DATE FILED: November 2, 2023 11:56 PM
FILING ID: 6ED78B53E80CB
CASE NUMBER: 2023CA995

COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203 720-624-5150	
District Court, City & County of Denver, Colorado Case No. 2023CV32315 The Honorable J. Marie Avery Moses	
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-Appellee:** DENVER SCHOOL LEADERS ASSOCIATION	**Δ COURT USE ONLY Δ**
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DEFENDANT-APPELLEE'S ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 28(g).

It contains 9,414 words.

The brief complies with C.A.R. 28(a)–(b).

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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

s/ Jonathan P. Fero
Jonathan P. Fero, Reg. No. 35754

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STATEMENT OF THE CASE

This is an open records case involving the scope of personnel files for educators and the application of the substantial injury exemption to disclosure of public records. Local press sought all final disciplinary records—including but not limited to letters of wrong-doing, memos to file, letters of suspension, and letters of termination—for every Denver Public Schools ("DPS" or the "District") district- and school-level administrator over three years. The district court ordered that such records, excluding sexual harassment discipline, were not exempt from disclosure as personnel files, but it allowed DPS to assert that disclosure would cause substantial harm to the public interest. DPS did so, and after an evidentiary hearing, the district court found the District had met its burden and authorized it to withhold the requested disciplinary records. As discussed below, the district court reached the right result, and its order exempting disclosure should be affirmed.

STATEMENT OF THE FACTS

In January 2022, Plaintiffs-Appellants David Migoya and the Denver Gazette (collectively, the "Gazette") submitted a request to DPS under the Colorado Open Records Act, §§ 24-72-200.1 *et seq.*, C.R.S. ("CORA") for:

> [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 above those positions, for the 2021 Calendar Year.

CF, pp. 6, 94.[1] The request was subsequently expanded to cover three full years. *See id.* at 7. DPS denied the request, citing the personnel files exemption, as well as the "public policy favoring privacy, efficient operation of schools." CF, pp. 28, 94.

[1] This Brief cites to the court file as "CF," the exhibits as "Ex", and the sole hearing transcript as "Tr". The supplemental record is cited as "Supp. CF".

The Gazette appealed, and DPS affirmed its denial. *Id.* at 25–28, 30–31, 94. More specifically, DPS explained that its Office of General Counsel, its Human Resources department, and the union representing its school administrators, Intervenor-Appellee the Denver School Leaders Association ("DSLA"), had "reviewed the substantial injury to the public interest that would result if all disciplinary records within principal personnel files were open to the public," and "[a]ll agree that the potential injury is undeniable and serious." *Id.* at 30. DPS reiterated that the requested documents were personnel files, and it referenced CORA's separate protection of "records relating to sexual harassment, gender discrimination, and retaliation." *Id.* at 30–31.

Following mandatory conferral, and almost eight months after its CORA request was denied, the Gazette filed this civil action. DSLA intervened, *id.* at 103–08, 270–75, and the parties submitted briefs addressing whether the requested disciplinary records were open to public inspection, *id.* at 146, 202, 256, 276. DPS argued the records were confidential "personnel files" as defined in CORA. *Id.* at 205–11. DPS

alternatively asserted that disclosure of such records would do substantial injury to the public interest, and it requested an opportunity to present evidence if necessary. *Id.* at 212–15.

On November 22, 2022, the district court ordered that final disciplinary records were not exempt from disclosure as personnel files, but it held that any responsive records addressing discipline imposed based on sexual harassment are not open to public inspection. *Id.* at 324–31. The district court afforded DPS eleven (11) days, to December 2, 2022, to assert that disclosure of the non-sexual harassment disciplinary records would cause substantial harm to the public interest. *Id.* at 332. DPS did so, arguing it and its administrators have had a reasonable expectation that disciplinary memos would not be subject to automatic disclosure upon demand, and disclosing disciplinary memos would prejudice the District's ability to function as an effective employer. *Id.* at 333, 335–38. DPS also argued that the public's interest in the public school system would not be served by disclosing administrator disciplinary records. *Id.* at 338–39. DSLA joined the request. *Id.* at 343.

The Gazette objected, *id.* at 346, and an evidentiary hearing was set for January 23, 2023, *id.* at 366.

Meanwhile, over a week before the hearing, DSLA sent a letter to the Gazette's counsel, summarizing the anticipated testimony of its witness Dr. Moria Coogan, the union's President and a DPS school principal. *Id.* at 392–94. Among other things, DSLA notified the parties that Dr. Coogan would testify that she believed she could not lawfully disclose records pertaining to educator evaluations or performance ratings, pursuant to the exemption in the Colorado Licensed Personnel Performance Evaluation Act, §§ 22-9-101 *et seq.*, C.R.S. ("CLPPEA").[2] CF, p. 392. Also, according to Dr. Coogan, such disclosure could cause reputational harm without any due process. *Id.* at 393. DSLA

[2] § 22-9-109(1), C.R.S., provides in relevant part: "[n]otwithstanding the provisions of [CORA] 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 . . . ."

subsequently filed its summary of testimony with the district court. *Id.* at 395–97.

The Gazette then moved to strike the summary, which it argued was an improper sur-reply on the already decided issue of whether the disciplinary records were open to public inspection. *Id.* at 378–83. DSLA separately moved to preclude Dr. Coogan's testimony as inadmissible. *Id.* at 398–403.

The district court took up the motions at the start of the January 23, 2023 hearing. Tr, pp. 6:7–7:10. The district court denied the motion to strike because it wanted "to get this case right" and "to know from all of [the parties] what legal authority you think exist both for or—in support of your position or, obviously, you have the duty of candor to tell me about authority that undermines your position as well." *Id.* at 6:18–25. As for the motion in limine, the district court deferred ruling on specific evidentiary issues and directed the Gazette to lodge objections when questions were asked. *Id.* at 7:1–10.

The parties made opening statements, and the Gazette again challenged consideration of CLPPEA. *Id.* at 14:9–15:11. The district court then stated:

> I do think it is relevant to—potentially relevant to today's proceedings are that if that statute creates an expectation—whether it's true or not—but if that statute does create an expectation of privacy, and there has been a pattern of conduct within DPS related to its administrators, that they think the documents that they are generating and preparing and submitting to are protected by 22-9-109, then is it injurious to the public interest for me to suddenly throw that confidentiality out the window?

