COLORADO COURT OF APPEALS Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal from: The District Court for the City and County of Denver District Court Judge: Marie Averie Moses District Court Case Number: 2022CV32315 **Plaintiffs-Appellants:** DAVID MIGOYA and THE DENVER GAZETTE, **v.** **Defendant-Appellee:** STACY WHEELER, in her official capacity as custodian of records, DENVER PUBLIC SCHOOLS. **Intervenor Defendant-Appellee:** DENVER SCHOOL LEADERS ASSOCIATION. **Attorney for Plaintiffs-Appellants:** 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 rjohnson@rcfp.org	**COURT USE ONLY** Court of Appeals Case No. 2023CA000995
PLAINTIFFS-APPELLANTS' OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g). It contains 7,935 words and does not exceed 9,500 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A).

For each issued raised by the Plaintiffs-Appellants, the brief contains under a separate heading before the discussion of the issue, a concise statement (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/Rachael Johnson
Rachael Johnson, #43597

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2. Whether the District Court erred by failing to exclude evidence, legal arguments, and testimony of Dr. Moira Coogan in Denver School Leaders Association's post-briefing sur-reply (letter brief) to its findings on DPS employees' expectations of privacy.

3. Whether the District Court failed to address and consider Plaintiffs-Appellants' request for reasonable attorney's fees and costs.

STATEMENT OF THE CASE

Plaintiff-Appellant David Migoya is a senior investigative reporter for *The Denver Gazette*, a daily online publication. He has written several investigative articles concerning government ethics and accountability.[1] CF, p. 5. His reporting shed light on a high-profile financial misconduct investigation conducted by Defendant-Appellee Denver Public Schools ("DPS") into a former principal alleged to have misappropriated $175,000 in public funds.[2]

On January 6, 2022, Mr. Migoya filed a Colorado Open Records Act ("CORA") request with Defendant-Appellee Stacy Wheeler, the custodian of records for DPS, seeking the agency's FRISK records for:[3]

> [E]lectronic copies of 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

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[1] David Migoya, *Proposed Sweeping Changes to Colorado's Judicial Discipline Process Would Need Public Approval*, The Denv. Gazette (Sept. 5, 2022), https://perma.cc/9DRY-UB94; David Migoya, *Colorado Legislator Says Polis Profited From Legislation He Signed, Used Office for Financial Gain; What's Next?*, The Denv. Gazette (Sept. 28, 2022), https://perma.cc/8YSY-SSYF.

[2] David Migoya, *Denver Schools Investigated Former Principal Over $175K in Purchases, Then Promoted Her*, The Denv. Gazette (Dec. 11, 2022), https://perma.cc/MX9R-V3RM.

[3] FRISK is a model for addressing employee misconduct. The acronym stands for Facts, Rule, Impact, Suggestions, Knowledge. [https://accca-dev.amzb.securityserve.com/wp-content/uploads/2022/02/2019-ACCCA-Great-Deans-FRISK.pdf].

> 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.

CF, pp. 6, 14–15; Ex. 54–55.

Ms. Wheeler granted Plaintiff's request on January 10, 2022, stating the DPS would produce non-exempt public records responsive to the request, and require a payment of $1,170 to process the cost of the records. CF, pp. 19–20; Ex. 52–53. On January 11, 2022, Mr. Migoya sent a receipt for payment of the $1,170 to Defendant-Appellee. CF, p. 16; Ex. 49. A few days later, Defendant-Appellee informed Mr. Migoya that a seven-day extension was needed to process the CORA request. *Id*.

Nearly two weeks later, on January 25, 2022, DPS unexpectedly reversed its decision to produce the records and denied the CORA request on the grounds that the FRISK records were exempt "personnel files" under §24-72-204(3)(a)(II)(A), C.R.S. (the "Personnel Records Exemption") and that "public policy favoring privacy [and] efficient operation of schools" counseled against disclosure. CF, p. 28. On January 26, 2022, Mr. Migoya appealed that denial, CF, pp. 25–28, asserting that the "personnel files" exception was inapplicable, and that there is no exemption under CORA for the generic statement that nondisclosure would affect the "public policy favoring privacy [or] efficient operation of schools." Thereafter, on January 31, 2022, DPS again denied access, citing three CORA exemptions and arguing that: (i) disclosure would result in "substantial injury to the public interest" pursuant to

§24-72-204(6)(a), C.R.S.; (ii) the FRISK records constituted records of sexual harassment, gender discrimination, and retaliation exempt from disclosure under §24-72-204(3)(a)(X), C.R.S.; and (iii) DPS is prohibited from disclosing certain "personnel files" under §§24-72-204(3)(a)(II)(A) and 24-72-202(4.5), C.R.S. CF, pp. 30–31.

Plaintiffs-Appellants provided DPS with the requisite notice of intent and subsequently filed a Complaint and Application for Order to Show Cause with the District Court for the City and County of Denver (the "District Court") on August 11, 2022 to access the FRISK records. CF, pp. 4–9. The parties held a status conference and established a briefing schedule on September 26, 2022. CF, pp. 96–97. On October 11, 2022, Intervenor Defendant-Appellee Denver School Leaders Association ("DSLA") filed an Answer to the Complaint and a Motion to Intervene pursuant to Rule 24 C.R.C.P., which the District Court granted, over Plaintiffs-Appellants' opposition, CF, p. 190–201, on November 4, 2022. CF, pp. 99–108; 270–75.

