COLORADO COURT OF APPEALS
Ralph L. Carr Judicial Center
2 East 14th Avenue
Denver, Colorado 80203

Appeal from: The District Court for the City and County of Denver

District Court Judge: Hon. J. Eric Elliff

District Court Case Number: 2021CV31519

Plaintiffs-Appellants:
THE GAZETTE,
CHRISTOPHER N. OSHER, reporter at *The Gazette*, and THE INVISIBLE INSTITUTE

v.

Defendant-Appellee:
ERIK BOURGERIE, in his official capacity as custodian and Director of the Colorado Peace Officer Standards and Training Board

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Court of Appeals Case No. 2021CA1880

PLAINTIFFS-APPELLANTS' OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g). It contains 9,359 words and does not exceed 9,500 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A).

> For each issued raised by the Plaintiffs-Appellants, the brief contains under a separate heading before the discussion of the issue, a concise statement (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/Rachael Johnson
Rachael Johnson, #43597

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2. Did the district court err when it determined—without documentary evidence—that the records custodian considered the public interest before denying Plaintiffs-Appellants' records request?

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4. Did the district court err in failing to adequately consider the General Assembly's intent to provide the public a meaningful right of access to criminal justice records under the CCJRA?

STATEMENT OF THE CASE

Plaintiffs-Appellants are a journalist and two news organizations who publish award-winning investigative reporting in Colorado and nationwide. TR 10/05/21, pp. 113:6–17, 114:1–20, 181:19–183:25. Their work frequently involves reporting on police misconduct using government records. TR 10/05/21, pp. 113:13–22, 116:1–15, 184:1–25. For example, using government records, Mr. Christopher Osher, who is employed by *The Gazette*, has written a series of articles showing how Colorado peace officers migrate from department to department within the state despite having records of conduct that would bar them from law enforcement employment in other states. TR 10/05/21, p. 119:10–20; EX, pp. 124–156. And, in connection with its reporting, The Invisible Institute has sought and obtained, via public record requests, access to police standards and training databases for more than half of the fifty states. TR 10/05/21, p. 196:2–19; EX, pp. 168–175.

Independently, over the span of a year, Plaintiffs-Appellants made three requests seeking records from the Colorado Peace Officer Standards and Training Board and unit (collectively, "POST"). Two of these requests, one by The Invisible Institute (the August 15, 2019 "**Invisible Institute Request**," EX, p. 97), and one by Mr. Osher (the June 4, 2020 "**First Osher Request**," EX, p. 101), sought access to (inspect) or copies of the Colorado POST Database (the "POST

Database"). The Invisible Institute Request sought information related to all officers certified by the state. EX, p. 97. Both requesters anticipated that they would receive an Excel spreadsheet or analogous comma-separated value ("CSV") file in response to their requests. TR 10/05/21, p. 191:2–5; EX, p. 101. Neither requester sought officers' personal contact information, social security numbers, medical, or financial information. TR 10/05/21, pp. 117:13–17, 190:14–191:1. Another request submitted by Mr. Osher (the August 18, 2020 "**Second Osher Request**," EX, p. 105), sought all 2020 notifications of peace officer appointments to and separations from law enforcement agencies—information that is also maintained in the POST Database. TR 08/03/21, pp. 61:25–62:2.

POST denied each of the three requests in full; no records were produced to Plaintiffs-Appellants. EX, pp. 99–100, 103–104, 107–108. Each denial asserted that the request was governed by the Colorado Criminal Justice Records Act ("CCJRA"), §§ 24-72-301, C.R.S. *et seq.*, as opposed to the Colorado Open Records Act ("CORA"), §§ 24-72-201, C.R.S. *et seq*. EX, pp. 99–100, 103–104, 107–108. POST's denial of The Invisible Institute Request further stated that POST did not maintain records responsive to the request. EX, p. 100. Each denial contained a substantially similar articulation of the agency's rationale:

> To produce the requested information would require us to manipulate the database where information regarding all peace officers is stored. Under Colorado law, criminal justice agencies are not required to manipulate data in order to create a new record upon request of a

> member of the public. In our discretion, we decline to manipulate the requested data in response to your request.

See EX, pp. 100, 104, 108 (citations omitted). The denial of the Second Osher Request also asserted that publicly disclosing the names of peace officers would threaten their safety and ongoing investigations. EX, p. 108.

On December 15, 2020, counsel for Plaintiffs-Appellants sent a statutorily required Notice of Intent to File an Application for Order to Show Cause to Lawrence Pacheco, Director of Communications for the Colorado Office of Attorney General (the "Attorney General's Office"), who had signed each of the denial letters. CF, p. 67. On May 14, 2021, Plaintiffs-Appellants filed their Complaint (With Application for Order to Show Cause) in Denver District Court against Erik Bourgerie, the Director of POST, in his official capacity. CF, p. 1. Defendant-Appellee did not file a responsive pleading.

