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COLORADO COURT OF APPEALS 2 East 14th Ave Denver, Colorado 80203	
Appeal from District Court, City & County of Denver Honorable J. Marie Avery Moses Case No. 2022CV32315	
Appellants: DAVID MIGOYA and THE DENVER GAZETTE v. Appellee: STACY WHEELER, in her official capacity as custodian of records, DENVER PUBLIC SCHOOLS Intervenor Appellee: DENVER SCHOOL LEADERS ASSOCIATION.	**▲COURT USE ONLY▲**
Attorney for Proposed *Amicus Curiae* Colorado Freedom of Information Coalition Madeline Rana, Atty Reg. # 58834 (limited license) ZWILGEN PLLC 1900 M Street NW, Suite 250 Washington, DC 20036 Telephone: (202) 706-5233 Facsimile: (202) 706-5298 madeline@zwillgen.com	Court of Appeals Case No.: 2023CA000995

PROPOSED BRIEF OF PROPOSED *AMICUS CURIAE*
THE COLORADO FREEDOM OF INFORMATION COALITION
IN SUPPORT OF APPELLANTS

EXHIBIT 1

CERTIFICATE OF COMPLIANCE

I hereby certify that this Proposed Brief of *Amicus Curiae* in Support of the Appellants complies with the requirement of Rule 29(d). This amicus brief contains 1,828 words. In addition, I certify that this brief complies with the content and form requirements of C.A.R. 29 and 32.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ Madeline Rana # 58834

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IDENTITY OF THE AMICI AND THEIR INTEREST IN THIS CASE

Colorado Freedom of Information Coalition ("CFOIC") is a 501(c)(3) not-for-profit, educational, and nonpartisan alliance of news organizations, citizen groups and individuals dedicated to ensuring the transparency of state and local governments in Colorado by promoting open access to government records and meetings, and more generally, a free flow of information to We the People. Among CFOIC's member organizations are The ACLU of Colorado, Colorado Bar Association, Colorado Broadcasters Association, Colorado Association of Libraries, Colorado Press Association, Common Cause, and The Independence Institute.[1] CFOIC has a significant interest in the issues of this case. CFOIC submits this brief in support of Appellants.

The CFOIC (and all residents of Colorado) have a vested and continuing interest in the issues presented by this appeal. The District Court erred in ruling that final summary memoranda of disciplinary actions against Denver Public Schools administrators are exempt from disclosure under Colorado's Open Records Act pursuant to the "substantial injury to the public interest" exemption codified at C.R.S. § 24-72-204(6)(a).

[1] The positions set forth in this proposed *Amicus Curiae* brief by CFOIC do not necessarily represent the views of each member of the coalition.

ARGUMENT

Plaintiffs-Appellants investigative reporter David Migoya and the Denver Gazette sought final summary memoranda ("FRISK") of disciplinary actions against Denver Public Schools ("DPS") administrators for the 2018–21 calendar years (the "FRISK records") through a Colorado Open Records Act ("CORA") request to DPS. After initially concluding in November 2022 that the FRISK records were not exempt from disclosure (save for a subset of the requested records subject to a CORA exemption for records containing information regarding "discipline imposed based on sexual harassment"), the District Court issued an order on April 24, 2023, granting Defendants-Appellees' motion to restrict access to the FRISK records (Order Regarding Def.'s Mot. to Restrict Access Pursuant to C.R.S. §24-72-204(6)(a)–(b), the "Order"). Based on testimony presented by DPS and Intervenor the Denver School Leaders Association ("DSLA"), the District Court found that the FRISK records should be withheld from disclosure pursuant to C.R.S. § 24-72-204(6)(a). Order at 12. This provision exempts public records from disclosure when their release would cause substantial injury to the public interest. C.R.S. § 24-72-204(6)(a).

