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' REPLY BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and 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 5,688 words and does not exceed 5,700 words.

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

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/Rachael Johnson
Rachael Johnson, #43597

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

Cases:

Statutes:

Rules:

INTRODUCTION

DPS and DSLA (collectively "Appellees") seek to rewrite the Colorado Open Records Act ("CORA") to accommodate their clients' interests. This approach fails for various reasons.

First, Appellees advocate for a change in CORA exceptions §§ 24-72-204(6)(a), C.R.S. and 24-72-204(3)(a)(II)(A), C.R.S., but these arguments are best left up to a vote by the General Assembly. Additionally, its claim that disciplinary records can never be released under CORA because any disclosure would result in substantial injury to the public interest is too broad and wholly out of step with how Colorado Courts have ruled in favor of disclosure when applying the substantial injury exception, *see e.g. Denv. Post Corp. v. Univ. of Colo.*, 739 P.2d 874, 879 (Colo. App. 1987); *Denv. Publ'g Co. v. Univ. of Colo.*, 812 P.2d 682 (Colo. App. 1990); *Zubeck v. El Paso Cnty. Ret. Plan*, 961 P.2d 597 (Colo. App. 1998); *Daniels v. City of Commerce City, Custodian of Rs.*, 988 P. 2d 648 (Colo. App. 1999); *Bodelson v. Denv. Publ'g Co.*, 5 P.3d 373 (Colo. App. 2000); *Freedom Newspapers, Inc v. Tollefson*, 961 P.2d 1150 (Colo. App. 1998); *Martinelli v. Dist. Ct., City & Cnty. of Denv.*, 612 P.2d 1083 (Colo. 1980), which is to be narrowly construed.

Second, Appellees seek declaratory judgment on issues that were not decided by the District Court or are not at issue on appeal. Here, DSLA asks this Court to "directly" apply CLPPEA § 22-9-109, C.R.S. yet it freely admits that the issue of

application was not even contemplated by the District Court. DSLA Br. 12. And, DPS seeks to improperly reassert its claim that the FRISK records are "personnel files" when Appellant ("The Gazette") made no such argument in its Opening Brief.

This Court must reject these arguments and reverse and remand this case for the following reasons.

ARGUMENT

I. Neither DPS or DSLA have met their burden of showing that the disclosure of principals and administrators' disciplinary records would cause substantial injury to the public interest.

A. *De novo* review is warranted.

Appellees disagree that this court can review the District Court's application of the substantial injury exemption under the *de novo* standard. DPS Br. 17; DSLA Br. 17. Yet, the standard for this Court to review questions of law—including those involving the statutory interpretation of the Colorado Open Records Act ("CORA") —is *de novo*. *See Harris v. Denv. Post Corp.*, 123 P.3d 1166, 1170 (Colo. 2005) (Courts "review de novo questions of law concerning the correct construction and application of CORA … "); *People v. Sprinkle*, 2021 CO 60, ¶ 12. And, this court reviews the substantial injury to the public interest exception under the *de novo* standard. *Zubeck*, 961 P.2d at 599 (reviewing the "substantial injury" exception to CORA *de novo* because it is a "question[] of statutory interpretation").

DPS cites *Blesch v. Denver Publishing Co.*, 62 P.4d 1060 (Colo. App. 2002) to argue that the inquiries before this Court are purely questions of fact and are subject to clear error review. However, the *Blesch* court clearly stated that "[w]hether there *has been* substantial injury to the public interest is a question of fact." *Blesch*, 62 P.4d 1063 (emphasis added). Here, there is no dispute between the parties that there has not yet been an injury to any DPS principals or administrators caused by the release of disciplinary records. And, any assertions that an injury might occur is merely speculative. In *Blesch*—which involved a request for the autopsy records of one of the perpetrators of the Columbine shooting—the question of risk of public harm was much more straightforward. Autopsies of victims and the other shooter had already been released because they contained only nongraphic conclusions. The Court of Appeals simply had to consider if the additional autopsy was factually similar to those records already made public. *Id.* at 1064. The same standard of review cannot be used to consider the issues at hand here because there has been no prior analogous disclosure. An open question remains: can the FRISK records be withheld under the "substantial injury to the public interest" exception if that injury is based entirely on conjecture. This question of law must be resolved under *de novo* review and in favor of disclosure to avoid creating a slippery slope that would undermine the purpose of CORA altogether.

