* similarly glosses over C.R.S. §24-72-204(3)(a)(X)(A), noting that the exception at the time applied if the reports were maintained "pursuant to any rule of the general assembly on a sexual harassment policy," and that the record was devoid of any indication that the school district's actions were based on any such rule. *Pierce*, 981 P.2d at 606. The *Pierce* court noted only that the provision "evidences the intent of the legislature to treat matters concerning sexual harassment allegations and investigations with discretion and care." *Id*.

Thus, the Court has little beyond the plain language of the statutory section, which broadly covers "any records of sexual harassment complaints and investigations." C.R.S. §24-72-204(3)(a)(X)(A). The Court FINDS that a discipline memo that describe the imposition of discipline at the conclusion of a sexual harassment investigation is a record of that investigation. Thus, the FRISK records which relate to the imposition of discipline related to sexual harassment are protected from disclosure by C.R.S. §24-72-204(3)(a)(X)(A).

Plaintiffs argue that even if C.R.S. §24-72-204(3)(a)(X)(A) provides a shield to the disclosure of records relating to sexual harassment complaints and investigations, this Court must still permit some disclosure of the related FRISK records with the protected information redacted. In support of this argument, Plaintiff cites to *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 900 n.3 (Colo. 2008), *Land Owners United, LLC, v. Waters*, 293 P.3d 86, 99 (Colo. App. 2011) and *Bodelson v. Denver, Publ'g Co*., 5 P.3d 373, 378 (Colo. App. 2000). However, none of the cases cited by Plaintiffs as supporting the "redaction" approach to disclosure of sexual harassment FRISK records addressed a CORA statutory exclusion which expressly

prohibited the disclosure of "any" record in a particular category. *Freedom Colo. Info.* addressed disclosure of investigative records under the Colorado Criminal Justice Records Act which allows for the "deletion of identifying information." *See* C.R.S. §24-72-304(4)(a). *Land Owners United* addressed the statutory exception for the disclosure of confidential information such as trade secrets, privileged information, and confidential commercial, financial, geological or geophysical data found in C.R.S. §24-72-204(3)(a)(IV) which is not as broad of an exemption as the statutory language at play in C.R.S. §24-72-204(3)(a)(X)(A) which protects from disclosure "any" record. Finally, *Bodelson* addressed efforts to block the disclosure of autopsy reports under the "catch-all" provision of C.R.S. §24-72-204(6)(a) which allows a custodian to request an order permitting him or her "to restrict such disclosure or for the court to determine if disclosure is prohibited." Under this statutory provision, the court is permitted to issue an order authorizing the custodian to "restrict disclosure." In contrast to C.R.S. §24-72-204(6)(a) grant of authority for "restricting" access to certain records, C.R.S. §24-72-204(3)(a)(X)(A) mandates that the custodian "shall deny the right of inspection" of records of sexual harassment complaints and investigations. (emphasis added).

Finally, C.R.S. §24-72-204(3)(a)(X)(A) expressly permits redacting records to remove identifying information of "individuals involved" in sexual harassment complaints and investigations, but only in circumstances where such records are disclosed "to the person in interest" to the record. The statute does not otherwise provide for the redacting of records of sexual harassment. Because Plaintiffs are not persons in interests, redaction of the FRISK records does not appear to be an available avenue for permitting the release of the records to Plaintiffs. *See* C.R.S. §24-72-204(3)(a)(X)(B) ("person in interest under subparagraph (X) includes the person making a complaint and the person whose conduct is the subject of such complaint.")

The Court recognizes that discipline memos of school administrators found to have committed sexual harassment is inherently a matter of public concern. *See Brammer- Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1206 (10th Cir. 2007); *Connick v. Myers*, 461 U.S. 138, 145 (1983) (public concern defined as speech "relating to any matter of political, social, or other concern to the community"); *Wulf v. City of Wichita*, 883 F.2d 842, 860 (10th Cir. 1989) ("Allegations of sexual harassment have been found to involve matters of public concern"), citing *Wren v. Spurlock*, 798 F.2d 1313, 1317 (10th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987). The Court further notes that a specific statutory exemption for such complaints and investigations is somewhat unusual, and other states resolve the question of whether such public records should be made public by balancing the privacy interest of those involved with the public's interest in the content of the documents, not unlike the analysis employed under C.R.S. § 24-72-204(6)(a). *See, e.g.*, *Martin v. Riverside Sch. Dist. No. 416*, 329 P.3d 911, 914 (Wash. App. 2014) (action by former teacher to enjoin disclosure of investigation of allegations of sexual misconduct to reporter under request pursuant to Public Records Act analyzed under personal information exemption); *Rocque v. Freedom of Info. Comm'n*, 774 A.2d 957 (Conn. 2001) (analyzing claim for disclosure of sexual harassment complaint and investigation under privacy/public interest balancing test); *State J.-Reg. v. Univ. of Illinois Springfield*, 994 N.E.2d 705 (Ill. App. 2013) (applying same balancing test to determine propriety of disclosure of certain parts of an employee's personnel file concerning sexual harassment investigations and settlement).

But CORA, unlike the open records acts in the states mentioned above, contains a clear exemption to disclosure for "any record" of sexual harassment complaints and investigations. While there may be compelling reasons for FRISK discipline memos concerning sexual harassment of school administrators to be subject to disclosure, that is a matter to be addressed

with the General Assembly, not this Court. *See People v. Thompson*, 181 P.3d 1143, 1148 (Colo. 2008).

The Court finds that FRISK memos addressing discipline imposed based on sexual harassment are records of a sexual harassment complaint or investigation and disclosures of such records is not permitted under CORA.

c. Claim of Substantial Injury to Public Interest

DPS has reserved the rights to apply to this Court to restrict the disclosure of such records pursuant to C.R.S. §24-72-204(6)(a) on the grounds that disclosure of such records would do substantial injury to the public interest. *See Gumina v. City of Sterling*, 119 P.3d 527, 532 (Colo. App. 2004).

Because the Court has determined that some of the FRISK records requested are subject to disclosure, DPS has the opportunity to apply to this Court to restrict the disclosure of such records pursuant to C.R.S. §24-72-204(6)(a). If DPS wishes to apply to this Court for a restriction pursuant to C.R.S. §24-72-204(6)(a), it must submit such request no later than **December 2, 2022**. Plaintiffs' Response/Objection shall be filed no later than **December 9, 2022**. If DPS has applied to restrict disclosure pursuant to C.R.S. §24-72-204(6)(a), counsel for DPS shall contact the clerk of Courtroom 409 via email (02Courtroom409@judicial.state.co.us) no later than **December 5, 2022** to schedule an evidentiary hearing to be held no later than **December 30, 2022**.

CONCLUSION

For the reasons stated above, the Court ORDERS DPS to maintain the confidentiality of the FRISK records which relate to sexual harassment complaints and investigation. All other FRISK records are subject to disclosure, unless DPS timely files an application to restrict access

pursuant to C.R.S. §24-72-204(6)(a) by December 2, 2022. If such an application is filed, the Court will hold an evidentiary hearing on such application no later than December 30, 2022.

SO ORDERED this 22nd day of November, 2022.

BY THE COURT:

Marie Avery Moses
District Court Judge