DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, Colorado 80401-6002	DATE FILED: June 12, 2015 4:25 PM CASE NUMBER: 2015CV30320
Plaintiff(s): **JEFFERSON COUNTY EDUCATION ASSOCIATION**, v. Defendant(s): **JEFFERSON COUNTY SCHOOL DISTRICT NO. R-1 and LISA PINTO in her official capacity as Custodian of Records.**	▲COURT USE ONLY▲ **Case Number:** 15CV30320 **Division:** 2 **Courtroom:** 5A

ORDER RE: CLAIM FOR WRIT OF MANDAMUS PURSUANT TO C.R.C.P. 106

THIS MATTER comes before the Court on Plaintiff's ("JCEA") Opening Brief for a claim for writ of mandamus, filed March 20, 2015. Defendants ("School District") filed a Response on April 10, 2015. Plaintiffs filed a Reply on May 8, 2015. On June 1, 2015, Plaintiff also filed a Motion for Stay of Court's Ruling in Event that Plaintiff's Request for Mandamus Relief Is Denied. Defendants filed a Response to the Motion for Stay on June 3, 2015. The Court finds it has jurisdiction over the parties and subject matter of this action. The Court, having reviewed the briefs and all other relevant materials, FINDS and ORDERS as follows:

I. BACKGROUND

This action concerns a challenge by JCEA to a Colorado Open Records Act ("CORA") request for sick leave records of teachers in the Jefferson County School District. JCEA is a labor and membership organization representing employees of Jefferson County School District in matters involving the terms and conditions of their employment.

On February 10, 2015, the School District received a written request, pursuant to CORA, from Kathy Littlefield, a resident of Jefferson County. Specifically, Ms. Littlefield's request stated:

> I am requesting all records showing the names of teachers who reported in sick at Standley Lake High School and Conifer High School on September 19, 2014. I am also requesting the same records for September 29, 2014 in regard to teachers who reported in sick at Golden High School and Jefferson High School. I am not requesting that you make up a list that does not currently exist, I am requesting existing records that contain the teachers at these four high schools who reported sick on these two dates. I have been informed by Colorado Freedom of Information Coalition that I am entitled to these existing records.

Pl.'s Opening Br., Ex. 3. Ms. Littlefield purportedly requested these records because of two "sickouts" that occurred at several Jefferson County high schools in September of 2014 in protest of certain actions by the school district. On September 19, 2014, a number of teachers from Standley Lake and Conifer High Schools allegedly participated in a "sickout" by calling in sick and requesting substitute teachers. Several teachers from Golden and Jefferson High Schools allegedly carried out a similar "sickout" on September 29, 2014. In each instance, the School Districts closed the high schools for the day.

On February 13, 2015, the School District notified JCEA of the CORA request. The Executive Director of JCEA submitted a written objection to the School District, on behalf of the JCEA members whose records were sought. The Director also requested, pursuant to CORA, a copy of Ms. Littlefield's CORA request.

On February 17, 2015, the School District informed JCEA that it would release the requested sick leave records on or about February 18, 2015. The records to be released consisted of a list of teachers for each of the four school districts, identified by last name and first initial (no other information was included). JCEA responded that day advising the District's counsel that it intended to file a lawsuit and a motion for a preliminary injunction seeking a court order prohibiting the release.

On February 18, 2015, the School District provided JCEA with a copy of the request but had redacted the identity and contact information for the requester, Ms. Littlefield. JCEA filed the current mandamus action that same day.

The Court held a forthwith status conference in this case on February 20, 2015. At the conference, the Parties stipulated to a preliminary injunction prohibiting release of the teacher sick leave records. The Court ordered the School District to provide JCEA with an unredacted copy of the CORA request, and the Parties to brief the issue of permanent injunctive relief for JCEA. On May 15, 2015, after the issue had been fully briefed, the Court conducted an evidentiary hearing. The Court heard testimony from Lisa Elliott on behalf of JCEA, and admitted Exhibit 1, the Jefferson County School District's Policies. Additionally, on April 10, 2015, and by leave of the Court, certain third parties filed a Brief of Amicus Curiae in support of the School District.

