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DISTRICT COURT, DENVER COUNTY **STATE OF COLORADO** 1437 Bannock Street Denver, Colorado 80202 (303) 606-2300	
Plaintiff: **CLAY BURLEW** **v.** **Defendants:** **ENID WADE**, in her official capacity as General Counsel for Denver Health and Hospital Authority; **JUDITH BENTON**, in her official capacity as Senior Assistant General Counsel for Denver Health and Hospital Authority; and **DENVER HEALTH AND HOSPITAL AUTHORITY**	▲Court Use Only▲
***Attorneys for Defendants*:** Marsha M. Piccone, Atty. No. 15268 Heidi K. Wilbur, Atty. No. 42456 Kirsten N. Kube, Atty. No. 51374 FOX ROTHSCHILD LLP 1225 17th Street, Suite 2200 Denver, Colorado 80202 Telephone: (303) 292-1200 Email: mpiccone@foxrothschild.com; hwilbur@foxrothschild.com; kkube@foxrothschild.com	Case No. 2022CV031898 Division: 269

RESPONSE TO APPLICATION FOR AN ORDER TO SHOW CAUSE PURSUANT TO THE COLORADO OPEN RECORDS ACT

Defendants Enid Wade, Judith Benton, and Denver Health and Hospital Authority ("Denver Health"),[1] by and through their undersigned counsel, Fox Rothschild LLP, and in accordance with the Court's August 2, 2022 Order, submit their Response to Application for an Order to Show Cause Pursuant to the Colorado Open Records Act ("Application") as follows:[2]

SUMMARY OF RESPONSE

This matter arises out of Plaintiff's demands for internal records of Denver Health that are not public records subject to the Colorado Open Records Act ("CORA"). Even if they were public records, the requested records are confidential and privileged under either the attorney-client privilege, attorney work product doctrine, and/or deliberative process privilege, or are otherwise exempt from disclosure. Denver Health's enabling statute provides a limited definition of "public records" in C.R.S. § 25-29-109, which states that only certain records of Denver Health are public records under CORA. Indeed, in amending § 25-29-109 in 2018, the General Assembly was clear in its intent to outline a defined list of records. Plaintiff disregards the plain language of § 25-29-109 and the legislative history behind the 2018 amendment and requests records that fall outside those identified in § 25-29-109, claiming the statute does not limit the records of Denver Health subject to CORA. Plaintiff's Application should be denied, with fees and costs awarded to Defendants pursuant to C.R.S. § 24-72-204(5)(b).

[1] Defendants Wade and Benton are not custodians of Denver Health's records and are therefore not properly named parties in this action. Denver Health is the custodian of its own records and is the only properly named party here. Defendant Benton specifically told Plaintiff's counsel that she, Benton, was not the custodian during a conferral call on June 21, 2022. Application at ¶ 13. Plaintiff nevertheless chose to name Benton, and Wade, in this action. By responding to Plaintiff's Application, Defendants Wade and Benton do not concede they are custodians of Denver Health's records and do not consent to their naming in this action. Defendants Wade and Benton specifically reserve and retain, and do not waive, all rights and remedies with respect to the same.

[2] The Response is submitted in advance of the October 4, 2022 hearing during which evidence supporting Denver Health's arguments will be presented, if necessary.

PLAINTIFF'S CORA REQUEST

Plaintiff submitted a CORA request to Denver Health. Application, Ex. A. Denver Health responded, notified Plaintiff of the limitations in § 25-29-109, stated that certain of Plaintiff's requests were not considered public records therein, and provided Plaintiff with information concerning annual compensation increases. Application, Ex. B. Thereafter, Denver Health and Plaintiff exchanged correspondence and participated in conferral calls regarding Plaintiff's requests in an attempt to resolve the same. Application, Exs. B-H. Denver Health provided Plaintiff with her personnel file, as requested. While Plaintiff's requests changed over time, the Application now contains the following requests: [3]

a. Pay band policies for Denver Health;[4]
b. Leadership stipend policies;
c. Employee salaries and bonuses for the Department of Surgery;[5]
d. Reports completed by Employment Matters, LLC;
e. Complaints of gender discrimination in the past six months;
f. Internal job postings for the Interim Director of Services Position for the Surgery Department as well as the Interim Associate Director of Services Position for the Surgery Department from 2019 to present; and
g. Internal job posting for the Associate Director of Services for the Subspecialty Surgeons position from 2019 to present.

