Jefferson County District Court **100 Jefferson County Parkway** **Golden, CO 80401**	DATE FILED: February 18, 2015 4:51 PM FILING ID: 42EA20A8F2C4F CASE NUMBER: 2015CV30320
Plaintiff: **JEFFERSON COUNTY COLORADO EDUCATION ASSOCIATION,** v. **Defendants:** **JEFFERSON COUNTY SCHOOL DISTRICT No. R-1 and LISA PINTO, in her official capacity as Custodian of Records.**	**▲ COURT USE ONLY ▲**
Attorneys for Plaintiff: Kris A. Gomez, #28039 Sharyn E. Dreyer, #19637 Colorado Education Association 1500 Grant Street Denver, Colorado 80203 Phone: (303) 837-1500 Fax: (303) 861-2039 Email: kgomez@coloradoea.org sdreyer@coloradoea.org	Case Number: _____ Courtroom: _____
MOTION FOR A PRELIMINARY INJUNCTION AND REQUEST FOR A FORTHWITH HEARING	

Plaintiff, the Jefferson County Education Association ("JCEA"), by and through counsel, respectfully moves this Court to issue a Preliminary Injunction pursuant to C.R.C.P. 65(a) to enjoin the Defendants, the Jefferson County School District No. R-1 and Lisa Pinto in her official capacity as Custodian of Records, from releasing records concerning teachers' absences and use of sick leave requested pursuant to the Colorado Open Records Act ("CORA"). The JCEA requests that this matter be heard forthwith pursuant to C.R.C.P. 121, 1-15, 4. In support of this Motion, the JCEA states the following:

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

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

PROCEDURAL HISTORY

On or about February 12, 2015, the District notified JCEA that it had received a CORA request asking for the release of "all records showing the names of" teachers at Standley Lake and Conifer High Schools who called in sick on September 19, 2014 and "all records showing the names of" teachers at Golden and Jefferson High Schools who reported sick on September 29, 2014.

On February 13, 2015, JCEA, on behalf of its teacher members whose records are sought in the CORA request, objected to the release of the records and requested a copy of the CORA request. On February 17, 2015, the District notified counsel for JCEA that it intended to release the requested records on or about February 18, 2015. On February 17, 2015, JCEA's counsel informed the District's counsel that JCEA intended to file a motion for a preliminary injunction to prohibit release of the requested records. JCEA's counsel asked the District's counsel to delay release of the records until February 20, 2015 so that JCEA would have adequate time to file its motion for a preliminary injunction. As of the date and time of filing of the instant motion, the District's counsel has not agreed to delay releasing the records.

JCEA is simultaneously filing a Complaint pursuant to C.R.C.P. 106(a)(2) seeking to compel the District to perform its 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 JCEA is 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 teacher absence/sick leave 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 extremely large number of express exemptions to its disclosure requirements. (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).)

1. 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).

Under the above provisions, if requested records fall within the scope of the term, "personnel files," as used in this statute, the records must not be disclosed unless they constitute employment contracts or contain information about amounts/benefits paid under a settlement agreement. It cannot reasonably be disputed that the records at issue in the instant case—i.e., absence records of teachers—do not constitute employment contracts or contain any information about money or benefits paid under a settlement agreement.

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).

Under this definition, records do not fall within the scope of the term, "personnel files," and are therefore subject to public disclosure, if they constitute employment applications or employment agreements, contain information as to amounts or benefits paid incident to termination of employment, contain performance ratings, constitute final sabbatical reports, or contain information as to compensation paid to public employees. Once again, the teacher absence records at issue in the instant case do not fall within any of these statutorily enumerated categories.

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 contains a list of examples followed by the language, "and other information

maintained because of the employer-employee relationship." This "is a general phrase following a list of specific types of personal information" (*Daniels v. City of Commerce City*, 988 P.2d 648, 651 (Colo. App. 1999)), which means that the enumerated types of information are not the only ones, and certain other types of information are also included in the definition. Under "the rule of *ejusdem generis*," "information . . . of the same general nature as an employee's home address and telephone number or personal financial information" (the previously enumerated types of information) is also included in the definition. *Daniels*, *supra*. at 651.