In JCEA's Opening Brief, it seeks mandamus relief under C.R.C.P. 106(a)(2) compelling the School District to deny Ms. Littlefield's CORA request, as well as entry of a permanent injunction mandating the same. Defendants counter argue that JCEA is not entitled to mandamus, and, therefore, the sick leave lists should be disclosed and JCEA's complaint dismissed.

II. APPLICABLE LAW

A) WRIT OF MANDAMUS.

A plaintiff must satisfy a three-part test before a court will issue mandamus:

1. The plaintiff must have a clear right to the relief sought;
2. The defendant must have a clear duty to perform the act requested; and
3. There must be no other available remedy.

Gramiger v. Crowley, 660 P.2d 1279, 1281 (Colo. 1983). Importantly, mandamus lies to compel the performance of a purely ministerial duty involving no discretionary right and not requiring the exercise of judgment. *Bd. of Cnty. Comm'rs of Cnty. of Archuleta v. Cnty. Rd. Users Ass'n*, 11 P.3d 432 (Colo. 2000).

B) COLORADO OPEN RECORDS ACT.

CORA contains "a broad legislative declaration that all public records shall be open for inspection unless excepted by the statute itself or specifically by other law." *Daniels v. City of Commerce City, Custodian of Records*, 988 P.2d 648, 650 (Colo. App. 1999) (citing *Denver Publishing Co. v. Dreyfus*, 520 P.2d 104 (Colo. 1974)). Exceptions to disclosure under CORA should be narrowly construed. *City of Westminster v. Dogan Const. Co.*, 930 P.2d 585, 589 (Colo. 1997); *Daniels*, 988 P.2d at 650.

The custodian of any public records must allow any person the right to inspect the records unless otherwise excepted by the statute. C.R.S. § 24-72-204(1). The custodian shall deny inspection of the following records to anyone other than the person in interest,[1] unless otherwise provided by law:

1. Medical, mental health, sociological . . . data on individual persons exclusive of coroners' autopsy reports;
2. 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.

C.R.S. § 24-72-204(3)(a). CORA further defines "personnel files" as meaning and including:

> home addresses, telephone numbers, financial information, and other information maintained because of the employer-employee relationship . . . . "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 required under section 23-5-123, C.R.S., or any compensation, including expense allowances and

[1] "Person in interest" means and includes the person who is the subject of a record or any representative designated by said person; except that, if the subject of the record is under legal disability, "person in interest" means and includes his parent or duly appointed legal representative. C.R.S. § 24-72-202(4).

> benefits, paid to employees by the state, its agencies, institutions, or political subdivisions.

C.R.S. § 24-72-202(4.5). A public entity may not restrict access to certain records merely by placing them in a personnel file; a legitimate expectation of privacy must exist. *Daniels*, 988 P.2d at 651.

III. ANALYSIS

Based on the evidence presented to the Court in the Parties briefs and during the evidentiary hearing on May 15, 2015, the Court finds mandamus relief is not appropriate. Although the Parties do not dispute that JCEA has satisfied the first and third prongs of the test for relief under C.R.C.P. 106, JCEA has failed to satisfy the requirement that the School District has a clear duty to deny the CORA request.

A) PLAINTIFF HAS A CLEAR RIGHT TO THE RELIEF SOUGHT.

The first prong of the test for mandamus relief is whether the plaintiff has a clear right to the relief sought. *Gramiger*, 660 P.2d at 1281. CORA requires the School District's custodian of records to deny inspection and copying of certain personnel records. C.R.S. §§ 24-72-202(4.5), 24-72-204(3)(a). Consequently, JCEA argues, the individual teachers whose sick leave records have been requested have a right to seek a permanent injunction to enjoin the School District from releasing those records. JCEA further contends it has a right to relief as an organization because it has standing to sue on behalf of its members. Defendants do not dispute that Plaintiff has a clear right to the relief it seeks and has standing to sue on behalf of its teacher members.

Therefore, the Court finds JCEA has satisfied the first prong of the test for mandamus relief.

B) PLAINTIFF HAS NO OTHER AVAILABLE REMEDY.