On November 22, 2022, the District Court issued an Order finding that the FRISK records were not subject to the "personnel files" records exemption of CORA §25-72-204(3)(a)(II)(A), C.R.S. and that the requested records, except records for sexual harassment complaints and investigations, were subject to disclosure. CF, pp. 322–32. The District Court further ordered that if Defendant-Appellee DPS

timely filed a Motion to Restrict Access by December 2, 2022, it would have another opportunity to apply to the court to restrict access on the basis that disclosure would cause "substantial injury to the public interest," thereby justifying the records' nondisclosure pursuant to §24-72-204(6)(a), C.R.S. *Id.* Defendant-Appellee DPS timely filed its Motion to Restrict Access on December 2, 2022; and subsequently, Intervenor Defendant-Appellee DSLA filed a joint motion to restrict access with Defendant-Appellee DPS on November 5, 2022. CF, pp. 333–45. Plaintiffs-Appellants opposed the Motion to Restrict Access on December 9, 2022. CF, pp. 346–365. Subsequently, the District Court set an evidentiary hearing, solely on the question of whether DPS could meet its evidentiary burden to show that disclosure of the FRISK records would cause substantial injury to the public interest. CF, p. 366.

After the conclusion of all briefing, and three days before the scheduled evidentiary hearing, Intervenor Defendant-Appellee DSLA filed a Letter Brief on January 20, 2023 noticing witness testimony and raising new legal arguments, including the claim that §22-9-101, C.R.S. *et seq.*, a provision of the Colorado Licensed Personnel Performance Evaluation Act ("CLPPEA") enjoined disclosure of the FRISK records. CF, pp. 392–394. Plaintiffs moved to exclude the irrelevant testimony of DSLA's proffered witness Dr. Moira Coogan and strike DSLA's post-briefing sur-reply. CF, pp. 378–83. The District Court denied Plaintiffs' Motion to

Strike and denied in part the improper sur-reply, permitting Plaintiffs the opportunity to respond to DSLA's newly raised arguments in oral argument and proposed findings of fact. TR 01/23/2023, p. 6:18–7:10.

At the January 23, 2023 show cause hearing, the District Court heard testimony from Defendant DSLA's fact witnesses Dr. Moira Coogan, a DPS principal, and DPS's witness Ms. Jennifer Troy, a district administrator, TR 01/23/2023, pp. 19–106, regarding the limited issue of whether disclosure of the FRISK disciplinary records would cause "substantial injury to the public interest." At the conclusion of the evidentiary hearing, the court ordered the parties to submit Findings of Fact and Conclusions of Law, which the parties submitted on January 30, 2023. TR 01/23/2023, p. 133:9–16; CF, pp. 422–67.

On April 24, 2023, the District Court issued an order determining that Defendant DPS and Defendant Intervenor DSLA had met their burden of showing a "substantial injury to the public interest" would result if DPS disclosed the FRISK records, justifying their nondisclosure under §24-72-204(6)(a), C.R.S.. April 24, 2023 Order at 12.[4] This appeal timely followed.

[4] The District Court's April 24, 2023 final Order was omitted from the court's August 9, 2023 certified Record on Appeal. Accordingly, on September 18, 2023, Plaintiffs-Appellants moved this Court to supplement the record and are awaiting the complete Record on Appeal to be shared with all parties. In the interim, Plaintiffs-Appellants cite to the original April 24, 2023 Order throughout this brief

SUMMARY OF ARGUMENT

In enacting CORA, the legislature enshrined "a broad legislative declaration that all public records shall be open for inspection ... " *Daniels v. City of Com. City*, 988 P.2d 648, 650–51 (Colo. App. 1999) (citing *Denv. Publ'g Co. v. Dreyfus*, 520 P.2d 104 (Colo. 1974)). Accordingly, there is a presumption that public records are subject to disclosure unless a clearly enumerated statutory exception or other specific provision of law precludes the release of a particular record. *Dreyfus*, 520 P.2d at 106. Any exceptions to CORA's mandatory disclosure requirements should be narrowly construed. *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1154 (Colo. App. 1998). Here, the District Court correctly held that the FRISK records sought by Plaintiffs-Appellants are "not properly considered 'personnel files' under §24-72-202(4.5), C.R.S" because the records are not considered "demographic information" as defined by 202(4.5) and must be disclosed to Plaintiffs, excluding records of sexual harassment complaint and investigations. CF, pp. 324–31. However, the District Court erroneously denied Plaintiffs-Appellants access to the FRISK records on the ground that disclosure would cause "substantial injury to the public interest." *Id.* Its decision should be reversed for the following reasons.

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and attach a copy of the Order as Appendix A to this brief for the court's convenience.

First, the District Court erred in concluding that releasing the FRISK records would cause "substantial injury to the public interest" under §24-72-204(6)(a), C.R.S. The court's overbroad reading of this exception is in conflict with the Legislature's intent and applicable caselaw. Indeed, contrary to the court's reasoning, DPS's school leaders' mistaken and "long-standing" understanding that disciplinary records are confidential did not constitute an "extraordinary circumstance" that amounted to a substantial injury to the public interest. April 24, 2023 Order at 9. Instead, the clear intent of the Legislature that these personnel records remain public records, *see* §24-72-204(3)(a)(II)(A), C.R.S., confirms that the District Court's application of §24-72-204(6)(a), C.R.S. was in error and must be reversed. To hold otherwise would endorse the proposition that the government's subjective beliefs about the secrecy of its own actions are enough to thwart public oversight—a slippery slope that defeats CORA's purpose.

Second, the District Court erred in admitting Defendants-Appellees' legal arguments and testimony on statutes and legal doctrines beyond the scope of CORA's "substantial injury to the public interest" exception, §24-72-204(6)(a), C.R.S. Despite the District Court's own recognition that DSLA sought to "bootstrap" new arguments to a hearing limited to whether Defendants-Appellees could meet their burden under §24-72-204(6)(a), C.R.S., the District Court nevertheless endorsed these inadmissible arguments in its decision. *Compare* TR

01/23/2023, p. 11:11–17 ("A bootstrapping argument."); 15:12 ("I'm as frustrated as you are that the first I'm hearing about 22-9-109 is this morning. Like, it seems like if this is why these documents should not be disclosed, someone should have mentioned it, you know, before last week.") *with* CF, pp. 404-09, 410 (denying Plaintiffs-Appellants' Motion *in Limine* to Exclude [Dr. Coogan's] Non-factual and Irrelevant Testimony and Motion to Strike an Improper Sur Reply). In so ruling, the District Court erred as a matter of law.