B. Appellees' cannot meet their burden to prove that the substantial injury exception applies.

The Colorado Supreme Court was clear—"exceptions *to the broad, general policy* of [CORA] are to be narrowly construed." *City of Westminster v. Dogan Const. Co.*, 930 P.2d 585, 589 (Colo. 1997) (emphasis added) (citation omitted). Public records are presumed open absent a finding that an exception to CORA applies. § 24-72-201, C.R.S. DPS and DSLA failed to convince the District Court that the FRISK records were subject to the "personnel files" exemption of CORA, § 24-72-204(3)(a)(II)(A), C.R.S.; § 24-72-202(4.5), C.R.S., and instead asked the court to find that the "catch-all" provision of CORA, C.R.S. § 24-72-204(6)(a), applies. However, "substantial injury" is reserved for only a narrow set of extreme circumstances. *See Freedom Newspapers, Inc.*, 961 P.2d at 1156 ("[substantial injury] is to be used ***only*** in those extraordinary situations which the General Assembly could not have identified in advance.) (emphasis added). For the reasons set forth below, DPS and DSLA have failed to meet the requisite, and rare, substantial injury standard.

i. The District Court erred in finding that DPS and DSLA demonstrated substantial injury to the public interest when Appellees merely cited inconveniences.

More than mere inconveniences are required to meet the high burden of showing that release of public records will cause substantial injury to the public interest. Nevertheless, the justifications Appellees suggest satisfy the "substantial

injury" standard pale in comparison to the extraordinary circumstances before the court in *Bodelson v. Denver Publishing Co.*, 5 P.3d 373 (Colo. App. 2000). In *Bodelson*, the court clarified that while autopsy records are generally open to inspection, courts have jurisdiction to prohibit disclosure in extreme cases. *Id.* No such determination has been made regarding standard disciplinary records, which are otherwise codified as public records subject to CORA. *See* § 24-72-202(4.5), C.R.S. ("'personnel files' does not include … performance ratings"); *see also* CF, p. 326 (finding that disciplinary records are "more akin to performance ratings"); (Order re: Pls.' Am. Mot. for Prelim. Inj., *Cherry Creek Educ. Ass'n v. Cherry Creek Sch. Dist. No. 5*, No. 2016CV30740 (Arapahoe Cnty. Dist. Ct. Sept. 21, 2016) (holding that the "personnel file" exception does not apply to disciplinary records of public school bus drivers)); (Order, *The Request of the Greeley Tribune For Certain Records Pursuant to the Colorado Open Records Act, C.R.S. 24- 72-201, et seq.*, No. 18CV30034 (Weld Cnty. Dist. Ct. Jan. 26, 2018) (holding that the "personnel file" exception does not apply to records of discipline imposed on a public employee)); (Order, *Bd. of Cnty. Comm'rs of El Paso v. The Gazette Inc.*, No. 03 CV 4140 (El Paso Cnty. Dist. Ct. Feb. 17, 2004)).

Contrary to DPS's argument, the role of this Court is not to identify new applications of the CORA exceptions that were not articulated by the General Assembly. Rather, the Court's authority is limited to "giving all the words of the

statute[] 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. When given the opportunity to elaborate on the "extraordinary circumstances" supposedly present in this case, and explain how disclosure of the FRISK records would injure the public, DPS instead launches into an explanation of why this Court should decide what rises to the level of "substantial injury to the public interest." DPS Br. 20–25. In describing the line of cases Appellees use to support their argument, they attempt to appoint the court, rather than the legislature, as the arbiter of what constitutes substantial injury to the public interest. *Id*. But this is not workable: Courts are not to be burdened with legislative functions and it is problematic to suggest that the Courts inject meaning into settled law. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1093 (Colo. 2011)("[E]xpanding a statute's reach is an inherently legislative function not proper for [this] court…").

