DISTRICT COURT, CITY & COUNTY OF DENVER, STATE OF COLORADO **1437 Bannock Street** **Denver, Colorado 80202**	DATE FILED: April 24, 2023 11:30 AM 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 DEFENDANT'S MOTION TO RESTRICT ACCESS PURSUANT TO C.R.S. §24-72-204(6)(a)–(b)

THIS MATTER initially came 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 was 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 and have filed a *Motion to Restrict Access Pursuant to C.R.S. §24-72-204(6)(a)-(b)*. The Court, having reviewed all briefs submitted by the parties, and having conducted an evidentiary hearing on January 23, 2023, having considered the arguments and proposed findings of fact and conclusions of law submitted by counsel, 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.

On November 22, 2022, the Court entered an Order concluding that the records sought by Plaintiff were not exempt from disclosure as "personnel files" under C.R.S. §24-72-204(3)(a)(II)(A) and 202(4.5). However, the Court also concluded that, pursuant to C.R.S. §24-72-204(3)(a)(X)(A), a subset of the FRISK records was excluded from public inspection if such records contained information regarding "discipline imposed based on sexual harassment."

Thereafter, on December 2, 2022, and pursuant to C.R.S. §24-72-204(6)(a)–(b), DPS moved to restrict access to the remaining FRISK records, asserting that disclosure of the disciplinary records would cause substantial harm to the public interest. This motion to restrict access was joined by DSLA. Plaintiffs filed an objection, and the Court held an evidentiary hearing on January 23, 2023.

On January 20, 2023, DSLA filed a Notice of Testimony and Letter Brief titled "Public Interest Arguments" ("Letter Brief"). This notice of testimony raised arguments that the FRISK records could not be disclosed pursuant to C.R.S. §22-9-209, a provision of the Colorado Licensed Personnel Performance Evaluation Act ("CLPPEA"). Plaintiffs moved to strike DSLA's letter brief as an improper sur-reply and submitted a *Motion in Limine to Exclude Non- Factual and Irrelevant Testimony of Dr. Moira Coogan*. At the January 23 hearing, the Court denied Plaintiffs' *Motion in Limine* and denied in part their *Motion to Strike*, permitting Plaintiffs an opportunity to respond to the legal arguments made by DSLA during closing arguments and through the submission of a post-hearing proposed findings of fact and conclusions of law. Plaintiffs did not

request that the January 23rd hearing be continued to allow them additional time to respond to DSLA's arguments and witness testimony regarding the applicability of CLPPEA to the issues presented to the Court.

At the January 23 hearing, DPS presented the testimony of Ms. Jennifer Troy, and DSLA called Dr. Moira Coogan as its only witness. Plaintiffs did not call any witnesses. Exhibits A, B, and 1 were admitted into evidence. At the hearing, Plaintiffs' counsel stipulated that Plaintiffs were withdrawing their request for letters of placement on *administrative leave pending investigation*.

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. *See Pierce v. St. Vrain Valley Sch. Dist.*, 981 P.2d 600, 605–06 (Colo. 1999); *Gumina v. City of Sterling*, 119 P.3d 527, 532 (Colo. App. 2004).

A substantial injury to the public interest is not defined in the CORA. However, the substantial injury to the public interest exemption contained in C.R.S. §24-72-204(6)(a) is to be used only in those extraordinary situations which the General Assembly could not have identified in advance. *Bodelson v. Denver Pub. Co.*, 5 P.3d 373, 377 (Colo. App. 2000), *citing Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150 (Colo. App. 1998). Additionally, the custodian of

records has the burden to prove an extraordinary situation and that the information revealed would do substantial injury to the public. *Id.*, *citing Zubeck v. El Paso County Retirement Plan*, 961 P.2d 597 (Colo. App. 1998).

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.

In determining whether disclosure of the requested documents would do substantial injury to the public interest by invading an employee's constitutional right to privacy, the court must consider: (1) whether the individual has a legitimate expectation of nondisclosure; (2) whether there is a compelling public interest in access to the information; and (3) where the public interest compels disclosure of otherwise protected information, how disclosure may occur in a manner least intrusive with respect to the individual's right of privacy. *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1156 (Colo. App. 1998), *citing Denver Post Corp. v. University of Colorado*, 739 P.2d 874 (Colo. App. 1987). An employee has at least a minimal privacy interest in his or her employment history and job performance evaluations, but public employees have a narrower expectation of privacy than other citizens. *Id*.