Third, for the foregoing reasons, the District Court erred in denying Plaintiffs-Appellants' access to the FRISK records. Plaintiffs-Appellants sought, and should have been awarded, their attorney fees and costs as the prevailing party pursuant to § 24-72-204(5)(b), C.R.S. Should this Court reverse and remand the District Court's ruling on review, this Court should also conclude that Plaintiffs-Appellants are entitled to recover their fees and costs associated with seeking access to the FRISK records—both before the District Court and this Court. *Nibert v. Geico Ins. Co.*, 488 P.3d 142, 149–50 (Colo. App. 2017) (authorizing recovery of "fees on fees" where state statute provides for fee award to prevailing party); *Stresscon Corp. v. Travelers Prop. Cas. Co. of Am.*, 373 P.3d 615, 639 (Colo. App. 2013)("If a fee-shifting provision in a statute is part of a larger remedial scheme, appellate courts in Colorado have upheld awards of 'fees-on-fees' based on the compensatory purpose of fee-shifting."), *rev'd, on other grounds*, 370 P.3d 140 (Colo. 2016).

The District Court's ruling fails to apply the legislature's mandate that public records are presumed open and instead gives the government unilateral discretion to withhold information based on its own interpretation or reliance on a misreading of the CORA. This threatens the very foundation of Colorado's public records laws, which were enacted to foster transparency and ensure public access to information about government activities and its use of public funds. Indeed, if taken to its logical end, the District Court's interpretation of CORA would make countless public records that are currently available under the statute exempt from its mandatory disclosure requirement simply because of officials' mistaken and subjective belief that those records have been, and thus should be, insulated from public scrutiny. This is a dangerous road to tread and threatens to strip away the public protections that the legislature enshrined in CORA.

ARGUMENT

I. In analyzing whether the "substantial injury to the public interest" exception applied to the FRISK records, the District Court failed to apply the exception narrowly and disregarded CORA's statutory presumption in favor of disclosure.

Standard of review and preservation on appeal:

This issue—whether release of the FRISK records would cause substantial injury to the public interest justifying their nondisclosure under § 24-72-204(6)(a), C.R.S.—was raised in Defendant-Appellant DPS's CORA denial and Answer,

briefed by Plaintiffs-Appellants and Defendant-Appellee DPS, and was the subject of an evidentiary hearing held on January 23, 2023. CF, pp. 31, 95, 104, 156–59, 212-215, 288–90; TR 01/23/2023, p. 5:1–4 ("We are here this morning for a hearing on the Defendant's motion to restrict access, pursuant to C.R.S. 24-72-204(6)(a) through (b) concerning whether or not release of the nonsexual harassment discipline records would do substantial injury to the public interest.").

Courts "review de novo questions of law concerning the correct construction and application of CORA … " *Harris v. Denv. Post Corp.*, 123 P.3d 1166, 1170 (Colo. 2005). More generally, matters of statutory interpretation, including statutory interpretation of public records laws, are questions of law subject to *de novo* review on appeal. *People v. Sprinkle*, 2021 CO 60, ¶ 12. In interpreting such statutes, a court's "duty is to effectuate the General Assembly's intent, giving all the words of the statutes their intended meaning, harmonizing potentially conflicting provisions, and resolving conflicts and ambiguities in a way that implements the legislature's purpose." *Harris*, 123 P.3d at 1170.

Discussion:

In light of CORA's broad mandate in favor of disclosure, Defendants-Appellees bear the burden of demonstrating that the records in question may be withheld pursuant to CORA's "substantial injury to the public interest" exception. *Civ. Serv. Comm'n v. Pinder*, 812 P.2d 645 (Colo. 1991). An agency seeking to

assert this exception must establish that the unique circumstances surrounding a particular record are so extraordinary that the legislature can be presumed not to have reasonably anticipated such a set of circumstances and would have precluded the record's release. *See id.* at 648–49; *Bodelson v. Denver Publ'g Co.*, 5 P.3d 373, 377 (Colo. App. 2000). Under CORA, the General Assembly intended that "all public records shall be open for inspection by any person at reasonable times," § 24-72-201, C.R.S., *see also Daniels*, 988 P.2d at 650–51 (explaining that CORA creates strong presumption in favor of public disclosure). Accordingly, both the General Assembly and this Court require that exceptions to CORA's disclosure mandate—including its statutory "substantial injury to the public interest" or the "catch-all" exception, *see* § 24-72-204(6)(a), C.R.S.—be construed ***narrowly***. §24-72-201, C.R.S. *et seq.*; *See City of Westminster v. Dogan Constr. Co*., 930 P.2d 585, 589 (Colo. 1997).

A. *No "extraordinary" circumstance exists to justify withholding every requested FRISK record.*

A custodian seeking to withhold records pursuant to § 24-72-204(6)(a), C.R.S. bears the burden of showing that disclosure of each public record at issue, because of truly unique and "extraordinary" situations or circumstances, would cause "substantial injury" to the public interest. *See Bodelson*, 5 P.3d at 377. "[T]he substantial injury to the public interest exemption contained in § 24-72-204(6)(a) is to be used only in extraordinary situations which the General

Assembly could not have identified in advance. 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*. (internal citations omitted)); *see also Zubeck v. El Paso Cnty. Ret. Plan*, 961 P.2d 597, 601 (Colo. App. 1998) (same); *Tollefson*, 961 P.2d at 1156; *Dreyfus*, 520 P.2d at 107–08. A mere "good faith belief" that the records should not be disclosed is insufficient to warrant nondisclosure. § 24-72-204(6)(a), C.R.S. In holding that Denver Public School's "long-standing institutional" practice of confidentiality with respect to disciplinary records equates to an "extraordinary circumstance," April 24, 2023 Order at 9–10, the District Court erred for the following reasons.

