DISTRICT COURT, PUEBLO COUNTY, COLORADO 501 N. Elizabeth St. Pueblo, Colorado 80113	DATE FILED: June 9, 2024 6:00 PM CASE NUMBER: 2023CV30595
Applicants: **JILL MARSHALL** and **JAMIE SMITH,** in their official capacity as an Official Custodians of Records for the Colorado Department of Human Services, v. Respondent: **ALASYN ZIMMERMAN** Cross-Plaintiffs/Applicants: **ALASYN ZIMMERMAN** and **SCRIPPS BROADCASTING HOLDINGS, L.L.C. d/b/a KOAA-TV** **v.** Cross-Defendant/Respondent: **JORDAN SAENZ**, in her official capacity as the Interim CORA Manager of the Colorado Department of Human Services	**COURT USE ONLY** Case Number: 23CV30595 Division: 403

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER REGARDING APPLICATIONS UNDER THE COLORADO OPEN RECORDS ACT

THIS MATTER CAME BEFORE THE COURT on Wednesday, February 21, 2024 for a show cause hearing pursuant to the Colorado Open Records Act (CORA), specifically C.R.S. §§ 24-72-204(5) and 24-72-204(6)(a).

The Cross-Plaintiffs/Applicants, Alasyn Zimmerman and Scripps Broadcasting Holdings, L.L.C. d/b/a KOAA-TV ("KOAA") were represented by Steven D. Zansberg of the Law Office of Steven D. Zansberg, L.L.C.

The Cross-Defendant/Respondent, Jordan Saenz, in her official capacity as the Interim CORA Manager of the Colorado Department of Human Services ("CDHS" or "Department"), was represented by Senior Assistant Attorney General Megan A. Embrey and Assistant Attorney

General II Deanna Marie O'Sullivan of the Office of the Colorado Attorney General.[1]

The Court heard and considered the testimony of four witnesses: (1) Amy Ferrin, Chief Legal Director for CDHS; (2) Jordan Saenz, Interim CORA Manger for CDHS; (3) Jamie Smith, Deputy Chief Human Resource Officer for CDHS; and (4) Jill Marshall, CEO of the Colorado Mental Health Hospital in Pueblo ("CMHIP"). The following exhibits were admitted into evidence: 1, 2, 4-16, E, H, I, O, and R.

Having reviewed and considered all evidence admitted, and taking judicial notice of all relevant adjudicative facts contained in the court file and record, including closing arguments presented by the parties at trial as well as the Proposed Findings of Fact and Conclusions of Law submitted by the parties, the Court enters the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

Background

1. This is a dispute over records inspection under the Colorado Open Records Act (CORA), C.R.S. § 24-72-101 *et seq*., specifically pursuant to §§ 24-72- 200.1 through 24-72-206. The Colorado Department of Human Services is a principal agency of the State and, therefore, has public records subject to CORA. C.R.S. §§ 24-1-110(1)(w), 24-72-202(6)(a)(I). As CMHIP is administered and managed by the Department, CMHIP employees are employees of the Department. Ms. Alasyn Zimmerman, a reporter with KOAA-TV, submitted the CORA requests before this Court.

2. The dispute centers on a request sent on September 26, 2023 (received by the Department the next day) for CMHIP employee records.[2] The request was submitted by the requester KOAA to the agency CDHS, and sought the employment applications for any CMHIP employee placed on investigatory administrative leave at any point from January, 2021 to the time of the request. Exhibit 4. Both the agency and the requester have filed applications to the District Court.

3. The Department filed its original Application for Judgment Pursuant to the Colorado Open Records Act, Section 24-72-204(6)(a) on October 30, 2023, which it amended on November 30, 2023. The Department asks this Court to determine whether the identity of a CMHIP employee who has been placed on administrative leave pending a workplace investigation, revealed through that employee's application for employment, is part of the employee's personnel file and therefore required to be withheld under CORA by redaction when responding to KOAA's request for employment

[1] As the Court stated at the conclusion of the Show Cause Hearing, both sets of parties were represented by skilled advocates who very professionally presented cogent and persuasive arguments, both in their Hearing Briefs, at hearing, and in their Proposed Orders.

[2] As discussed below, there were two record requests made to the Department: the first on September 20, 2023, which was withdrawn by the requester on September 26, 2023; and a second request made after business hours on September 26, 2023 and received by the Department on September 27, 2023. As KOAA withdrew its September 20, 2023 records request (the "first request"), it is not germane to the issues at bar and thus will not be analyzed. Furthermore, KOAA has not (in either its Cross-Application or its Hearing Brief), challenged the redactions of names and employee ID numbers in the first request. As a result, only the second request is at issue here.

applications.

4. KOAA filed its Response to First Amended Application and Cross-Claim for an Order to Show Cause Pursuant to §24-72-205(5), C.R.S. on December 8, 2023. KOAA seeks court orders directing the Department to provide KOAA access to the records it requested, in unredacted form, and awarding KOAA its costs and reasonable attorney fees associated with this action.

Timeline of Events

5. On September 20, 2023, KOAA submitted a first CORA request. Exhibit 1. This request was initially for all Rule 5-15D records for CMHIP employees on administrative leave greater than twenty consecutive days between January 1, 2021 through the time of the request. The request also included a request of related emails during the same period. *Id*.

