DISTRICT COURT, COUNTY OF ARAPAHOE, COLORADO 7325 S. Potomac Street Centennial, CO 80012	DATE FILED: June 8, 2016 2:55 PM FILING ID: 5D100983B41FE CASE NUMBER: 2016CV30740
Plaintiffs: **CHERRY CREEK TRANSPORTATION EMPLOYEES ASSOCIATION** **and** **CHERRY CREEK EDUCATION ASSOCIATION** v. Defendants: **CHERRY CREEK SCHOOL DISTRICT NO. 5 and TUSTIN AMOLE in her official capacity as Custodian of Records.**	▲ COURT USE ONLY ▲ Case Number: 2016CV030740 Courtroom: 202
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AMENDED MOTION FOR PRELIMINARY INJUNCTION AND REQUEST FOR FORTHWITH HEARING

The Plaintiffs, the Cherry Creek Transportation Employees Association ("CCTEA") and Cherry Creek Education Association ("CCEA"), by and through counsel, respectfully move this Court to issue a Preliminary Injunction pursuant to C.R.C.P. 65(a) to enjoin the Defendants, Cherry Creek School District No. 5 ("School District" or "District") and Tustin Amole in her official capacity as Custodian of Records, from releasing employee records of any complaints about job performance or disciplinary action pursuant to the Colorado Open Records Act ("CORA"). The Plaintiffs request that this matter be heard forthwith pursuant to C.R.C.P. 121, 1-15, 4. In support of this motion, the Plaintiffs state the following:

C.R.C.P. § 121, 1-15, 8 – Duty to Confer

Counsel for the Plaintiffs informed Defendants' counsel of the nature and intended filing of this motion, but Defendants' counsel has not stated the Defendants' position on the relief sought in this motion.

Procedural History

On or about March 17, 2016, the District notified CCTEA and CCEA that it had received a CORA request from a reporter with Channel 9News asking for the release of "job application, position and salary if employed, discharge date if no longer employed, any records of complaints about the job performance of the individual, and records of disciplinary action taken against the individual" pertaining to six named current or former employees of the District. Four of these employees are members of either CCTEA or CCEA.

The District informed CCTEA and CCEA that it had already released the "job application, position and salary, and discharge dates" of the named employees to the 9News reporter.

On or about March 22, 2016, CCTEA and CCEA made the Defendants aware that they object to the release of the remaining records on behalf of their members who are named in the CORA request. On or about the same date, Defendants' counsel informed Plaintiffs' counsel that the District intended to release the requested records to 9News. Plaintiffs' counsel stated that the Plaintiffs intend to file a motion for a preliminary injunction to prohibit release of the requested records. Defendants' counsel responded that the District will release the records in issue unless the Plaintiffs file such a motion by the close of business on March 25, 2016.

On or about June 3, 2016, the School District received a subsequent identical CORA request for the "the same set of records that Kevin Vaughn requested to inspect." The CORA requesters in the June 3, 2016 letter are the Associated Press, KCNC-TV/Channel 4, KMGH-TV/Channel 7, KDVR-TV/Channel 31, *The Denver Post* newspaper, and the Colorado Freedom of Information Coalition. On or about June 3, 2016, the School District contacted counsel for CCTEA and CCEA, making them aware of the updated CORA request. The School District's counsel has indicated to the Plaintiffs that they would release on June 8, 2016, absent intervention by the Plaintiffs.

The Plaintiffs are simultaneously filing a First Amended Complaint pursuant to C.R.C.P. 106(a)(2) seeking to compel the Defendants to perform their legal duty to deny release of the requested records pursuant to §24-72-204(3)(a), C.R.S, as these records constitute "personnel files" and the Custodian of Records is prohibited from releasing them under CORA.

Argument

Requirements for Preliminary Injunctive Relief

A party seeking a preliminary injunction must establish: 1) a reasonable probability of success on the merits; 2) a danger of real, immediate and irreparable injury which may be prevented by

injunctive relief; 3) lack of a plain, speedy and adequate remedy at law; 4) no disservice to the public interest; 5) a balance of the equities in favor of granting injunctive relief; and 6) preservation of the status quo pending a trial on the merits. *Rathke v. MacFarlane*, 648 P.2d 648, 653-654 (Colo. 1984). In addition, C.R.S. §24-4-106 (8) requires a showing of irreparable injury for a court to enjoin "the conduct of any agency proceeding in which the proceeding itself or the action proposed to be taken therein is clearly beyond the constitutional or statutory jurisdiction or authority of the agency." Accordingly, when asking for injunctive relief or a stay, the complainant must prove that irreparable damage would otherwise result.

I. Probability of Success on the Merits

The Plaintiffs are likely to succeed on the merits of its case because it will be able to establish all of the required elements of a claim for relief under C.R.C.P. 106(a)(2).

a. The Defendants have a clear legal duty under §24-72-204(3)(a) of the Colorado Open Records Act ("CORA"), C.R.S. §24-72-101, *et seq.*, to deny the right of inspection of the "complaints about job performance" and "disciplinary records" requested in this case.