See Application at ¶ 20(a)-(g). Denver Health provided Plaintiff with the requested employee salaries. The remaining requests can be grouped into the following categories: (1) policies

[3] Plaintiff's requests have changed over time. *Compare* Application, Ex. A (initial CORA request) *with* Application at ¶ 20 and Ex. E. The changing requests, along with Plaintiff's counsel's "further clarification" "about the types of public records" Plaintiff believes are responsive, Application, Ex. E, has made responding to the Application challenging. In this Response, Denver Health has followed the requests enumerated in Plaintiff's Application (¶ 20(a)-(g)) and how they are categorized in Exhibit E. Exhibit E contains lists of the "types of documents" Plaintiff believes fall within her requests. Denver Health has responded to the requests, as reflected in the Application, Plaintiff's initial request (Application, Ex. A), and Exhibit E.

[4] Denver Health provided Plaintiff with information concerning annual compensation increases. Application, Ex. B.

[5] Denver Health provided Plaintiff with salaries for employees in the Department of Surgery.

concerning pay bands and leadership stipends (¶ 20(a) and (b)), (2) employee bonuses (¶ 20(c)), (3) investigation reports (¶ 20(d)), (4) complaints to human resources on gender discrimination (¶ 20(e)), and (5) internal job postings (¶ 20 (f) and (g)). The requested records are not public records of Denver Health under CORA.

ARGUMENT

I. The Denver Health Enabling Statute and The Colorado Open Records Act.

Colorado Revised Statute § 25-29-101, *et seq*., is the enabling statute for Denver Health. It creates Denver Health and provides that it "shall be a body corporate and a political subdivision of the state." C.R.S. § 25-29-103(1). CORA governs the ability to inspect "public records" of a political subdivision that are not specifically exempted by law. *Denver Pub. Co. v. Univ. of Colorado*, 812 P.2d 682, 683 (Colo. App. 1990); *see also* C.R.S. §§ 24-72-201; 24-72-202(6)(a)(I); 24-72-203. C.R.S. § 25-29-109 provides that only certain defined records of Denver Health are "public records" as defined in CORA. They are:

1. Resolutions and other proceedings of the board of directors;
2. Minutes of board meetings;
3. Annual reports and financial statements;
4. Certificates;
5. Contracts and financial agreements;
6. Employee salaries;
7. Bonds given by officers, employees, and any other agents of Denver Health;
8. Personnel reports, guidelines, manuals, or handbooks, other than individual personnel files; and
9. Account of all money received by and disbursed on behalf of Denver Health.

See C.R.S. § 25-29-109. The statute excludes from the definition of public records "the content of an electronic medical record system and individual medical records or medical information" and provides that "all writings and other records concerning the modification, initiation, or cessation of patient care and authority health-care programs or initiatives shall not be deemed to be a public

record if premature disclosure of information contained in such writings or other records would give an unfair competitive or bargaining advantage to any person or entity." *Id.*

As the statute makes clear, only certain records specifically identified in the statutory language and not otherwise excepted are subject to disclosure. Any records of Denver Health not specifically listed in § 25-29-109 are not public records. *See* **Ex. 1**, *Denver Health Workers United v. Denver Health and Hospital Authority*, Denver Dist. Ct. No. 2021CV32935, Aug. 5, 2022 Order on Application for an Order to Show Cause Pursuant to § 24-72-204(5), at 3 (finding that Denver Health's enabling statute "specifies that ***only certain records of [Denver Health] are 'public records' subject to CORA***.") (emphasis added);[6] **Ex. 2**, *Axios v. Denver Health and Hospital Authority, Custodian of Records*, Denver Dist. Ct. No. 2019CV34834, Sept. 18, 2020 Order Re Plaintiff's Amended Complaint and Application for Order to Show Cause, at 7 ("Section 25-29-109 describes the records of Denver Health subject to the Colorado Open Records Act.").

