DISTRICT COURT ARAPAHOE COUNTY, COLORADO Arapahoe County Justice Center 7325 South Potomac Street Centennial, Colorado 80112	DATE FILED: September 21, 2016 4:09 PM CASE NUMBER: 2016CV30740
Plaintiffs: CHERRY CREEK TRANSPORTATION EMPLOYEES ASSOCIATION and CHERRY CREEK EDUCATION ASSOCATION v. **Defendants**: CHERRY CREEK SCHOOL DISTRICT NO. 5 and TUSTIN AMOLE in her official capacity as Custodian of Records and **Intervenors/Crossclaim Plaintiffs**: THE ASSOCIATED PRESS, KCNC-TV/CHANNEL 4, KDVR-TV/CHANNEL 31, KMGH-TV/CHANNEL 7, KUSA-TV/CHANNEL 9, COLORADO FREEDOM OF INFORMATION COALITION, and THE DENVER POST	**▲ COURT USE ONLY ▲** **Case Number**: 2016CV30740 **Division**: 202

ORDER RE: PLAINTIFFS' AMENDED MOTION FOR PRELIMINARY INJUNCTION

This lawsuit is brought under the Colorado Open Records Act ("CORA"), C.R.S., section 24-72-201, *et seq.* Before the Court is the Amended Motion for Preliminary Injunction and Request for Forthwith Hearing of Plaintiffs Cherry Creek Transportation Employees Association ("CCTEA") and Cherry Creek Education Association ("CCEA") (collectively, the "Associations"). The Associations are labor unions that represent employees within Cherry Creek School District No. 5 ("CCSD"). CCTEA represents transportation employees, *e.g.*, bus drivers; CCEA represents teachers.

The Associations sued CCSD and its Director of Communications, Tustin Amole, to prevent them from producing certain records pursuant to CORA. Ms. Amole is the custodian of

records for CCSD. (Hereinafter, references to "CCSD" include Ms. Amole as appropriate to the context.) The Associated Press, Colorado Freedom of Information Coalition, The Denver Post, KCNC-TV/Channel 4, KDVR-TV/Channel 31, KMGH-TV/Channel 7, and KUSA-TV/Channel 9 (collectively, the "Intervenors"), all of whom now have submitted like CORA requests to CCSD, have intervened in this action. The Intervenors, having brought what they denominate as a "crossclaim" against the Associations, seek a declaration that Intervenors are entitled to the records at issue.[1]

The only issue presently before the Court is whether the Associations established the criteria required to obtain a preliminary injunction. The Court has considered Plaintiff's motion and the pre-hearing brief of Intervenors. The Court conducted an evidentiary hearing on the motion on July 26, and August 8, 2016, at which counsel also made arguments. The parties submitted post-hearing briefs, which the Court also has considered.

I. BACKGROUND FACTS

In December 2015 and January 2016, KUSA 9News investigative reporter Kevin Vaughan learned about serious traffic accidents involving school buses in Boulder County and Durango. Motivated by these accounts, Mr. Vaughan began investigating school bus accidents in Colorado.

In January 2016, Mr. Vaughan sent a CORA request to the State Department of Education for information about school bus accidents from 2011 through the present. Mr. Vaughan received information showing there had been approximately 1,400 traffic accidents in

[1] The proper nomenclature for the Intervenor's pleading is a "counterclaim." However, they perhaps more appropriately should have brought a "crossclaim" against CCSD as the custodian of the records which they seek. Because the Intervenor's pleading specifically names the Associations, the Court treats their pleading in this litigation as a counterclaim against the Associations. At this procedural juncture, however, the counterclaim has no bearing on the Court's ruling.

Colorado involving school buses from January 1, 2011, through mid-2015, the then-most current data available.

With this information, Mr. Vaughan obtained accident reports from the law enforcement agencies within whose jurisdictions these accidents occurred. (It is unclear from the record whether this information was sought and obtained pursuant to a CORA request or pursuant to the Colorado Criminal Justice Records Act ("CCJRA"), C.R.S. section 24-72-301, *et seq.*) Mr. Vaughan was able to determine that in approximately half – or 700 – of the accidents, the school bus driver was at fault. In approximately ten percent – or 70 – of those accidents, injuries were reported.