Id. at 15:17–16:4. The Gazette responded that allowing testimony on CLPPEA was prejudicial because the statute had not been raised before. *Id.* at 16:20–17:4. The district court stated it "can't ignore a statute" or "a pattern of practice," even if it prejudiced a party. *Id.* at 17:9–16. Nonetheless, the district court offered that it could remedy any prejudice by granting a continuance or allowing additional briefing; the Gazette agreed to move forward with the hearing, preserving its objections, and

simply requested an opportunity to submit additional briefing later, which the district court allowed. *Id.* at 17:17–18:15.

DPS called Jen Troy, its Associate Chief of Secondary Schools, *id.* at 18:19–20, and DSLA called Dr. Coogan, *id.* at 59:11–12. Ms. Troy testified that she is an experienced educator, school leader, and district-level administrator. *Id.* at 20:25–21:8, 44:15–17. Her office is responsible for supervising school leaders, and that work includes development, coaching, evaluation, and corrective action. *Id.* at 20:20–22, 21:13–22:4. Dr. Coogan testified that she is an experienced school leader and union leader who has experience with evaluations and corrective action from the perspectives of both a supervised employee and an employee who supervises others. *Id.* at 60:2–20, 61:6–62:3, 62:17–20, 68:8–10. Dr. Coogan also was on the team that negotiated the collective bargaining agreement ("CBA") between DPS and DSLA, which represents over 300 school leaders, and she has served as union representative during the corrective action process. *Id.* at 70:1–16, 80:22–81:3.

Corrective action is used in DPS to promote professional growth towards achieving the Board of Education's goals. *Id.* at 21:23–22:4, 37:18–19; Ex, p. 38. Corrective action is not intended to be punitive and can take the form of a letter of expectations, a letter of warning, or a letter of reprimand. Tr, pp. 25:19–26:15, 28:20–22; Ex, pp. 41–42. 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. Tr, p. 26:16–24; Ex, pp. 41–42. 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. Tr, pp. 27:20–24, 28:23–29:2, 108:20–25.

Corrective action letters are placed in personnel files to document the supervisor's concerns and promote accountability by the employee moving forward. *Id.* at 29:3–25, 30:23–31:3. Doing so also honors the employee's and the District's expectations and needs for confidentiality. *See id.* at 29:3–25, 30:23–31:3, 46:15–24, 88:1–5. Historically, DPS has maintained the confidentially of corrective action letters, and school

leaders expect as much. *Id.* at 27:25–28:5, 37:25–38:15, 44:18–20, 49:15–19. DPS has written descriptions and template examples of corrective action letters, which demonstrate that they contain sensitive information about employees. Ex, pp. 41–42, 45–46. Nonetheless, a corrective action letter is not going to contain all the information or context that may be relevant to a given situation. *See* Tr, 111:9–14. Supervisors may consider prior corrective action when evaluating employees. *Id.* at 64:22–65:16, 115:5–9. As a result, a letter of expectations, a letter of warning, and a letter of reprimand can be part of the body of evidence used in preparing written performance evaluation reports. *Id.* School leaders understand and expect that their performance evaluations and all documents used in preparing the evaluations are not going to be open to public inspection. *See id.* at 29:3–25, 30:23–31:3, 46:15–24, 65:17–66:21, 88:1–5.

DPS's corrective action guidelines afford an affected employee notice of the allegations against them and an opportunity to be heard. *Id.* at 107:12–18, 110:16–22; Ex., pp. 11, 41. Employees also have an opportunity to submit a written response to a letter of corrective action,

and any such response accompanies the letter into the personnel file. Tr, pp. 26:25–27:1, 30:4–16, 70:20–25, 107:19–108:15, 110:23–111:8; Ex, pp. 17, 39, 41–42. Not all employees exercise that right. Tr, pp. 111:23–112:2. An employee may file a grievance alleging a violation, misinterpretation, or inequitable application of the CBA in the corrective action process. *Id.* at 91:11–92:15; Ex, p. 12. DSLA interprets the CBA to not authorize a grievance challenging the propriety of a corrective action. Tr, pp. 91:11–92:15.

Ms. Troy and Dr. Coogan explained several concerns that DPS and DSLA had about disclosing corrective action letters for all administrators over a three-year time period, as the Gazette requested. *Id.* at 33:15–34:10. First, there was concern that disclosure would devalue the corrective action process and harm its integrity in the future. *Id.* at 35:17–37:1. The process, as governed by the CBA and the corrective action guidelines, was developed based on the District's and DSLA's expectation that the facts regarding corrective action will remain confidential. *Id.* at 87:18–88:6. In the face of possible public scrutiny,

supervisors would face an incentive to overcorrect, which would not promote professional growth and could prematurely end an administrator's career; or, to simply not issue letters, which would prevent the District from holding employees accountable. *Id.* at 35:17–37:1, 51:19–25, 81:4–82:6.

Second, there was concern that disclosure will break the trust that is essential to the effective operation of school communities, and cause reputational harm. *Id.* at 34:17–35:13. When parents and staff learn about a principal's corrective action, their assumptions about that individual's ability to lead are going to change, and probably not for the better. *See* Tr, pp. 34:17–35:13; 97:22–98:4. Without all the relevant information or the full context of what happened and why a disciplinary decision was made, parents and staff are likely to reach the wrong conclusion about a principal, who nonetheless will see their authority and reputation weakened. *Id.* at 57:9–58:17, 71:18–75:7, 76:18–77:15, 94:16–95:4.

Third, there was concern that disclosure would make recruiting and retaining school leaders even more difficult. *Id.* at 37:4–37:24, 46:23–47:1, 56:23–57:4. DPS is a large school system and always has vacancies. *See id.* at 37:5–6, 46:2–6. Being a school leader is challenging work, and it is expected that administrators must grow into their positions. *See id.* at 37:4–37:24. Corrective action imposes anxiety even without worry of public disclosure. *E.g. id.* at 32:4–14. Opening every mistake to public scrutiny may be more than many incumbent and aspiring administrators are willing to bear. *See id.* at 37:4–37:24.

