COLORADO COURT OF APPEALS

DATE FILED: February 1, 2024
CASE NUMBER: 2023CA514

Court of Appeals No. 23CA0514
Teller County District Court No. 23CV30021
Honorable Scott Sells, Judge

Erin O'Connell,

Plaintiff-Appellee,

v.

Woodland Park School District; Woodland Park School District Board of Education; Mike Bates, in his official capacity as a Board Member; David Illingworth, II, in his official capacity as a Board Member; Cassie Kimbrell, in her official capacity as a Board Member; Suzanne Patterson, in her official capacity as a Board Member; and David Rusterholtz, in his official capacity as a Board Member,

Defendants-Appellants.

ORDER AFFIRMED

Division VII
Opinion by JUDGE TOW
Lipinsky and Grove, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced February 1, 2024

Eric Maxfield Law, LLC, Eric Maxfield, Boulder, Colorado, for Plaintiff-Appellee

Gessler Blue LLC, Scott E. Gessler, Geoffrey N. Blue, Greenwood Village, Colorado, for Defendants-Appellants

¶ 1 Defendants, Woodland Park School District; Woodland Park School District Board of Education; Mike Bates; David Illingworth, II; Cassie Kimbrell; Suzanne Patterson; and David Rusterholtz (collectively, the School District),[1] appeal the district court's order requiring the School District to provide security camera footage to plaintiff, Erin O'Connell. We affirm.

I. Background

¶ 2 O'Connell requested certain recordings from the School District's security cameras under section 24-72-203, C.R.S. 2023, of the Colorado Open Records Act (CORA). Specifically, she asked for a copy of the footage that the School District's security cameras recorded on December 19, 2022, in four areas: (1) "[t]he Woodland Park Central Office Lobby"; (2) "[t]he area known as the Commons in the Woodland Park High School Building"; (3) "[t]he high school auditorium"; and (4) "[t]he hallway heading North from the Commons to the Central Office."

¶ 3 The School District denied O'Connell's request, saying the footage would reveal "specialized details of . . . security

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[1] The individual defendants are sued in their official capacity as school board members.

arrangements," echoing the exemption from inspection set forth in section 24-72-204(2)(a)(VIII)(A), C.R.S. 2023. O'Connell then filed a complaint in district court, asking for an expedited show cause hearing, in camera review of the recordings, and an order directing the School District to provide copies of the recordings to O'Connell.[2] In her complaint, O'Connell alleged that the recordings revealed a conversation between three school board members and a candidate for the superintendent position.

¶ 4 The district court held a show cause hearing. At the hearing, the School District presented no evidence. Instead, it argued, on purely legal grounds, that it was not required to disclose the recordings because they (1) were not "public records" under CORA and (2) revealed "specialized details of . . . security arrangements" and, therefore, were exempt from CORA's inspection requirement. §§ 24-72-202(6)(a)(I), -204(2)(a)(VIII)(A), C.R.S. 2023. During this argument, the School District's counsel conceded that some of the requested footage depicted a conversation between school board members:

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[2] There is no indication in the record that the court reviewed the recordings in camera.

> I think it's fairly obvious that Ms. O'Connell is in pursuit of a particular video of board members having a brief conversation at their December 19th meeting. I acknowledged the fact that conversation took place when I conferred with Mr. Maxfield and with Ms. O'Connell in anticipation of this hearing and the District really has nothing to hide with respect to that clip.

The School District's counsel also said the recordings contained "no audio."

¶ 5 In support of her request, O'Connell testified that a school board meeting occurred on December 19, 2022, which was the date of the requested recordings. O'Connell said she was familiar with cameras in the building where the meeting occurred, and that the cameras were visible to "anyone who walks through [the] building."

¶ 6 The district court ordered the School District to provide a copy of the recordings to O'Connell. It entered its order orally at the hearing and subsequently adopted a written proposed order submitted by O'Connell.

II. CORA Request

¶ 7 The School District contends that it is not required to allow O'Connell to inspect the security camera recordings (or provide her with a copy of them) because (1) O'Connell did not meet her burden

of showing that the recordings are "public records" under CORA and (2) the recordings are protected from disclosure by CORA's "specialized details of . . . security arrangements" exception. §§ 24-72-202(6)(a)(I), -204(2)(a)(VIII)(A). We disagree.

