



## Azizpour Donnelly LLC

Katayoun A. Donnelly  
Attorney

October 28, 2014

### Via e-mail

Kristin C. Edgar  
CAPLAN AND EARNEST LLC  
1800 Broadway, Suite 200  
Boulder, CO 80302-5289

Dear Ms. Edgar:

I represent Mr. Kyle Walpole as a volunteer attorney for the Colorado Freedom of Information Coalition. I write in reference to your response to Mr. Walpole's records request under the Colorado Open Records Act ("CORA"), § 24-72-201, *et seq.*, C.R.S., submitted on October 3, 2014, which asked for a list of the Conifer High School teachers who called in sick on September 19, 2014.

In an e-mail dated October 8, 2014, responding to Mr. Walpole's request, you denied access to the records indicating sick leave taken by Conifer High School teachers on September 19, 2014, stating "[w]e consider records related to an employee's health status, including records regarding the basis for an absence, to be confidential medical information that is maintained because of the employer-employee relationship and, therefore, not subject to inspection under C.R.S. § 24-72-204(3)(a)(I) and (II)."

I write first to clarify that Mr. Walpole is interested in inspecting only records that indicate the names of the Conifer High School teachers who were absent from work on "sick leave" on September 19, 2014. Mr. Walpole is not interested in, nor seeking inspection of, any records disclosing the *reason* (condition or treatment) that prompted or was associated with the sick leave taken by these public employees.

Second, I ask that the Jefferson County School District R-1 ("School District") reconsider its refusal to permit inspection of the records requested by Mr. Walpole, as clarified above. Such records do not constitute "medical data." Section 24-72-204(3)(a)(1) requires the withholding of "*medical . . . data on individual persons . . .*" (emphasis added). On its face, this provision precludes the disclosure of less information than that contained in the broader category of "medical records." In other contexts, though, Colorado's courts have held that this broader category of "medical records" is limited to information that is subject to the physician-patient privilege. *See, e.g., In re Search Warrant for 2045 Franklin, Denver, Colo.*, 709 P.2d 597, 601 (Colo. App. 1985). Under these precedents (as well as common sense), the names of the public employee absent from work does not constitute "*medical . . . data.*"

2373 Central Park Blvd., Suite 100  
Denver, CO 80238

720 675-8584 (phone) 720 880-3142 (fax)  
katy@kdonnellylaw.com



Katayoun A. Donnelly

As explained above, Mr. Walpole does not seek to inspect (and is not interested in learning) any of the *reasons* given by these public employees for their taking sick leave; he is only interested in the names of Conifer High School teachers who took sick leave on September 19, 2014 and were, therefore, compensated from public funds for absences from performing public duties. Separate from the inapposite category of “medical data,” numerous courts, throughout the country, have determined that disclosure of this exact quantum of information – the names of public employees, and the number of days of paid leave they took – does not constitute “highly personal and sensitive information,” such that its disclosure would constitute an invasion of privacy. *See Dobronski v. FCC*, 17 F.3d 275, 279 (9th Cir. 1994) (no privacy rights violated by disclosure of sick leave records that “do not state the reasons why the assistant took sick leave, merely the dates on which she took sick leave”); *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 46-48 (Iowa 1999) (same) (collecting cases).

The Iowa Supreme Court provided an accurate summary of how other courts have resolved this question:

Other jurisdictions have dealt directly with the issue of disclosing sick leave information or absentee cards. Given the accountability demanded of public servants, courts have generally found the nominal privacy interest in nondisclosure outweighed by the public’s interest in preventing abuse of governmental vacation and sick leave policies, so long as the disclosed sick leave information is of a non-intimate or non-personal character. *See Dobronski v. FCC*, 17 F.3d 275, 277-80 (9th Cir.1994) (affirming judgment compelling disclosure of sick leave records to publisher investigating improper usage of sick leave where records contain no personal medical or health information); *Perkins v. Freedom of Info. Comm'n*, 228 Conn. 158, 635 A.2d 783, 792 (1993) (disclosure of numerical data concerning public employee’s attendance records, including or limited to sick leave, not an invasion of privacy); *Brogan v. School Committee of Westport*, 401 Mass. 306, 516 N.E.2d 159, 160-61 (1987) (disclosure of absentee records of individual teachers held valid where records requested did not contain information of a personal nature such as medical reason for absence or details of family emergency); *State ex rel. Petty v. Wurst*, 49 Ohio App.3d 59, 550 N.E.2d 214, 216-17 (1989) (public’s right to inspect payroll records outweighs any nominal invasion of county employee’s privacy); *State ex rel. Jones v. Myers*, 61 Ohio Misc. 2d 617, 581 N.E.2d 629, 631 (Ohio Ct.C.P.1991) (privacy interest of sick employee outweighed by public interest in preventing abuse of vacation and sick leave in public arena); *Kanzelmeyer v. Eger*, 16 Pa. Cmwlth. 495, 329 A.2d 307, 310 (1974) (privacy considerations must yield to public’s interest in public servants’ performance of duty).

*Clymer*, 601 N.W.2d at 46-48; *see also Capital Newspapers Division of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 496 N.E.2d 665, 505 N.Y.S.2d 576 (1986) (granting access to



Katayoun A. Donnelly

sick leave report of identified police officer, rejecting contention that it was a personnel record exempted from disclosure by New York's Civil Rights Law); *Hatfield v. Bush*, 572 So. 2d 588 (La. App. 1st Cir. 1990), *writ denied*, 576 So. 2d 49 (La. 1991) (holding that employee leave records are not protected by privacy right). At least two States' Attorneys Generals have reached the same conclusion: *see* <http://www.hawaii.gov/oip/opinionletters/opinion%2090-17.pdf> and <http://www.ag.state.mi.us/opinion/datafiles/1980s/op06087.htm>


Finally, it is noteworthy that other municipalities in Colorado (Centennial, Denver, Englewood, and Longmont) have agreed to requests from the news media for access to public records recording the amount of public employee sick leave/absenteeism. They have not asserted that such information constitutes "confidential medical information that is maintained because of the employer-employee relationship."

Based upon the foregoing, I trust that School District will reconsider its denial of access to the records reflecting merely the names of the Conifer High School teachers who took sick leave on September 19, 2014.

Please contact me at (720) 675-8584 if you wish to discuss this further. I look forward to your prompt response.

Very truly yours,

AZIZPOUR DONNELLY LLC.

By   
Katayoun A. Donnelly

cc: Kyle Walpole  
Jeffrey A. Roberts, Executive Director, Colorado Freedom of Information Coalition