The Gazette called no witnesses. *Id.* at 38:20, 82:22–23. The district court then heard closing arguments, *id.* at 116:22–24, and set a briefing schedule for proposed findings and conclusions, *id.* at 135:20–21, which the parties filed. CF, pp. 422, 436, 455. Among other things, the Gazette argued DPS and DSLA's desire to protect disciplinary records was not extraordinary enough to satisfy the substantial injury exemption. *Id.* at 445–46. The Gazette also argued that CLPPEA should not be read narrowly to comport with CORA. *Id.* at 450–52.

On April 24, 2023, the district court issued a written order authorizing DPS to not disclose the disciplinary records. Supp. CF, pp. 1–12. From Ms. Troy and Dr. Coogan's testimony, the district court found "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." *Id.* at 6. As a result, "DPS principals, assistant principals and administrators have a legitimate expectation of privacy in keeping their discipline records confidential . . . ." *Id.* at 12. Such a "long-standing institutional understanding of the confidential nature of the DPS corrective action process," concluded the district court, "constitutes an extraordinary circumstance not contemplated by the General Assembly." *Id.* at 9.

Further crediting Ms. Troy and Dr. Coogan's testimony, the district court found "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." *Id.* at 7. The district court additionally found "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." *Id.* at 8. Finding "substantial value to the current discipline process that allows corrective action to take place in a confidential setting," the district court explained that "there would be a substantial injury to the public if supervisors were deprived of the opportunity to improve educators' professional performance" away from public scrutiny. *Id.* at 10.

Although the Gazette, "through cross-examination, sought to establish that there is a general public interest in the public disclosure of school discipline memorandums . . . , there was no testimony or evidence presented regarding a compelling public interest in obtaining the broad swathe of discipline records [it] requested . . . ." *Id.* at 8. The district court determined that "[w]hile 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 . . . ." *Id.* at 11.

Accordingly, the district court found DPS and DSLA had "established that disclosure of the FRISK records as requested by Plaintiffs would substantially injure the public." *Id.* at 12. The Gazette now seeks appellate review.

SUMMARY OF THE ARGUMENT

The district court correctly authorized DPS not to disclose three years of disciplinary memos for all its administrators because DPS and DSLA proved that disclosure of the records would cause substantial harm to the public interest. Alternatively, the district court's order should be affirmed because disciplinary memos are personnel files exempt from public inspection.

The district court correctly denied the Gazette's evidentiary motions. Declining to strike DSLA's summary of testimony was within the district court's discretion, and the Gazette was not prejudiced. Dr.

Coogan's testimony about her understanding of CLPPEA was highly relevant and did not amount to expert opinion.

The Gazette is not entitled to attorney's fees because the denial of inspection was proper, and it did not obtain any of the records it requested.

ARGUMENT

I. The district court correctly authorized DPS not to disclose three years of disciplinary memos for all its administrators.

A. Standard of Review and Preservation.

DPS disagrees with the Gazette's suggestion that the district court's application of CORA's substantial injury exemption following an evidentiary hearing is reviewed de novo. "Whether there has been substantial injury to the public interest is a question of fact." *Blesch v. Denver Pub. Co.*, 62 P.3d 1060, 1063 (Colo. App. 2002). Accordingly, DPS agrees with DSLA that the district court's credibility determinations are entitled to deference, and findings of fact may be disturbed only if they are clearly erroneous and not supported by the record. *See, e.g.*, *Lawry v. Palm*, 192 P.3d 550, 558 (Colo. App. 2008); *see also Blesch*, 62 P.3d at

1063 ("A trial court's ruling is an abuse of discretion if it is manifestly arbitrary, unreasonable, or unfair."). The district court's application of governing legal standards is subject to de novo review. *E.g.*, *id.*

DPS agrees appellate review of the district court's determination of substantial injury has been preserved. Of course, "a respondent or appellee . . . may, without filing a cross-appeal, defend the judgment of the trial court on any ground supported by the record, so long as that party's rights would not be increased under the judgment." *White v. Caterpillar, Inc.*, 867 P.2d 100, 109 (Colo. App. 1993) (citing authority).

B. Law and Analysis.

CORA recognizes the public interest may weigh against disclosure, even if no specific exemption applies. § 24-72-204(6)(a)–(b). A custodian is specifically authorized to assert that disclosure of a public record "would do substantial injury to the public interest," whether on their own motion or in a defensive posture. *Id.*; *Gumina v. City of Sterling*, 119 P.3d 527, 532 (Colo. App. 2004) ("If the court orders that the records should be open to public inspection, the official custodian of public records may then

apply to the district court to restrict disclosure if such disclosure would do substantial injury to the public interest.").

1. A substantial injury to the public interest may exist even if records are otherwise subject to public inspection.

The Gazette argues disclosure of administrator disciplinary memos cannot be extraordinary because a substantial injury to the public interest must be limited to records that the legislature could not have anticipated when it enacted CORA. Apparently according to the Gazette, if documents are public records, falling outside the scope of any other statutory exemptions, then the General Assembly necessarily has rejected their confidentiality. There are several problems with applying a foreseeability threshold, both generally and as applied to facts of this case.

To start, it ignores the plain language of the substantial injury exemption. A custodian may apply for an order restricting disclosure, "*notwithstanding* the facts that [the] record might otherwise be available to public inspection . . . ." § 24-72-204(6)(a) (emphasis added). In other

words, the whole point of the exemption is to potentially protect against disclosure of a public record that may not be covered by any other exemption. *See, e.g.*, *Yellow Jacket Water Conservancy Dist. v. Livingston*, 318 P.3d 454, 456 (Colo. 2013) (explaining statutory words and phrases should be construed "according to the rules of grammar and common usage"). To say that disclosure of disciplinary memos is not extraordinary because they are not personnel files would render the substantial injury exemption meaningless. *See, e.g.*, *Well Augmentation Subdist. of Cent. Colo. Water Conservancy Dist. v. City of Aurora*, 221 P.3d 399, 420 (Colo. 2009) (explaining courts must "give meaning to all portions of the statute, and avoid a construction rendering any language meaningless"); *see also* § 2-4-201(1)(b), C.R.S. ("The entire statute is presumed to be effective.").