6. On September 25, 2023, the Department provided the responsive 5-15D records to KOAA with CMHIP employee identification numbers and names redacted, along with a cost estimate for the emails requested. Exhibit 2. KOAA responded to the cost estimate by rescinding the request for the emails and submitting a new request. Exhibit 4.

7. On September 26, 2023, KOAA submitted the second CORA request, at issue here. *Id*. As this request was sent after business hours, it was received by the Department on September 27, 2023. This request sought "employment applications for any employee at the Colorado Mental Health Hospital in Pueblo placed on investigatory administrative leave during any point from Jan. 2021 – Present." *Id*.

8. On September 28, 2023, Ms. Jessie Bixler, in her capacity as Interim CORA Manager, responded to KOAA's Second Request with a cost estimate. Exhibit 5. After receiving the estimate, on September 28, 2023, Ms. Zimmerman asked Ms. Bixler, "will the names be redacted on these records?" Exhibit 6. This inspired a series of internal discussions within CDHS between Ms. Jordan Saenz, Interim CORA Manager and Ms. Amy Ferrin, Chief Legal Director for CDHS, while the Department simultaneously responded via email to Ms. Zimmerman's repeated inquiries as to why the sought records would be redacted. Exhibit 6, 7, E.

9. On September 28, 2023, Ms. Saenz answered Ms. Zimmerman's question by stating: "Yes, names and other potentially identifiable information will be redacted from those records." Exhibit 6. On September 29, 2023, Ms. Zimmerman responded by asking "what CORA exemption allows redacting identifying information on these? Looking at CORA it specifically excludes employment applications." *Id*.

10. After again consulting with Ms. Ferrin, on September 29, 2023, Ms. Saenz responded to Ms. Zimmerman, stating: "Your request would identify employee(s) who have been put on administrative leave related to a civil investigation. Therefore, we are redacting per 24-72-204(2)(a)(IX)(A)-(B), (3)(a)." *Id*.

11. On October 3, 2023, Ms. Zimmerman, in an email to Ms. Saenz, again questioned the

Department's statutory basis for redacting the sought records. That day, Ms. Ferrin responded to Ms. Zimmerman on behalf of CDHS, stating: "Personnel investigations fall specifically under section (IX)(B), which says the investigation must be closed and that we may redact the personal identifying information of the target(s) of the investigation. The Department does not release records that reflect personnel action with names/identifying information." Exhibit 7, E.

12. At this point counsel for KOAA-TV and Ms. Zimmerman got involved. On October 9, 2023, Mr. Zansberg emailed a letter to Ms. Saenz, with courtesy copies sent to: (1) Ms. Ferrin, Chief Legal Director, DHS; (2) Ms. Zimmerman, KOAA-TV reporter; (3) David Giles, Esq., Associate General Counsel of Scripps Media, Inc.; and (4) Jeff Roberts, Colorado Freedom of Information Coalition. Exhibit 8. The letter, citing authority and discussing legislative history, informed CDHS that "the statutory provision relied upon by CDHS as a basis for its redactions . . . expressly *excludes* from its ambit an investigation into CDHS employees." *Id*. (emphasis in original). The letter respectfully requested that CDHS reconsider its position and make the records Ms. Zimmerman requested available in unredacted form, expressing "trust and hope that KOAA-TV will not be compelled to bring this matter to a court for resolution." *Id*.

13. On October 20, 2023, the Department responded to Mr. Zansberg's letter with an emailed letter authored by Chief Legal Director Ms. Ferrin. Exhibit 9, 10. By all testimony, the letter was the product of discussions and collaboration between Ms. Ferrin, Ms. Saenz (CDHS Interim CORA Manager), Jill Marshall (CMHIP CEO), and Department leaders Ms. Leora Joseph and Mr. Perry May (who supervise Ms. Marshall). The Department noted that it considered the authority cited by counsel and agreed that the civil/administrative investigation section of CORA did not apply to the records requested in Ms. Zimmerman's first or second request. Exhibit 9. At hearing, Ms. Ferrin testified that the authorities that counsel pointed to convinced her to change the Department's previous understanding about the application of those subsections to this request.

14. However, the letter also notified KOAA, unequivocally and repeatedly, that CDHS would still not disclose unredacted versions of the applications for employment, but for a different reason: because disclosure of the employees' names is prohibited by CORA's "personnel files" exemption. *Id*. The letter setting forth CDHS's position states, in relevant part:

> [P]ersonnel investigations are protected information part of an employee's personnel file. C.R.S. § 24-72-202(4.5); C.R.S. § 24-72-204(3)(a)(II). . . . Because investigatory administrative leave is used by the Department while investigating personnel matters and investigatory administrative leave is not evidence of wrongdoing, employees have a legitimate expectation of privacy in this investigative process including the fact and reason ("investigatory") that an employee is placed on leave. . . .
>
> Ms. Zimmerman requested more than merely job applications. Ms. Zimmerman's request for unredacted . . . "employment applications for any employee … placed on investigatory administrative leave" is no different than a request for the names of employees placed on investigatory administrative leave. State employees have a legitimate expectation of the privacy of this information in their personnel files. **Accordingly, the Department will not release the records with identifying**

> **information, to include employee names**.
>
> **As described in previous email and letter correspondence**, the Department will work with Ms. Zimmerman to release records responsive to this request **so long as names and identifying information are redacted**.