Appellees' specific claims that potential reputational harm to its principals and administrators and "trouble recruiting and retaining school leaders," constitute substantial injury miss the mark. DSLA Br. 18. Aside from their purely speculative nature, neither claim constitutes an extreme risk of substantial injury to the public. To the extent principals or administrators might allege reputational harm resulting from disclosure of the FRISK records, the state of Colorado already has in place a mechanism for protecting one's reputation from false and defamatory statements—

the tort of libel. *See e.g. McIntyre v. Jones*, 194 P.3d 519, 523 (Colo. App. 2008) (setting forth the elements of libel); *Hayes v. Smith*, 832 P.2d 1022 (Colo. App. 1991) (High school teacher brought defamation action based on statements allegedly made to school superintendent falsely accusing teacher of homosexual conduct.).

And the impacts on recruitment—which are speculative at best—is a policy argument that ignores the fact that CORA doesn't exempt other public employees' disciplinary records from release and public offices statewide do not suffer from debilitating attrition.

Next, DPS and DSLA argue that the District Court's determination that a long-standing "expectation" by its members of privacy[1] in their disciplinary records existed such that the release of those records would substantially injure the public was not in error. DSLA Br. 6, 18; DPS Br. 4. The Gazette disagrees. The court engaged in a three-part test—(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.*, 961 P.2d at

[1] Colorado courts have construed §24-72-204(6)(a), C.R.S. 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*, 2015 COA 105, ¶ 35.

1156—finding that the DPS school leaders had a legitimate privacy interest. CF, p. 335. The District Court misapplied *Freedom Newspapers*, which held that an employee has a "minimal" expectation of privacy with regard to their employment history and job performance, and a ***public employee***, such as the principals and administrators here, has a ***narrower*** privacy interest in their job performance in comparison to other citizens. 961 P.2d at 1156. For similar reasons, in *Todd*, the Court confirmed that public employees' privacy expectations are narrowly recognized only when "the information which the state possesses is highly personal or intimate." *Todd*, ¶ 43 (quoting *Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995)). Accordingly, courts regularly hold that job performance evaluations are not "intimate, personal information at all." *City of Boulder v. Avery*, No. 01CV1741, 2002 WL 31954865, at *2–3 (D. Colo. Mar. 18, 2002).

Contrary to the District Court's holding, CF, p. 335, documentation of a school leader's misconduct is greatly in the public interest and not highly-personal or intimate. And, even if "certain aspects" of the conduct of a public employee are private, CF, p. 335, not all of the information in a disciplinary file is entitled to an expectation of privacy especially when it comes to interacting with members of the public. *Avery*, 2002 WL 31954865, at *3 ("Given that there can ***be only a miniscule***, legitimate expectation of privacy about how one performs in such a public position and given that there is a legitimate and compelling public interest in the same topic,

the balance here favors disclosure." (emphasis added)); *Guy v. Whitsitt*, 2020 COA 93, ¶ 29 (holding that the town manager ***did not*** have a privacy interest in his employment contract ***or over certain aspects of his conduct*** as a public employee; "the public has an interest in knowing … employee work performance."). This is especially so given that the records are related to discipline of individuals who interact with children.