The word "extraordinary" is not even used in § 24-72-204(6)(a). The language appears to derive from the Supreme Court's decision in *Civil Service Commission v. Pinder*, 812 P.2d 645 (Colo. 1991), which a division of this Court cited in *Zubeck v. El Paso Cnty. Ret. Plan*, 961 P.2d 597,

601 (Colo. App. 1998) ("[T]his catch-all exemption is to be used only in those extraordinary situations which the General Assembly could not have identified in advance."). *Pinder*, however, did not set out any such rule; it did not even use the word "extraordinary." There, the Supreme Court interpreted § 24-72-204(6)(a) and affirmed a district court finding that disclosure of a police promotional examination and results to a single test-taker would cause substantial injury to the public interest. *Pinder*, 812 P.2d at 648–50.

In doing so, the Supreme Court rejected the reasoning of a division of this Court that the legislature had expressly authorized the release of test results to the test-taker in a specific CORA exemption. *Id.* at 648. "[S]ince premature disclosure of such information would defeat the purpose of the examination," the Supreme Court concluded that "[t]he legislature clearly intended to prevent premature disclosure of examination questions, but did not foresee these circumstances where one examination would be reused . . . ." *Id.* at 649. The Supreme Court then quoted from a legislative publication that advised:

> To the extent that these situations ***can*** be identified in advance, it may be advisable for the legislature to decide what is contrary or injurious to the public interest . . . . If there is need for additional determinations—***if the legislature is unable to identify every possible situation where disclosure would be contrary to the public interest***—the courts with their experience along these lines might be the logical place for decision.

Id. at 649 (quoting Colo. Legislative Council, Research Pub. No. 126, *Open Public Records for Colo.* 5 (1967) (emphasis added)).

Clearly, the General Assembly accepted Legislative Council's recommendation and determined that as a practical matter, it ***could not foresee*** every possible public records situation that might arise. That is why it authorized custodians to assert substantial injury—so the judiciary could decide such cases in the first instance when needed. The Supreme Court answered that call in *Pinder* without expressing any hesitation, and while it noted the legislature must not have foreseen the reuse of promotional examinations, the Court did not state a new threshold for custodians or otherwise engage in any analysis about

whether disclosure of the records in question could have (or should have) been foreseen.

For good reason. In addition to going beyond the statute, such a standard would prove unworkable and short-sighted. CORA was enacted decades ago, and the policy choices it codified were neither prescient nor set in stone. It is not uncommon for the legislature to respond to the unique needs of government and schools after they arise. Amendments following the personnel files exemption decisions in *Daniels v. City of Commerce City*, 988 P.2d 648 (Colo. App. 1999), and *Jefferson County Education Association v. Jefferson County School District R–1 ("JCEA")*, 378 P.3d 835 (Colo. App. 2016), illustrate that the General Assembly did not initially foresee harm from disclosure of sexual harassment records and sick leave records. *See* H.B. 99-1191, Ch. 73, Sec. 2, 1999 Colo. Sess. Laws 207, 207–08 (amending § 24-72-204(2)(a)(X)(A)); S.B. 22-171, Ch. 240, sec. 2, 2022 Colo. Sess. Laws 1781, 1781–82 (amending § 24-72-202(4.5)). The substantial injury exemption can protect the public interest in the meantime, before the legislature may be able to act.

The Gazette's outcome-determinative logic is also squarely defeated by the case it cites most—*Bodelson v. Denver Publishing Company*, 5 P.3d 373, 377–80 (Colo. App. 2000). The press made essentially the same argument there, contending the legislature already had determined autopsy results shall be released to the public in all cases in which a coroner investigates the cause of death. Indeed, the press argued "it must be presumed that the General Assembly concluded that the 'cost' of public access to the information—including being exposed to gruesome medical and forensic information that is necessarily included in all autopsy reports—was outweighed by the greater public interest in open government." *Id.* at 377. A division of this Court correctly rejected the argument as inconsistent with the plain language of the substantial injury exemption. *Id.*

Contrary to the Gazette's characterization, substantial injury to the public interest is not a rarity like Halley's Comet. To be sure, it is an exception and not the rule, but there is no basis for the superficial gates the Gazette tries to bar. There are several reported Colorado cases

finding a substantial injury beyond *Bodelson's* restriction of autopsy records for Columbine mass shooting victims, 5 P.3d 373, 377 (Colo. App. 2000). *Pinder* is far less extraordinary by the Gazette's measure. As is *Todd v. Hause*, 371 P.3d 705, 710 (Colo. App. 2015), in which a division of this Court affirmed that disclosure of breathalyzer operator identification information not qualifying as personnel files would still cause substantial injury to public interest by undermining the state's breath alcohol testing program.

The concerns here of a large public school district and its more than 300 administrators are at least equally significant. And, as the district court found, to the extent the situation has to be deemed extraordinary, there is ample basis to do so. The "long-standing institutional understanding of the confidential nature of the DPS corrective action process" could not have been contemplated by the General Assembly and "warrant[ed] . . . balanc[ing] the privacy interests at stake and the public interest in disclosure of the corrective action documentation." Supp. CF, p. 9.

2. The legislature has made plain its intent that disciplinary records remain confidential when, as here, they are used to prepare an administrator's performance evaluation.

In any event, the Gazette has chosen on appeal to ignore the impact of the legislature's unequivocal effort to maintain the confidentiality of "all public records . . . used in preparing the evaluation report" for licensed school professionals. § 22-9-109(1). As DSLA explains in its Answer Brief, this provision in CLPPEA is unambiguous, and the undisputed evidence in the record establishes that the disciplinary memos sought here must be protected from public disclosure. All principals, assistant principals, and other administrators in DPS must have a state-issued professional license to perform their duties, they are evaluated under CLPPEA, and disciplinary records form part of the comprehensive body of evidence used in preparing their evaluations. Tr, pp. 62:1–9, 105:17–106:2.

That alone is sufficient grounds to affirm. It also demonstrates that even if some analysis of legislative intent was required in assessing the substantial injury exemption, there can be no reasonable dispute that the

General Assembly's goal is to maintain confidentiality of all records used in preparing evaluations of licensed education personnel. CLPPEA's subsequently enacted exemption reveals the legislature did not anticipate the need for confidentiality of such records when it first enacted CORA. Such gaps are exactly what the substantial injury exemption is for.

The Gazette cites *City of Boulder v. Avery*, No. 01CV1741, 2002 WL 31954865, *3 (Colo. 20th D. Mar. 18, 2002), to argue against protection of employee performance records. Yet, that case was not governed by a statute like CLPPEA protecting a report that addressed a city judge's performance. CORA's substantial injury exemption cannot be read in a way that frustrates legislative intent regarding a specific type of record, particularly when, as here, the legislature has spoken so clearly.