Of critical import here, the General Assembly amended § 25-29-109 in 2018 to specifically provide the above limited list of public records of Denver Health considered within the meaning of CORA. **Ex. 3**, Overview of SB 18-149.[7] Prior to the amendment, the statute read: "Records of the authority are subject to the open records law under article 72 of title 24 C.R.S." **Ex. 4**, Signed Act. In amending the statute, the General Assembly deleted this language in its entirety, specifically noting that "***[r]ather than all records*** of [Denver Health] being subject to the open records law, ***only certain*** reports, statements, agreements, bonds, guidelines, manuals, handbooks, and accounts of [Denver Health] are public records[.]" **Ex. 3** (emphasis added); *see also* **Ex. 2** at

[6] As this Order was recently issued in a case where Denver Health is a party, by citing to the Order herein Denver Health takes no position on the same and specifically reserves and retains, and does not waive, all rights and remedies with respect to the same.
[7] Accessed at https://leg.colorado.gov/bills/sb18-149.

7-11 (discussing amendment and noting "the amended statute clarifies which records of the authority (i.e. Denver Health) are and are not subject to CORA"); **Ex. 5**, SB 18-149 Final Fiscal Note ("*This bill specifies that certain documents* of the authority are public records . . . .") (emphasis added). The General Assembly then added in the defined list we see in the statute today. *See* **Ex. 4**; *see also* **Ex. 6**, C.R.S. § 25-29-109. This defined list clarified Denver Health's obligations under CORA. *See Douglas Cty. Bd. of Equalization v. Fidelity Castle Pines, Ltd.*, 890 P.2d 119, 125 (Colo. 1995) ("There is a presumption that when the legislature amends a statute it intends to change the law.").

II. The Records Requested by Plaintiff are Not Public Records.

The Application assumes the records Plaintiff seeks are public records subject to CORA. They are not. The *only* public records of Denver Health subject to CORA are those stated in § 25-29-109.[8] "[W]hen it is disputed whether a requested record is private or public, the court must determine as a threshold matter whether the requested records are likely public records as defined by CORA." *Denver Post Corp. v. Ritter*, 230 P.3d 1238, 1241 (Colo. App. 2009); *see also Wick Commc'ns Co. v. Montrose Cnty. Bd. of Cnty. Comm.*, 81 P.3d 360, 363-64 (Colo. 2003). Plaintiff bears the initial burden of demonstrating that the records she requests are public records under § 25-29-109. *Denver Pub. Co. v. Bd. of Cnty. Comm'rs of Cnty. of Arapahoe*, 121 P.3d 190, 199 (Colo. 2005) (citing *Wick*).

Denver Health fully complied with its obligations under CORA. Denver Health responded to Plaintiff's requests, engaged in meaningful written correspondence with Plaintiff's counsel, participated in conferral calls with Plaintiff's counsel, and provided Plaintiff with records that fell

[8] Denver Health submits that a ruling on this threshold legal question should be reached before delving into the specific categories of requested records and any exceptions that exist precluding their disclosure, which would only apply if the records are public records and they are not.

within § 25-29-109. With respect to the remaining requested records, Denver Health explained that the records were not public records within § 25-29-109. *See* Application, Ex. B ("With respect to limitations set forth under Denver Health's enabling statute . . . some of the items you seek [are] not subject to disclosure. Therefore, Denver Health is not providing any information in response to your request for these items since these items are not considered 'public records' subject to the Colorado Open Records Act."); Ex. D ("your request for emails, investigation reports, internal job postings, and complaints are not considered personnel reports and therefore not subject to disclosure."); Ex. H ("As stated previously Denver Health's enabling statute, C.R.S. §25-29-109, is clear that the only records of Denver Health that are a public record . . . are those enumerated in §25-29-109"). Denver Health also provided Plaintiff with legal authority to support its positions, citing § 25-29-109 and providing Judge Baumann's Order in *Axios*, which states, "Section 25-29-109 describes the records of Denver Health subject to the Colorado Open Records Act." Application, Ex. D (providing *Axios* Order to Plaintiff's counsel); *see also* **Ex. 2** at 7 (*Axios* Order). Plaintiff however, remained steadfast in her position that § 25-29-109 does not limit Denver Health's CORA obligations. This Court, and Judge Baumann in *Axios*, have held that § 25-29-109 *does* limit the records of Denver Health subject to disclosure under CORA and Plaintiff has not cited any authority to the contrary. Plaintiff has not met her burden of establishing the records she seeks are public records.