The employee absence records at issue in the instant case are a classic example of "information maintained because of the employer-employee relationship" and are very similar in this respect to the examples of information enumerated in the statutory definition. Information regarding employees' absences from work, especially absences taken as sick leave, is no less personal and deserving of protection from public disclosure than the enumerated types of information.

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.

Even though the instant case does not involve an assertion of the personnel files exception by a public agency, JCEA can show, if necessary, that the records at issue in this case genuinely implicate the privacy rights of members of JCEA. Records of teachers' absences from work, especially absences taken as sick leave, touch upon personal matters, such as physical and mental health issues and individual/family problems. These are matters regarding which teachers have "a legitimate expectation of privacy." *Freedom Newspapers, Inc., supra.* at 1155. Information about employee absences implicates the right to privacy at least as much as the statutorily enumerated examples of information that are protected by the personnel files exception, i.e., employees' home addresses, telephone numbers and financial information.

The Defendants may argue that the records request in the instant case does not implicate privacy rights because the only information requested, and the only information that the Defendants intend to disclose, are the names of certain teachers. The Defendants may argue that, because CORA does not prohibit the disclosure of employee names, the Defendants are required to release the names of teachers in response to the CORA request in this case.

The contention that the CORA request in this case seeks only employee names is disingenuous. The request does not simply ask for the names of teachers employed in the District or employed at particular schools in the District. Rather, the request asks for the names of teachers who took sick leave on certain dates. By disclosing teachers' names in response to the CORA request, the Defendants would be disclosing that the named teachers took sick leave on the dates in issue.

The Defendants may argue that the teacher absence records at issue in the instant case do not implicate privacy interests because these records are being sought only because some teachers in the School District allegedly participated in a "sickout"—i.e., called in sick to protest certain actions of the District—on the dates in issue. This argument lacks merit because the reason for a records request is irrelevant under CORA. Indeed, a member of the public is not even required to give a reason in order to be able to inspect and copy the public records of his/her choice.

Instead of focusing on the reason for the records request at issue in this case, this Court should consider the nature of the records themselves in determining whether they are the type of records that are subject to public disclosure under CORA. The records at issue in this case are records of individual teacher absences from work and, in particular, absences taken as sick leave. Employee absence and sick leave records frequently touch upon mental and physical health issues and other matters of a personal nature involving individual employees. There is no basis on which to conclude that employee absence and sick leave records are <u>not</u> the types of records that the drafters of CORA intended to protect from disclosure under the personnel files exemption.

Furthermore, even if the reason for the CORA request in this case is considered, the request still implicates the privacy rights of the teachers involved. If the requested records reveal publicly that particular teachers took sick leave on dates when a "sickout" was allegedly taking place, these teachers will be put in the position of having to publicly reveal personal information, such as mental or physical health information or the specifics of individual/family problems, in order to defend themselves and justify their use of sick leave.

The Defendants may contend that the employee absence records at issue in the instant case are not, in fact, kept by the Defendants in the employees' personnel files and the Defendants may argue on this basis that the personnel files exemption cannot apply. Such an argument lacks merit for a number of reasons.

•First, in construing CORA, Colorado court "precedent eschews strict attention to form and mandates a content-based inquiry." *Marks v. Koch*, 284 P.3d 118, 121 (Colo. App. 2011), citing *Ritter v. Jones*, 207 P.3d 954, 959 (Colo. App. 2009).

•Second, in conformity with the above principle, the definition of "personnel files" contained in CORA makes absolutely no mention of where the information or records are kept, but, instead, defines "personnel files" entirely on the basis of the nature of the records and the information contained in the records.