Appellants need not prove that there is a compelling public interest in access to the FRISK records if no legitimate expectation of privacy exists. *Todd*, ¶ 47 ("If no legitimate expectation of nondisclosure exists, the inquiry ends, and disclosure of the requested information is required under CORA."). Moreover, here, there is a compelling public interest in the public's understanding of why a school leader was disciplined, CF, p. 361–62, disclosure is required. *See Denv. Post Corp.*, 739 P.2d 874, 879 ("the important public interest in disclosing circumstances under which public employees of the University received payments from a foreign government clearly overrides the privacy interest the individuals might have in the disclosure of a portion of their income."); *Univ. of Colo.*, 812 P.2d 682, 685 ("The university argues that disclosure, contrary to the expectation of parties, of the terms of the settlement of a controversy may chill its future ability to resolve internal matters of dispute, thus effectuating a substantial injury to the public interest. While such an effect is possible, the public's right to know how public funds are expended is

paramount considering the public policy of the Open Records Act."); *see also Zubeck*, 961 P.2d 597; *Daniels*, 988 P. 2d 648; *Bodelson*, 5. P.2d 373; *Freedom Newspapers, Inc.*, 961 P.2d 1150; *Martinelli*, 612 P.2d 1083. The District Court erred in holding that the privacy interests of the DPS principals outweighs the public interest.

Furthermore, the District Court's finding that the memorialization of the Appellees' Collective Bargaining Agreement ("CBA") confirmed that the school leaders had an expectation of privacy is immaterial. CF, p. 335. DPS cannot carve out an invented exception to CORA by arguing that the Appellees' own "expectations" of confidentiality in their CBA establish a privacy interest not otherwise recognized under law. DPS Br. 11. No authority permits a public entity the right to contract away the public's right of access to public records. *Citizens Progressive All. v. Sw. Water Conservation Dist.*, 97 P.3d 308, 312–13 (Colo. App. 2004) ("CORA does not allow a records custodian to promulgate a policy that denies access to otherwise accessible public records or contravenes the statutory requirements for responding to records requests …"); *Univ. of Colo.*, 812 P.2d at 685 ("the arbitration group agreed that information concerning the settlement process would remain confidential, but such agreements alone are insufficient to transform a public record into a private one."). Thus, any expectation of privacy formed among contracting parties has no bearing on CORA.

Finally, DPS and DSLA cite no substantial injury to the ***public interest***, only an injury to its members. *Id.* at 685 ("the university, as custodian, must establish that the ***public interest*** will be substantially injured if disclosure is allowed.") (emphasis added). If narrowly construed, the exception only applies if there is injury to the ***public's interest*** in disclosure of the records. *City of Westminster*, 930 P.2d at 589. Here, no such injury to the public is asserted.

In *Bodelson*, for example, the Court found that releasing autopsy records of victims in the immediate aftermath of the Columbine shooting would result in substantial injury to the public interest due to the unique ***public*** grieving after a tragic mass shooting. *Bodelson*, 5 P.3d 373. In contrast, Appellees ask this Court protect ***its 300 members'*** interests from injury—not the public's. The injury they seek to protect is purely personal: speculative reputational embarrassment (as DPS would have "trouble" retaining and recruiting" public employees should the FRISK records be disclosed, DSLA Br. 17–18) and ensuring that DPS's policy of shielding public records of employee discipline from the public remains confidential so that candid evaluations can be preserved. Thus, Appellees cannot show that the substanital injury they claim will impact the public's interest.

For these reasons, the District Court erred in finding that a legitimate expectation of privacy exists in the FRISK records warranting reversal.

ii. Public interest in the FRISK records was easily foreseeable.

The need for the public to access the disciplinary records of high-ranking public employees, especially school principals and administrators, is completely foreseeable. Access to this information is routine, and cannot reasonably qualify as an extraordinary circumstance that the general assembly could not have identified in advance.