3. DPS and DSLA proved that disclosure of administrator disciplinary records would cause substantial harm to the public interest.

The Gazette next challenges the district's court's factual findings, arguing it relied on speculative and unsubstantiated testimony. The

district court's findings are amply supported by the record, and there was no clear error or abuse of discretion.

The testimony of Ms. Troy and Dr. Coogan established that DPS and its administrators have treated disciplinary memos as confidential personnel records and expected they would remain confidential and not be subject to public inspection upon demand. *E.g.* Tr, pp. 46:23–24, 88:1–5. The Gazette now challenges that testimony as "subjective beliefs," Op. Br., p. 8, but it did not counter the strong foundation for it below—years of experience working in DPS, being involved with corrective action, and evaluating administrators. In addition, the CBA between the District and DSLA incorporates corrective action guidelines that require disciplinary memos to be placed in employee personnel files. Ex, pp. 17, 39, 41–42. CLPPEA, as well, eliminates any doubt that the prevailing view in the District was reasonable, as it clearly protects all records used in preparing evaluations. § 22-9-109(1).

Disclosing such memos now would turn that expectation on its head and subject administrators to reputational harm, while also prejudicing

DPS's ability to function as an effective employer. *E.g.* Tr, 35:17–37:1, 94:18–95:4. The Gazette did not present any evidence to dispute these serious concerns, and regardless, it was not guesswork. While DPS's corrective action guidelines and the CBA afford an affected employee notice of the allegations against them and an opportunity to be heard, Ex, pp. 11, 41, there is no right to demand a hearing before corrective action is memorialized in writing, and DSLA interprets the CBA to not authorize a grievance challenging the propriety of a corrective action.

As other courts have recognized, "confidentiality likely produces candor and . . . employees more likely will admit mistakes or explain their actions if they do not risk public disclosure and potential embarrassment." *Basey v. Dep't of Pub. Safety*, 462 P.3d 529, 537 (Alaska 2020) (noting also that policy of maintaining employee disciplinary records' confidentiality was "critical component" of evaluation and correction process) (quotation omitted). "It would not be unreasonable to conclude that disclosure of this sensitive and careful investigation and analysis would make the same kind of investigation and analysis

difficult, if not impossible, in the future." *Wakefield Teachers Ass'n v. Sch. Comm. of Wakefield*, 731 N.E.2d 63, 70 (Mass. 2000) (quotation omitted). We are "in an era where even a hint of impropriety in the relations between teachers and young students may produce a public reaction wholly disproportionate to the actual or suspected nature of the impropriety . . . ." *Id.* at 71.

Ms. Troy and Dr. Coogan both recounted personal disciplinary experiences, and it required no great leap to see how knowledge of corrective action can be perceived negatively, especially out of context and without all the facts, with real individual and systemic consequences. Ultimately, the lack of any specific injury to date is because DPS has historically kept corrective action memos confidential. The Gazette cannot have it both ways, seeking documents for an entire class of employees over multiple school years while insisting harm from nonexistent disclosure must have already happened ***before*** it can ever be proven. we argued that the harm is speculative

The district court correctly avoided applying such an impossible standard. The burden of proof in all civil actions is by a preponderance of the evidence, § 13-25-127(1), C.R.S., and the statutory standard is ***future harm***, § 24-72-204(6)(a). The express purpose of the exemption is to prevent substantial injury. Prediction is inherent in the statute, and that is not speculation. *Pinder* and *Todd* involved similar unrebutted evidence about future harm, and substantial injury to the public interest was upheld in both cases. In *Todd*, a division of this Court stated:

> The Department presented admissible evidence that disclosure of the operator identification, login information, and personal identification numbers (PINs) ***could*** undermine the breath alcohol testing program by ***potentially*** giving a third party unauthorized access to the Intoxilyzer 9000 instruments. The Department and the State of Colorado have substantial legitimate interests in ***preventing such a breach*** of security of the DUI enforcement system.

371 P.3d at 710 (emphasis added). Similarly, in *Pinder*, the Supreme Court wrote:

> The Commission presented evidence in the form of affidavits attesting to its intent to reuse the examination; the lack of funds to develop a new

> examination; the need to develop a nondiscriminatory examination because of the federal court order; the competitive nature of the examination and the need for confidentiality; ***the unfairness that would result if the examination were released to a limited number of those taking the examination***; and the availability of materials from which Pinder and all applicants could study to improve test results.

812 P.2d at 649–50 (emphasis added). The evidence adduced here, through witnesses subject to cross-examination, was even stronger.

4. The district court correctly evaluated this case on its unique facts and did not create any new categorical exemption to CORA.

The Gazette further argues a full class of documents cannot be withheld from the public under the substantial injury exemption. Contrary to its suggestion, there is no such rule, and in any event, the district court did not create a categorical exemption.

The case the Gazette cites rejected the very argument it is trying to make. In *Bodelson*, a division of this Court affirmed the protection of autopsy records of all 12 Columbine mass shooting victims. 5 P.3d at 375, 378–79. That contrasted with a more limited application of the

substantial injury exemption in *Denver Publishing Co. v. Dreyfus*, 520 P.2d 104 (Colo. 1974), where the district court ordered 11 out of 14 prisoner autopsy reports must be disclosed. As the division in *Bodelson* explained, "each petition must be decided on a case-by-case analysis." 5 P.3d at 379.

Protecting the entire class of documents in that case did not "create[e] a categorical exemption for public records considered to be highly offensive or objectionable to the general public"; instead, the district court had "simply appl[ied] the exception set forth in § 24-72-204(6)(a) to the unique circumstances before it, as the General Assembly authorized it to do." *Id.* at 379; *accord Todd*, 371 P.3d at 708, 710 (affirming order allowing state to withhold disclosure of identification, login information, and PINs for all breathalyzer operators). The scope of protection sought in this case was similarly broad because the Gazette made a broad request—three years of disciplinary memos for all DPS administrators.