Although CORA contains a legislative declaration favoring the disclosure of public records, it does not "provide for release of information merely because it is in the possession of the government." *Internat'l Brotherhd. of Elec. Workers, Local 68 v. Denver Metro. Major League Baseball Stadium Dist.*, 880 P.2d 160, 165 (Colo. App. 1994). As the Colorado Supreme Court has stated, "the General Assembly has not defined 'public records' to include all records that a public agency made, maintained or kept." *Denver Pub'g Co. v. Bd. of Cnty Comm'rs of Arapahoe Cnty*, 121 P.3d 190, 191 (Colo. 2005). To the contrary, CORA contains an extraordinarily large number of express exemptions to its disclosure requirements, and the Legislature has added new exemptions to this lengthy list every few years. (See, §§24-72-202(6)(b)(I)-(XIII) and 24-72-204(1)(a)-(d), (2)(a)(I)-(IX), (3)(a)(I)-(XXI) and (3.5).)

Under CORA, public records are exempt from disclosure if: (1) they are "excepted by the statute itself;" or (2) they are excepted "specifically by other law" (*Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1153-54 (Colo. App. 1998))—i.e., if "inspection would be contrary to any state statute" or "any federal statute." C.R.S. §24-72-204(1)(a) and (b). Some of the express exemptions contained in CORA allow a public agency to deny inspection of requested records (see, e.g., §24-72-204(2)(a)), while other express exemptions require a public agency to deny inspection of the requested records. (See, e.g., §24-72-204(3)(a).)

One of the express exemptions in CORA that requires a public agency to deny the right of inspection is the exemption for "personnel files," which provides that:

> The custodian shall deny the right of inspection of the following records, unless otherwise provided by law; except that any of the following records, other than letters of reference concerning employment, licensing, or issuance of permits, shall be available to the person in interest . . . :
>
> . . .

> (II) (A) Personnel files; but such files shall be available to the person in interest and to the duly elected and appointed public officials who supervise such person's work.
> (B) The provisions of this subparagraph (II) shall not be interpreted to prevent the public inspection or copying of any employment contract or any information regarding amounts paid or benefits provided under any settlement agreement . . .
>
> C.R.S. §24-72-204(3)(a) and (3)(a)(II). *Emphasis added.*

CORA contains the following definition of the term, "personnel files":

> "Personnel files" means and includes home addresses, telephone numbers, financial information, and 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.
> "Personnel files" does 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 . . . or any compensation, including expense allowances and benefits, paid to employees by the state, its agencies, institutions, or political subdivisions.
>
> C.R.S. §24-72-202(4.5).

The statutory definition of "personnel files" does not contain an exhaustive list of the specific kinds of records and information that fall within the scope of the term. Instead, the definition lists a few examples followed by the language, "and other information maintained because of the employer-employee relationship." This means that the listed items of information are not the only ones, and certain other information is also included in the definition.

The requested information, "complaints about job performance" and "disciplinary action," are clearly "information maintained because of the employer-employee relationship," and this information does not fall within any of the express statutory exceptions to the term, "personnel files." There is no basis on which to conclude that the employee personnel records in issue are not the types of records that the drafters of CORA intended to protect from disclosure under the personnel files exemption.

In some cases involving the refusal of public agencies to disclose requested records on the basis of the personnel files exception, the Colorado Court of Appeals has expressed concern that public agencies may "restrict access" to documents and "place beyond disclosure any document(s)" they choose "merely by placing such documents in a personnel file." *Denver Pub'g Co. v. Univ. of Colo.*, 812 P.2d 682, 684 (Colo. App. 1990), cert. denied (1991). See also, *Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874 (Colo. App. 1987); *Freedom Newspapers, Inc., supra.* In these cases, the Court of Appeals has held that it is "the duty of the courts to ensure that documents as to which this protection is claimed actually do in fact implicate" the "right to privacy." *Denver Post Corp., supra.* at 878; *Denver Pub'g Co., supra.* at 684.

The Plaintiffs can show, if necessary, that the records in issue in this case genuinely implicate the employees' privacy rights. Such records touch upon matters which are likely to be embarrassing and humiliating and which may involve falsehoods, inaccuracies and an absence of any verification or fact-checking. Further, both CORA and School District policy and practice protect these records from disclosure and thereby create legitimate expectations of privacy regarding these records. District Policy 4134, attached to the Complaint as Exhibit 2, protects the confidentiality of teachers' personnel files, and the District's longstanding and consistent practice protects the confidentiality of bus drivers' personnel files. (See Affidavit of Misty Hart, attached to Complaint as Exhibit 1.)

b. The Defendants have a duty to deny the right of inspection on the grounds that disclosure would violate state statute regarding the confidentiality of teacher evaluations, §24-72-203(1)(a), C.R.S.

Licensed personnel performance evaluations are implemented as a matter of law for teachers, principals, and administrators. § 22-9-106, C.R.S (2015). Established in state statute is a clear and unequivocal right to confidentiality of those evaluations. § 22-9-109, C.R.S (2015). This right to confidentiality extends to all public records, defined in §24-72-202(6), C.R.S., used in preparing the evaluation reports. The records requested from and intended to be disclosed by the Defendants are protected by this state statute.

c. The Defendants have a duty to deny the right of inspection pursuant to C.R.S. § 24-72-204(6)(a), as disclosure would do substantial injury to the public interest.