CFOIC agrees with Plaintiffs-Appellants that this ruling was in error and submits this *amicus curiae* brief to emphasize two particular ways in which the District Court erred. First, the District Court's finding that releasing the FRISK records would cause substantial injury to the public interest sets a precedent sharply at odds with CORA's presumption of public access and goal of public oversight, suggesting that generalized and foreseeable privacy concerns may warrant nondisclosure of public records for public officials at all levels of state and municipal government. Second, the District Court failed to recognize the significant public interest in access to the FRISK records, both when the records reflect egregious misconduct and when they

reflect lesser misconduct. For these reasons, as well as the reasons set forth in Plaintiffs-Appellants' submission, the District Court's ruling should be overturned and the FRISK records should be released.

I. Releasing the FRISK Records Will Not Cause Substantial Injury to the Public Interest.

The District Court's application of C.R.S. § 24-72-204(6)(a), the "substantial injury to the public interest" exemption to CORA's presumptive right of public access, was in error. This exemption "is to be used only in those extraordinary situations which the General Assembly could not have identified in advance." *Bodelson v. Denver Pub. Co.*, 5 P.3d 373, 377 (Colo. App. 2000), *citing Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150 (Colo. App. 1998). In applying that exemption to the FRISK records, the District Court misapprehended its scope and purpose.

In *Bodelson*, the court applied this exemption to autopsy records of victims of the Columbine High School massacre, finding that "the overwhelming grief caused by the nature and extent of this tragedy constituted an extraordinary situation that the General Assembly could not have identified in advance." *Id.* at 378. Here, by contrast, no "extraordinary situation" exists that the General Assembly could not have identified in advance. Rather, DPS and DSLA invoked entirely foreseeable rationales for withholding the FRISK records—namely, concerns about employee retention and recruiting. *See* Order at 7. The General Assembly could have anticipated such concerns, but it did not choose to codify them in one of the enumerated CORA exemptions. This aligns with CORA's purpose of facilitating public oversight into how public officials perform their duties: "The general purpose of the ORA is to assure that, by providing access to public records, the workings of government are not unduly shielded from the public eye." *Zubeck*

v. El Paso Cty. Ret. Plan, 961 P.2d 597, 600 (Colo. App. 1998); *see also Cole v. State*, 673 P.2d 345, 350 (Colo. 1983) (*en banc*) ("A free self-governing people needs full information concerning the activities of its government not only to shape its views of policy and to vote intelligently in elections, but also to compel the state, the agent of the people, to act responsibly and account for its actions."). Applying this exemption to the FRISK records in a context where no extraordinary circumstance exists sets a precedent entirely at odds with the scope and purpose of CORA.

By allowing concerns about administrators' reputations to trump the public's right of access to information about how public officials carry out their official duties, the District Court's order lays the foundation for other public officials to invoke C.R.S. § 24-72-204(6)(a) whenever the release of records would cause embarrassment, potentially hinder recruiting efforts, or contribute to other speculative and foreseeable harms. This flies in the face of CORA's mandate that exemptions from disclosure must be narrowly construed. *See Freedom Newspapers*, 961 P.2d at 1154. Concerns such as "embarrassment" or "discomfort in having an unfavorable review shared with the public" do not warrant nondisclosure under the "substantial injury to the public interest" exception. *See City of Boulder, Co. v. Avery*, No. 01CV1741, 2002 WL 31954865, at *3 (Colo. Dist. Ct. Mar. 18, 2002). And speculative concerns about potential future harm are insufficient to establish an infringement of constitutionally-protected reputational interests. *Freedom Newspapers*, 961 P.2d at 1157 (affirming trial court's decision not to credit "conclusory and speculative" affidavits asserting potential reputational harms that could arise from disclosure of records); *Perez v. Denver Pub. Sch.*, 919 P.2d 960, 961 (Colo. App. 1996) (finding former DPS assistant principal's invocation of the "possibility of future harm to

prospective employment opportunities" to be "too intangible to constitute a constitutional deprivation of a protected liberty interest in reputation"). No extraordinary, unforeseeable circumstance is present here; rather, DPS and DSLA invoked foreseeable concerns that the General Assembly chose not to codify as CORA exemptions. The District Court's decision improperly elevates such concerns to the level of an unforeseeable circumstance, setting a precedent that will allow other public officials to similarly shield their activities from public oversight on the basis of garden variety reputational concerns.