Id. (emphasis added).

15. On the same day counsel for KOAA received the Department's denial decision, Mr. Zansberg emailed Ms. Ferrin legal authority, and requested as follows: "Please review carefully the two attached COA precedents and the two District Court rulings, and reconsider your erroneous interpretation of the scope of the "personnel files" exemption. Exhibit 10, H. The decisions and rulings construed and applied the "personnel files" exemption. Mr. Zansberg's letter concluded: "My clients would prefer not to have to file suit and impose the litigation costs on your department." *Id*. Ms. Ferrin reviewed the authorities, had questions about their applicability to records related to investigatory administrative leave, and began further discussions within the Department. Specifically, Ms. Ferrin scheduled meetings with the Department's counsel to discuss Mr. Zansberg's response, and had internal meetings through and including October 27, 2023.

16. Four days passed with no apparent communication between the agency and the requester. Then, on October 25, 2023, KOAA, through its counsel Ms. Zansberg, emailed Ms. Ferrin and provided a copy of a then-recently filed Application for an Order to Show Cause under the Colorado Open Records Act by "a local attorney with the Reporter's Committee for Freedom of the Press" (Mr. Zansberg) that challenged another governmental body's assertion that the personnel files exemption applies to records reflecting official conduct of public employees. Exhibit 10, I. The email stated:

> Please let us know, by close of business today, whether we should file essentially the same pleading in Denver District Court.
>
> This email serves as written notice, pursuant to § 24-6-204(5). C.R.S., of my client's intent to file an Application for an Order to Show Cause and, because KOAA and Ms. Zimmerman are engaged in providing daily and breaking news coverage, it also establishes that they need not wait 14 (additional) days to file such Application.

Exhibit 10, I at 2 (emphasis in original).

17. On the same day, CDHS, through counsel, emailed KOAA to clarify the statutory provision it had cited as the basis for the written notice of intent to file an Application to Show Cause. CDHS also pointed out that a requestor must provide "a factual basis" for being able to file the application without awaiting the statutory 14-day conferral period, and noted that if an expedited filing was factually supported, "the requestor must wait 3 business days after providing written notice" before ("prior to") filing. Exhibit I at 1.

18. Four minutes later, counsel for KOAA responded via email, stating: "Thanks Amy.

Yes, its (*sic*) 24-72-204(5), C.R.S. that I meant to cite, and my statement 'provides the factual basis' for suspending the 14-day waiting period, reducing it to three days from today." *Id*.

19. CDHS did not respond to KOAA's request to notify it by the close of business on October 25, 2023 whether CDHS would produce the unredacted applications for employment, as KOAA had requested. Ms. Ferrin, Ms. Saenz, and Ms. Marshall all testified that during the three business days following October 25, 2023 (October 26, 27, and 30), there were no further communications between CDHS and KOAA.[3]

20. In the interim between receiving KOAA's notice of its intention to file the Application for an Order to Show Cause pursuant to C.R.S. § 24-72-204(5), and October 30, 2023, Ms. Ferrin met with attorneys in the Attorney General's office. The decision was made that the Attorney General's office would file an Application on behalf of CDHS, in which the Department would ask this Court (and not the Denver District Court that KOAA's notice had identified) for guidance, pursuant to C.R.S. § 24-72-204(6)(a), regarding its obligations under CORA. The basis of the Application was that the Official Custodian of the applications for employment sought by KOAA was, at that time, "unable, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if disclosure" of the employees' names and identifying information contained in the requested public records is prohibited pursuant to the personnel files exemption. C.R.S. § 24-72-204(6)(a).

21. At 5:40 p.m. on October 30, 2023, the third business day after it received KOAA's written notice of its intent to file an Application for an Order to Show Cause challenging the propriety of CDHS' denial decision in Denver District Court (pursuant to the expedited three business day timeframe under C.R.S. § 24-72-204(5)(a)), the Department filed the instant Application in Pueblo District Court. The Application, pursuant to C.R.S. § 24-72-204(a), was filed on behalf of CMHIP CEO Jill Marshall as "an Official Records Custodian of Records for the Colorado Department of Human Services."

22. At 11:55 a.m. on November 1, 2023, Alasyn Zimmerman and KOAA-TV filed an Application for an Order to Show Cause pursuant to C.R.S. § 24-72-204(5), in the District Court for the City and County of Denver, case number 2023CV33211, related to the same September 28, 2023, CORA request at issue in this Pueblo case. That case was dismissed by stipulation of the parties on December 12, 2023.

23. After KOAA filed its November 30, 2023 Motion to Dismiss Ms. Marshall's Application in the instant case, CDHS filed a First Amended Application for Judgment, naming Jill Marshall and Jamie Smith as "Official Custodians" of the same records at issue. On December 12, 2023, Ms. Zimmerman filed her Response to First Amended Application and Cross-Claim for an Order to Show Cause Pursuant to C.R.S. § 24-72-205(5). Hearing was held on February 21, 2024.