The custodian of record, upon a good faith and after exercising due diligence, may apply to the district court…for the court to determine if disclosure is prohibited.

When determining whether disclosure would do substantial injury to the public interest by invading an employee's constitutional right to privacy, courts consider (1) whether the individual has a legitimate expectation of nondisclosure; (2) whether there is a compelling public interest in access to the information; and (3) where the public interest compels disclosure, how disclosure may occur in a manner least intrusive with respect to the individual's right of privacy. *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1156 (Colo. App. 1998).

As discussed above, the employees in the instant case have a legitimate and reasonable expectation that the records in issue will not be disclosed to the public.

d. The employees named in the CORA request have a clear right to relief enjoining the Defendants from releasing the records in issue.

As discussed in Section A, above, CORA requires the District and its custodian of records to deny inspection and copying of these records. C.R.S. §24-72-204(3)(a). Consequently, the employees represented by CCTEA and CCEA in this case have a clear right, based on this statute, to an injunction prohibiting the Defendants from releasing the personnel records in issue.

e. There is no other adequate remedy available to the employees whose records are sought in the CORA request.

CORA provides no remedy or process for an individual to object to or attempt to stop the release of records by a governmental body. *McDonald v. Wise*, 769 F.3d 1202, 1217 (10th Cir. 2014); citing *McDonald v. Miller*, 945 F.Supp. 1201, 1205 (D.Colo. 2013); *Shields v. Shelter*, 682 F.Supp. 1172, 1176 (D.Colo. 1988). Likewise, an appeal or an action for judicial review under the Colorado Administrative Procedure Act, C.R.S. §24-4-101 *et seq.*, is also unavailable to a party seeking to challenge a governmental body's decision to release records under CORA. *CF&I Steel, L.P. v. Air Pollution Control Div.*, 77 P.3d 933, 936 (Colo. App. 2003).

II. Danger of Irreparable Injury

Absent a preliminary injunction, the requested records will be released and will cause irreparable injury to the subject employees. The requested records are of a personal and private nature for the employees, who will be without recourse once the records have been disclosed publicly. The subject employees have a right to and an expectation of privacy concerning information contained in their personnel files and are statutorily protected from the release of such information. The District has asserted its intent to release the records despite the objections raised by CCTEA and CCEA on behalf of the employees. The District has an affirmative duty to deny the inspection and release of the requested records. §24-72-204(3)(a)(II), C.R.S.

The District's position that it intends to release the requested records despite its duty to protect the personnel files of its employees deprives the subject employees of their privacy interests in their personnel files and the statutory protections provided under CORA with no adequate legal remedy to prevent or remedy the disclosure.

Irreparable injury results when there is no legal remedy that can provide full, complete and adequate relief, where monetary damages are difficult to ascertain, or where there exists no certain pecuniary standard for the measurement of damages. *Gitlitz v. Bellock*, 171 P.3d 1274, 1279 (Colo. App. 2007). The employees named in the CORA request in the instant case will be irreparably injured by the Defendants' release of the requested records because there will be no legal remedy that can provide full and adequate relief from the injuries caused by the disclosure, monetary damages will be difficult or impossible to ascertain, and there is no certain pecuniary standard to measure the damages suffered by the employees.

III. No Plain, Speedy and Adequate Remedy of Law

CORA does not provide any legal remedy or process for an individual who objects to the release of records sought in a CORA request. Consequently, there is no legal process for the subject employees to use to challenge the District's decision to release their personnel records. Without a right to appeal or to contest to the District's decision to permit inspection of the personnel records that contain the names of the subject employees, these employees have no plain, speedy and adequate remedy at law.

IV. No Disservice to the Public Interest

The public interest will not be adversely affected should this Court grant the requested preliminary injunction. The personnel records at issue are ones that the Legislature has determined not to be of sufficient public interest so as to require their public disclosure. The Legislature has determined that these records should be protected from public disclosure and it will serve the public interest to comply with this legislative determination.

V. Balance of the Equities and Status Quo

The balance of equities favors issuance of the requested preliminary injunction and the status quo will be maintained by issuance of the injunction because the rights of the parties will be preserved pending a final hearing on the merits.

VI. Conclusion

For the above-stated reasons, the Plaintiffs, Cherry Creek Transportation Employees Association and Cherry Creek Education Association, respectfully request entry of relief as set forth in this motion and request that this Court set a forthwith hearing pursuant to C.R.C.P. 121. §1-15, 4 as the disposition of this matter requires prompt attention.

Respectfully submitted, this 8th day of June, 2016.

/s/ Rory M. Herington
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CERTIFICATE OF SERVICE

I certify that on this 8th day of June, 2016, a true and correct copy of the foregoing AMENDED MOTION FOR PRELIMINARY INJUNCTION and REQUEST FOR FORTHWITH HEARING was filed via ICCES and served on the following:

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