At a July 16, 2021, status conference, the district court ordered that the show cause hearing would be preceded by a preliminary hearing and determination as to which statutory scheme—CORA or the CCJRA—applied to Plaintiffs-Appellants' requests. *See* CF, p. 113. The parties submitted simultaneous briefing on the issue. CF, pp. 137 (Plaintiffs-Appellants' brief), 161 (Defendant-Appellee's brief). On August 3, after hearing testimony from Defendant-Appellee and argument from the parties, the district court held that the CCJRA—not CORA—was the appropriate statutory framework to determine whether the records at issue would

be disclosed. TR 08/03/21, pp. 89:94–90:5. This holding was based on the district court's interpretation of the statutory definition of "criminal justice agency" in the CCJRA. TR 08/03/21, p. 88:8–14.

The parties thereafter submitted briefing on the issue of whether the records in question would be disclosed under the CCJRA. CF, pp. 203, 227, 3757. At an October 5, 2021 show cause hearing, the district court heard testimony from Natalie Hanlon-Leh, Chief Deputy Attorney General, whom Defendant-Appellee called as a fact witness. TR 10/05/21, pp. 9–111. Ms. Hanlon-Leh testified that she is a custodian of all POST records. *Id.* at 11:8–11. The district court also heard testimony from Plaintiffs-Appellants' witnesses Mr. Osher, *id.* at 113–178, and Sam Stecklow, a reporter at The Invisible Institute, *id.* at 181–221. The district court limited its review to determining "whether the attorney general committed an abuse of discretion in undertaking its analysis" of the requests at issue. *Id.* at 222:23–25. Applying that standard, the court found, "I don't view this as a paragon of discretionary review, but discretionary review it was," *id.* at 227:11–12, and in an oral bench ruling denied Plaintiffs-Appellants' application. *Id*. at 227:21–23. The district court judge stated that his oral ruling would serve as the final judgment. *Id.* at 228:1–5. This appeal timely followed.

SUMMARY OF ARGUMENT

POST—like other state licensing agencies—is charged with ensuring that individuals in a certain profession meet the standards that the General Assembly has determined are necessary to serve the people of Colorado safely and effectively. To fulfill that purpose, POST has been granted statutory authority to establish standards that applicants to that profession must meet,[1] to formulate procedural rules designed to ensure those standards are satisfied,[2] and to require—but not conduct—background checks for applicants.[3]

Many of the professionals that POST licenses—peace officers—become members of law enforcement agencies throughout the state. As such, their qualifications and compliance with professional standards are matters of vital public concern. And access to the POST Database, where POST maintains training, certification, decertification, appointment, and separation data for peace officers statewide, is of immense importance to the public. Such data not only provides crucial information about law enforcement officers in Colorado, but also provides transparency into the activities and efficacy of POST itself.

CORA requires such access. The POST Database falls squarely under CORA's definition of a "public record," and within what the Colorado Supreme

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1 § 24-31-303(1)(c), C.R.S.
2 §§ 24-31-303(1)(g), § 24-31-303(1)(m), C.R.S.
3 § 24-31-303(1)(f), C.R.S.

Court has held to be the legislative intent of CORA: that records "directly related to functions of government[,] . . . tied to public functions or public funds" be available to the public.[4] The district court, however, erroneously denied Plaintiffs-Appellants access to the POST Database and its decision should be reversed for the following reasons.

First, the district court erred in applying an exception to CORA's definition of "public record" and evaluating the requests at issue under the CCJRA—which leaves the disclosure of certain records of "criminal justice agencies" to the sound discretion of the custodians of those records. But POST is not a "criminal justice agency." As a regulatory licensing agency, POST's statutory authority (and, accordingly, its activities) simply do not fit the relevant statutory definition of a "criminal justice agency."

Second, even if the CCJRA were applicable, which it is not, the custodian of the POST Database abused her discretion by arbitrarily denying the requests at issue in full, and inconsistently applying the law. The custodian failed to conduct any balancing of the public interest as required by law. And, even to the extent any such balancing was conducted—and the evidence shows it was not—she abused her discretion by failing to give the public interest proper weight. The

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[4] *Denver Publ'g Co. v. Bd. of Cty. Comm'rs of Cty. of Arapahoe*, 121 P.3d 190, 197 (Colo. 2005).

district court committed reversible error by ignoring the weight of credible evidence showing that the public's powerful interest in disclosure of the POST Database was not adequately considered—if it was considered at all—before the custodian denied Plaintiffs-Appellants' requests.

Third, the district court committed reversible error when it found that it would be an undue burden for POST to produce portions of the POST Database (i.e., in redacted form). The district court's erroneous holding improperly relied on opinion and fact testimony by a custodian with conceded lack of personal knowledge of the technological capabilities of the POST Database's Benchmark and Acadis systems. Meanwhile, POST's previous offer to Plaintiffs-Appellants to provide an Excel spreadsheet of the data, the credible testimony of database capabilities by Mr. Osher and Mr. Stecklow, and documentary evidence of POST's ability to directly export data contradicted the custodian's largely inadmissible testimony.