[3] "This waiting period provides the custodian an opportunity to reconsider her denial and encourages custodians to resolve the matter without forcing the records requestor into court." *Reno v. Marks*, 349 P.3d 248, 254 (Colo. 2015). While the Department could have, as a professional courtesy, responded to KOAA's request for a response by close of business, or reached out to KOAA during the 3 business days prior to KOAA filing in Denver District Court, when access to records is being pursued on an expedited basis "no meeting to determine if the dispute can be resolved without filing an application with the district court is required." C.R.S. § 24-72-204(5)(a).

Witness Testimony

24. The Court first heard the testimony of Amy Ferrin, Chief Legal Director for CDHS. Ms. Ferrin supervises the Department's CORA Manager. At the time of the request at issue, the CORA Manager position was vacant. Five staff members served as Interim CORA Managers, including Ms. Jordan Saenz and Ms. Jessie Bixler. Ms. Ferrin testified at length and in detail regarding the volume of CORA requests received by the Department, the Department's process and procedures for responding to them, and her role in analyzing the requests at issue here. Ms. Ferrin further testified to her correspondence with KOAA's counsel. Ms. Ferrin described with specificity the work she did in evaluating KOAA's requests, including her consultations with Interim CORA Managers and CMHIP CEO Ms. Marshall, and her review of the authorities provided to her by Mr. Zansberg. While Ms. Ferrin found KOAA's requests to be problematic, it is clear from her testimony that she and her team reached consensus on their responses to KOAA. Ms. Ferrin testified to authoring the October 20, 2023 denial decision letter, and that the decision was unequivocal. Exhibit 9. The Court found Ms. Ferrin's testimony credible.

25. The Court next heard the testimony of Ms. Jordan Saenz, at the time one of the Department's Interim CORA Managers. Ms. Saenz testified to her correspondence with Ms. Zimmerman, researching and analyzing KOAA's first and second requests, and consulting with Ms. Ferrin on the second request. Ms. Saenz testified that she agreed with the Department's denial decision of October 20, 2023, that it "will not" disclose the names or identifying information of employees who are on investigatory administrative leave. Ms. Saenz testified that she understood and believed that such information constitutes "personnel files" which must be withheld from public disclosure, and maintained that belief at the time of hearing. Ms. Saenz testified that the October 20, 2023 letter stated the Department's non-disclosure position without any equivocation or any uncertainty. The Court found Ms. Saenz credible.

26. The Court heard the testimony of Mr. Jamie Smith, Deputy Chief Human Resource Officer for CDHS. Mr. Smith testified that his role in the subject CORA requests was to gather the documents requested and communicate his concerns to Ms. Ferrin. Mr. Smith testified that he had concerns about KOAA's requests, but the decision to provide access to, or withhold, public records in response to a CORA request was not included in his professional duties or responsibilities. The Court found Mr. Smith's testimony credible, and relevant to demonstrate the level of discussion and collaboration within the Department regarding these requests.

27. The Court heard the testimony of CMHIP's CEO, Jill Marshall. Ms. Marshall, who was named as one of two official custodians of the public records at issue, also testified that she conferred with Ms. Ferrin, and fully agreed with the October 20, 2023 letter to KOAA setting forth the Department's denial position. Ms. Marshall similarly testified that the October 20, 2023 letter was unequivocal in expressing the Department's denial decision.

Additional Findings

28. The Court finds that in response to KOAA's September 26, 2023 records request, the

Department communicated four separate denials to the requester, culminating in the unequivocal final denial of October 20, 2023:

A. September 28, 2023 email from Ms. Saenz to Ms. Zimmerman stating that the records would be redacted. Exhibit 6.

B. September 29, 2023 email from Ms. Saenz to Ms. Zimmerman affirming that the records would be redacted. Exhibit 6.

C. October 3, 2023 email from Ms. Ferrin to Ms. Zimmerman confirming that the records would be redacted. Exhibit 7, E.

D. October 20, 2023 letter from Ms. Ferrin to Mr. Zansberg, stating that "the Department will not release the records with identifying information, to include employee names" and that "the Department will work with Ms. Zimmerman to release records responsive to this request so long as names and identifying information are redacted." Exhibit 9.

29. The successive denials communicated by CDHS to KOAA came after multiple internal meetings and consultations among CORA professionals and decision-makers within the Department. Ms. Saenz (who communicated two of the denials to KOAA) and Ms. Marshall testified that they concurred with the final denial of October 20, 2023. The evidence demonstrates that CDHS, in good faith, exercised reasonable diligence and made reasonable inquiry to determine whether disclosing the unredacted records sought by KOAA is prohibited under CORA. However, there is no evidence in the record demonstrating that *after* exercising reasonable diligence and making reasonable inquiry the Department was ever *unable to determine* whether disclosing the unredacted records is prohibited by CORA. C.R.S. §24-72-204(6)(a). On the contrary, the Department was very much able to consistently determine, on different grounds but always quite clearly, that disclosing the unredacted employment applications is prohibited under CORA. Even when KOAA persuaded CDHS that its basis for a denial was faulty (via its October 9, 2023 letter to the Department), the Department's reassessment of its position led to an unambiguous denial on a different basis. Exhibit 9. The evidence in the record is that while the Department wrestled with KOAA's records request, nondisclosure always came out on top as the clear winner.