A. Policies Concerning Pay Bands and Leadership Stipends Not Public Records

A policy is not one of the enumerated categories of public records under § 25-29-109. The requested policies concerning pay bands and leadership stipends, including underlying information from Sullivan Cotter, are therefore not subject to disclosure. Denver Health provided Plaintiff with information concerning annual compensation increases in response to this request. Application,

Ex. B. Denver Health is not required to provide Plaintiff with any further information as the requested records fall outside the circumscribed list in § 25-29-109.[9] *See* Application, Ex. E at 2-4 (listing an expansive number of alleged policies related to pay bands, compensation structure, and leadership stipends, including how pay bands are created and implemented at Denver Health, as well as eligibility requirements and amounts of leadership stipends). Denver Health notes that any such policies, in whatever form, would be further protected from disclosure under § 25-29-109, which states that "all writings and other records concerning . . . authority health-care programs or initiatives shall not be deemed to be a public record if premature disclosure of information contained in such writings or other records would give an unfair competitive or bargaining advantage to any person or entity." The public disclosure of policies or underlying information concerning how Denver Health develops its compensation structure would place Denver Health at an unfair competitive bargaining advantage when hiring doctors or other professionals and *vis-à-vis* other hospitals in the Denver metropolitan area. Lastly, any contention by Plaintiff that such policies would fall under "employee salaries" is without merit. What Plaintiff is asking for are policies concerning *how* Denver Health determines its compensation structure—not employee salaries within the Department of Surgery, which have been provided.

B. Employee Bonuses Not Public Records

Section 25-29-109 includes "employee salaries" when defining the public records of Denver Health, but says nothing about bonuses, and that is presumed to be intentional. *See, e.g., In re Marriage of Bertsch*, 97 P.3d 219, 221 (Colo. App. 2004) (legislature presumed to have acted intentionally when it includes language in one section of a statute, but omits it from another, citing *United States v. Burch*, 202 F.3d 1274, 1277 (10th Cir. 2000)); *E-470 Pub. Highway Auth. v.*

[9] As set forth below, other exceptions apply to protect the requested records from disclosure.

Kortum Inv. Co., LLLP, 121 P.3d 331, 333 (Colo. App. 2005) ("legislative choice of language may be concluded to be a deliberate one calculated to obtain the result dictated by the plain meaning of the words."); *Rock v. Indus. Claim Appeals Office*, 111 P.3d 549, 552 (Colo. App. 2005) ("We may not read into a statute a provision not found in it."). Bonuses are not an enumerated category in § 25-29-109 and are thus not public records of Denver Health subject to disclosure.

C. Investigation Reports and Related Correspondence Not Public Records

Plaintiff seeks the investigation report from Employment Matters, LLC,[10] along with correspondence concerning the same, and also requests correspondence regarding a specific physician's consideration for a position.[11] Application, Ex. E at 4. None of these requests fall within the categories enumerated in § 25-29-109. The plain language of the statute does not contain the words "investigation reports," "communications," or "correspondence." Accordingly, the records requested are not public records subject to CORA. Notably, in an attempt to fit her request into the language of § 25-29-109, Plaintiff recharacterized the requested investigation reports and related correspondence as "personnel reports" in the Application, despite referring to them as "investigation reports" in her initial CORA Request.[12] Plaintiff cites no authority to support her position that what she requests are personnel reports. To be sure, the result of an internal investigation *is not* a personnel report. While "personnel reports" is not a defined term in either CORA or Denver Health's enabling statute, this Court, in assessing what types of reports constitute "personnel reports," has held that "the [Denver Health] statute covering 'personnel reports'

[10] Plaintiff also seeks an investigation report regarding the Department of Emergency Medicine. Application, Ex. A, Ex. E.

[11] Plaintiff included this request under that category, Application, Ex. E at 4, so Denver Health addresses it herein for consistency.

