

<p><b>DISTRICT COURT, JEFFERSON COUNTY, STATE OF COLORADO</b></p> <p>Court Address: 100 Jefferson County Pkwy. Golden, CO 80401</p> <hr/> <p><b>Plaintiff:</b> JEFFERSON COUNTY EDUCATION ASSOCIATION</p> <p>vs.</p> <p><b>Defendant:</b> JEFFERSON COUNTY SCHOOL DISTRICT NO. R-1 and LISA PINTO in her official capacity as Custodian of Records</p> <p>and,</p> <p><b>Amici:</b> The Associated Press, Colorado Press Association, Colorado Broadcasters Association, Colorado Freedom of Information Coalition, and <i>The Denver Post</i></p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p><b>Attorneys for Amici:</b> Steven D. Zansberg, #26634 Thomas B. Kelley, #1971 Christopher P. Beall, #28536 LEVINE SULLIVAN KOCH &amp; SCHULZ, LLP 1888 Sherman Street, Suite 370 Denver, Colorado 80203 Phone: (303) 376-2400 FAX: (303) 376-2401 szansberg@lskslaw.com</p>	<p>Case No. 2015-CV-30320</p> <p>Division:</p>
<p style="text-align: center;"><b>[PROPOSED] BRIEF OF AMICUS CURIAE THE ASSOCIATED PRESS, COLORADO PRESS ASSOCIATION, COLORADO BROADCASTERS ASSOCIATION, COLORADO FREEDOM OF INFORMATION COALITION AND THE DENVER POST IN SUPPORT OF THE JEFFERSON COUNTY SCHOOL DISTRICT</b></p>	

Amici curiae, the Associated Press, Colorado Press Association, Colorado Broadcasters Association, Colorado Freedom of Information Coalition and *The Denver Post* (collectively, the

“Amici”), by and through their undersigned counsel at Levine Sullivan Koch & Schulz, LLP, hereby respectfully submit this brief of amici curiae in support of the Jefferson County School District.

### **INTRODUCTION**

In this action, the union representing Jefferson County School District public school teachers has asked the Court to enjoin the Jefferson County School District from releasing public records – records revealing which public employees in four schools did not show up for work on two specified dates while receiving public monies for sick leave, unquestionably among those employees’ benefits of public employment.

As demonstrated below, such records are not within the ambit of “personnel files” as defined in statute and interpreted by Colorado’s appellate courts. Nor does such rudimentary *non-medical* information about employment benefits implicate any legitimate or reasonable expectations of privacy on behalf of the public employees. Indeed, numerous jurisdictions, throughout the country routinely disclose such information pursuant to freedom of information laws at both the state and federal level.

Because the public has a compelling interest in being able to monitor the performance (or, as here, non-performance) of public employees’ public functions, *and* the expenditure of public funds, no injunction should be issued barring the School District from fulfilling the citizen’s CORA request.

## ARGUMENT

### **I. Records Documenting Which Public Employees Availed Themselves of the Employment Benefit of Paid Sick Leave on Particular Dates Are Not Within the Statutory Exemption for “Personnel Files”**

The public records that are the focus of the Plaintiffs’ Complaint – showing which public school teachers opted to not perform their public functions on two specified dates, while receiving paid “sick leave” benefits – are not the types of records the General Assembly exempted from public disclosure under the “personnel files” provision of the Colorado Open Records Act (CORA), § 24-72-200, *et seq.*, C.R.S..

As the Plaintiff’s Opening Brief acknowledges, the Colorado Court of Appeals has expressly limited the reach of “personnel files” records, within the exemption from disclosure, to records that contain “personal demographic information” that is of the same nature as the specified examples – “home address and telephone number, or personal financial information.” *Daniels v. City of Commerce City*, 988 P.2d 648, 651 (Colo. App. 1998) (holding that for information to come within the “personnel file” exemption, “*the information must be of the same general nature as an employee’s home address and telephone number or personal financial information.*” The information at issue does not meet that criterion; it is not the type of personal, demographic information listed in the statute.”).