30. Additionally, the Court finds that at no time did the Department communicate an inability to make a CORA determination to the requester. The evidence reflects that the first indication that the Department was actually *unable* to determine whether disclosure of the records requested by KOAA is prohibited under CORA came at the filing of the instant Application seeking direction from this Court, ten days after the Department's carefully considered and well-articulated October 20, 2023 denial at issue here. Exhibit 9.

ISSUES

31. The issues to be determined by the Court are:

A. Whether the Department properly denied KOAA's right of inspection when

it informed KOAA in writing on October 20, 2023 that, consistent with CORA, the Department would not disclose the names and identifying information in the employment applications for any CMHIP employee placed on investigatory administrative leave during any point from January 2021 to the time of the records request;[4]

B. Whether the Official Custodians of the public records requested for inspection by KOAA properly filed their Application to the Court herein; and if so,

C. Whether the Official Custodians proved that at the time of filing they, "in good faith, after exercising reasonable diligence, and after making reasonable inquiry [were] unable to determine if disclosure of" the employees' names and identifying information contained in the requested "public record(s) was prohibited without a ruling by the court." C.R.S. § 24-72-204(6)(a).[5]

This case also presented questions of whether: (a) only a single individual can serve as "the Official Custodian" of public records eligible to file an Application under C.R.S. § 24-72-204(6)(a); and (b) whether Ms. Marshall and/or Mr. Smith are, in fact, the Official Custodian(s) of the public records at issue under the meaning of that term in the CORA. However, in his opening statement at hearing and in his trial brief, counsel for KOAA stated that "for purposes of this matter only, his client would no longer contest whether more than one person can be 'the Official Custodian' of public records under the CORA." In addition, the Court need not address that issue to fully resolve this dispute.

LEGAL AUTHORITY

CORA

32. The Colorado Open Records Act ("CORA"), found at C.R.S. §§ 24-72-201 et seq., declares that it is the public policy of the State of Colorado that "all public records shall be open for inspection by any person at reasonable times," unless specifically excepted by statute. C.R.S.§ 24-72-203(1)(a). *Daniels v. City of Commerce City*, 988 P.2d 648, 650–51 (Colo. App. 1999).

33. The public's right to inspect public records applies to all portions of those records. "The custodian of any public records shall allow any person the right of inspection of such records or any portion thereof except on one or more of the following grounds or as provided in subsection (2) or (3) of this section" of the statute. C.R.S. § 24-72-204(1).

34. "Public records" are statutorily defined to "mean[] and include[] all writings made,

[4] If the Court finds that the denial was not proper, "it shall order the custodian to permit such inspection and shall award court costs and reasonable attorney fees to the prevailing applicant in an amount to be determined by the court." C.R.S. § 24-72-204(5)(b).

[5] If the Court finds that the Official Custodians met their burden of proof, then "the attorney fees provision of subsection (5) shall not apply." C.R.S. 24-72-204(6)(a). This is the safe harbor from the attorney fee provision of subsection (5).

maintained, or kept by the state, any agency, institution, . . . or political subdivision of the state, . . . for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds." C.R.S. § 24-72-202(6)(a)(I).

35. "Exceptions to the Act should be narrowly construed." *Daniels*, 988 P.2d at 650 citing *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1154 (Colo. App. 1998). Because CORA was enacted for the benefit of the general public, courts are required to construe its provisions expansively in favor of public access, and to construe all statutory exemptions to that presumption of access narrowly. See, e.g., *Jefferson Cty. Educ. Ass'n v. Jefferson Cty. Sch. Dist. R-1*, 378 P.3d 835, 838 (Colo. App. 2016) ("CORA's clear language creates a strong presumption in favor of disclosing records. . . . This strong presumption requires us to construe any exceptions to CORA's disclosure requirements narrowly.") (citations omitted).

The Personnel File Exemption

36. CORA contains an exemption protecting an employee's personnel file. The statute mandates that the custodian of records shall *deny* the right of inspection of personnel files to requesters other than "the person in interest[6] and to the duly elected and appointed public officials who supervise such person's work." C.R.S. § 24-72-204(3)(a)(II)(A).

37. However, CORA specifies that "'Personnel files' does not include applications of past or current employees," which are at issue here. C.R.S. § 24-72-202(4.5). The statute provides: "'Personnel files' means and includes home addresses, telephone numbers, financial information, a disclosure of an intimate relationship filed in accordance with the policies of the general assembly, other information maintained because of the employer-employee relationship, and other documents specifically exempt from disclosure pursuant to this part 2 or any other provision of law." *Id*.

38. Colorado's Court of Appeals has construed the scope of the "personnel files" exemption as limited exclusively to "personal demographic information" *unrelated to an employee's official functions*, that is of the same nature as the illustrative examples listed at the outset of that statutory exemption (i.e., "home address and telephone number, or personal financial information"). *Daniels*, 988 P.2d at 651 (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").

39. "A public entity may not restrict access to information by merely placing a record in a personnel file; a legitimate expectation of privacy must exist." *Daniels*, 988 P.2d at 651.