[12] *Compare* Application, Ex. A (requesting "***Investigation report(s)*** from Employment Matters LLC") *with* Application at ¶ 20(d) (requesting "***Personnel reports*** completed by Employment Matters LLC, as described in more detail in Exhibit E.") (all emphasis added).

contemplates the release of some information about the collective [Denver Health] workforce as opposed to information in which specific employees would have an expectation of privacy." **Ex. 1** at 5. Personnel reports about Denver Health's collective workforce may encompass, for example, demographic data on the professionals that work for Denver Health. What a personnel report most certainly does not encompass are findings compiled following an internal investigation. Thus, the investigation reports and any correspondence concerning the same are not public records subject to disclosure under § 25-29-109.[13] Neither is correspondence concerning a specific physician a "personnel report," as such correspondence would not be about the collective workforce, but about a single individual with an expectation of privacy.

D. Complaints to Human Resources Not Public Records

Complaints to human resources are not public records under § 25-29-109. Plaintiff also seeks leadership assessment interviews within this category.[14] Again, Plaintiff attempts to recharacterize these requests as requests for personnel reports when they are not.[15] Complaints allegedly made to human resources about alleged gender discrimination or pay disparity or a specific physician are by definition not a personnel report—they are a complaint. They also do not fall within the ambit of information about Denver Health's collective workforce, but rather, information regarding a specific employee, in which such employee would have an expectation of privacy. *See* **Ex. 1** at 4-5. Moreover, information about the workforce must necessarily be based in fact. A complaint received by human resources is not a report about Denver Health's collective

[13] As set forth below, other exceptions apply to protect the requested records from disclosure.
[14] *See* Application, Ex. E at 5. These too would not fall under the definition of "personnel report" and are not public records under § 25-29-109.
[15] *Compare* Application, Ex. A (requesting "***Complaints made to Human Resources*** for Denver Health regarding gender discrimination in the past six months") *with* Application at ¶ 20(e) (requesting "***Personnel reports containing complaints*** of gender discrimination in the past six months, as described in more detail in Exhibit E.") (all emphasis added).

workforce—but rather, a complaint that inevitably implicates privacy concerns (of the person making the complaint and any persons involved in the complaint) that human resources would be charged with investigating. Such records are not public records under § 25-29-109.

E. Internal Job Postings Not Public Records

Internal job postings are not an enumerated category in § 25-29-109. Accordingly, the requested internal job postings, to the extent any existed, would not be public records subject to disclosure. Plaintiff also requests "the contracts of Dr. Pieracci, as Interim DOS, and Dr. Campion, Associate DOS" be provided in the event "no such job postings were ever created or posted." Application, Ex. E at 5. Denver Health has no such contracts.

Plaintiff has not met her burden of demonstrating the records she seeks are public records of Denver Health. To the contrary, none of the requested records fall within the limited definition of "public records" in § 25-29-109 and are not subject to disclosure.

III. The Requested Records are Not Subject to Disclosure Even Under CORA.

Even if Plaintiff were able to establish that any of the requested records fell within § 25-29-109 (they do not), the documents are further protected from disclosure by CORA exceptions and Colorado law. CORA protects from disclosure, *inter alia*: "[t]rade secrets, privileged information, and confidential commercial, financial . . . data . . . furnished by or obtained from any person." C.R.S. § 24-72-204(3)(a)(IV). If disclosure of financial information is likely to cause substantial harm to the competitive position of the person providing the information, the financial information is confidential for purposes of the statutory exemption. *Int'l Bhd. of Elec. Workers Loc. 68 v. Denver Metro. Major League Baseball Stadium Dist.*, 880 P.2d 160, 166 (Colo. App. 1994). CORA also exempts from disclosure records that are otherwise prohibited from disclosure under any other legal authority such as state statute, federal statute, or court rules. C.R.S. § 24-72-

204(1)(a)-(c). Accordingly, the privileges for attorney-client communications, attorney work product, and the deliberative process have been incorporated into CORA. *City of Colorado Springs v. White*, 967 P.2d 1042, 1054-55 (Colo. 1998) ("We hold that the open records laws incorporate the deliberative process privilege in section 24–72–204(3)(a)(IV)."); *Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874, 880 (Colo. App. 1987) ("we conclude that the privileges for attorney-client communication and attorney work product established by common law have been incorporated into the Open Records Act.").