It does not matter that the reasons against disclosure apply equally to the full class of documents. Just because a compelling case of substantial injury to the public interest can be made as to an individual administrator's disciplinary records does not diminish the real, significant harm common to disclosure of all administrators' disciplinary memos. Again, *Pinder* is instructive. While the records request there came from a single state employee for their own results, the government's arguments against disclosure were generalized; they had nothing to do with the specific employee and applied equally to other employees' examination results. That did not stop the Supreme Court from affirming a finding that disclosure of a promotional examination and results would cause substantial injury to the public interest. 812 P.2d at 648–50.

5. The district court put the burden of proof on DPS and DSLA, and there was no error in noting the Gazette's failure to present any contrary evidence.

The Gazette next argues the district court impermissibly shifted the burden, requiring it to show a public interest in accessing disciplinary

memos. As with many of the Gazette's other positions on appeal, the argument has been raised and rejected before.

In *Bodelson*, a division of this Court considered the same assertion and wrote:

> We do not view the court's order as requiring the [applicant] to present evidence or as misallocating the burden of proof as to disclosure. The custodians and plaintiffs alleged that release of the autopsy reports would serve no useful purpose and also presented evidence and argument to that effect. While the [applicant] presented arguments against this position, a fair reading of the court's order is that it was rejecting those arguments and that it viewed the burden of proof to be the responsibility of the custodians and plaintiffs . . . . Here, weighing the benefits of releasing the autopsy reports against the harm that would result to the victims' families and the Columbine community was permissible as part of the inquiry necessary to determine whether disclosure of the reports would cause substantial injury to the public interest.

5 P.3d at 379–80. Moreover, some of the reported cases addressing the substantial injury exemption arose on affidavits alone and were resolved under the summary judgment standard, which incorporates burden-shifting. *See, e.g.*, *Todd*, 371 P.3d at 709–12.

The district court's analysis comported with *Bodelson* and other precedent. It required DPS and DSLA to establish that disclosure of disciplinary memos would cause substantial injury to the public interest. Supp. CF, pp. 4–5. In doing so, the district court credited DPS and DSLA's evidence regarding the likelihood that disclosure would lead to "substantial difficulty retaining . . . and recruiting . . . school leaders," and would negatively impact "coaching and improving DPS school leaders," with "a chilling effect on the ability of supervisors to effectively train school principals, assistant principals and administrators . . . ." *Id.* at 10. It was entirely appropriate for the district court to recognize that the Gazette had presented no countervailing evidence, and doing so did not relieve DPS and DSLA of their burden of proof.

In any event, the Gazette minimizes that the district court did credit its ***argument*** that disclosure was in the public interest. The district court explicitly recognized that "there may be an obvious public interest in disclosure of disciplinary records related to egregious conduct . . . ." *Id.* at 11. Yet, the Gazette's request was for all disciplinary memos and had

no qualitative limits, and the district court concluded that "there is no obvious public interest in disclosure of corrective action related to minor disciplinary matters . . . ." *Id.* In the analogous open meetings context, a division of this Court has likewise stated that "[g]enerally, disciplinary decisions and application of an existing personnel policy to an individual employee are not matters that require, or are necessarily appropriate for, public input." *Ark. Valley Publ'g Co. v. Lake Cty. Bd. of Cty. Comm'rs*, 369 P.3d 725, 728 (Colo. App. 2015).

6. The district court's order alternatively should be affirmed because disciplinary memos are personnel files.

CORA requires a custodian to deny inspection of "personnel files." § 24-72-204(3)(a)(II)(A). "Personnel files" are defined 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***, and other documents specifically exempt from disclosure under this part 2 or any other provision of law."

§ 24-72-202(4.5) (emphasis added). Personnel files also "include[] the specific date of an educator's absence from work." *Id.* The definition further provides that "'[p]ersonnel files' do not include applications of past or current employees, employment agreements, any amount paid or benefit provided incident to termination of employment, performance ratings, final sabbatical reports required under section 23-5-123, or any compensation, including expense allowances and benefits, paid to employees by the state, its agencies, institutions, or political subdivisions." *Id.* Applying well-established rules of construction to this definition, the requested disciplinary records are precisely the type of records the legislature intended to protect from public disclosure.

CORA defines personnel files in two parts. The first lists the types of information and documents that are "include[d]" in the definition of personnel files. *Id.* By its own terms, the list is illustrative and not exclusive. *See, e.g.*, *Yellow Jacket*, 318 P.3d at 457; *cf.* § 22-36-101(3), C.R.S. ("Any school district may deny . . . permission to enroll . . . ***only*** for any of the following reasons . . . .") (emphasis added). And that list

expressly includes the broad category of information maintained because of the employer-employee relationship. § 24-72-202(4.5). There can be no reasonable dispute that a record of disciplinary action for an administrative employee is maintained because of the employment relationship. As a matter of plain language construction, the analysis arguably could stop there.

The Gazette maintained that only personal demographic information is exempted. Yet, that wrongly presupposes everything listed in the first part of the definition is demographic in nature. Employers certainly maintain personal demographic information about employees, but more is kept because of the employer-employee relationship. For example, who an employee might be in an intimate relationship with is obviously not demographic information.

The Gazette's constrained view also completely ignores the second part of the statutory definition. If the legislature intended the scope of personnel files to be so limited, then there would have been no need for it to list employment applications, employment agreements, performance

ratings, sabbatical reports, severance payments, or other compensation paid. None of that is personal demographic information. By listing examples of what are personnel files and specific items that are not, the scope of the exemption is reasonably clear. Had the legislature intended that disciplinary records be open to public inspection, it would have said so. *See, e.g.*, *Yellow Jacket*, 318 P.3d at 457; *cf. Sooper Credit Union v. Sholar Grp. Architects, P.C.*, 113 P.3d 768, 772 (Colo. 2005) (declaring same and refusing to "read in . . . a requirement that the General Assembly plainly chose not to include."); *see also Shelter Mut. Ins. Co. v. Mid-Century Ins. Co.*, 246 P.3d 651, 661 (Colo. 2011) ("We will not judicially legislate by reading a statute to accomplish something the plain language does not suggest, warrant or mandate.").

The Colorado Supreme Court applied the same intuitive, common-sense reasoning in *Pierce v. St. Vrain Valley School District*, 981 P.2d 600 (Colo. 1999). There, the Supreme Court was presented with a dispute between a school district and its former superintendent. *Id.* at 601. The parties' separation agreement had confidentiality and non-

disparagement clauses that the superintendent sued to enforce. *Id.* The school district responded that the clauses were contrary to "the public policy interest favoring open access to information," as specifically enumerated in CORA. *Id.* at 604–05. In that context, the Supreme Court examined the applicability of the personnel files exception to the separation agreement.