Applications under sections 24-72-204(5) and (6)(a)

40. **KOAA'S Application Under Subsection (5)**: Any person denied the right to inspect any record may apply to the district court for an order directing the custodian to show cause why the

[6] "'Person in interest' means and includes the person who is the subject of a record or any representative designated by said person; . . ." C.R.S. §24-72-202(4).

custodian should not permit inspection of the record. C.R.S. § 24-72-204(5)(a). If the requester is successful in obtaining access to any of the records requested, the requester is entitled to costs and reasonable attorney fees. *Reno v. Marks*, 349 P.3d 248, 249 (Colo. 2015).

41. **CDHP's Application Under Subsection (6)(a)**: The official custodian of any public record may apply to the district court for a determination as to whether disclosure of the public record is prohibited "if the official custodian is *unable*, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if disclosure of the public record is prohibited pursuant to [CORA]." C.R.S. § 24-72-204(6)(a) (emphasis added). "In an action brought pursuant to this paragraph [(6)](a), the burden of proof shall be upon the custodian." *Id*.

CONCLUSIONS OF LAW

A. The Department did not properly deny KOAA's right of inspection when it informed KOAA in writing on October 20, 2023 that, consistent with CORA, the Department would not disclose the names and identifying information in the employment applications for any CMHIP employee placed on investigatory administrative leave during any point from January 2021 to the time of the records request.

42. The Court concludes, and the parties do not dispute, that the CMHIP employment applications at issue constitute "writings" that are "maintained, or kept" by CDHS for use in the exercise of official functions and are therefore "public records." C.R.S. § 24-72-202(6)(a)(I).

43. As found above, the Court concludes that on October 20, 2023, in response to KOAA's request to examine employment applications, including identifying information, for any employee at CMHIP placed on investigatory administrative leave during any point from January 2021 to the time of the request, the Department issued a written denial decision. Exhibit 9.

44. The basis for the Department's denial is that while the Department agrees that employment applications are releasable, KOAA's request for job applications for employees placed on investigatory leave "is no different than a request for the names of employees placed on investigatory administrative leave." *Id*. Because "personnel investigations are protected information part (*sic*) of an employee's personnel file" under C.R.S. § 24-72-202(4.5) and § 24-72-204(3)(a)(II), and because "employees have a legitimate expectation of privacy in this investigative process" and in "this information in their personnel files," the Department reasoned, it "will not release [the employment applications] with identifying information, to include employee names." *Id*.

45. First, when a particular type of record is expressly carved out of the "personnel files" exemption from disclosure, such as "applications of past or current employees, employment agreements, any amount paid or benefit provided incident to termination of employment, performance ratings, final sabbatical reports . . . or any compensation, including expense allowances and benefits, paid to employees by the state, its agencies, institutions, or political subdivisions," C.R.S. § 24-72-202(4.5), the *names* of the employees contained in those records are also outside the definition of "personnel files." See *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1154 (Colo. App. 1998)

(holding that the names of public employees who received compensation or other benefits for participating in early retirement program could not be withheld under the "personnel files" exemption).

46. Next, in order for the Department to restrict access to the applications by redacting identifying information, a legitimate expectation of privacy must exist. *Daniels*, 988 P.2d at 651. The Department asserts that because the sought applications are for employees who have been placed on investigatory administrative leave for performance of their official duties, the employment applications would reveal "information in their personnel files," information for which the employees have a legitimate expectation of privacy and protection for their personnel file. Exhibit 9. However, "it remains the duty of the courts to ensure that documents as to which this protection is claimed actually do in fact implicate this right." *Denver Post Corp. v. University of Colorado*, 739 P.2d 874, 878 (Colo. App. 1987).

47. Here, the information the Department seeks to protect under the personnel file exemption – the mere fact that a public employee is or was the subject of a pending internal review into whether the employee's official conduct, on the job, was (or was not) proper – is not "of the same general nature as an employee's home address and telephone number or personal financial information." *Daniels*, 988 P.2d 648 at 651. Rather, it is "directly related to the [CMHIP employee's] job as a public employee." *Jefferson Cty. Educ. Assoc. v. Jefferson Cty. Sch. Dist. R-1*, 378 P.3d 835, 839 (Colo. App. 2016).

48. The Court concludes that the fact that an employee was placed on investigatory administrative leave, without more, does not actually implicate the employee's right of privacy and the protection for personnel files. Thus, the names and identifying information of employees contained in the requested employment applications are not exempt from disclosure by the "personnel file" exemption. *Denver Post Corp*., 739 P.2d 874 at 878. The Court further concludes that the Department restricted access to a record otherwise subject to disclosure without a legitimate expectation of privacy. *Daniels*, 988 P.2d at 651.

49. For the reasons stated above, the Court concludes that the Department's October 20, 2023 denial decision, declaring that pursuant to the "personnel files" exemption, the Department would not disclose the names and identifying information in the requested employment applications, was not proper.

B. The Official Custodians of the public records requested for inspection by KOAA did not properly file their Application to the Court herein.

50. "Section 24-72-204 delineates the procedures for that applicant or the custodian to apply to the district court for judicial resolution of a dispute over inspection of a public record." *Reno*, 349 P.3d 248 at 253.