First, in drafting CORA, the General Assembly could foresee that the press and other members of the public would seek access to disciplinary records of public school principals and administrators. In support of its claim that Appellant's request would cause substantial injury, DPS relies on *Bodelson*. However, the *Bodelson* court went to great lengths to describe the unique harm that disclosure could inflict citing the "overwhelming grief caused by the nature and extent of this tragedy," as evidence that the substantial injury standard was met. 5 P.3d at 378. At the time, a crime of this scale and nature was completely unforeseeable, so it could not be argued that the General Assembly had intended to provide access to this type of information. Here, DPS cannot reasonably suggest that the legislature could not foresee that members of the public—including parents and taxpayers—would have an interest in public records relating to routine disciplinary action taken against school principals and administrators. DPS principals and administrators are entrusted with the care of children and are the individuals that students have the most

regular contact with. As such, the gravity of their actions and the public's interest in information relating to their performance is well-established.

iii. The cases cited, *Pinder, Todd,* regarding the substantial injury exception do not support Appellees contention.

DPS attempts to bolster its substantial injury arguments with a discussion of "less extraordinary" cases than *Bodelson* to show that "substantial injury to the public interest is not a rarity like Halley's Comet." DPS Br. 24–25. Yet, reliance on these cases is again misplaced. In *Civil Service Commission v. Pinder*, the court denied a police officer's request to review test materials to help him secure a promotion. 812 P.2d 645 (Colo. 1991). The court cited the "competitive nature of the examination" and the "unfairness that would result if the examination were released to a limited number of those taking the examination" as the reasons for its denial. *Id*. at 649–50. Such concerns are completely absent in the present case. No inherent unfairness would result if the Gazette were given access to the FRISK records because, unlike the officer in *Pinder*, the Gazette does not intend to use the records for any personal gain. In *Todd*, the court found that disclosing the "personal identifying information" of a breathalyzer operator would cause substantial injury to the public interest. *Todd*, ¶ 36. Notably, "personal identifying information" is subject to the "personnel file exemption" of CORA, which clearly states that this kind of information cannot be disclosed. *Jefferson Cnty. Educ. Ass'n v. Jefferson Cnty. Sch. Dist. R-1* (*JCEA*), 2016 COA 10 Here, the District Court already correctly

concluded that FRISK records are not personnel files because this exemption must be applied narrowly and "discipline records are more akin to 'performance ratings than 'demographic information', and performance ratings are expressly carved out from the definition of personnel files." CF, p. 326; *see also* §24-72-202(4.5), C.R.S. (citing "personnel files" are not "performance ratings").

Appellees' argument is thus based on a line of cases that are factually dissimilar from the records at issue here. In fact, Appellees fail to cite any cases in which the release of ***disciplinary files*** of public employees were requested. Critically, Colorado courts have found that releasing disciplinary files does not cause a substantial injury to the public interest. *See* Order, *Bd. of Cnty. Comm'rs of Larimer Cnty., v. BizWest Media, LLC*, No. 2022CV30489 (Larimer Cnty. Dist. Ct. Sept. 6, 2022). In *Bizwest*, the Court considered a request for records relating to the job performance of the directors of a public event space. The court acknowledged a compelling public interest in understanding why several employees resigned from their positions running a taxpayer-funded project. *Id.* The court weighed this interest against a public employee's limited expectation of privacy and found in favor of disclosure. The disciplinary records of a public employee in *BizWest* are more similar to those that Appellants seek than any of the autopsy files, exam materials, or demographic data that Appellees attempt to draw a parallel between. Public schools are taxpayer-funded institutions, and the public has a significant

interest in understanding the actions of those appointed to run them. Further, the *BizWest* court explained that the nature of an employee's position could impact this analysis and noted that high-ranking public employees are subject to greater public interest and scrutiny than rank-and-file employees which weighs in favor of disclosure of records pertaining to their performance. *Id.* Here, the disciplinary records sought are those belonging to administrators rather than teachers or other lower-level district employees. This fact weighs in favor of disclosure.

Moreover, as discussed *supra*, Courts overwhelmingly rule in favor of public disclosure when applying the substantial injury exception.