The attorney-client privilege protects communications between attorney and client and extends to confidential matters communicated by or to the client in the course of gaining counsel, advice, or direction with respect to the client's rights or obligations. C.R.S. § 13-90-107(1)(b); *Guy v. Whitsitt*, 469 P.3d 546, 551 (Colo. App. 2020).[16] The attorney work product doctrine safeguards mental impressions, conclusions, opinions, or legal theories of an attorney or other party representative concerning litigation. *Gall ex rel. Gall v. Jamison*, 44 P.3d 233, 235 (Colo. 2002); C.R.C.P. 26(b)(3). The deliberative process privilege protects the government's decision-making process and consultative functions in order to protect the frank exchange of ideas and opinions critical to government decision making. *City of Colorado Springs*, 967 P.2d at 1046-51. The privilege protects material that is both predecisional and deliberative, including recommendations, draft documents, suggestions, and other subjective documents that reflect the opinions of the writer rather than the policy of the agency itself. *Id.* at 1051; 1053.

[16] It also extends "to communications with professionals hired by legal counsel to assist in the lawyer's provision of legal advice." **Ex. 1** at 9; *see also All. Const. Sols., Inc. v. Dep't of Corr.*, 54 P.3d 861, 863, 866, 871 (Colo. 2002) (communications between counsel and client's independent contractor protected by the attorney-client privilege).

A. Policies Concerning Pay Bands and Stipends Not Subject to Disclosure

The Sullivan Cotter report requested by Plaintiff[17] concerns the development of pay bands and the underlying methodology for the same. It contains financial information that would cause competitive harm to Denver Health if released, as it concerns the basis for development of Denver Health's compensation structure. *See* C.R.S. § 24-72-204(3)(a)(IV); C.R.S. § 25-29-109; *Int'l Bhd. of Elec. Workers*, 880 P.2d at 166. It would also be subject to the deliberative process privilege, as it was provided by an outside consultant for the benefit of decision-making at Denver Health. *City of Colorado Springs*, 967 P.2d at 1051-57 ("deliberative process privilege protects opinions and recommendations to a government agency by outside consultants so long as such opinions and recommendations are obtained during the agency's deliberative predecisional process.").

B. Employee Bonuses Not Subject to Disclosure

Information concerning the bonuses Denver Health pays its employees in the Surgery Department is financial information that would cause competitive harm to Denver Health if released with respect to Denver Health's hiring activities and *vis-à-vis* its relationship with other hospitals in the Denver metropolitan area. It is thus protected from disclosure. *See* C.R.S. § 24-72-204(3)(a)(IV); C.R.S. § 25-29-109; *Int'l Bhd. of Elec. Workers*, 880 P.2d at 166.

C. Investigation Reports and Related Correspondence Not Subject to Disclosure

The requested investigation report by Employment Matters, LLC ("EM") and correspondence related to the same are protected from disclosure pursuant to C.R.S. § 24-72-204(3)(a)(IV) as they are confidential and privileged. The investigation by EM was done at the direction of Denver Health counsel and EM reported to counsel. **Ex. 7**, Benton Affidavit, at ¶ 4. The investigator who performed the investigation is a licensed attorney in Colorado. All

[17] *See* Application, Ex. E at 2, with Plaintiff requesting information related to Sullivan Cotter.

information gathered pursuant to the investigation was strictly confidential. *Id.* All participants were advised to treat the matter confidentially. For these reasons, the requested report is protected by both the attorney-client privilege and attorney work product doctrine and is not subject to disclosure. *Denver Post Corp.*, 739 P.2d at 880. Any communications between Denver Health (or its employees) and EM are similarly protected, as they fall within the umbrella of the privileges. *See, e.g., Collardey v. Alliance for Sustainable Energy, LLC*, 406 F.Supp.3d 977, 980-81 (D. Colo. 2019) (employee statements to investigator for purpose of assisting employer's counsel in providing legal advice protected by attorney-client privilege and work product doctrine). The report is also protected by the deliberative process privilege, as it contains an assessment of the Department of Surgery based on participant interviews for the purposes of review and consideration by Denver Health counsel. As noted in *City of Colorado Springs*:

> Our review of the Warrick Report confirms that it contains an evaluation of the working environment and policies of the Industrial Training Division. The report contains observations on the current atmosphere and suggestions on how to improve it. Thus, the report qualifies as predecisional in that it was designed to guide the Petitioners in developing strategies to improve the division. The report is also deliberative. The report is largely composed of employees' opinions as to the strengths and weaknesses of the Industrial Training Division and its administrator. The role of these opinions and observations was to assist the decisionmaking process rather than to serve as an expression of a final agency decision.