51. The Department brought this Application under C.R.S. § 24-72-204(6)(a), specifically its provision allowing the official custodian to bring an application "if (she) is unable, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if disclosure of the public record is prohibited pursuant to [CORA]." C.R.S. § 24-72-204(6)(a).

52. "If the custodian denies access to any public record, the applicant may request a written statement of the grounds for the denial, which statement shall cite the law or regulation under which access is denied and shall be furnished forthwith to the applicant." C.R.S. § 24-72-204(4). Here, the custodian denied access to the public records sought in writing, citing the law under which access was denied, and furnished the denial to KOAA. Exhibit 9.

53. Upon receipt of written notice of denial of access, as here, if the records requester wishes to challenge the denial decision, the requester must provide written notice to the custodian of the requester's intent to file an Application for an Order to Show Cause in the District Court prior to actually filing the Application. Ordinarily, the "Notice of Intent to File" must be sent to the custodian at least fourteen (14) days prior to the date of filing, during which time the requester and the custodian may, though are not required to, engage in any form of mediation to resolve the dispute. However, when the requester, as here, articulates a factual basis for the "need to pursue access to the record on an expedited basis," the requester can forego the 14-day waiting period and notify the custodian that, no sooner than after three business days have elapsed following service of Notice of Intent to File on the custodian, the requester will be filing an Application for an Order to Show Cause. C.R.S. § 24-72-204(5)(a). Here, upon receipt of the Department's written denial decision, KOAA provided the Department with written notice of its intent to file an Application for an Order to Show Cause in the District Court of Denver on an expedited basis, which articulated a factual basis for doing so. Exhibit 10, I.

54. In certain limited circumstances, the Official Custodian may file an Application in the District Court for resolution of questions concerning the rights of the parties with respect to a particular set of records that have been sought under CORA. C.R.S. § 24-72-204(6)(a). The two permissible circumstances are: (1) where even though no CORA provision either requires or authorizes withholding of any portion of the requested records, the Official Custodian nevertheless believes, in the unique and extraordinary circumstances presented, that disclosure of some or all of the records "would cause substantial injury to the public interest"; **or** (2) where upon receiving a records request, and despite having conducted reasonable inquiry and having exercised reasonable diligence into the facts and law, the Official Custodian is "unable, in good faith . . . to determine if disclosure of the public records is prohibited" by a mandatory non-disclosure provision of the Act. *Id*. A stated above, here the only provision of subsection 204(6)(a) invoked by the Department is the second one above, which the Court will refer to as the "unable to determine" provision.

55. Also, notably, in any case in which a requester becomes the Applicant by filing an Application for an Order to Show Cause, the custodian can, in response to that Application, raise either of the two grounds listed in subsection (6)(a). C.R.S. § 24-72-204(6)(b).

56. The "unable to determine" provision was added to CORA in 2001 as part of the same bill that mandated an award of attorney fees award to a "prevailing applicant." Previously, attorney fees were recoverable only upon a judicial finding that an improper withholding decision was "arbitrary or capricious."

> Section 24-72-204(5) formerly provided: '[U]pon a finding that the denial [of the right of inspection] was arbitrary or capricious, [the trial court] may order the custodian personally to pay the applicant's court costs and attorney fees in an

amount to be determined by the court.' This provision was deleted in 2001.

Black v. Southwestern Water Conservation Dist., 74 P.3d 462, 472 (Colo. App. 2003) citing Colo. Sess. Laws 2001, ch. 286 at 1074. The purpose of the amendment to subsection 204(6)(2) was to relieve records custodians of the obligation to pay attorney's fees to a records requester in those circumstances where a custodian could not, in good faith, determine whether disclosure was permitted or prohibited, such that an erroneous disclosure could potentially give rise to liability to a third party (e.g., for disclosing its trade secrets, an individual's medical or mental health records, etc.).

57. As stated above in Paragraph 52, CORA mandates that in her written denial decision, the official custodian must provide "the law or regulation under which access is denied." C.R.S. § 24-72-204(4). In the "unable to determine" scenario, as here, it is presumed that the official custodian's written denial decision to the requester would state or somehow indicate that the basis for the denial is that "the official custodian is unable, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if disclosure of the public record is prohibited pursuant to [CORA]," rather than the conclusive denial determination (citing its statutory basis), at issue here. C.R.S. § 24-72-204(6)(a); Exhibit 9.

58. Upon receipt of the custodian's written denial decision on the basis that the custodian is "unable to determine," the records requester may provide the custodian notice of Intent to File an Application challenging that denial decision. C.R.S. § 24-72-204(5)(a). Then, in response to the Application challenging an "unable to determine" denial, the custodian can properly assert to the court (as she would have in her denial letter to the requester) that (s)he is "unable, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if disclosure of the [withheld portion(s) of the] public record[(s)] is prohibited" by a mandatory non-disclosure provision of CORA. C.R.S. § 24-72-204(6)(a).

59. Alternatively, the records requester, having received an "unable to determine" denial decision, may choose not to provide Notice and file an Application. In that case, the official custodian of the withheld records may file her own Application, pursuant to C.R.S. § 24-72-204(6)(a), and provide notice to the records requester. Upon receiving that notice, the records requester can choose to either to participate or not in litigating the official custodian's Application. Presumably, too, upon receipt of Notice that the Official Custodian's Application has been filed, the records requester could formally withdraw her CORA request, thereby mooting the official custodian's action.