Notably, the Colorado Supreme Court has articulated only one narrow instance—"perhaps the most *extraordinary event* in the history of this community"—that justified withholding a record under the substantial injury to the public interest exception. *Bodelson*, 5 P.3d at 378–79 (finding that circumstances surrounding the aftermath of the Columbine High School shooting constituted "***extraordinary" circumstances*** justifying withholding victims' autopsy records (emphasis added)). No such singular, extraordinary circumstance exists in this case.

Here, DPS and DSLA pointed to various asserted hardships that are hardly "extraordinary" and certainly anticipated by the General Assembly.[5] The District Court erred in concluding that Defendants-Appellees' claimed hardships constituted an "extraordinary situation" within the meaning of the "substantial injury to the public interest" exception.

First, the District Court found that DPS employees' assumed belief that their disciplinary records would never be public constituted an "extraordinary circumstance":

> [I]t 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

[5] Aside from the alleged "exceptional circumstances" found by the District Court discussed herein, DPS further claimed that the alleged breadth of Plaintiffs-Appellants' request was itself an extraordinary circumstance within the meaning of the "substantial injury to the public" exception to CORA. *See* TR 01/23/2023, pp. 131:22–32:4; TR 01/23/2023, p. 9:8–11. Contrary to Defendant-Appellee DPS's contention that releasing "three years" of disciplinary records is "extraordinary," *Id*.; TR 01/23/2023, p. 118:33–35, CF, pp. 339–40, it is not a far-fetched notion that the General Assembly could have anticipated that agencies would be required to produce voluminous records under CORA. Indeed, CORA begins with the presumption that "***all public records*** shall be open for inspection by any person at reasonable times" § 24-72-201, C.R.S. (emphasis added). If anything, this argument merely expresses a belated "burdensome" not "extraordinary" objection after Defendants-Appellees originally agreed to release ***all*** the requested records to Plaintiffs-Appellants—charging more than $1,100 to do so. CF, pp. 16, 17, 19.

> corrective action process constitutes an extraordinary circumstance not contemplated by the General Assembly.

April 24, 2023 Order at 9.

The mistaken and "long-standing institutional understanding of the confidential nature of the DPS corrective action process" is not remotely comparable to the shocking and then-unprecedented circumstances surrounding the Columbine shooting and autopsy records and cannot be categorized as "*an extraordinary situation* that the General Assembly could not have identified in advance." *Bodelson*, 5 P.3d at 378–79. The assumption that all administrators, principals, and assistant principals in the Denver Public Schools ***believed*** that their disciplinary files were confidential despite CORA's mandate that such personnel files are not exempt from disclosure, *see* §24-72-204(3)(a)(II)(A), C.R.S. and §24-72-202(4.5), C.R.S., is not an extraordinary event.[6] The mistaken belief that a category of documents are not public records cannot be used as a defense to circumvent CORA law. *Kirkendoll v. People*, 331 P.2d 809, 810 (Colo. 1958) ("It is an axiom as old as jurisprudence, that ignorance of the substantive law is no excuse for a violation thereof.").

[6] Ms. Troy testified that the principals, administrators, and teachers understood and "expected" that their "disciplinary file" was placed into their "personnel file." TR 01/23/2023, pp. 8:20–9:3; 28:10–16 (testifying that letters of reprimand are placed in an employee's personnel file.); 52:8–18 ("Q: no principal or administrator has come to you and said, 'I'm concerned about a record being disclosed'? A: No, because they don't think the records would be disclosed. It's going into a confidential personnel file.").

Indeed, "disciplinary records" (or the FRISK records in this instance) are not "personnel files" subject to any withholding under CORA. By definition, the "personnel files" exemption as defined in § 24-72-204(3)(a)(II)(A), C.R.S. applies only to personal demographic information. *See, e.g.*, *Jefferson Cnty. Educ. Ass'n v. Jefferson Cnty. Sch. Dist. R-1*, 378 P.3d 835, 839 (Colo. App. 2016) (sick leave records of school teachers are not the type of personal demographic information included under CORA's personnel file exemption); *Daniels*, 988 P.2d at 651 (records related to complaints of sexual harassment, gender discrimination, and retaliation not the type of personal, demographic information listed in the statute). In fact, § 24-72-202(4.5), C.R.S. defines "personnel files" narrowly 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, other information maintained because of the employer-employee relationship."[7] *See Denv. Publ'g Co. v. Univ. of Colo.*, 812 P.2d 682, 684 (Colo. App. 1990) (a public

[7] Colorado courts interpret the "employer-employee" provision narrowly and limit it ***only*** to the disclosure of "personal, demographic information" or information similar in nature. *Daniels*, 988 P.2d at 651 (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 Cnty. Educ. Ass'n*, 378 P.3d at 839. It is immaterial if such records are contained in a folder marked "personnel file" or if they are housed outside any such folder.

employer cannot restrict access to documents which are otherwise public records "merely by placing such documents in a personnel file").

Notably, the District Court properly held in its November 22, 2022 Order that the FRISK records are not exempt "personnel files" under CORA and must be open for inspection, CF, p. 326 ("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)"), yet it erred in later concluding that releasing such non-exempt records would impose a "substantial injury to the public interest" because of public employees' mistaken belief that the records would not be disclosed. April 24, 2023 Order at 9, 10, 12. Public bodies, like DPS, should not be permitted to shield public records by either (i) perpetuating a widespread and erroneous belief that the records are nonpublic; or (ii) trying to change the public nature of the record by changing its location. Allowing exceptions to transparency in these circumstances would eviscerate CORA and frustrate the legislature's stated intent.