Mr. Vaughan then sent CORA requests to the school districts whose bus drivers had been in at-fault accidents involving injuries. The requests sought the following categories of records (or some variation thereof) for the bus drivers involved in the accidents: (1) job applications, (2) position and salary if currently employed by the district, (3) discharge date if no longer employed by the district, (4) any records of complaints about the job performance of the individual, and (5) any records of disciplinary action taken against the individual.

According to Mr. Vaughan, most of the school districts provided the records without question, approximately four districts reported that no records existed, and three districts, including Denver Public Schools, Swink School District, and Adams School District, outright declined to produce records based upon CORA's exemption for personnel files. The Durango School District initially declined to produce records, but after further correspondence in which 9News asserted that the records were not exempt as "personnel files" under Colorado law, the Durango School District produced the records. CCSD initially agreed to produce records; however, CCSD subsequently declined to produce some of the records when the Associations

representing the personnel about whom 9News sought information filed this proceeding. The circumstances leading to CCSD's decision are as follows:

On January 21, 2016, Mr. Vaughan sent a letter to Tustin Amole, the Director of Communications for CCSD, requesting, pursuant to CORA, the previously set forth records for the following employees: Constance Senneoff, Kenneth L. Sablich, Sharon K. Bogges, Robert L. Shouse, Dawn R. Jesperson,[2] and Michael M. Portales. With the exception of Ms. Jesperson, these employees are or were bus drivers for CCSD; Ms. Jesperson is a teacher who, incident to her assignment, must transport students in a 13-passenger van. All of these employees were involved in at-fault traffic accidents involving injuries.

For each of these employees, CCSD furnished Mr. Vaughan job applications. On January 25, 2016, for each of the employees, CCSD furnished Mr. Vaughan information about position, salary, employment status, and, if applicable, discharge date. CCSD also furnished Mr. Vaughan the internal CCSD Accident Report completed by the employees, relating to the accidents in which they had been involved. These reports are kept within CCSD's Risk Management Department, and are not part of employee personnel files. As to the request for information about complaints and disciplinary actions, Ms. Amole advised that CCSD would respond after its legal counsel reviewed the legal authority Mr. Vaughan provided, which he claimed established that complaints and disciplinary records are not exempt from production under CORA's personnel files exemption.

According to CCSD, between January and March 2016, CCSD conducted discussions with 9News and the Associations about whether to turn over complaints and disciplinary records.

[2] The request for records about Ms. Jesperson, a member of the CCEA, is the reason the CCEA is party to this lawsuit, with the CCEA raising arguments against production unique to Ms. Jesperson's status as a licensed teacher. However, it is now clarified that there are no records relating to Ms. Jesperson that are both responsive to the CORA request and being withheld. Therefore, the Court does not address the CCEA's unique arguments.

To place these discussions in context, it is important to understand how CCSD maintains the relevant records. CCSD refers to complaints against bus drivers as "community complaints." Community complaints come in regularly, not just against bus drivers, but against teachers, administrators, etc. Most are unfounded and even frivolous. Accordingly, for complaints against bus drivers, CCSD has a process by which community complaints are handled called "Policy 4534." Of particular relevance to the issue at hand, Policy 4534 states: "If during the school year, management receives complaint(s) against a driver, management will notify the driver of the complaint(s) and ***will log these complaint(s) outside of the bus driver's personnel file.***" (Emphasis added). Per policy, a complaint is made part of a driver's personnel file only after it is investigated and substantiated, allowing the driver an opportunity to respond in writing to any findings. Thus, within CCSD, records of "community complaints" only reside outside of traditional personnel files unless a complaint is found to have merit. Whether based upon a community complaint or otherwise, disciplinary records, on the other hand, are contained with a bus driver's personnel file.