60. In *Reno*, the Colorado Supreme Court made it abundantly clear that a custodian's transparent effort to avoid having to defend its unequivocal denial decision and pay the requester's attorney's fees is not to be judicially countenanced:

> Subsection (5) provides a person who is denied access to a record with the right to apply to the district court for an order directing the custodian to show cause why the inspection should not be permitted. § 24-72-204(5). Subsection (5) requires the records requestor to give the custodian three days' advance notice before applying to the district court for an order permitting inspection. *Id*. This waiting period provides the custodian an opportunity to reconsider her denial and encourages custodians to resolve the matter without forcing the records requestor

into court.

* * *

> [S]ection 24-72-204 is clearly structured to provide disincentives to forcing an applicant to vindicate [her] right of inspection by filing [an application] with the district court. . . . These disincentives include subsection (5)'s requirement that an applicant give the custodian three days' notice before applying to the district court and the non-reciprocal costs and fees provision favoring the applicant.
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> * * *
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> Because subsection (5) requires a records requestor to give the custodian written notice at least three business days before filing an application in district court to challenge the custodian's denial of inspection, § 24-72-204(5), a custodian could immunize herself from any potential liability for attorney fees simply by filing an action under subsection (6)(a) first. . . . [S]uch an interpretation could create a "race to the courthouse" that the custodian would always win. This result would render CORA's fee-shifting scheme meaningless.

Reno, 349 P.3d 248 at 253-54, 255-56 (emphasis added) (internal quotation marks and citations omitted).

61. Here there is no evidence in the record that the Department was ever unable to make a disclosure determination. The facts of this case, as set forth above, demonstrate that this is clearly not a case where the Official Custodians were, in good faith, *unable to determine* if disclosure of the requested public record is prohibited pursuant to CORA.[7] As a result, by the instant Application, the Department is obviously not asking the Court to make a determination that *the Department was unable to make on its own*. Yet it was filed as such.

62. The Court concludes that the Department's Application contravenes the clear statutory framework for resolving public access questions in cases where the records custodian is "unable to determine" if disclosure is prohibited, and notifies or somehow indicates to the requester of that inability to make a determination.

63. Accordingly, the Court finds that the Application filed by CDHS on October 30, 2023, after KOAA had provided notice under C.R.S. § 24-72-204(5), was not filed "in good faith," and was not a proper response to the statutory notice it received from by KOAA.

C. The Official Custodians failed to prove that at the time of filing they, "in good faith, after exercising reasonable diligence, and after making reasonable inquiry [were] unable to determine if disclosure of" the employees' names and identifying information contained in the requested

[7] Quite the opposite. See Paragraphs 29-30 in particular.

"public record(s) was prohibited without a ruling by the court." C.R.S. § 24-72-204(6)(a).

64. As set forth above, the evidence clearly demonstrates that KOAA's request was not denied because the Official Custodians were "unable, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if disclosure of the public record(s)" sought by KOAA is prohibited under CORA. C.R.S. § 24-72-204(6)(a). Rather, the request was denied because the Department, in good faith, and after exercising reasonable diligence and making reasonable inquiry, determined conclusively that disclosure of the public records sought by KOAA *is* prohibited under CORA's personnel files exemption.

65. Because there is no evidence in the record that the Department was ever unable to determine if disclosure of the public records sought by KOAA is prohibited under CORA, the Court finds that the Official Custodians failed to meet their burden of proving that they were unable, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if disclosure of the employees' names and identifying information contained in the requested public records was prohibited by the personnel files exemption. Therefore, the attorney fee provision of C.R.S. § 24-72-204(5) applies.

ORDER

Because the Department's withholding of the names and identifying information of public employees from the requested applications of employment on grounds that disclosure is prohibited under CORA's "personnel files" exemption was not proper, upon receipt from KOAA of the appropriate fees associated with processing its records request, CDHS shall make those records available to KOAA, including the names and identifying information of the employees in those records.

Because the Department's withholding of the names and identifying information of public employees from the requested applications of employment on grounds that disclosure is prohibited under CORA's "personnel files" exemption was not proper, and because the Official Custodians failed to demonstrate that they were in fact "unable, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if disclosure" of that information was prohibited pursuant to the personnel files exemption, CDHS shall pay KOAA its reasonable attorney fees and costs incurred in litigating this action.

The Court will address a request for attorney fees and costs pursuant to C.R.C.P. Rule 121 Section 1-22, with the following additional requirements:

1. No later than 14 days from the issuance of this order, counsel for KOAA shall forward to counsel for CDHS a draft affidavit of attorney fees along with supporting documentation, and counsel shall confer and attempt to reach agreement on the amount.

2. No later than 21 days from the issuance of this order, counsel for KOAA shall file an affidavit of attorney fees, along with supporting billing records, and a statement as to whether agreement has been reached. If the amount is disputed, CDHS will have 21 days in which to respond,

and KOAA will have 7 days to file a reply. The Court notes that KOAA will be entitled to recover attorney fees reasonably incurred in seeking to recover its fees.

SO ORDERED this 9th day of June, 2024.

BY THE COURT

Timothy Michael O'Shea
District Court Judge