Second, the District Court erred in concluding that DPS employees' asserted privacy concerns posed an "extraordinary" circumstance precluding disclosure. April 24, 2023 Order at 10–11. Colorado courts have made it clear in circumstances

nearly identical to this case—in which a public employee claims a privacy interest in their job performance records and that any disclosure would cause the substantial injury to the public interest—that a public employee's privacy is ***not*** an extraordinary circumstance requiring nondisclosure. *Tollefson*, 961 P.2d at 1156 (holding that the dissemination of the names of public employees who participated in early retirement incentive program and amounts each individual received would not cause "substantial injury to the public interest"); *City of Boulder v. Avery*, No. 01CV1741, 2002 WL 31954865, at *2–3 (D. Colo. Mar. 18, 2002) (holding that the performance evaluation of judge was not exempt from public inspection as disclosure would not cause substantial injury to the public interest). As discussed, it is well-established that the "substantial injury" exception is only to be used in "***extraordinary situations*** which the General Assembly could not have identified in advance." *Bodelson*, 5 P.3d at 377 (emphasis added); *see also Tollefson*, 961 P.2d at 1156; *Dreyfus*, 520 P.2d 104. Thus here, in finding that employees' alleged privacy concerns constituted an "extraordinary circumstance," the District Court erred by embarking on an improper analysis in which it balanced the asserted privacy interests of DPS employees with the public interest in access to disclosure of information. April 24, 2023 Order 10–11. In so doing, the court misapplied the applicable standard because without a legitimate extraordinary circumstance, no privacy interest should be weighed by the court against the public's interest in

disclosure. *See id*. at 9 ("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.").

In sum, no extraordinary circumstance lies in this case and, therefore, it was error for the District Court to conclude that releasing otherwise non-exempt FRISK records would cause a "substantial injury to the public interest."

B. *Releasing the FRISK Records will not cause "substantial injury to the public interest.*

Not only must the custodian demonstrate that an "extraordinary circumstance" exists that the General Assembly could not have contemplated to withhold the requested public records, but it must also show that ***releasing*** the records will cause "substantial injury to the public interest." In other words, Defendants-Appellees bear the burden of proving that notwithstanding the fact that no statutory exemption applies to the records at issue, disclosure of each particular record, because of truly unique and extraordinary circumstances, would cause "substantial injury" to the public interest. *See, e.g.*, *Bodelson*, 5 P.3d at 377 ("The custodian of records has the burden to prove an extraordinary situation ***and*** that the information revealed would do substantial injury to the public." (emphasis added)); *Tollefson*, 961 P.2d at 1156; *Dreyfus*, 520 P.2d 104. The District Court erred in finding that disclosure of all the

FRISK records would cause "substantial injury to the public interest" based on speculative and unsubstantiated witness testimony. *See* April 24, 2023 Order at 9.

The District Court gave considerable weight to Ms. Troy's conjectural testimony regarding what she ***believed*** would happen should the disciplinary records be released 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.

April 24, 2023 Order at 9–10 (emphasis added). In so finding, the District Court disregarded contrary testimony confirming other causes of DPS attrition and revealing the speculative nature of Ms. Troy's contentions.

For example, Ms. Troy admitted that DPS already had difficulty recruiting and retaining principals and that it was a broader problem, unconnected to the possible release of disciplinary records. TR 01/23/2023, p. 37:4–7 ("A: I think the recruitment and the retention aspect of, like pre-COVID it was always a little bit challenging to recruit and retain folks into a role. It's really – school leaders is a really tough job."); TR 01/23/2023, p. 46:2–11 ("Q: … isn't it true that there are many other reasons why it's hard to recruit and retain principals and administrators for DPS Schools? A: I named some of them, yes. The job requirements. Q: So it's

fair to say that there's additional reasons … why it would be difficult to recruit and retain? A: Correct."). And, Ms. Troy acknowledged that she was not aware of how each of her colleagues would feel if they knew that their disciplinary records were disclosed. TR 01/23/2023, p. 46:15–23 ("Q: And is there any specific data that you have related to the number of principals who have objected to the release of their records -- their disciplinary records? A: I don't think they know that it's even a possibility.").

Based on Ms. Troy's thin testimony, the District Court nevertheless found that there would be 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. April 24, 2023 Order at 10. In so doing, the court disregarded Ms. Troy's testimony that she was aware that other public records, such as emails, related to teacher misconduct were subject to CORA, and that she had personally complied with CORA requests to disclose emails citing the misconduct actions of DPS employees. TR 01/23/2023, p. 50:11–14 ("Q: And that [emails related to misconduct by a teacher] was disclosed by DPS as a response -- in response to a CORA request? A: …what I forwarded on was, yes."); *Id*. at 50:15–19 (Q: "So, you sent along to…a custodian an email related to potential misconduct actions [against a teacher]. A: Yes. Q: And that was in response to a CORA request? A: Yes."). Thus, public records identifying DPS employee misconduct are routinely

released to the public and no record evidence suggests that those disclosures resulted in recruitment deficits or attrition.

Moreover, Defendants-Appellees put forward no evidence showing that any harm, let alone substantial harm to the public interest, would flow from release of the FRISK records. When asked on cross examination whether Dr. Coogan could point to ***any*** example of harm—reputational or otherwise—that flowed from disclosure of DPS employees' disciplinary records or other public records pertaining to their employment, she could name none. TR 01/23/2023, p. 86:21–25 ("Q: Dr. Coogan, you talked about significant reputational harm that might come out of records being disclosed. Do you have any specific examples of an instance where -- where this kind of reputational harm materialized? A: Not personally.").