In CCSD's discussions with 9News and the Associations, 9News took the position that neither community complaints nor disciplinary records are exempt "personnel files" under CORA; the Associations asserted the opposite view. On March 25, 2016, CCSD decided to turn over all of the records to 9News. According to the CCSD, "[t]his decision reflected [CCSD's] desire to err on the side of transparency in an uncertain legal environment. It was not and is not necessarily indicative of [CCSD's] agreement that it must, by law, produce the requested documents."[3] However, CCSD altered its determination when, on this same date, the

[3] The Court notes that CORA does not permit a government agency to err on the side of transparency when it comes to personnel files. CORA is clear: if a record is a personnel file, the record custodian must not disclose it. *See* C.R.S., section 24-72-204(3)(a)(II).

Associations filed suit and their motion seeking an injunction against production of the records. CCSD decided to await the Court's ruling before turning over the documents.

Subsequently, the Intervenors (less 9News) made similar CORA requests to CCSD. CCSD again determined to turn over the records, until the Associations amended their Complaint to seek an injunction against CCSD turning over records to these entities as well. For now, therefore, CCSD is declining to produce to 9News and the other Intervenors records of community complaints and disciplinary records of the six named employees.

II. STANDARD OF REVIEW

By this action, the Associations seek an order pursuant to C.R.C.P. 106 barring CCSD from producing the at-issue records. Mandamus is an extraordinary remedy that a court may use to compel performance of a duty that the law requires. *See State v. Bd. of Cnty. Comm'rs*, 897 P.2d 788, 791 (Colo. 1995). A court will grant a request for mandamus only if (1) the plaintiff has a clear right to the relief sought; (2) the defendant has a clear duty to perform the act requested; and (3) there is no other available remedy. *Bd. of Cnty. Comm'rs v. Cnty. Rd. Users Ass'n*, 11 P.3d 432, 437 (Colo. 2000).

At this juncture, the Associations seek a preliminary injunction, barring production of the at-issue records pending adjudication of the case on the merits. A preliminary injunction, too, is an extraordinary remedy designed to protect a plaintiff from sustaining irreparable injury and to preserve the power of the court to render a meaningful decision following a trial on the merits. *Rathke v. MacFarlane*, 648 P.2d 648, 653 (Colo. 1982) (citing *Mid-Fla Coin Exch. v. Griffin*, 529 F.Supp. 1006 (M.D. Fla. 1981)). The granting or denial of a preliminary injunction is a decision which lies within the sound discretion of the trial court. *Crosby v. Watson*, 355 P.2d 958 (Colo. 1960); *Allen v. Denver*, 351 P.2d 390 (Colo. 1960); *Macleod v. Miller*, 612 P.2d 1158 (Colo. App. 1980). However, injunctive relief should not be indiscriminately granted; it should

be exercised sparingly and cautiously and with a full conviction on the part of the trial court of its urgent necessity.

To obtain a preliminary injunction under Rule 65 of the Colorado Rules of Civil Procedure the moving party must show that: "(1) it has a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury exists that may be prevented by injunctive relief; (3) there is no plain, speedy and adequate remedy at law; (4) there is no disservice to the public interest; (5) the balance of equities favors injunction; and (6) the injunction will preserve the status quo pending trial on the merits." *Denver Firefighters Local No. 858, IAFF, AFL-CIO v. City & Cnty. of Denver*, 292 P.3d 1101, 1104 (Colo. App. 2012) (citing *Rathke*, 648 P.2d at 653-54), *rev'd on other grounds*, 320 P.3d 354 (Colo. 2014). In addition, the Court must find that the injury will be irreparable before it may enjoin action an agency proposes to take as being beyond the constitutional or statutory jurisdiction or authority of the agency. *See* C.R.S. § 24-4-106(8).

