

<p>DISTRICT COURT, COUNTY OF ARAPAHOE COLORADO</p> <p>7325 S. Potomac Street Centennial, CO 80012</p>	<p>DATE FILED: July 1, 2016 2:42 PM FILING ID: FE676983A6092 CASE NUMBER: 2016CV30740</p>
<p>Plaintiffs:</p> <p>CHERRY CREEK TRANSPORTATION EMPLOYEES ASSOCIATION and CHERRY CREEK EDUCATION ASSOCIATION</p> <p>v.</p> <p>Defendants:</p> <p>CHERRY CREEK SCHOOL DISTRICT NO. 5 and TUSTIN AMOLE in her official capacity as Custodian of Records</p> <p>Steve Colella, #45503 Sonja S. McKenzie, #23356 Cherry Creek School District #5 4700 S. Yosemite Street Greenwood Village, CO 80111 Phone: (720) 554-4373 Email: scolella@cherrycreekschools.org smckenzie3@cherrycreekschools.org</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 16CV030740 Division: 202</p>
<p style="text-align: center;">DEFENDANTS' RESPONSE TO PLAINTIFFS' AMENDED MOTION FOR PRELIMINARY INJUNCTION AND REQUEST FOR FORTHWITH HEARING</p>	

CHERRY CREEK SCHOOL DISTRICT NO. 5 and TUSTIN AMOLE, IN HER OFFICIAL CAPACITY AS CUSTODIAN OF RECORDS FOR THE CHERRY CREEK SCHOOL DISTRICT, NO. 5 (collectively, "Defendants"), by and through their attorneys, hereby files this

Response to Plaintiffs' Amended Motion for Preliminary Injunction and Request for Forthwith Hearing as follows:

1. On or about January 21, 2016, 9News, A Tegna Company ("9News") submitted a records request to Defendants under the Colorado Open Records Act [attached hereto as Exhibit A]. Defendants held various discussions with counsel for 9News and Plaintiffs from January through March 2016. 9News argued vigorously in favor of production of the requested records while Plaintiffs took the position set out in their initial Complaint and Motion for Preliminary Injunction and Request for Forthwith Hearing in this case.

2. As a result of these discussions, Defendants eventually decided to submit responsive documents to 9News. This decision reflected Defendants' desire to err on the side of transparency in an uncertain legal environment. It was not and is not necessarily indicative of Defendants' agreement that it must, by law, produce the requested documents.

3. On the day Defendants were prepared to submit the documents, Plaintiffs filed their initial complaint and motion in this case. Defendants thus withheld submission of responsive documents due to Plaintiffs' filings.

4. On June 3, 2016, counsel on behalf of 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 (collectively, "Requesting Parties") submitted a substantially similar CORA request to 9News' January 21st request [attached hereto as Exhibit B]. Just as with the January 21st request [Exhibit A], Defendants notified Plaintiffs that they would submit responsive documents by the close of business on June 8, 2016. That day, Plaintiffs filed their First Amended Complaint and related motion at issue here.

5. In light of Plaintiffs' filings, and consistent with their position regarding the January 21 request, Defendants will not release responsive documents to Requesting Parties unless ordered to do so by this Court or another court of competent jurisdiction.

6. The issue in this case for the Court to resolve is whether the records requested by 9News and the other media outlets – complaints and disciplinary records of CCSD employees (including one teacher) - constitute personnel files under the personnel files exception to CORA. See C.R.S. § 24-72-204(3)(a)(II)(A). Personnel files are defined by C.R.S. § 24-72-202(4.5) to include home addresses, telephone numbers, financial information and *other information maintained because of the employer-employee relationship*. This statutory definition specifically excludes applications, employment agreements, any amount paid or benefit provided incident to termination of employment, performance ratings, final sabbatical reports ... or any compensation.... However, the statutory definition neither expressly includes nor excludes

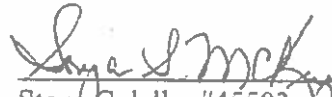
disciplinary records and complaints, which are often incorporated into personnel evaluations. Thus, the plain language of the statute does not resolve the issue of whether the public can access these types of records.

7. Moreover, the language, “other information maintained because of the employer-employee relationship” is broad and could easily be interpreted to encompass the types of records requested in this case. In researching case law on CORA access, CCSD has not found any cases specifically addressing the types of records requested in this case – complaints, disciplinary records, and personnel evaluations (to the extent complaints are included in such evaluations). None of the parties involved in this matter (CCTEA, CCEA, 9News etc.) have cited any legal authority to CCSD which definitively resolves this issue. As such, the accessibility of disciplinary records, complaints, and personnel records appears to be an issue of first impression which CCSD asks this Court to resolve pursuant to C.R.S. § 24-72-204(6), as CCSD is unable in good faith to determine if the requested records should be disclosed.

8. Defendants wish to avoid inconsistent and unfair application of the law so that they have withheld all requested documents related to all employees named in the CORA request, whether represented by Plaintiffs as labor organizations or not. As a custodian of records, CCSD is entitled to raise privacy objections. See, *Corbetta*, 975 P.2d 718, 721, n.3. Thus, CCSD hereby raises a privacy objection on behalf of all the CCSD employees whose disciplinary and personnel records were requested. Further, to employ a different approach for employees with association membership versus those who do not would do a substantial injustice to the public interest under C.R.S. § 24-72-204(6)(a). Thus, CCSD requests that this Court assess whether the records requested by 9News and the other media outlets should be disclosed under CORA, if said records are protected under the personnel records exception to C.R.S. § 24-72-204(3)(a)(II)(A), and if substantial injury to the public interest will occur by interfering with the privacy rights of public employees under C.R.S. § 24-72-204(6)(a).

9. In essence, Defendants find themselves stuck within a murky legal landscape as they try to satisfy and reconcile two important interests: continuing their long history of open and transparent dealings with the public while trying to protect the legitimate privacy interests of each and every one of its valued employees. In doing so, Defendants seek clarity from this Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on this ____ day of July, 2016, a true and correct copy of the above and foregoing **DEFENDANTS' RESPONSE TO PLAINTIFFS' AMENDED MOTION FOR PRELIMINARY INJUNCTION AND REQUEST FOR FORTHWITH HEARING** was electronically filed served upon all counsel via ICCES:

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