C. The Appellees' position is based on unsubstantiated testimony and speculation of future harm.

Appellees' assertion that they have proved the existence of a substantial injury to the public interest rests almost entirely on the testimony of Ms. Jennifer Troy and Dr. Moira Coogan. Appellants raised the issue of whether the District Court should exclude lay testimony on legislative intent in enacting CLPPEA and CORA in their Motion to Strike and Motion *in Limine* arguing that the witnesses lacked the requisite personal experience to testify, and that the witnesses' testimony was irrelevant. CF, pp. 378–82, 398–401. Yet, the District Court improperly allowed Dr. Coogan to testify at the evidentiary hearing where she offered, and the court accepted, a legal opinion on the applicability of CORA.

The inquiry for the court is whether disclosure of the FRISK records would substantially injure the public's interest. Despite the reasonable desire to get the case "right" the District Court got it wrong by agreeing to hear and crediting irrelevant evidence about Dr. Coogan's "understanding of C.R.S. §22-9-109," DSLA Br. 11, because administrators' expectations regarding how the statute affects their job duties is not relevant. CF, p. 378, 398; TR 01/23/2023, p.11:1–3. The reasonable expectation of employees, as discussed *supra*, has no bearing on the application of the substantial injury exception. Accordingly, it was unfair for the Court to consider and ultimately adopt the flawed reasoning that Dr. Coogan's expectation of privacy under § 22-9-109 was supported a finding of substantial injury.

Further, Appellees continue to ignore a key admission made by these witnesses—that there are a myriad of reasons why Denver schools struggle to retain educators. TR 01/23/2023, p. 37:4–6. They attribute long-standing leadership problems to the risk of disclosure of this information. TR 01/23/2023, p. 37:15–24. This is a logical fallacy that was pointed out by the Gazette in their Opening Br. 21, but Appellees fail to address in their answers.

D. Section §22-9-109 is not applicable, nor does CLPPEA preclude disclosure because it does not conflict with CORA's disclosure obligations.

As DSLA stated in its brief, the District Court did not reach the issue of whether CLPPEA § 22-9-109, C.R.S. is applicable in this case. DSLA Br. 12. After determining that the FRISK records were not exempt personnel records, the court solely looked to whether or not disclosure of the records at issue would cause substantial injury to the public interest under § 24-72-204(6)(a), C.R.S. Thus, the application of § 22-9-109 is not at issue on appeal. DSLA impermissibly asks this Court to "directly" decide whether § 22-9-109, C.R.S. prohibits the Gazette from inspecting the records at issue. *People v. Salazar*, 964 P.2d 507 (Colo. 1998) ("It is axiomatic that issues not raised in or decided by a lower court will not be addressed for the first time on appeal."); *Flagstaff Enterprises Const. Inc. v. Snow*, 908 P.2d 1183, 1185 (Colo. App. 1995)("issues" not ruled on by a trial court are "deemed waived and cannot be raised for the first time on appeal.").

Second, even if this Court reached the question, the documents which constitute or are subject to inclusion in the "evaluation report and all public records," § 22-9-109, C.R.S., is not specifically inclusive of all the FRISK records that the Gazette requested.[2] The nondisclosure provision of CLPPEA has no bearing on

[2] Gazette sought: any final summary when discipline is imposed; including letters of warning, letters of reprimand, summary memos for disciplinary leave, and summary memos for termination. CF, p. 4, 15.

whether final disciplinary records of Principals, Assistant Principals, and Administrators are disclosable under CORA, because it narrowly applies to the enumerated evaluative paperwork public agencies must generate to comply with CLPPEA's operative provisions. Appellees contend that CLPPEA's legislative purpose is consistent with a finding that disclosure of disciplinary records amounts to the kind of extraordinary circumstances that would do substantial injury to the public interest pursuant to CORA's catch-all exemption. *Bodelson*, 5 P.3d at 377. But there is no basis or authority Appellees can cite to support their argument.