The third prong of the test for mandamus is whether a plaintiff has no other available remedy to achieve the relief it seeks. *Gramiger*, 660 P.2d at 1281. In its brief, JCEA argues that CORA provides no private right of action for a party to challenge disclosure of records. *McDonald v. Wise*, 769 F.3d 1202, 1217 (10th Cir. 2014) (citing *McDonald v. Miller*, 945 F. Supp. 2d 1201, 1205 (D. Colo. 2013)); *Shields v. Shetler*, 682 F. Supp. 1172, 1176 (D. Colo. 1988). JCEA also states that an appeal or action for judicial review under the Colorado Administrative Procedure Act, C.R.S. §24-4-101 et seq., is 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). Defendants do not dispute these claims and agree that Plaintiff has no other remedy outside of mandamus under C.R.C.P. 106.

Therefore, the Court finds JCEA has satisfied the third prong of the test for mandamus relief.

C) DEFENDANTS DO NOT HAVE A CLEAR DUTY TO PERFORM THE ACT REQUESTED.

The second prong of the test for mandamus relief is whether the defendant has a clear duty to perform the act requested by plaintiff. *Gramiger*, 660 P.2d at 1281. This prong is the crux of the dispute between JCEA and the School District. Whether or not the School District has a clear duty to deny release of the teachers' sick leave records hinges on whether sick leave records are protected as an exception under CORA. CORA favors disclosure of public records, and exceptions to disclosure must be narrowly construed. *Westminster*, 930 P.2d at 589; *Daniels*, 988 P.2d at 650.

JCEA argues the sick leave records exist as part of "personnel files," under Sections 24-72-204(3)(a) and 24-72-202(4.5), and/or medical information under Section 24-72-204(3)(a). Thus, JCEA claims the sick leave records are excepted from mandatory disclosure under CORA. JCEA further argues that teachers have a legitimate expectation of privacy in matters related to their sick leave, which weighs against their disclosure to the public. The School District opposes all of these contentions.

i. The Teachers' Sick Leave Records Are Not "Personnel Files" Under CORA.

Although JCEA concedes that CORA favors disclosure of public records, it first argues the sick leave records fall under the "personnel files" exception as "other information maintained because of the employer-employee relationship." C.R.S. § 24-72-202(4.5). The phrase "maintained because of the employer-employee relationship" has been interpreted by the Court of Appeals in *Daniels v. City of Commerce City, Custodian of Records*. This particular piece of the "personnel files" definition is a general phrase following a list of specific types of personal information ("home addresses, telephone numbers, financial information"). C.R.S. § 24-72-202(4.5). "If general words follow the enumeration of particular classes of things, the rule of *ejusdem generis* provides that the general words will be construed as applicable only to things of the same general nature as the enumerated things." *Daniels*, 988 P.2d at 651 (emphasis added).

In *Daniels*, the individual requesting documents through CORA sought information "related to complaints of sexual harassment, gender discrimination and retaliation." *Id.* at 650. The City argued these documents qualified as "personnel files" under CORA because they were "maintained because of the employer-employee relationship." *Id.* at 651. However, the Court of Appeals applied the statutory interpretation rule of *ejusdem generis* and construed the "personnel files" exception narrowly. *Id.* The Court of Appeals ruled "the phrase at issue mean[s] that the information must be of the same general nature as an employee's home address and telephone number or personal financial information." Therefore, the Court held that records related to complaints of sexual harassment, gender discrimination, and retaliation are not "personnel files" because they are "not the type of personal, demographic information listed in the statute." *Id.*

Here, as in *Daniels*, the party challenging disclosure is arguing the requested records qualify as "personnel files" because they are "maintained because of the employer-employee relationship." C.R.S. § 24-72-202(4.5). JCEA argues sick leave records are "no less personal and deserving of protection from public disclosure" than a teacher's address, telephone number, or financial information. The Court is not persuaded. Like in *Daniels*, the Court finds sick leave records are not the type of personal, demographic information that is contained in a person's address, telephone number, or financial information.