The District Court also based its decision on the speculative testimony of Dr. Coogan and Ms. Troy that all DPS employees had "an expectation of privacy" in the FRISK records, finding 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 substantial injury to the public if supervisors were deprived of the opportunity to improve educators' professional performance in a confidential setting." April 24, 2023 Order at 10, 12. But this conclusion improperly elides the question of whether harm would flow from the records' release; and ignores this Court's precedent that simply because information or long standing practices and/or

procedures are confidential does not shield otherwise public information from disclosure under CORA. A mere "good faith belief" that the records should not be disclosed is insufficient to warrant nondisclosure. § 24-72-204(6)(a), C.R.S.; *Int'l Bhd. of Elec. Workers Loc. 68 v. Denv. Metro. Major League Baseball Stadium Dist.*, 880 P.2d 160, 167 (Colo. App. 1994) ("under the Colorado Open Records Act, it remains insufficient as a matter of law ***merely to classify the information as confidential***" to show that information was protected by confidential financial information exemption) (emphasis added) (citing *Freedom Newspapers, Inc. v. Denv. & Rio Grande Western R.R. Co.*, 731 P.2d 740 (Colo. App. 1986); *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (that the information was the kind which generally would not be made available for public perusal is insufficient to support a finding that the confidential financial information exemption applies); *Wash. Post Co. v. N.Y. State Ins. Dep't*, 61. N.Y 2d 557 (1984) (government agency's longstanding promise of confidentiality to insurance companies was irrelevant to whether the requested documents were public records subject to disclosure). The District Court's reasoning, if taken to its logical conclusion, would allow government officials to shield any category of public record from release simply because officials themselves believe that release would undermine presumed confidentiality or would cause them reputational or other harm.

Furthermore, as Colorado Courts have concluded, releasing a public official's disciplinary records is in the public's interest, and withholding disclosure contradicts the legislature's intent in enacting CORA, and would subvert the statute's broad mandate of disclosure. *See, e.g.*, *Daniels*, 988 P.2d at 651–52 (holding, under CORA's "substantial injury to the public interest" exception that even though city maintained a confidential reporting system for investigation of such sexual harassment complaints, "the general public and members of the general public have a compelling interest to see that public entities, when conducting internal reviews of these kinds of matters, do so efficiently and clearly and effectively," and that the "strong public interest in access to such records … balances in favor of the public as against the necessity for confidentiality that may exist with reference to the individual public entity employers"); Order Regarding Application Pursuant to C.R.S. 24-72-204(6)(a) Of the Colorado Open Records Act, *Bd. of Cnty. Comm'rs of Larimer Cnty., v. BizWest Media, LLC,* No. 2022CV30489 (Larimer Cnty. Dist. Ct. Sept. 6, 2022) (ordering disclosure of performance narratives section of a county director and assistant director's disciplinary record upon finding such disclosure would not cause substantial injury to the public interest). The public has a strong interest in knowing that internal disciplinary actions are handled efficiently and effectively, and an even stronger public interest in knowing whether or not public school principals and administrative directors are effectively doing their jobs. For

these reasons, Colorado courts have confirmed that disciplinary records, like the FRISK records at issue in this case, are non-exempt public records under CORA. *Daniels*, 988 P.2d at 651; *Jefferson Cnty. Educ. Ass'n,* 378 P.3d at 837–38.

Accordingly, the District Court erred in finding that "substantial injury to the public interest" would result should the FRISK records be disclosed.

C. *The District Court erred by broadly applying the "substantial injury to the public interest" exemption to an entire category of documents.*

As noted throughout this brief, the "substantial injury to the public interest" exception must be narrowly construed because any "exceptions to the broad, general policy of [CORA] are to be narrowly construed," *City of Westminster*, 930 P.2d at 589, considering CORA's strong presumption in favor of disclosure. Here, the District Court failed to narrowly apply the exception by (i) determining that disclosure of the FRISK records constituted an "exceptional circumstance" on the basis that it would disrupt a "long-standing" practice of secrecy, *see, supra,* Argument I.A; (ii) concluding that speculative claims that releasing the records would cause employee attrition, impact recruitment, and impose reputational harms out-weighed the substantial public interest in government transparency, *see, supra,* Argument I.B; and (iii) failing to require Defendants-Appellees to meet their burden as to each FRISK record individually. *See* April 24, 2023 Order at 9-10.

On the third point, the substantial injury or "catch-all exemption" cannot be used to justify withholding an ***entire category*** of records. *Bodelson,* 5 P.3d at 378–

79 (emphasizing that the Columbine holding "was not creating a categorical exemption"); *see also* CF, pp. 61–63 (Order re: Propriety of Withholding Autopsy Reports Under C.O.R.A. Request, *Bux v. Colo. Springs Gazette*, *et al.*, Case No. 2018CV197 (El Paso Cnty. Dist. Ct. June 14, 2019) (barring application of the "substantial injury to the public interest" exception to all autopsy records). Indeed, in *Bodelson*, this Court exempted a few specific records—autopsy reports of the victims of the Columbine shooting—under the "catch-all" exception, not all autopsy records categorically.

In contrast, the District Court below applied the substantial injury to the public interest exception to restrict public access to a universe of records—***all*** non-sexual harassment disciplinary records of ***all*** DPS principals and administrators. April 24, 2023 Order at 12. This ruling impermissibly opens the door for other large classes of records to be withheld from public inspection, defying CORA's "broad, general policy" of transparency. § 24-72-201, C.R.S.

D. *The requester does not have a burden to show obvious public interest in the disclosure of public records.*

In enacting CORA, the legislature expressly refused to burden requestors with a requirement to show a public interest in records to which they are entitled by stating at the outset: "It is declared to be the public policy of this state that all public records shall be open for inspection by any person at reasonable times, except as … otherwise specifically provided by law." §24-72-201, C.R.S.; *see also Dreyfus*, 520

P.2d at 106 (internal citations omitted) (upholding a judgment instructing an agency to disclose withheld autopsy records, which the agency had argued were subject to the substantial injury to the public interest exception of CORA) ("Public policy regarding public access to public records is succinctly set out in the declaration of policy in [CORA] … This statement of policy clearly eliminates any requirement that a person seeking access to public records show a special interest in those records in order to be permitted access thereto.").