Since there had been no third party open records request, the Supreme Court emphasized it was "not resolv[ing] the question of whether the [school d]istrict would be required to disclose the contents of the [separation] agreement." *Id.* at 606 n.7. Nonetheless, the Supreme Court held the separation agreement was "not so plainly a public record that a promise to keep its terms confidential would be unenforceable." *Id.* Other than the amount of the severance payment, "parts of the agreement might have been excepted from inspection if they were considered to be part of a personnel file." *Id.* at 605 (citing, *inter alia*, § 24-72-202(4.5)). The Supreme Court emphasized that nothing in CORA "conclusively direct[ed]" that the separation agreement "must

his is referring to an agreement. but you cannot contract away access. this reasoning would defendant the purpose of CORA.

categorically be subject to public inspection." *Id.* at 606. It is a small step here to follow *Pierce*'s reasoning and conclude that because disciplinary records relate to the employer-employee relationship and are not specifically excluded from the definition, they are personnel files.

To reach a different result, the Gazette relied on two decisions from divisions of this Court, *Daniels*, 988 P.2d 648, and *JCEA*, 378 P.3d 835. Neither case, however, involved disciplinary records or squarely addressed the full extent of section 24-72-202(4.5)'s definition. Moreover, subsequent statutory amendments have overruled the holdings and rationale in both cases.

First, in *Daniels*, the applicant sought records regarding "complaints of sexual harassment, gender discrimination and retaliation" made by others over a period of three years. 988 P.2d at 650. At the time, a separate provision in CORA exempted those records from disclosure, but only if "maintained pursuant to any rule of the general assembly on a sexual harassment policy." § 24-72-204(3)(a)(X)(A), C.R.S. (1998). Apparently, the custodian did not maintain the records under such a

policy, as they asserted the personnel files exception on appeal. *Daniels*, 988 P.2d at 650. The division found the records did not qualify because the custodian did not actually maintain any of the complaint records in personnel files. *Id.* at 651. Although the question was moot, the division went on to conclude that to be exempted from public inspection, a personnel record must fit "the type of personal, demographic information" listed in the first part of section 24-72-202(4.5). *Id.*

Daniels was decided without the benefit of the Supreme Court's contrary analysis in *Pierce*, 981 P.2d 600, issued several months later, and the division only reached the personnel files definition in *dictum*. Further undercutting *Daniels* is the General Assembly's swift response. Just over a month after *Daniels* was decided, the legislature effectively overruled it. Specifically, the legislature expanded CORA's separate exemption for records of sexual harassment complaints and investigations, prohibiting public inspection without regard to any internal policy and "***whether or not*** such records are maintained as part of a personnel file." 1999 Colo. Sess. Laws at 207–08 (emphasis added).

The second case, *JCEA*, is likewise inapposite. There, the division considered records showing the names of teachers who requested leave on a suspected "sick out" day. 378 P.3d at 837. The case arose somewhat unusually on a mandamus action filed by the teachers' union to force the school district to deny the records request. *Id.* Consequently, the question on appeal was whether the district had a "clear duty" to deny the request. *Id.* The division held it did not. Since the fact of a teacher's absence was conspicuous, the division concluded the leave records were not "personal" or "demographic" in nature. *Id.* at 839. The division then addressed the second part of the personnel files definition and held the leave records did not qualify because they "pertain[ed] to 'any compensation . . . including [the] benefit[]' of sick leave." *Id.* at 840. As a result, the Court concluded that the district was "obligated to release the[records]." *Id.*

JCEA does not support the Gazette's request. The fact of discipline is not so conspicuous as absences during a mass sick out. Discipline can range from a private admonishment that conduct needs to improve to a separation and everything in between. *E.g.* Ex, pp. 40–42. Even with the

ultimate sanction, the underlying reasons are inherently personal to the employee and not obvious. Furthermore, *JCEA* does not go as far as the Gazette suggested below. The division did not hold a record must contain demographic information to be a personnel file. As the division explained, other types of information may qualify a record, such as "sick leave records" containing "descriptions of specific medical conditions," and it expressly declined to issue an advisory opinion on "abstract propositions that [we]re not directly before [the court]." *Id.* at 839–40 (citing cases). In addition, as with *Daniels*, *JCEA* has been expressly overruled by the legislature. Last year, section 24-72-202(4.5) was amended to add the sentence, "'Personnel files' includes the specific date of an educator's absence from work." 2022 Colo. Sess. Laws at 1781–82.

CORA requires the protection of personnel files, and for all the above reasons, disciplinary memos qualify. While the district court disagreed, it reached the right result that DPS did not have to disclose the requested records. Consequently, this Court may reach the scope of the personnel files exemption to affirm on alternative grounds.

II. The district court correctly denied the Gazette's evidentiary motions.

The Gazette's next attack is to the district court's denial of its evidentiary motions, which it apparently hoped would remove consideration of CLPPEA from the case. The district court properly exercised its discretion.

A. Standard of review and preservation.

DPS disagrees with the Gazette's proffered standard of review. As DSLA states, evidentiary rulings are reviewed for an abuse of discretion. *E.g.*, *Murray v. Just in Case Business Lighthouse*, 374 P3d 443, 453 (Colo. 2016).

DPS agrees this issue has been preserved.

B. Law and analysis.

Declining to strike DSLA's summary of testimony at the outset of the hearing was within the district court's discretion. The Gazette characterizes the summary as a sur-reply, which is a stretch. While it cites law, the summary focuses on Dr. Coogan's anticipated testimony, and citations are presented to establish relevance. CF, pp. 392–94. Even

if it was a sur-reply, as the district court explained, it "want[ed] to get this case right." Tr, p. 6:19–20. Appropriately so.

The Gazette does not argue prejudice on appeal, and there could not have been any. DSLA could have called Dr. Coogan without such a thorough disclosure, and its professional courtesy gave the Gazette advance notice that CLPPEA would be raised, along with an opportunity to file a motion in limine. The district court suggested it would have entertained a continuance, but the Gazette chose to proceed. Tr, pp. 17:17–18:13; *see also* Supp. CF, pp. 3–4. Additionally, the district court allowed the Gazette to reserve its objection for when Dr. Coogan testified, and it afforded an opportunity to present legal argument in proposed findings and conclusions, Tr, pp. 17:23–18:13; Supp. CF, p. 3, which the Gazette did, CF, pp. 450–52.