JCEA also contends that the appellate court has issued a "clear ruling" that "leave of absence records fall within the definition of 'personnel files' contained in CORA." It relies on *Ornelas v. Department of Institutions*, 804 P.2d 235 (Colo. App. 1990), to support its argument. However, this Court concludes that the *Ornelas* court did not address the issue of sick leave records as part of "personnel files" in the same context as the case at hand. *Ornelas* involved a discovery dispute over a former employee's leave of absence records. In ruling that the employee did not need to submit a formal discovery request to access his leave records, the appellate court noted as an aside that the employee was also "entitled to access his own personnel files pursuant to [CORA]." *Id.* at 238. JCEA urges the Court to interpret this dicta as a holding that leave records are part of "personnel files" under CORA. However, the appellate court in *Ornelas* did not actually confront the question of whether the employee could have prevented members of the public from reviewing his leave records, which is the issue in the current case. The employee in *Ornelas* was attempting to access his own leave of absence records, which is explicitly permitted by CORA and not at issue in the current case. C.R.S. § 24-72-204(3)(a)(II).

Further, the Court of Appeals' decision in *Denver Publishing* one year later, as well as its decision in *Daniels* eight years later, do not cite to *Ornelas*. In fact, *Ornelas* has never been cited in a subsequent CORA case. In addition, both *Denver Publishing* and *Daniels* authorized the disclosure of records far more sensitive than leave of absence records. *See Daniels*, 988 P.2d 648; *Denver Publishing*, 520 P.2d 104**.** For these reasons, the Court does not find that *Ornelas* is applicable here.

JCEA maintains a third argument in favor of characterizing sick leave records as "personnel files." It asserts that sick leave records are not excluded from the definition of "personnel files" by the language in the statute that excludes "any compensation, including expense allowances and benefits, paid to employees." C.R.S. § 22-72-202(4.5). JCEA states that the sick leave records contain no information regarding the amounts paid to the teachers, or whether the teachers had accrued sufficient sick leave by the time they called in sick on the days in question. Hence, JCEA claims, the records cannot be considered "compensation" or "benefits" paid to the teachers, both of which would exclude them from "personnel files." Yet, as demonstrated by JCEA's testimony during the evidentiary hearing, sick leave is a part of the teachers' annual compensation package. Therefore, the Court finds sick leave could be construed as a form of compensation and/or benefits paid to the School District's employees.

Therefore, the Court finds the sick leave records at issue in this case do not qualify as "personnel files" for purposes of protection under CORA.

ii. The Teachers' Sick Leave Records Do Not Qualify as Medical Information Under CORA.

JCEA next asserts that the sick leave records fall under CORA's requirement for nondisclosure of "medical, mental health . . . data on individual persons, . . . exclusive of coroners' autopsy reports . . . ." JCEA claims "[e]mployee absence records and, in particular, sick leave records, frequently contain information relating to medical or mental health issues of individual employees" (sick leave records may suggest an employee is suffering from an illness, and/or the length or severity of that illness).

However, the Court finds the CORA request at issue in this case is only seeking the names of teacher's who called in sick on two specific dates. The request does not ask for the teachers' reasons for doing so or for any other medical-related information.

JCEA also argues the teachers may be compelled to reveal specific medical information to the public, should they need to defend themselves from attacks resulting from the release of the lists; however, the Court finds this is pure speculation and irrelevant to the issue of whether the sick leave records qualify as "medical" under CORA. Therefore, the Court declines to address JCEA's argument regarding the theory of "foreseeable self-disclosure," as discussed in *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988) (discussing "foreseeable self-disclosure" in the context of the publication element required for a defamation claim).

Therefore, the Court finds the sick leave records at issue also do not qualify as medical information for purposes of nondisclosure under CORA.

iii. The Teachers Do Not Have a Legitimate Expectation of Privacy in Their Sick Leave Records.

JCEA also contends that the teachers have a reasonable and legitimate expectation of privacy in their sick leave records, pursuant to School District Policy. Specifically, School District Policy GBJ (Hearing Exhibit 1) states that all personnel records of individual employees are confidential and shall not be open for public inspection, with the exception of the following:

1. Employee applications;
2. Employment agreements;
3. Any amount paid or benefit provided incident to employment termination;
4. Performance ratings for classified employee; and
5. Any compensation, including expense allowances and benefits.

JCEA argues sick leave records are confidential under this policy because they are not contained in this enumerated list. JCEA also argues that sick leave records implicate the right to privacy

because they "touch upon personal matters, such as medical and mental health issues and individual/family problems."

