

DISTRICT COURT, LARIMER COUNTY, STATE OF COLORADO 201 La Porte Ave., Suite 100 Ft. Collins, CO 80521	DATE FILED: September 6, 2022 3:42 PM CASE NUMBER: 2022CV30489
<b>BOARD OF COUNTY COMMISSIONERS OF          LARIMER COUNTY, STATE OF COLORADO ON          BEHALF OF NICHOLAS COLE (CUSTODIAN OF          RECORDS FOR LARIMER COUNTY HUMAN          RESOURCES</b>  Applicant  v.  <b>BIZWEST MEDIA, LLC</b>  Requestor	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>  Case Number: 2022CV30489  Division: 4A
<p style="text-align: center;"><b>ORDER REGARDING APPLICATION PURSUANT TO C.R.S. § 24-72-204(6)(a) OF          THE COLORADO OPEN RECORDS ACT</b></p>	

**THIS MATTER** came before the Court for a show cause hearing pursuant to C.R.S. § 24-72-204(5)(b) of the Colorado Open Records Act (“CORA”). A hearing was conducted by the Court on August 15, 2022. Requestor BizWest Media, LLC (“BizWest”) was present and represented by Rachael Johnson, Esq. Applicant, Larimer County Board of County Commissioners on Behalf of Nicholas Cole (Custodian of Records for Larimer County Human Resources) (“Larimer County”) was present and represented by David Ayraud, Esq. Deputy County Attorney. The Court heard argument from both Parties. No evidence was received at the hearing. Based on the arguments of Parties, relevant caselaw, and an *in-camera* review of records withheld from disclosure by the Applicant Larimer County, the Court makes the following findings and order:

## I. INTRODUCTION

BizWest submitted a records request to Larimer County pursuant to the CORA on April 18, 2022. The request sought “1. Records, including correspondence, relating to the job performance of Chris Ashby, former director of the Ranch. 2. Records pertaining to Chris Ashby’s departure from his position. 3. Records, including correspondence, pertaining to the performance and/or departure of Diana Frick from her position at The Ranch.” App. Ex. A. Larimer County produced many documents in compliance with the CORA request; however, sought to protect from public disclosure performance narrative portions of evaluations (“performance narratives”) for Chris Ashby and Diana Frick (collectively “subjects”) under C.R.S. 24-72-204(6)(a). C.R.S. 24-72-204(6)(a) allows a court to protect requested documents if the court finds that disclosure of such information would result in substantial injury to the public interest.

Applicant argues that disclosure of the performance narratives would invade the reasonable expectation of privacy for the public employees at question. Unable to determine the issue without viewing the requested documents, the Court conducted an *in-camera* review. The Court finds that the requested documents should be released to Requestor BizWest.

## II. LEGAL AUTHORITY

CORA establishes a fundamental presumption that records of all local and state government entities that relate in any way to the discharge of governmental authority shall be open for public review. *See* § 24-72-201, C.R.S. CORA implements this basic public policy by declaring that “[A]ll public records shall be open for inspection [and

copying] by any person,” unless a specific exemption under CORA applies. See § 24-72-203(1)(a), C.R.S. Moreover, the purpose of open records statutes is to assure that the workings of government are not unduly shielded from the public eye. See *Int’l Bhd. of Elec. Workers Local 68 v. Denver Metro. Major League Baseball Stadium Dist.*, 880 P.2d 160, 165 (Colo.App. 1994). The strong presumption of disclosure requires any exceptions to CORA’s disclosure requirements be narrowly construed. *City of Westminster v. Dogan Constr. Co.*, 930 P.2d 585, 592 (Colo. 1997); *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150 (Colo.App. 1998).