The District Court below further erred by imposing a burden on requestors to show public interest in disclosure of public records. April 24, 2023 Order at 12. In particular, the court found Plaintiffs-Appellants failed to show "obvious public interest in disclosure of [the FRISK records]." *Id*. In effect, the District Court improperly demanded that record requestors, like Plaintiffs-Appellants, make detailed arguments about the merit of accessing specific public records when requestors have no way to ascertain those records' contents. This Catch-22 is precisely why the state's legislature expressly places the burden of showing that an exception to CORA applies on the agency that seeks to withhold records. On the contrary, the burden lies solely with Defendants-Appellees to show that disclosure of the FRISK records—because of truly unique and "extraordinary" circumstances—would cause "substantial injury" to the public interest. *See Bodelson*, 5 P.3d at 377.

* * *

In sum, the District Court erred as a matter of law in concluding Defendants-Appellees met their burden of demonstrating that the records in question may be withheld pursuant to CORA's "substantial injury to the public interest" exception. Accordingly, this Court should reverse and remand this case with directions for the District Court to oversee Defendants-Appellees' release of the FRISK records.

II. The District Court erred in admitting inapplicable legal arguments and testimony put forth by Defendants-Appellees.

Standard of law and preservation on appeal:

Plaintiffs-Appellants raised the issue of whether the District Court should admit the irrelevant legal arguments and testimony of Dr. Moira Coogan in their Motion to Strike and Motion in Limine. CF, pp. 378–383; 398–403. The District Court's determination as to the admissibility of the arguments and weight given to the testimony submitted by Defendant-Appellee DSLA is reversible upon a finding of clear error. *In re Marriage of de Koning*, 2016 CO 2, ¶ 17.

Discussion:

The District Court further erred by admitting inapplicable legal arguments and a lay witness's improper testimony on those legal arguments. At the outset, the District Court acknowledged that DSLA's sur-reply and proffered testimony of Dr. Coogan presented belated "bootstrapping" arguments by raising extraneous statutes and corresponding legal arguments which DSLA sought to make relevant through

witness testimony.[8] Indeed, Defendant-Appellee DSLA acknowledged in its January 13, 2023 letter brief that it was the new "legal authorities which made [Dr. Coogan's] testimony relevant." CF, pp 392–94. The District Court's ultimate decisions to deny Plaintiffs-Appellants' motion to strike DSLA's sur-reply and deny Plaintiffs-Appellants' motion to strike Dr. Coogan's testimony were in error for the following reasons.

First, it was error for the District Court to deny Plaintiffs-Appellants' Motion to Strike Defendant DSLA's Improper Surreply. CF, pp. 378–83, 410. Sur-replies are not recognized under the Colorado Rules of Civil Procedure. *See* C.R.C.P. 121 § 1-15. Although the District Court permitted Plaintiffs-Appellants an opportunity to respond to Defendant DSLA's letter brief during the January 23 hearing, the court did not grant leave for DSLA to file its supplemental legal arguments, which is typically required for additional or supplemental responses to be filed. *See Pirnie v. Key Energy Servs., LLC*, No. 08-cv-01256-CMA-KMT, 2009 WL 1386997, at *1

[8] TR 01/23/2023, p. 11:11–17 ("A bootstrapping argument."); 12:4–8 ("that sounds more like an argument, though, as to whether or not my November order was – my November 22nd order was correct. I don't know how that gets to the public interest argument."); 12:25 ("You all asked to vacate the oral arguments and then you all said if you rule against us on the legal issues, then we want to be able to assert the –the public interest objection."); 13:18–19 ("Because neither DPS nor DSLA raised 22-9-109 in their—prior briefing, correct?"); 15:12 ("I'm as frustrated as you are that the first I'm hearing about 22-9-109 is this morning. Like, it seems like if this is why these documents should not be disclosed, someone should have mentioned it, you know, before last week.").

(D. Colo. May 15, 2009) ("Plaintiffs never asked for leave of court to file their surreply brief; nor did they argue that a surreply brief was necessary under the circumstances of the case … the Court finds that Plaintiffs' surreply brief is improper and should be stricken."). Indeed, the Court's Civil Practice Standard 7.1A(d)(4) prohibits "surreply or supplemental briefs…without permission of the Court." Without leave or asking the Court permission to file an additional response, DSLA's letter brief was improper and should have been stricken. *Id.*; *See Pirnie,* 2009 WL 1386997, at *1 (Arguello, J.) (citing *Green v. New Mexico*, 420 F.3d 1189, 1196 (10th Cir. 2005))(where the Court struck the Plaintiff's surreply as improper for failing to request leave.).

Further the legal arguments in the Letter Brief were irrelevant to the purpose of the January 23, 2023 hearing, which was to adjudicate the applicability of §24-72-204(6)(a), C.R.S. of the CORA to the final disciplinary records of administrators, principals, and assistant principals in Denver Public Schools. DSLA's unbriefed and unrelated legal arguments related to Due Process Clause of the U.S. Constitution, and the meaning and application of The Teacher Employment, Compensation, and Dismissal Act ("TECDA") and Colorado Licensed Personnel Performance Evaluation Act ("CLPPEA"), *see* CF, pp. 392–94, were beyond the scope of hearing, irrelevant to resolving the instant litigation, and the District Court should have

stricken the brief on those grounds as well. Colo. R. Evid. 402 (irrelevant evidence is inadmissible).