FACTUAL FINDINGS

Ms. Troy, DPS Associate Chief of Secondary Schools, testified regarding the discipline process of principals, assistant principals and other administrators within DPS. Her office is responsible for supervising school leaders, and that work includes development, coaching, evaluation, and corrective action. She described the process by which DPS supervisors address misconduct and mistakes made by administrators which involve the need for corrective action. Corrective action can take the form of a letter of expectations, a letter of warning, or a letter of

reprimand. Consistent with the range of severity represented by these different written communications, only a letter of reprimand must be placed in the employee's personnel file, which DPS treats as confidential. (Stip'd Hrg. Ex. B, pp. 5–6). It is within the supervisor's discretion as to whether a less serious letter of expectations or letter of warning are placed in the employee's personnel file. Corrective action letters are placed in personnel files to document the supervisor's concerns and promote accountability by the employee moving forward. Historically, DPS has maintained the confidentially of corrective action letters, and school leaders and their supervisors expect as much.

When conducting performance evaluations for principals and assistant principals, supervisors consider corrective action which has been imposed previsously. As a result, letters of expectations, letters of warning, and letters of reprimand are often part of the body of evidence used in preparing written performance evaluation reports for principals and assistant principals pursuant to C.R.S. §22-9-101, et seq..

C.R.S. §22-9-109 provides: "[n]otwithstanding the provisions of section 24-72-204(3), C.R.S., the evaluation report and all public records as defined in section 24-72-202(6), C.R.S., used in preparing the evaluation report shall be confidential and shall be available only to the licensed person being evaluated, to the duly elected and appointed public officials who supervise his or her work, and to a hearing officer conducting a hearing . . . ." There are certain exceptions to this confidentiality provision, none of which are applicable here.

The Court finds that based on the history of practice within DPS and the express provisions of C.R.S. §22-9-109, school leaders within DPS understand and expect that their performance evaluations and all documents used in preparing the evaluations—including documentation of corrective action—are confidential and not open to public inspection.

Based on prior practice, the terms of the Collective Bargaining Agreement between DPS and school administrators, developed corrective action guidelines, and DPS and DSLA's interpretation of applicable law, DPS and its administrators have treated corrective action memos as confidential personnel records and have expected they would remain confidential and not be subject to public inspection.

Ms. Troy testified credibly that she had concerns about the ability to retain principals and assistant principals if their discipline records were made public. She also testified that she feared it would be more difficult to recruit principals and assistant principals if potential candidates were aware that any corrective action imposed while they learned the job would be subject to public inspection. Ms. Troy also discussed concerns that school staff may lose trust in their school leaders if they were provided information regarding their school leader's corrective action. Further, Ms. Troy expressed credible concerns that opening corrective action documents to public inspection could jeopardize the integrity of the corrective action process. Specifically, she expressed legitimate concerns that opening discipline records would lead to supervisors over-documenting corrective actions (to protect their own interests) or under-documenting concerns (to protect their employees). The Court finds that there is a significant potential that public disclosure of all letters of expectations, letters of warning, and letters of reprimand will devalue DPS's corrective action process and harm the efficacy of the discipline process in the future.

Dr. Moira Coogan is the DSLA President and a principal in DPS. Dr. Coogan testified that all DPS principals and assistant principals are expected to hold professional licenses and are covered by the CLPPEA. She testified regarding the body of evidence which is required to be considered as part of the required evaluations of principals and assistant principals under the CLPPEA. Dr. Coogan has previously performed evaluations under CLPPEA. In conducting those

evaluations, she has considered corrective action documentation as part of the body of evidence, including, by way of example, letters of warning regarding budgeting information or scheduling difficulties. Dr. Coogan testified that her expectation in preparing the CLPPEA evaluation reports was that all documents considered in preparing the evaluations, including corrective action documents, would remain confidential.

Dr. Coogan testified that reputational harm would occur to a school leader if discipline memos were released to the public because it could result in the loss of trust in the school leader by students, parents and the public. The Court finds that the potential for reputational harm is particularly problematic because the discipline memo can be a one-sided document, because it is not subject to due process whereby the school leader could demand a hearing before the discipline memo is finalized. The only avenue for the school leader to address a finding of a discipline issue requiring corrective action is through the submission of a letter which may or may not be incorporated into the discipline memo.

Plaintiffs did not present any witnesses to testify regarding a compelling public interest in access to the information. Plaintiffs, through cross-examination, sought to establish that there is a general public interest in the public disclosure of school discipline memorandums because such disclosure would provide additional information to parents seeking to be well-informed regarding the operation of schools. However, there was no testimony or evidence presented regarding a compelling public interest in obtaining the broad swathe of discipline records requested here.