So, too, the information that is the subject of this citizen’s records request – identifying only which public employees were absent from four public high schools on two particular dates and received public funds in compensation nonetheless—is “not the type of personal, demographic information listed in the statute.” *Id.*

Plaintiff's description of *Ornelas v. Department of Institutions, Division of Youth Services*, 804 P.2d 235 (Colo. App. 1990), Pls.' Op. Br. at 6, is disingenuous. Not only did that ruling predate the Court of Appeals' clarification of the scope of the "personnel file" exemption in *Daniels*, in *Ornelas* the Court of Appeals merely stated, in *dicta*, that an employee is entitled to inspect his own "personnel files"; the Department's denial of his informal request to inspect his records in an administrative proceeding challenging his termination was therefore sanctionable. The Court did *not* hold, "specifically rule," or even intimate, that a public employee's sick leave records are appropriately within the definition of "personnel files" which cannot be provided to the public under the CORA.

Indeed, the "personnel files" exemption itself expressly excludes from its definition (and thereby requires public disclosure) of "*any compensation, including expense allowances and benefits paid to employees by . . . [any] political subdivisions.*" See § 24-72-202(4.5), C.R.S. (emphasis added). Here, paid sick leave is indisputably among the "benefits" that the Jefferson County School District pays its teachers under the collective bargaining agreement negotiated by the Jefferson County Education Association. See **Exhibit A** at 62-63 ¶ 35-1. The Jefferson County School District promotes the fact that paid sick leave is among the employment benefits provided to its teachers. See **Exhibit B** at 2. Thus, records that reflect which public employees received these *benefits* of public employment on a particular set of dates are expressly excluded from the "personnel files" exemption that Plaintiff has invoked.

Lastly, it is firmly established that merely stamping a document "personnel file," or filing it in a folder so designated, does not render the document exempt from public inspection: *Land Owners United, LLC v. Waters*, 293 P.3d 86, 94 (Colo. App. 2011) ("it [is] unreasonable for [a]

public institution to restrict access to information by merely placing documents in [a] personnel file; *a legitimate expectation of privacy must be present*” (emphasis added) (citation omitted)).

As demonstrated below, the sick leave benefit information that is the subject of this lawsuit does not qualify for such designation.

## **II. Public Employees Have No “Legitimate Expectation of Privacy” with Respect to Records Showing If They Were Absent and Received Paid Sick Leave on a Particular Date**

There is no merit to Plaintiff’s contention that public school teachers have a constitutionally-protected reasonable expectation of privacy in public records which merely document the fact that they were absent from performing their public function on a particular day and collected the paid sick leave benefit for that absence.

The citizen’s CORA request at issue in this case does not seek to inspect any of the *reasons* given by these public employees for their taking sick leave<sup>1</sup>; the citizens’ request made clear that she is interested to discover *only* which public employees took called in “sick” on two

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<sup>1</sup> Because none of the information sought would disclose any medical information or conditions of the public employees in question, such records are not within the separate narrowly-defined exemption for “*medical . . . data on individual persons . . .*” § 24-72-204(3)(a)(1), C.R.S. (emphasis added). Moreover, to the extent the absentee/paid sick leave records responsive to the citizen’s CORA request contained such information, the custodian was required to redact that information. *See* § 24-72-204(1), C.R.S. (“[t]he custodian of any public records shall allow any person the right of inspection of such records *or any portion thereof . . .*” (emphasis added)); *Ritter v. Jones*, 207 P.3d 954, 960 (Colo. App. 2009) (“where a single document contains both public and confidential information, *it is appropriate to redact the confidential information prior to public inspection.*” (emphasis added)); *Land Owners United, LLC v. Waters*, 293 P.3d 86, 99 (Colo. App. 2011) (holding that District Court has “discretion to direct redaction of specific confidential information.”); *cf. Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff’s Dep’t*, 196 P.3d 892, 900 n.3 (Colo. 2008) (“[b]y providing the custodian of records with *the power to redact* names, addresses, social security numbers, and *other personal information*, disclosure of which may be outweighed by *the need for privacy*, the legislature has given the custodian an effective tool *to provide the public with as much information as possible*, while still protecting privacy interests when deemed necessary.” (emphasis added)).