Instead, Appellees' argument, if not rejected, would enable any public agency that employs licensed professionals to circumvent their disclosure obligations under CORA by considering broader and broader categories of information in assembling a staff member's performance evaluation. In fact, that is just what DPS and DSLA argue here. It cannot be that final disciplinary records, which are not personnel records falling within CORA's personnel records exemption, are not disclosable simply because evaluators contemplate whether staff have been disciplined in the course of assembling their CLPPEA-mandated evaluation reports. Such a proposition would exempt vast categories of information from disclosure; a proposition, as discussed *supra*, that Colorado Courts have even declined to follow when interpreting the substantial injury to the public interest exception of § 24-72-204(6)(a), C.R.S. *Bodelson*, 5 P.3d at 378‑79 (requiring trial court to find "*an*

extraordinary situation that the General Assembly could not have identified in advance," so the trial court's ruling "was *not creating a categorical exemption*" (emphasis added)). That is why when interpreting the personnel records exemption, this State's courts have held that a custodian cannot shield a record from disclosure simply by placing it in an employee's personnel file. *Daniels*, 988 P.2d at 651. Because a fulsome evaluation requires an evaluator to consider ***everything*** a staff member does in connection with their official duties, Appellees' interpretation would exempt every record that merely relates to a licensed staff member in the State of Colorado from disclosure, so long as an evaluator considers that record in writing up the evaluation. If the legislature intended this radical, far-reaching outcome, they would have amended CORA to make their purpose clear.

As such, §22-9-109, C.R.S. is not appropriate for this court to directly decide on appeal.

E. DPS once again incorrectly places the burden on the requester to show a significant public interest in disclosure.

The burden rests on those seeking to withhold information to show that the records fit within a recognized exception to CORA. §24-72-204(6)(a), C.R.S.; *see also Denv. Publ'g Co. v. Bd. of Cnty. Comm'rs of Cnty. of Arapahoe*, 121 P.3d 190, 199 (Colo. 2005); *Wick Commc'ns, Co. v. Montrose Cnty. Bd. of Cnty. Comm'rs*, 81 P.3d 360, 363 (Colo. 2003). CORA's presumption in favor of disclosure is laid out in its declaration of policy. *See* §§ 24-72-201, C.R.S. *et seq*. As pointed out by the

Gazette, CF, p. 359, nowhere in the statute does the legislature require a party to provide such proof. *See* §§ 24-72-201, C.R.S. *et seq*. CORA unequivocally indicates that the burden rests on the party denying access to public records, not those requesting the information. *See Denv. Publ'g Co. v. Dreyfus*, 184 Colo. 288, 292 (Colo. 1974) ("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.").

F. Appellees impermissibly seek to relitigate the application of the personnel file exemption.

The Gazette did not raise the issue of the application of the "personnel file" exemption on appeal. Yet, DPS argues that if this court does not find substantial injury, "[t]he District Court's order alternatively should be affirmed because disciplinary memos are personnel files." DPS Br. 37. The personnel files category is established by well-settled law, and the District Court properly held that it does not apply to the records at issue in this case. CF, p. 326. Despite this, Appellees improperly attempt to relitigate the issue and unsuccessfully try to force FRISK records into their own definition of the exception.

Case law has interpreted §24-72-204(3)(a)(II)(A) to be limited to personal demographic information. *See e.g. Jefferson Cnty. Educ. Ass'n*, ¶ 20 (determining that "'other information maintained because of the employer-employee relationship'

only applies to those things which are of the same general kind or class as personal demographic information."); *Daniels*, 988 P.2d at 651.