II. There Is a Compelling Public Interest in Access to the FRISK Records.

In ruling that the FRISK records are exempt from disclosure under C.R.S. § 24-72-204(6)(a), the District Court erred when it concluded that there is no public interest in all final disciplinary decisions sought by Appellants. Order at 11. Under the substantial injury to the public exemption, the court weighs whether there is a legitimate expectation of nondisclosure, whether there is a compelling public interest in access, and if there will be disclosure, how to ensure that it will be done in the least intrusive manner. *Freedom Newspapers*, 961 P.2d at 1156, *citing Denver Post Corp. v. Univ. of Colorado*, 739 P.2d 874 (Colo. App. 1987). The District Court's analysis of the public interest prong failed to adequately account for the value of public oversight into DPS administrators' disciplinary records.

The District Court found that, "[w]hile there may be an obvious public interest in disclosure of disciplinary records related to egregious conduct, there is no obvious public interest in disclosure of corrective action related to minor disciplinary matters such as failing to properly secure an AV cart or failure to greet families at the front of the school at the start of each school day." Order at 11. Because Plaintiffs had not presented testimony or evidence regarding the

public interest in *all* final disciplinary actions, the Court concluded that it could not find a compelling public interest in their release. *Id.*

As the District Court acknowledged, the public interest in disciplinary records related to egregious conduct is "obvious." Order at 11. Public oversight into how school administrators perform their duties is essential for accountability. For example, documents obtained by the Denver Gazette in 2022 revealed that a DPS principal who had been investigated over allegations that she misspent over $175,000 on DPS credit cards—purchasing "[n]early $1,000 in scented candles," "Dallas Cowboys-branded steering wheel and headrest covers," and much more—was allowed keep her job and was later promoted. David Migoya, *DPS Investigated Former MLK Principal for Over $175,000 in Purchases, Then Promoted Her*, The Denver Gazette (Dec. 11, 2022), https://denvergazette.com/colorado-watch/dps-investigated-former-mlk-principal-for-over-175-000-in-purchases-then-promoted-her/article_54bc7b62-768d-11ed-97f9-3be48668d529.html. Her misspending promptly resumed when she was once again provided with a district credit card following the investigation. *Id.* Public oversight is critical to prevent this kind of repeated misconduct. For this reason alone, the FRISK records should be released.

There is also significant public interest in FRISK records involving lesser disciplinary matters, as access to these documents provides clarity for the public and may exonerate their subjects from suspicion of more serious wrongdoing. In *City of Boulder*, the court evaluated the public interest in access to a report evaluating the performance of the city's Chief Judge, who had been placed on administrative leave after the report was submitted to the City Council and resigned shortly thereafter. 2002 WL 31954865, at *1. The court recognized the value of access to the report based on what it did *not* include, stating: "it is important for the community that [the

Chief Judge] served to know that there are no claims that former Judge Carrigan lacked knowledge of the law or any other legal skills. The problems addressed . . . went only to administrative skills and management style." *Id.* at *3. The same reasoning applies with regard to school administrators. Just as public oversight is beneficial in the context of egregious misconduct, it also provides value in the context of lesser misconduct by allowing the public to understand the ways in which public officials do—and do not—fall short in the performance of their duties.

The absence of information about why a school administrator may have faced disciplinary action, resigned, been terminated, or changed roles can lead to speculation, fear, and mistrust. If a relevant FRISK record reveals egregious misconduct, the public has a right to hold this official to account. If a relevant FRISK record reveals only lesser disciplinary concerns, the public benefits from the reassuring knowledge that the administrator's misconduct was *not* egregious.

CONCLUSION

For the reasons set forth above, the FRISK records should be disclosed.