967 P.2d at 1057. So too here. With respect to the requested investigation report concerning the Department of Emergency Medicine, it was done at the direction of Denver Health counsel. **Ex. 7** at ¶ 5. It is thus protected by the attorney-client privilege. It is also confidential and thus further protected by C.R.S. § 24-72-204(3)(a)(IV). It was conducted by an internal department at Denver Health responsible for overseeing audit and compliance functions, and was prepared following receipt of a report and after conducting an investigation to evaluate the same that included interviews of certain individuals. It contains an assessment and recommendations. For these

reasons, it is also protected from disclosure by the deliberative process privilege. *City of Colorado Springs*, 967 P.2d at 1051-57. Lastly, Plaintiff requests correspondence concerning the consideration of a specific physician at Denver Health for a position.[18] For all the reasons stated above, such correspondence is not subject to disclosure as it would necessarily implicate that person's privacy rights if disclosed, much in the same way as disclosure of a personnel file would—and the reason CORA protects such files from disclosure. *See* C.R.S. § 24-72-204(3)(a)(II)(A). Any correspondence discussing this physician's consideration for a position would also be subject to the deliberative process privilege and would be further protected from disclosure under C.R.S. § 24-72-204(3)(IV).

D. Complaints to Human Resources Not Subject to Disclosure

Complaints to human resources are confidential[19] and by their very nature contain sensitive or privileged information and are therefore protected from disclosure pursuant to C.R.S. § 24-72-204(3)(a)(IV). Plaintiff seeks alleged complaints related to alleged gender discrimination, pay disparity, and complaints regarding a certain physician of Denver Health. For the same reasons that CORA prohibits the disclosure of specific personnel files, C.R.S. § 24-72-204(3)(a)(II)(A); *see also* C.R.S. § 25-29-109, it would also prohibit the disclosure of any complaints made about specific employees of Denver Health. In addition, information provided to Denver Health as part of a complaint process is necessarily subject to the deliberative process privilege, as Denver Health evaluates that information in making decisions and determining a course of action, if any is required. *City of Colorado Springs*, 967 P.2d at 1051-57. Making such complaints public would chill the reporting process, with individuals being less likely to voice concerns if they knew Denver

[18] *See* Application, Ex. E at 4.

[19] And also inevitably implicate privacy concerns (of the person making the complaint and any persons involved in the complaint).

Health was required to turn over what they believed were confidential and internal complaints pursuant to a CORA request. *See id.* at 1057 (noting report at issue "contains the employees' candid and personal views about the division and its administrator. As the trial court found, the knowledge that these views may be disclosed publicly is likely to discourage such frankness in the future.").

CONCLUSION

Plaintiff has not met her burden to demonstrate that the records she seeks are public records—nor can she. To the contrary, the Application requests records that the General Assembly specifically excluded when determining what is a public record of Denver Health pursuant to § 25-29-109. Even if certain of Plaintiff's requests somehow fell within the enumerated categories of records subject to CORA in § 25-29-109 (they do not), numerous exceptions provided by CORA and other Colorado authorities protect the records from disclosure. A review of the Application and attached correspondence demonstrates Plaintiff is on a fishing expedition intended to benefit only herself—not advance the public's interest in access to government records, which is the whole point of CORA. Further attention to Plaintiff's Application takes away valuable time, energy, and resources from one of Colorado's largest hospitals (and the Colorado citizens that depend on it) during a global pandemic. The Application should be denied, with fees and costs awarded to Defendants.

Dated this 2nd day of September, 2022.

Respectfully submitted,

FOX ROTHSCHILD LLP

/s/ Marsha M. Piccone
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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of September, 2022, a true and correct copy of the foregoing was filed and served electronically via ICCES to the following:

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