As for relevance, the district court likewise allowed Dr. Coogan's testimony within its discretion. The rules of evidence strongly favor admissibility of evidence. *See generally* CRE 401–403; *see also Bush v. Jackson*, 552 P.2d 509, 511 (Colo. 1976) ("The test of the relevancy of such

evidence is whether it renders the claimed inference more probable than it would be without the evidence."). CLPPEA was highly relevant to the question of whether disclosure of disciplinary memos would cause substantial injury to the public interest. With its clear protection of all documents used in preparing licensed professionals' evaluations, CLPPEA created a reasonable expectation by DPS, DSLA, and administrators that disciplinary memos would be confidential and not open to public inspection. That in turn explained the provisions in the CBA incorporating corrective action guidelines that require disciplinary memos to be placed in employee personnel files. Ex. pp. 17, 39, 41–42. And, critically, it explained why, as the district court put it, there would be injury to the public interest "to suddenly throw that confidentiality out the window[.]" Tr, pp. 15:17–16:1.

The Gazette further contends that Dr. Coogan gave improper expert testimony, but the transcript demonstrates otherwise. Dr. Coogan was not offered as an expert, and she did not need to be. She testified about her understanding of CLPPEA from her own experience as DSLA

President and a DPS school principal. Furthermore, Dr. Coogan was not asked whether a legal standard was met; she was asked about her ***expectation*** of public access to performance evaluations and referenced the statute to explain her belief. Tr, pp. 65:24–66:12. That testimony was factual in nature, not the drawing of a legal conclusion.

Even so, the district court made clear it was not accepting what Dr. Coogan said "as a legal matter." *Id.* at 66:19–21 ("I'm not taking it as a legal conclusion."). The district court was well-equipped to draw its own legal conclusions about the meaning of the statute, and there is no basis to presume otherwise. *See, e.g.*, *Liggett v. People*, 135 P.3d 725, 733 (Colo. 2006) ("In the context of a bench trial, the prejudicial effect of improperly admitted evidence is generally presumed innocuous.").

III. The Gazette is not entitled to attorney's fees because the denial of inspection was proper.

The Gazette finally seeks an award of attorney's fees. DPS does not dispute the Gazette may claim fees if the result of this appeal is that disciplinary records must be disclosed. The Gazette, however, is not

already entitled to attorney's fees, irrespective of this appeal and any subsequent order directing the District to disclose disciplinary records.

A. Standard of review and preservation.

DPS disagrees that *Colorado Republican Party v. Benefield*, 337 P.3d 1199, 1206 (Colo. App. 2011), expressly states a district court's failure to award attorney's fees must be reviewed de novo. The division of this Court in that case stated the issue was a mixed question of law and fact and "elect[ed]" to apply de novo review, as the primary issue was interpretation of CORA's attorney's fees provision. *Id.* at 1204–05. Nonetheless, the District does not dispute the issue presented here—entitlement to fees and not the amount—is appropriate for de novo review. *See Benefield v. Colo. Republican Party*, 329 P.3d 262, 268 (Colo. 2014).

DPS disagrees the Gazette's pursuit of attorney's fees has been fully preserved. While the Gazette did include a request for fees in its complaint, opening brief, and proposed findings and conclusions, it never separately moved for an award of fees as required by C.R.C.P. 121, § 1-

22(2)(a). And it certainly did not argue below that it must recover fees even if it never obtained any records. CF, pp. 11, 159, 290, 453. Such a motion was due by December 13, 2022—21 days after the district court's November 22, 2023 order holding the disciplinary records were public records. CF, pp. 331–32; C.R.C.P. § 121, 1-22(2)(b). As a result, the Gazette has waived any entitlement to attorney's fees based on that order.

B. Law and analysis.

Even if properly before the Court, the Gazette's argument for attorney's fees irrespective of the result of this appeal fails as a matter of law. The notion that it is entitled to fees because the disciplinary records were first held to be public records, despite the district court's second order holding DPS did not have to disclose any of them, is unsupported and simply makes no sense.

The Supreme Court has made clear that CORA "mandates an award of costs and attorney fees in favor of the prevailing applicant except in situations in which the custodian ***properly denied access***." *Reno*

v. Marks, 349 P.3d 248, 256 (Colo. 2015) (quoting *Benefield*, 329 P.3d at 265) (emphasis added). This means that if a custodian's denial of a request was proper, the applicant is not entitled to attorney's fees. *Reno*, 349 P.3d at 257. The Supreme Court's guidance in *Benefield* is even more on point: "[t]he award to the 'prevailing applicant' should include no more than the costs and attorney fees incurred ***with regard to the records as to which he has actually succeeded in gaining access***, rather than his costs and attorney fees in prosecuting the action as a whole." 329 P.3d at 268 (citing § 24-72-204(5) (emphasis added).

Here, the Gazette did not obtain any of the records it requested. DPS properly denied the Gazette's request because, as the district court found, disclosure would cause substantial injury to the public interest. Accordingly, the Gazette is not entitled to attorney's fees unless it obtains access to disciplinary memos on appeal. While this reasoning should be dispositive, it is noteworthy that applicants who ended up in similar positions—failing to obtain records after losing on the substantial injury

exemption—do not appear to have recovered fees. *See generally Pinder*, 812 P.2d 645, *Bodelson*, 5 P.3d 373, *Todd*, 371 P.3d 705.[3]

CONCLUSION

For all these reasons, the district court correctly authorized DPS to restrict disclosure of all its administrators' final disciplinary records spanning three years. The order below in favor of the District's custodian should be affirmed.

RESPECTFULLY SUBMITTED this 2nd day of November, 2023.

By: *s/Jonathan P. Fero*

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[3] The Gazette has never disclosed the amount of attorney's fees it may seek or the basis therefore. DPS reserves argument regarding the reasonableness of any amount of fees until that may become ripe.

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November, 2023, a true and correct copy of the foregoing **DEFENDANT-APPELLEE'S ANSWER BRIEF** was filed and provided to the following via the Colorado Courts E-filing system and email:

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