III. ANALYSIS

In the instant case, the Associations seek to prevent production under CORA of two types of records: (1) community complaints against bus drivers and (2) disciplinary records of bus drivers.[4] The Associations contend that both categories of records fall under CORA's exemption for personnel files. *See* C.R.S. § 24-72-204(3)(a)(II) ("The custodian shall deny the right of inspection of the following records, unless otherwise provided by law . . . Personnel files . . . ."). The Association also contends that if they have to, they can show "a legitimate expectation of privacy" in the records.

[4] CCSD indicates that the "[b]road nature of this request necessarily implicated performance complaints contained within performance evaluations." CCSD also states: "performance concerns are frequently documented in performance evaluations. Thus, the subject CORA request also implicates performance evaluations . . . ." Beyond these statements, however, the Court has not seen evidence that the CORA request before it requires the production of performance evaluations and therefore cannot comment on CCSD's representation.

Intervenors argue that the personnel files exemption does not apply. They argue that the issues before the Court are decided conclusively by Court of Appeals decisions in *Daniels v. City of Commerce City*, 988 P.2d 648 (Colo. App. 1999) and *Jefferson Cnty. Educ. Ass'n v. Jefferson Cnty. School Dist.*, 2016 COA 10, *cert. denied*, 2016 WL 4098232.

With respect to whether the records are personnel files, CCSD suggests that under the facts of this case the law is unclear and that the Court faces a "novel legal question." CCSD regards *Daniels* and *Jefferson Cnty. Educ. Ass'n* as possibly persuasive, but "not directly on point." CCSD also suggests that both the Associations and the Intervenors raise reasonable legal arguments, as well as valid public policy and practical considerations. In its answer, CCSD "hereby raises a privacy objection on behalf of all the CCSD employees whose disciplinary and personnel records were requested." CCSD purportedly made this assertion pursuant to C.R.S. section 24-72-204(6)(a), which provides: "the official custodian may apply to the district court of the district in which such record is located for an order permitting him or her to restrict such disclosure or for the court to determine if disclosure is prohibited." However, it is unclear that CCSD is requesting such a determination. This lack of clarity is compounded by the fact that CCSD amended its response to Intervenor's motion to intervene in order to expressly exclude any reference to C.R.S., section 24-72-204(6)(a). At any rate, it is clear that at this juncture, only the Associations seek intermediary relief by way of a preliminary injunction.

a. Records of Performance Complaints and Disciplinary Action do not Fall Within CORA's Personnel Files Exemption

This Court is obligated to follow binding precedent: "Opinions designated for official publication must be followed as precedent by all lower court judges in the state of Colorado." C.A.R. 35(e); *see also Martin v. Dist. Court*, 550 P.2d 864, 965 (Colo. 1976) ("In view of the fact that the case was selected for official publication, it had a precedential effect, and as the law of the state it was binding on the district court and should have been followed.").

The Associations urge that the holdings of *Daniels* and *Jefferson Cnty. Educ. Ass'n* are inapplicable because the records at issue here are substantially different than those involved in those cases. In both *Daniels* and *Jefferson Cnty. Educ. Ass'n*, the at-issue records were of a different nature and they were not contained within traditional personnel files. *Daniels* involved records of sexual harassment, discrimination, and retaliation complaints and investigations. The record custodian "conceded that the records requested . . . were not contained within any specific personnel file." 988 P.2d at 651. *Jefferson Cnty. Educ. Ass'n* involved teacher attendance records; the responsive attendance records consisted of just "four documents, . . . one for each high school." ¶ 7. Thus, attendance records need not have been extracted from individual personnel files to comply with the records request. In contrast, in the instant case, disciplinary records are kept within traditional personnel files; while most community complaints are not kept in traditional personnel files, they are moved there if investigated and found to have merit. However, the Court finds the distinctions among the records immaterial.