A. Preservation and Standard of Review

¶ 8 O'Connell contests preservation. She contends the School District did not argue, until now, that O'Connell failed to meet her burden of showing that the security camera recordings are public records. However, in its briefs and at the show cause hearing, the School District expressly said that the records O'Connell sought were not public records. And the district court's written order — which O'Connell drafted — expressly said that O'Connell met her burden in showing the records are public records. The argument is, therefore, preserved. *See Berra v. Springer & Steinberg, P.C.*, 251 P.3d 567, 570 (Colo. App. 2010) (holding issue was preserved when it was raised and the court had an opportunity to rule on it).

¶ 9 We review de novo the construction and application of CORA. *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1170 (Colo. 2005). However, we defer to the district court's findings of historical fact if

they are supported by the record. *City of Fort Morgan v. E. Colo. Publ'g Co.*, 240 P.3d 481, 485 (Colo. App. 2010).[3]

B. Public Records

¶ 10 A party seeking to inspect records under CORA bears the initial burden of showing that the requested records are likely public records.[4] *Denver Publ'g Co. v. Bd. of Cnty. Comm'rs*, 121 P.3d 190, 199 (Colo. 2005). "To carry this burden, the [requesting party] must show that the [record custodian] made, maintained, or kept the record in [their] official capacity." *Denver Post Corp. v.*

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[3] In *Shook v. Pitkin County Board of County Commissioners*, 2015 COA 84, ¶ 5, a division of this court reviewed for abuse of discretion the trial court's "ultimate conclusion that a CORA exception applies." We note that the division in *Shook* cited *Blesch v. Denver Publishing Co.*, 62 P.3d 1060, 1063 (Colo. App. 2002), in support of this proposition. The division in *Blesch* held that the exception at issue required a showing of substantial injury to the public interest — which the division characterized as a question of fact to be reviewed "for clear error or abuse of discretion." 62 P.3d at 1063 (citing *E-470 Pub. Highway Auth. v. 455 Co.*, 3 P.3d 18, 22 (Colo. 2000)). Nonetheless, our resolution of this matter is the same whether we review the district court's factual findings for clear error or abuse of discretion.

[4] CORA defines "[p]ublic records" as "all writings made, maintained, or kept by the state." § 24-72-202(6)(a)(I), C.R.S. 2023. "Writings," in turn, include "all . . . recordings . . . regardless of physical form or characteristics." § 24-72-202(7). There is no dispute that security camera recordings are capable of being "writings," and thus "public records," under CORA.

Ritter, 255 P.3d 1083, 1092 (Colo. 2011). This burden can be met "without looking to the content" of the requested records by "focus[ing] on the context in which" the records were created and kept. *Denver Publ'g Co.*, 121 P.3d at 199.

¶ 11 If the requesting party shows the requested documents are made, maintained, or kept in a public capacity, then the burden shifts to the custodian to show that the requested records are not public records. *Ritter*, 255 P.3d at 1092. Whether requested records are "public records" is a "content-driven" inquiry. *Denver Publ'g Co.*, 121 P.3d at 199, 203 (concluding certain emails were not public records because they contained only sexually explicit exchanges between state employees).

¶ 12 O'Connell met her burden of showing that the requested security camera recordings were "made, maintained, or kept" in the School District's official capacity. *Ritter*, 255 P.3d at 1092. The recordings were created by the School District, a public entity, and depicted public areas in which the School District operated. Considering this context, these recordings were likely made and maintained to assist the School District in its operations —

providing information on what happens in its school and office buildings.

¶ 13 The burden thus shifted to the School District to show that the recordings were not public records. *See Denver Publ'g Co.*, 121 P.3d at 203. The district court found that the requested security camera recordings showed a conversation between school board members and a superintendent candidate. And the record supports this finding. O'Connell sought recordings that were made the day of a board meeting. Further, the School District "acknowledged the fact that [the] conversation took place" but said it had "nothing to hide."

¶ 14 The School District disputes that the recording of the conversation was a public record because the conversation was about personal matters. But there is no evidence of this in the record. While the School District's counsel said that he spoke with the board members and they do not "recall any public business being discussed in that conversation," as the School District itself points out, "factual findings may not rest only on statements of counsel." *Whalen v. Shepler*, 104 P.3d 243, 246 (Colo. App. 2004) (citing *People v. Dist. Ct.*, 898 P.2d 1058, 1060 (Colo. 1995)), *aff'd*, 119 P.3d 1084 (Colo. 2005). And further, the School District did

not seek in camera review of the recordings. There is, therefore, no evidence that the recordings contained nonpublic information.