In addition to improperly raising the issue of the personnel files exemption, Appellees continue to fall back on the same inadequate case law that they relied on at the District Court level to support this argument. DPS cites *Pierce v. St. Vrain Valley School District*, in which the Colorado Supreme Court declined to categorize the separation agreement as either a public record subject to disclosure or a personnel record under the CORA exception. 981 P.2d 600, 606 (Colo. 1999). Appellees claim that "[i]t 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." DPS Br. 42. This is, in fact, a rather large leap. The *Pierce* court stated that "nothing in the Open Records Act [] would cause us to conclude that the General Assembly intended that this sort of information should *always* be disclosed." *Pierce*, 981 P.2d at 606 (emphasis added). The Court's warning that caution should be exercised in determining the right to inspection cannot be taken as a definitive ruling that any records of this nature should be automatically withheld from the public.

Furthermore, this Court should flat out reject this argument just as the District Court did:

> DPS and DSLA argue that recent legislative changes indicate a repudiation of the *Jefferson Cty. Educ. Assoc.*

> and *Daniels* holdings. However, this Court finds that the language of the recent legislative changes reflects a legislative intent to maintain the principle that personnel files are limited to demographic information.

CF, pp. 326.

DPS and DSLA improperly reassert their claims regarding the personnel exception and once again fail to explain how the records in this case could qualify under this category. As such, this argument should be disregarded.

II. The Gazette is entitled to attorney's fees because the denial of inspection was improper.

The District Court found that the FRISK records were not "properly considered personnel files under C.R.S. 24-72-202(4.5)" and ordered the release of the records. CF, pp. 324–26; 331 (finding that "all other FRISK records are subject to disclosure."). There can be no dispute that DPS's decision to deny the Gazette access to the public records at issue on the grounds that the FRISK records were "personnel files" was improper. *See Reno v. Marks*, 2015 CO 33, ¶ (Subsection 5 "mandate[s] an award of costs and attorney fees in favor of the prevailing applicant except in situations in which the custodian properly denied access." (quoting *Benefield v. Colo. Republican Party*, 2014 COA 57, ¶ 10)).

Appellees also incorrectly claim that the Gazette is not entitled to fees because the District Court denied inspection of the disciplinary records and a ruling on this appeal has yet to be made. However, CORA does not delineate between applicants

that successfully obtain ***some*** documents versus those that obtain ***all*** requested documents. *See Colo. Republican Party v. Benefield*, 337 P.3d 1199, 1207 (Colo. App. 2011) ("We see no basis in CORA to create such an anomalous distinction between applicants. The public policy expressed in CORA is to require disclosure of public documents, and not to reward custodians for withholding some public documents on the basis that other documents sought are protected from disclosure."). DPS disregards the fact that the District Court found that DPS improperly withheld certain FRISK records and ordered their disclosure. CF, p. 331–32. Moreover, DPS argues that *Benefield* is "even more on point," DPS Br. 52, because: "*[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." (quoting *Benefield*, ¶ 19 (citing § 24-72-204(5)) (emphasis added). But this states what the actually monetary award may include and consists of; not that the prevailing party cannot recover fees unless it succeeds at gaining access to the documents.

Finally, DPS argues that Appellants never separately moved for an award of attorney's fees as required by C.R.C.P. 121, § 1-22(2)(a) and has therefore waived its right to request attorney's fees. DPS Br. 56. This is incorrect. Section C.R.C.P. 121, § 1-22(2)(a) applies to requests for attorney fees "made at the conclusion of the

action." When a statue mandates an attorney's fees award to a prevailing party, the fees expended to the plaintiff to collect that judgement are also recoverable. *Nibert v. Geico Ins. Co*., 2017 COA 23, ¶ 32 (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.*, 2013 COA 131, ¶ 122 ("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*, 2016 COA 22M. Therefore, Appellants have not waived their right to seek attorneys in this matter.

CONCLUSION

For the foregoing reasons, the Gazette respectfully request that this Court reverse and remand the decision of the District Court.

Respectfully submitted this 8th day of December 2023.

By */s/Rachael Johnson*

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December 2023, a true and correct copy of the foregoing **PLAINTIFFS-APPELLANTS' REPLY BRIEF** was served on the following counsel through the Colorado Courts E-File & Serve electronic court filing system:

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