ANALYSIS

I. Extraordinary Circumstances

Here, the testimony was uncontroverted that DPS treats all FRISK memos as confidential. All participants in the discipline process operate with the understanding that such corrective action documents are protected from public inspection. The discipline process itself has been conducted with the understanding that the documentation regarding the discipline process is not subject to public disclosure. The understanding that the discipline process is confidential has influenced the type of concerns which have been reported and documented. Additionally, because of the understanding that discipline files are confidential, supervisors have provided candid assessments of a school leader's performance, without concern for public reprisals. This understanding has also influenced how school leaders respond to disciplinary investigations, including whether they submit letters to present their perspective of the incident giving rise to the corrective action. Whether or not this understanding is correct is not squarely before the Court at this phase of the proceedings. However, it is undeniable that all participants in the DPS discipline process have operated under the impression that the discipline records are not subject to CORA requests and that understanding has colored how the process has been conducted.

The Court finds that this long-standing institutional understanding of the confidential nature of the DPS corrective action process constitutes an extraordinary circumstance not contemplated by the General Assembly. This extraordinary circumstance warrants the Court embarking on a C.R.S. §24-72-204(6)(a) inquiry which requires the Court to balance the privacy interests at stake and the public interest in disclosure of the corrective action documentation.

II. Substantial Injury to the Public

Ms. Troy testified credibly regarding her concerns that disclosure of the corrective action documentation requested by Plaintiffs would cause substantial injury to the public. Specifically, she described legitimate concerns that making such discipline information public would cause a

loss of talent within DPS school leaders. The Court finds that the release of all final discipline memos, which were previously considered confidential, would likely result in DPS having substantial difficulty retaining DPS school leaders and recruiting new candidates to serve as school leaders. Additionally, the Court finds that the goal of coaching and improving DPS school leaders would also be negatively impacted if all final discipline memos were subject to public disclosure. The Court finds that a public disclosure requirement would have a chilling effect on the ability of supervisors to effectively train school principals, assistant principals and administrators if all final corrective action memos were open to public inspection.

Based on the credible testimony presented by Ms. Troy, the Court finds that there is substantial value to the current discipline process that allows corrective action to take place in a confidential setting and there would be a substantial injury to the public if supervisors were deprived of the opportunity to improve educators' professional performance in a confidential setting.

III. Employee's Constitutional Right to Privacy

In addition to determining that disclosure of all FRISK memos would create a substantial injury to the public by creating retention and recruitment problems and by chilling the ability of supervisors to coach and mentor school leaders, the Court has also considered whether Plaintiffs' request would do substantial injury to the public interest by invading DPS employees' constitutional right to privacy.

a. Does the individual have a legitimate expectation of nondisclosure?

Here, the Court finds that, despite the common knowledge that school principals and other administrators are generally subject to CORA open records requirement, DPS principals, assistant

principals and administrators have legitimately expected that their discipline records would be protected from disclosure. This legitimate expectation is the result of both the established policies and practices of DPS and the operation of CLPPEA, specifically C.R.S. §22-9-109.

b. Is there a compelling public interest in access to the information?

Plaintiffs did not present any specific evidence regarding a compelling public interest in access to all of DPS's FRISK records for school leaders. It is noteworthy that Plaintiffs sought all final discipline records. Plaintiffs did not narrow their request to serious disciplinary infractions which resulted in the suspension or termination of an employee, or to discipline records related to criminal conduct, substance use or mistreatment of children. While there may be an obvious public interest in disclosure of disciplinary records related to egregious conduct, there is no obvious public interest in disclosure of corrective action related to minor disciplinary matters such as failing to properly secure an AV cart or failure to greet families at the front of the school at the start of each school day. Without any testimony or evidence regarding the public's interest in accessing all such final disciplinary decisions, the Court cannot find that there is a compelling public interest in the vast category of documents sought by Plaintiffs.

c. If the public interest compels disclosure of otherwise protected information, how can disclosure occur in a manner least intrusive with respect to the individual's right of privacy?

Neither party presented the Court with any information regarding means by which disclosure of the FRISK records could be limited or restricted to protect the privacy rights of school leaders. Other than withdrawing their request for disciplinary decisions placing an employee on leave pending an investigation, Plaintiffs did not propose any sort of narrowing of their request that would better address the legitimate privacy interests of the DPS principals, assistant principals

and administrators that have been subject to corrective action for minor performance issues that do not implicate the public interest.

CONCLUSION

The Court FINDS that DPS and DSLA have carried their burden of proof and have established that disclosure of the FRISK records as requested by Plaintiffs would substantially injure the public. In addition, DPS principals, assistant principals and administrators have a legitimate expectation of privacy in keeping their discipline records confidential and the Court did not receive any evidence which established a public interest in the disclosure of the entire set of FRISK documents requested by Plaintiffs. Accordingly, pursuant to C.R.S. §24-72-204(6)(a), the Court GRANTS DPS's Motion to Restrict Access and authorizes DPS to restrict disclosure of the requested FRISK records.

SO ORDERED this 24th day of April, 2023.

BY THE COURT:

Marie Avery Moses
District Court Judge