The law is clear that where a record is physically housed does not determine whether it qualifies as "personnel files": the issue is the nature of the record. The hearings on the amendment to CORA providing the current definition of personnel files establish a clear legislative intent that "personnel files" are a "thing" not a "place." Hearings on H.B. 1195 before the H. Local Gov't Comm., 58th Gen. Assemb., 2d Sess. (Feb. 3, 1992) at 6:30; Hearings on H.B. 1195 before the S. Local Gov't Comm., 58th Gen. Assemb., 2d Sess. (Mar. 5, 1992) at 11:55; *cf. Daniels*, 988 P.2d at 651 ("A public entity may not restrict access to information by merely placing a record in a personnel file; a legitimate expectation of privacy must exist."); *Denver Publ'g Co. v. Univ. of Colo.*, 812 P.2d 682 (Colo. App. 1990) (explaining court's role in ensuring documents included in personnel files implicate privacy interest).

Of significance to the issue presently before this Court, in both *Daniels* and *Jefferson Cnty. Educ. Ass'n*, the parties opposing production argued for application of CORA's personnel files exemption even though the at-issue records were not contained within traditional personnel files. Thus, both courts were required to interpret and apply CORA's definition of "personnel files." Both concluded that the term "personnel files" is limited to information of the same general nature as an employee's home address and telephone number or personal financial information. *Daniels*, 988 P.2d at 651; *Jefferson Cnty. Educ. Ass'n*, ¶¶ 20-23.

It makes no sense to apply different interpretations to CORA's definition of "personnel files" depending upon whether a record resides within or without a traditional personnel file. Again, the Generally Assembly's concern was the nature of the record, not its location. *See supra.* Accordingly, in evaluating the records before it, this Court must apply the definition of "personnel files" as interpreted in two published decisions of the Court of Appeals. C.A.R. 35(e). The Associations' argument that *Daniels* is inapplicable because the General Assembly subsequently amended CORA to exempt from production records about sexual harassment complaints disregards the fact that the General Assembly left intact the *Daniels* court's interpretation of "personnel files." *See People v. Swain*, 959 P.2d 426, 430-31 (Colo. 1998); *Rauschenberger v. Radetsky*, 745 P.2d 640, 643 (Colo. 1987), *superseded by statute on other grounds as recognized in White v. Hansen*, 837 P.2d 1229 (Colo. 1992). Further, the Associations' argument ignores the fact that just this year the court in *Jefferson Cnty. Educ. Ass'n* identically defined "personnel files." Lastly, the Court declines even to consider the Associations' contention that the *Daniels* decision – upon which the *Jefferson Cnty. Educ. Assoc.* decision was based – is "seriously flawed." Whether rightly or wrongly decided, flawed, or otherwise, this Court does not second guess the binding judgments of the Court of Appeals. The

Associations may raise their argument before the Court of Appeals, but this Court will not consider it.

For these reasons, the Court concludes that disciplinary records and community complaints are not of the same general nature as an employee's home address and telephone number or personal financial information. Accordingly, they are not barred from production by CORA's "personnel files" exemption.

b. The Associations did not Establish the Existence of a Privacy Interest; the Court Declines to Consider Whether Disclosure Would do Substantial Injury to the Public Interest

In the post-hearing briefing on the Amended Motion for Preliminary Injunction, the Associations suppose and CCSD mentions public policy and privacy interest as grounds to proscribe production. However, the Associations have not established the existence of a privacy interest. Further, at this procedural point in the case, the Court declines to consider whether production of the at-issue records would substantially injure the public interest.[5]

The Court is unwilling to announce across the board that all disciplinary records and all community complaints implicate a privacy interest. However, the Associations' evidence, argument, and briefing require just that. The Associations speak in broad terms about employees' legitimate expectations of privacy in disciplinary records and in preventing public access to frivolous complaints against their job performance. However, the General Assembly, in the first instance, has declared a strong and compelling interest in the production of records that are not "personnel files." As established above, the disciplinary records and community complaints at issue here are not personnel files. Therefore, in the absence of anything showing

[5] The Associations raise this argument under the heading: "Although Plaintiffs Are Not Required to, They Can Show an Expectation of Privacy in the Records in Issue." CCSD states that it recognizes "the public policy and practical considerations raised" by the arguments of both the Associations and the Intervenors.

greater grounds for privacy than the Associations have shown, the Court must conclude that the Associations failed to establish a legitimate expectation of privacy.