In every public records case under CORA, the party seeking access to a record bears the ultimate burden of persuasion to show that “the public entity in question: (1) improperly; (2) withheld; (3) a public record.” *Wick Commc’ns Co. v. Montrose County Bd. of County Comm’rs*, 81 P.3d 360, 363 (Colo. 2003). Although the ultimate burden of persuasion will always lie with a records requestor on all elements of his claim, if a public entity contends that the document being sought is not a “public record” under CORA, and if the requestor meets their prima facie burden of establishing that the requested document was “made, maintained or kept” by the public entity in the discharge of functions authorized by law (see § 24-72-202(6)(a)(I), C.R.S.), then the burden of proof on this question shifts to the public entity. See *Denver Publ’g Co. v. Bd. of County Comm’rs*, 121 P.3d 190, 199 (Colo. 2005); *Wick*, 81 P.3d at 363. Here there is no dispute that the records sought are “public records” subject to request under CORA.

Larimer County seeks to protect the disclosure of the performance narratives under C.R.S. § 24-72-204(6)(a) which allows for the withholding of documents where

disclosure would do substantial injury to the public interest. *City of Boulder, Co. v. Avery*, provides the framework to evaluate an application pursuant to C.R.S. 24-72-204(6)(a) that asserts substantial injury to the public interest due to an invasion to the employee's right to privacy. *City of Boulder, Co. v. Avery*, 2002 WL 319546865 \*2 (D. Colo. Mar. 18, 2002). Under this exception the Court must weigh (1) whether there is a legitimate expectation of non-disclosure, (2) whether there is a compelling public interest in access, and (3) if there will be disclosure, how to ensure that it will be done in the least intrusive manner. *Denver Post Corp. v. University of Colorado*, 739 P.2d 874, 879 (Colo. App. 1987) cert. den. (Colo. 1987). See *Todd v. Hause*, 371 P.3d 705, 712 (Colo.App. 2015).

### **III. APPLICATION OF THE LAW**

#### **a. Legitimate Expectation of Non-Disclosure**

Applicant argues that the performance narrative “are the most private and sensitive of all employer-employee written communications. The performance narratives are where the most intimate of conversations must occur... there can be no greater areas in which an employee has a legitimate expectation of nondisclosure.” Brief in Support of App. pg. 7.

The Court agrees with Applicant that public employees have a legitimate expectation of privacy in their personnel files. This expectation of privacy is not, however, without limits. The reasonable expectation of privacy may depend significantly upon the nature of the position. For example, a high ranking or elected official may have a far lesser expectation of privacy given their specific position. An ordinary employee would likely have a far greater expectation of privacy. Further, the

job performance of a high-ranking public employee may be imbued with significant public interest, resulting in diminished privacy expectations. The opposite is true for a rank-and-file employee.

Here, BizWest seeks the performance narratives of a former director and assistant director of The Ranch a taxpayer funded project in Larimer County. The Court finds that the subjects have a lower expectation of privacy than a rank-and-file employee.

**b. Compelling Public Interest in Access to the Information**

Regarding the second element, “whether there is a compelling public interest in access to the information,” Requestor argues there is a compelling interest in understanding how taxpayer dollars are being used with respect to the completion of a voter-approved project. This interest, Requestor posits, is heightened due to the delay between voter approval and ground-breaking. Additionally, the subjects both resigned from their positions, leaving questions as to “why?” in the minds of some in the public.

There was no dispute about this prong of the analysis.

**c. Disclosure in the Least Intrusive Manner**

By conducting an *in-camera* review, the Court has ensured that the disclosure will occur in the least intrusive manner by guarding against any confidential information.

*See Land Owners United, LLC v. Waters*, 293 P.3d 86, 99 (Colo.App. 2011).

There was no dispute about this prong of the analysis.

**d. Balancing the Three Factors**

The Court looked at the totality of the circumstances regarding this particular case and these particular employees. When considering the nature of the narrow expectation of privacy the subjects enjoyed on account of their positions as Director and Assistant Director, the compelling public interest in access to the information, and the manner in which the information will be disclosed, the Court finds the performance narratives ought to be disclosed to Requestor.

**IV. ORDER**

The Court orders Larimer County the release of the requested performance narratives to Requestor BizWest Media.

Dated: September 6, 2022

BY THE COURT:

A handwritten signature in black ink, reading "C. Michelle Brinegar", is written over a horizontal line.

C. Michelle Brinegar  
District Court Judge