particular dates and were therefore compensated from public funds for their excused absences from performing their public functions. Numerous courts, throughout the country, have determined that disclosure of this exact information – the names of public employees, and the days on which they received paid leave– 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 nonintimate or nonpersonal 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 (emphasis added); *see also In re Capital Newspapers Div. of Hearst Corp. v. Burns*, 496 N.E.2d 665 (N.Y. 1986) (granting access to 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. Ct. App. 1990) (holding that employee leave records are not protected by privacy right). At least three States' Attorneys Generals have reached the same conclusion: *see Vacation and Sick Leave Records of Agency Employees*, No. 90-17 (Hawaii Att'y Gen. Op. Apr. 24, 1990), available at <http://www.hawaii.gov/oip/opinionletters/opinion%2090-17.pdf>; *Freedom of Information*, No. 6087 (Mich. Atty' Gen. Op. July 28, 1982), available at <http://www.ag.state.mi.us/opinion/datafiles/1980s/op06087.htm>; and *Freedom of Information Act Complaint Against Capital School District*, No. 06-IB11 (Del. Att'y Gen. Op. May 31, 2006), available at <http://opinions.attorneygeneral.delaware.gov/2006/05/31/06-ib11-re-freedom-of-information-act-complaint-against-capital-school-district/>.

Indeed, the number of days that particular public employees have availed themselves of a paid sick leave benefit is routinely provided by public entities under various states' public records laws and that information, or other similar information regarding public employee absences, is therefore frequently the subject of press reports. *See Exhibit C* (illustrative sampling of such reports).

### **III. The Public’s Compelling Interest in Monitoring the Performance of Public Employees and the Expenditure of Public Funds Compels the Court to Deny the Requested Injunction**

As noted above, the records requester in this case expressed her interest as a taxpaying citizen to discover only which public employees availed themselves a paid benefit of public employment – paid sick leave – on particular dates. The citizen requester, like all members of the public, has a well-recognized compelling interest in being able to monitor *how* the Jefferson County School District expends the public funds it administers on behalf of the District’s citizens. *See Denver Publ'g Co. v. Univ. of Colo.*, 812 P.2d 682, 685 (Colo.App.1990) (holding that “the public’s right to know *how* public funds are expended is paramount considering the public policy of the Open Records Act.” (emphasis added)); *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1157 (Colo. App. 1998) (same). Accordingly, the “public interest” would not be served, but strongly disserved, by the Court’s issuance of the injunction sought by the Plaintiff.

### **CONCLUSION**

WHEREFORE, amici curiae, The Associated Press, Colorado Press Association, Colorado Broadcasters Association, Colorado Freedom of Information Coalition, and *The Denver Post* respectfully urge the Court to deny the injunction sought by Plaintiff herein, so that the Defendant shall be free to comply with the Colorado Open Records Act and release the public records sought by the citizen herein.



Respectfully submitted this 10th day of April, 2015, by:

LEVINE SULLIVAN KOCH & SCHULZ, LLP

*s/ Steven D. Zansberg*

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*Attorneys for the Colorado Press Association,  
the Colorado Broadcasters Association, and  
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**CERTIFICATE OF MAILING**

I hereby certify that on this 10th day of April, 2015, a true and correct copy of this **PROPOSED BRIEF OF AMICUS CURIAE COLORADO PRESS ASSOCIATION, COLORADO BROADCASTERS ASSOCIATION, AND THE COLORADO FREEDOM OF INFORMATION COALITION IN SUPPORT OF THE JEFFERSON COUNTY SCHOOL DISTRICT** was served on the following counsel through the ICCES electronic court filing system, pursuant to C.R.C.P. 121(c), § 1-26:

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