Finally, the Court addresses whether producing the records would harm the public interest. "If documents are not part of the . . . personnel files, then the question of whether they implicate a legitimate expectation of privacy becomes a component of a different analysis, which is whether disclosing them would do substantial injury to the public interest." *Jefferson Cnty. Educ. Ass'n*, ¶ 48 (citing C.R.S. § 24-72-204(6)(a); *Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874, 878 (Colo. App. 1987)). However, it is for the custodian of records – here CCSD – to raise public interest:

> ***If, in the opinion of the official custodian of any public record, disclosure of the contents of said record would do substantial injury to the public interest***, notwithstanding the fact that said record might otherwise be available to public inspection or if the official custodian is unable, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if disclosure of the public record is prohibited pursuant to this part 2, ***the official custodian may apply to the district court of the district in which such record is located for an order permitting him or her to restrict such disclosure or for the court to determine if disclosure is prohibited.***

C.R.S. § 24-72-204(6)(a) (emphasis added); *see also Denver Post Corp.*, 739 P.2d at 878 ("[T]he custodian of the documents bears the burden of proving, under § 24-72-204(6), that disclosure would do substantial injury to the public interest by invading the constitutional right to privacy of the individuals involved.").[6]

[6] In *Jefferson Cnty. Educ. Ass'n*, the court observed that the teacher's union only argued that the at-issue records were personnel files; therefore, the court would not consider whether disclosure would work substantial injury to the public interest. ¶ 48. Implicit in this observation is a suggestion that the teacher's union could have raised this issue. However, the court did not squarely confront this issue and it was not part of the holding. This Court concludes that pursuant to the plain language of the statute, the records custodian – CCSD – must raise public interest as a basis for withholding documents otherwise subject to disclosure. Indeed, the Associations recognize that among CORA's exemptions some "merely *allow* the custodian of records to deny a request for disclosures."

The procedural posture of this case casts doubt on whether the Court should entertain consideration of harm to the public interest at any point in this lawsuit. As touched upon above, the Associations brought the Amended Complaint and the Amended Motion for Preliminary Injunction, seeking to enjoin CCSD from producing the at-issue records. In its Amended Answer, CCSD raised substantial injury to the public interest under C.R.S. section 24-72-204(6), stating: "CCSD requests that this Court assess whether the records . . . should be disclosed under CORA . . . and if substantial injury to public interest will occur by interfering with the privacy rights of public employees under C.R.S. § 24-72-204(6)(a)." However, CCSD has not affirmatively moved for any relief from the Court, and in its Amended Response to Proposed Intervenors['s] Motion to Intervene, CCSD expressly excluded this statutory argument. However, it is clear that this consideration is not before the Court on the present motion.

IV. CONCLUSION

The Court denies Plaintiffs' Amended Motion for Preliminary Injunction because the Court concludes that Plaintiffs are unlikely to prevail on the merits of their claim.

The Court bases its decision on the very clear and narrow interpretation of CORA's statutory definition of "personnel files" provided in two published decisions of the Court of Appeals. This Court is duty bound to accept and apply the definition provided in these authorities. Thus, finding that the records the Associations seek to protect do not constitute information of the same general nature as an employee's home address and telephone number or personal financial information, the Court must conclude the records are not personnel files exempt from production under CORA.

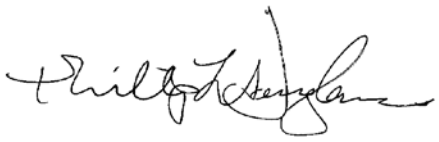
The Court also denies the motion because the Associations failed to establish a privacy interest in the at-issue records. Finally, while it is unclear that the records custodian – CCSD – intends to press whether disclosing the records would do substantial injury to the public interest,

this issue is not presented through the Associations' Amended Motion for Preliminary Injunction.

IT IS SO ORDERED.

Dated and signed: September 21, 2016.

BY THE COURT:



Phillip L. Douglass
District Court Judge