•Third, the only cases which say that the records in issue must actually be kept in personnel files are the ones cited above which involve assertions of the personnel files exemption by public agencies and provoke concerns on the part of the courts that the public agencies may use this exemption to improperly prevent disclosure of records in their possession. See, *Denver Pub'g Co. v. Univ. of Colo., supra., Denver Post Corp. v. Univ. of Colo., supra.*, and *Freedom Newspapers, Inc., supra.* In these cases, the courts take the reasonable position that the public agencies cannot assert the personnel files exemption if they did not even choose to place the records in issue in employee personnel files.

In the instant case, unlike the above-referenced cases, the party asserting the personnel files exemption is not a public agency, but an employee organization acting on behalf of its members whose records are sought in the CORA request at issue. This employee organization, JCEA, and its affected members had and have absolutely no say in where the requested records pertaining to their absences are kept by the Defendants. Consequently, it would make no sense to penalize these employees or deny protection to their records simply because the Defendants chose not to place these records in the employees' personnel files.

•Fourth, at the present time, most public agency records are maintained electronically and not necessarily in physical form. Consequently, a reliance upon where or in what file particular records are kept is no longer relevant or applicable.

2. Another express exemption in CORA that requires a public agency to deny the right of inspection is the exemption for medical information. This exemption 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 . . . :
>
> (I) Medical, mental health . . . data on individual persons, . . . exclusive of coroners' autopsy reports . . .

C.R.S. §24-72-204(3)(a) and (3)(a)(I). Under these provisions, if requested records contain medical or mental health data on specific employees, the records must not be disclosed unless they constitute coroners' autopsy reports.

Employee absence records and, in particular, sick leave records, frequently contain information relating to physical or mental health issues of individual employees. Even when particular absence or sick leave records do not explicitly contain physical or mental health information, public disclosure of the records may still reveal information about such issues indirectly.

•For example, the records may indicate or suggest that a particular employee is suffering from a mental or physical illness and for what period of time.

•As another example, public disclosure of the records may raise questions as to whether a particular employee was suffering from an illness and properly using sick leave on a particular date, thus compelling the employee to publicly reveal private physical or mental health information in order to defend him/herself and justify his/her use of sick leave. In the instant case, it is precisely this type of compelled self-disclosure of physical or mental health information that is likely to result if the absence and sick leave records at issue in this case are publicly released.

B. The teachers whose absence/ sick leave records are sought 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 teachers represented by JCEA in this case have a clear right, based on this statute and on School District Policy GBJ, to an injunction prohibiting the Defendants from releasing the personnel records in issue.

C. There is no other adequate remedy available to the teachers whose absence/ sick leave 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).

Consequently, a claim for relief pursuant to C.R.C.P. 106(a)(2) is the only remedy available to the members of the Plaintiff Association in this case.

For the forgoing reasons, the JCEA has established the Complaint's probability of success on the merits.

II. Danger of Irreparable Injury

Absent a preliminary injunction, the requested records will be released and will cause irreparable injury to the subject teachers. The requested records are of a personal and private nature for the teachers, who will be without recourse once the records have been disclosed publicly. The subject teachers 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 JCEA on behalf of the teachers. 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 teachers 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 teachers subject to 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 teachers.

III. No Plain, Speedy and Adequate Remedy at 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 teachers 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 teachers, these teachers 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.

CONCLUSION

For the above-stated reasons, Plaintiff respectfully requests entry of relief as set forth in its Motion for Preliminary Injunction and requests that this Court set a forthwith hearing pursuant to C.R.C.P. 121. §1-15, 4 as the disposition in this matter requires immediate attention.

Respectfully submitted this 18th day of February, 2015.

/s/ Kris A. Gomez
Kris A. Gomez, #28039
Sharyn Dreyer, #19637
Attorneys for the JCEA

CERTIFICATE OF SERVICE

I certify that on this 18th day of February, 2015, a true and correct copy of the foregoing MOTION FOR PRELIMINARY INJUNCTION and REQUEST FOR FORTHWITH HEARING was served via ICCES on the following:

Raymond C. Hess
Chief Legal Counsel, Employee Relations
Jeffco Public Schools
1829 Denver West Drive, Building 27
Golden, CO 80401

/s/ Debbie Bendell, paralegal