Second, pursuant to Rule 602, a witness may only testify to those things about which she has personal knowledge. DSLA proffered Dr. Coogan's testimony to show that "the Legislature has indicated a clear interest in protecting against the public dissemination of performance evaluation information and related records." CF, p. 393. Dr. Coogan, who was proffered as a factual witness with no personal experience as a state legislator or expert in statutory interpretation, wholly lacked personal knowledge regarding the Legislature's intent in enacting CORA, or any other statute. TR, 01/23/2023, p. 67:9–17 ("Yes, Your Honor, I do object to that statement. A lay witness cannot testify as to legal conclusions…"). Nevertheless, the District Court permitted Dr. Coogan, over Plaintiffs-Appellants' objection, to testify to a legal opinion of whether or not a disciplinary document is publicly disclosable:

> Q: … What is your expectation when doing an evaluation as to whether that evaluation report is publicly disclosable?
>
> A: It's actually – it's expected --
>
> MR. TAKEMOTO: Objection, Your Honor. No foundation.
>
> …
>
> THE COURT: The foundation objection is overruled. …

> A: My expectation would -- that it would be confidential because in the statute that governs all of our evaluations, it's laid out that it is -- the evaluation report and the evaluation ratings are confidential for everybody covered under that statute, which would include principals and assistant principals.
>
> Q: What about the material you use to compile the evaluation, is that confidential?
>
> A: Yes, under that statute, it's expected to be confidential.
>
> MR. TAKEMOTO: Objection, Your Honor. Calls for legal interpretation, legal opinion.
>
> THE COURT: I'm not taking it as a legal conclusion. I'm taking it only as to her expectation through her work, not as a legal matter.

TR 01/23/2023, pp. 65:17–25; 66:4–21. Even though the District Court did not evaluate Dr. Coogan's answer as a legal conclusion, the testimony should have been initially excluded as irrelevant and the District Court should have sustained Plaintiffs-Appellants objections that her testimony called for improper legal conclusion.

In sum, it was reversible error to give any decisive weight to Defendant-Appellees' improper legal arguments and the inadmissible testimony of Dr. Coogan.

III. The District Court erred by failing to address and consider Plaintiffs-Appellants' entitled to reasonable fees and costs.

Standard of law and preservation on appeal:

Plaintiffs-Appellants raised their entitlement to attorney's fees and costs in their Objection to Defendant's Motion to Restrict Access to Records Pursuant to §24-72-204(6)(a), C.R.S. filed December 9, 2022, CF, p. 363; the Complaint, CF, p. 5, 9, 11; and its October 17, 2022 Opening Brief, CF, p. 159; and their Proposed Findings of Facts and Conclusions of Law, CF, p. 453. The District Court's failure to award attorney's fees and costs is reviewable by this Court under a de novo review standard. *Colo. Republican Party v. Benefield*, 337 P.3d 1199, 1206 (Colo. App. 2011), *aff'd*, 2014 CO 57, 329 P.3d 262.

Discussion:

For the reasons set forth hereinabove, Plaintiffs-Appellants are entitled to recover their reasonable attorney's fees and costs in bringing this action because Defendants-Appellees have improperly withheld disclosure of the FRISK records, which are not exempt under CORA. *See* § 24-72-204(5)(b), C.R.S. Because the District Court erred in failing to find that Defendants-Appellees are in violation of CORA for failing to disclose the FRISK records at issue, this Court may exercise its de novo review authority to hold that Plaintiffs-Appellants are entitled to recover their reasonable fees and costs in bringing the instant action. *Nibert*, 488 P.3d at 149-50; *Stresscon Corp.*, 373 P.3d at 639. Moreover, Plaintiffs-Appellants

prevailed in its application because the District Court found that Defendant-Appellee DPS improperly withheld the FRISK records, CF, p. 324–26; and ordered disclosure of all non-sexual harassment FRISK records. CF, p. 331-32. Thus, Plaintiffs-Appellants are a prevailing party under CORA's fee provision and are entitled to mandatory attorney's fees. *See* § 24-72-204(5)(b), C.R.S. This is so regardless of the District Court's later finding that the FRISK records could be withheld on the ground that their release would cause "substantial injury to the public interest" because the Defendant-Appellee DPS's initial denial and withholding was improper. *Id*. ("[u]nless the court finds that the denial of the right of inspection was proper, it shall ... award court costs and reasonable attorney fees to the prevailing applicant in an amount to be determined by the court."); *see also Benefield*, 337 P.3d at 1206 ("Because the relevant part of subsection (5) refers only to whether the *applicant* prevailed, and makes no reference to whether the records custodian prevailed as to any part of the case, where the denial of right of inspection was not proper, a court must award costs and fees based solely on whether the *applicant* prevailed.")(emphasis in the original). Here, the District Court's November 22, 2022 Order clearly states that Plaintiffs-Appellants prevailed on the issue of whether the FRISK records were "personnel files" in holding that DPS's denial of inspection was improper. CF, p. 332 ("the Court has determined that some of the FRISK records requested are subject to disclosure.") 324–26.

Also, should Plaintiffs-Appellants prevail on this appeal, they would be entitled to recover attorney's fees and costs incurred in bringing this appeal under C.A.R. 39.1 and § 24-72-204(5)(b), C.R.S. In sum, Plaintiffs-Appellants are entitled to recover reasonable costs and attorney's fees in this matter.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court reverse and remand the decision of the District Court, hold that Plaintiffs-Appellants are entitled to recover their reasonable fees and costs in this action and respectfully request that this Court determine the fee award, and grant any further relief that this Court deems appropriate.

Respectfully submitted this 28th day of September 2023.

By */s/Rachael Johnson*

Rachael Johnson, #43597
Reporters Committee for Freedom
of the Press
Attorney for Plaintiffs-Appellants
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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September 2023, a true and correct copy of the foregoing **PLAINTIFFS-APPELLANTS' OPENING BRIEF** was served on the following counsel through the Colorado Courts E-File & Serve electronic court filing system:

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APPENDIX A

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