¶ 15 The School District raises three counter arguments. First, it argues that "factual findings may not rest only on statements of counsel," and thus its own counsel's representation of what the recordings depict cannot support the district court's finding. *Id.* at 246 (citing *Dist. Ct.*, 898 P.2d at 1060). However, the admission by the School District's counsel that the conversation occurred was more akin to a concession of fact than testimony. *See, e.g.*, *Justiniano v. Indus. Claim Appeals Off.*, 2016 COA 83, ¶ 15 (ruling counsel conceded fact). The difference between the concession here and counsel's other unsupported assertion about the *content* of the conversation — that the recorded conversation was about personal affairs — lies in the fact that O'Connell does not contest the former.

¶ 16 Second, the School District contends the district court applied the wrong legal standard. It argues that the court erroneously considered whether the School District had a "reasonable expectation of privacy" and that the court looked to the purpose of the video footage instead of to its contents. We agree that these standards are not determinative of whether a record is a public

record under CORA. *See Denver Publ'g Co.*, 121 P.3d at 199. However, we may affirm "on any ground supported by the record, whether relied upon or even considered by the trial court." *Laleh v. Johnson*, 2017 CO 93, ¶ 24 (quoting *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006)). And, as noted, O'Connell met her burden of showing the recordings were likely public records, while the School District presented no evidence that the recordings were private.

¶ 17 Third, the School District argues that the record only contains evidence regarding one of the areas from which O'Connell requested security camera footage, and thus, at most, it is required to hand over the recording of that area. However, the district court found that events, like school board meetings, occurred in all four of the areas for which O'Connell requested recordings. Additionally, there was a school board meeting on the date of the requested recordings. Because nothing in the record suggests otherwise, we conclude that the recordings from all cameras likely contain public records because they illuminate details surrounding the board meeting and any other potential meetings that occurred nearby on December 19, 2022.

C. Security Arrangements

¶ 18 Generally, under CORA, "[a]ll public records shall be open for inspection by any person at reasonable times." § 24-72-203(1)(a). However, public records that reveal specialized details of security arrangements need not be disclosed:

> The custodian may deny the right of inspection of the following records . . . .
>
> . . . .
>
> . . . Specialized details of . . . security arrangements . . . , including the specific engineering, vulnerability, detailed design information, protective measures, emergency response plans, or system operational data of such assets that would be useful to a person in planning an attack on critical infrastructure but that does not simply provide the general location of such infrastructure.

§ 24-72-204(2)(a)(VIII)(A). It is the custodian's burden to show that public records are subject to a CORA exception and need not be disclosed. *Colo. Sun v. Brubaker*, 2023 COA 101, ¶ 12.

¶ 19 The School District presented no evidence suggesting how the security camera footage showed "specialized details of . . . security arrangements." Instead, it argues that it is "axiomatic that the capabilities, configurations, settings, and usage of security cameras are 'specialized details' of security arrangements." However, this

argument would essentially mean that, as a matter of law, all security camera footage is exempt from inspection under CORA. We are aware of no authority — and the School District does not cite any — that suggests CORA includes a per se exemption for security camera footage. *See Lang v. Colo. Mental Health Inst.*, 44 P.3d 262, 264 (Colo. App. 2001) ("An exception not made by the legislature is not to be read into the statute.").

¶ 20 Instead, CORA requires the School District to demonstrate that the specialized details of the security camera footage would "be useful to a person in planning an attack on critical infrastructure." § 24-72-204(2)(a)(VII)(A). Again, the School District did not present any evidence, nor did it seek in camera review, to show the court that the security camera footage revealed anything that would aid one in planning an attack. If the cameras did have a blind spot, or if some manner of their operation could aid someone planning an attack, the School District needed to present evidence of that to the district court. On this record, therefore, there is no reason to think that the security camera footage reveals any information that is not already available to the public. Thus, the School District did not carry its burden of establishing the applicability of the "specialized

details of . . . security arrangements” exception to CORA’s disclosure mandate.

¶ 21 Finally, the School District counters that the district court’s written order required it to prove that a security threat was “credible or plausible.” Again, however, even if that standard was incorrect, we may affirm on any grounds supported by the record. *See Laleh*, ¶ 24. And, as just explained, the lack of evidence showing how the requested footage could aid anyone in planning an attack is dispositive.

III. Disposition

¶ 22 The order is affirmed.

JUDGE LIPINSKY and JUDGE GROVE concur.

Court of Appeals

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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

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