CORA's general presumption in favor of public access must be weighed against the privacy interest at stake. *Daniels*, 988 P.2d at 651. "An agreement by a government entity that information in public records will remain confidential is insufficient to transform a public record into a private one." *Id.* A public entity cannot adopt a policy that creates broader privacy protections than CORA permits. *Denver Pub. Co. v. Univ. of Colorado*, 812 P.2d 682, 684 (Colo. App. 1990). "[T]he protection for personnel files is based on a concern for the individual's right of privacy, and it remains the duty of the courts to ensure that documents as to which this protection is claimed actually do in fact implicate this right." *Denver Post Corp. v. Univ. of Colorado*, 739 P.2d 874, 878 (Colo. App. 1987). Further, "it has been recognized that public employees have a narrower expectation of privacy than other citizens." *Denver Pub. Co.*, 812 P.2d at 685.

School District Policy GBJ is an agreement by a government entity that information in public records will remain confidential and attempts to adopt a policy that creates broader privacy protections than CORA. Thus, the Court finds this policy is insufficient to transform the sick leave records into private records free from disclosure.

The Court also does not find the sick leave records implicate a legitimate right to privacy. A teacher's absence from school is not private—students, parents, colleagues, and supervisors will know the teacher is not present. Further, whether a teacher is absent from work due to an illness or otherwise does not reflect poorly upon him or her. *See Kanzelmeyer v. Eger*, 329 A.2d 307, 310 (Pa. Commw. Ct. 1974) ("While a person of even ordinary sensitivity might reasonably desire that the record of his illnesses or deaths in his family be withheld from scrutiny by members of the public, we are unable to agree that the facts of illness or deaths of family members can operate to impair reputation or personal security. Illness and deaths in the family are not disreputable.").

Therefore, the Court finds the teachers do not have a legitimate expectation of privacy in their sick leave records that would exempt the records from disclosure.

IV. CONCLUSION

Because Plaintiff has not satisfied the second prong of the three-part test for mandamus relief, the Court must deny the request. For the aforementioned reasons, the Court **DENIES** the relief Plaintiff requests in the Opening Brief, filed March 20, 2015. As the relief sought in the Brief is identical to the relief sought in the Complaint, the Court hereby **DISMISSES** the Complaint.

As to Plaintiff's Motion for Stay, the Court grants a fourteen-day stay of judgment pending application for appellate review. A party may seek a stay of judgment at the trial court

level under C.R.C.P. 62.[2] Automatic stays per C.R.C.P. 62(a) "are applicable only to final judgments, not to injunctions or temporary or interlocutory orders." C.R.C.P. 62(a); *People ex rel. Strodtman*, 293 P.3d 123, 134 (Colo. App. 2011). However, "when the order appealed from is an injunction, the trial court, under C.R.C.P. 62(c), 'in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal . . . .' It has generally been held that this rule authorizes the trial court to enter orders which preserve the status quo, or otherwise protect the rights of the parties pending appeal . . . ." *Rivera v. Civil Serv. Comm'n of City & Cnty. of Denver*, 529 P.2d 1347, 1348 (Colo. 1974) (citing *Woitchek v. Isenberg*, 379 P.2d 392 (Colo. 1963)). Seeing as the requested sick leave records are already prepared for release and that Defendants would be able to release them immediately upon receipt of this Order, the Court finds a stay of judgment is appropriate to preserve the status quo and afford JCEA the opportunity to appeal.

SO ORDERED this 12th day of June, 2015.

BY THE COURT:

Christie B. Phillips
District Court Judge

[2] The parties argue a 4-factor test from *Romero v. City of Fountain*, 307 P.3d 120 (Colo. App. 2011), for determining whether to grant a motion to stay. However, after review of the relevant case law, including *Romero*, the Court finds this 4-factor test is not applicable to trial court motions for stay under C.R.C.P. 62. Rather, the *Romero* test is utilized by the Court of Appeals in deciding motions for stay under C.A.R. 8(a). *Romero*, 307 P.3d at 121-23.

CERTIFICATE OF MAILING

I hereby certify that on this 12th day of June, 2015, a true and accurate copy of the above document was filed via ICCES/JPOD addressed to all parties that have entered their appearance in this matter.

Olivia Kyle
Division 2 Law Clerk