Finally, the district court erred as a matter of law in interpreting and applying the CCJRA. The CCJRA, like CORA, is a disclosure statute. The district court erred in failing to consider the Colorado Supreme Court's articulation of the General Assembly's intent in *Freedom Colorado Information, Inc. v. El Paso County Sheriff's Department*, 196 P.3d 892 (Colo. 2008), that redaction, not

wholesale withholding, is the favored method of protecting privacy interests under the CCJRA.

The district court's ruling below improperly expands the definition of a "criminal justice agency" and, thus, the scope of the CCJRA. In doing so, it threatens the very purpose of Colorado's public records laws: to foster transparency and ensure public access to information about government activities and its use of public funds. Indeed, if taken to its logical end, the district court's interpretation of CORA and the CCJRA would make numerous public records of licensing agencies that are currently available under CORA exempt from its mandatory disclosure requirement.

ARGUMENT

I. The district court applied the wrong statutory framework; CORA, not the CCJRA, governs disclosure of the POST Database.

Standard of review and preservation on appeal:

This issue—whether the POST Board is a "criminal justice agency" and, thus, whether disclosure of the records requested by Plaintiffs-Appellants is governed by the CCJRA, § 24-72-302(3), C.R.S.—was raised in Plaintiffs-Appellants' complaint, briefed by both parties, CF, pp. 137 (Plaintiffs-Appellants' brief), 161 (Defendant-Appellee's brief), and was the subject of a preliminary hearing held on August 3, 2021. CF, pp. 8–10; TR 08/03/21, pp. 3:13–16, 87:11–19, 89:24–90:5.

Courts "review de novo questions of law concerning the correct construction and application of CORA and the CCJRA." *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1170 (Colo. 2005). Matters of statutory interpretation, generally, including statutory interpretation of public records laws, are questions of law subject to de novo review on appeal. *People v. Sprinkle*, 2021 CO 60, ¶ 12. In interpreting such statutes, a court's "duty is to effectuate the General Assembly's intent, giving all the words of the statutes their intended meaning, harmonizing potentially conflicting provisions, and resolving conflicts and ambiguities in a way that implements the legislature's purpose." *Harris*, 123 P.3d at 1170.

Defendant-Appellee bears the burden of demonstrating that the records in question are not "public records" as defined in CORA because it is otherwise undisputed that the POST Database is made, maintained, and kept by a government agency. TR 08/03/21, p. 4:2–11; TR 10/05/21, p. 54:1–16; *see Wick Commc'ns, Co. v. Montrose Cty. Bd. of Cty. Comm'rs*, 81 P.3d 360, 363 (Colo. 2003). "Where the agency is the custodian of the records sought and the records are 'made, maintained, or kept' in a public capacity, the burden to show that the records are likely public records has been met. The burden then shifts to the public agency to show that the records are public or non-public." *Denver Publ'g Co. v. Bd. of Cty. Comm'rs of Cty. of Arapahoe*, 121 P.3d 190, 199 (Colo. 2005).

Discussion:

Since CORA's passage in 1968, the definition of "public records" has "determine[d] the reach of the bill." *Denver Publ'g Co.*, 121 P.3d at 197. The statutory definition reflects the legislature's desire for "a content-driven inquiry" that ensures that public records "tied to public functions or public funds," *id.*, are publicly available. § 24-72-202(6)(a)(I), C.R.S.; *see also* § 24-72-201, C.R.S.

The district court's expansive construction of a narrow exception to this disclosure mandate, if widely applied, would exempt broad swaths of public records from its ambit. Specifically, the district court erroneously held that a 1977 amendment to CORA, exempting "criminal justice records subject to the provisions of Part 3"—the CCJRA—from CORA's disclosure mandate, applied to the records Plaintiffs-Appellants requested from POST. TR 08/03/21, pp. 88:16–18, 89:3–5, 89:14–18. That erroneous application of CORA's "criminal justice records" exception shifted the district court's analysis from CORA's mandatory disclosure framework to a subsection of the CCJRA that makes a records custodian's decision to deny access reviewable for abuse of discretion. TR 08/03/21, p. 90:2–5. But CORA and the CCJRA, read together and in view of the General Assembly's clear legislative intent, do not support the district court's interpretation. The General Assembly did not intend to exempt from CORA all records of any agency that requires a criminal background check for professional

certification purposes, or that performs administrative investigations into professional certification.

The CCJRA was enacted to ensure Colorado's compliance with the federal Crime Control Act of 1973. *Harris*, 123 P.3d at 1171. The impetus for that bill was a congressional desire to "reduce and prevent crime," along with a congressional finding that "crime is essentially a local problem that must be dealt with by state and local governments." Pub. L. No. 93-83, 87 Stat. 297 (1973). "[C]ompliance in part required creation of a scheme for managing and disseminating criminal records information." *Harris*, 123 P.3d at 1172. In order to effectuate that scheme, "the General Assembly created the separate 'criminal justice records' category" in Colorado public records law. *Id.*

Exceptions to public disclosure under CORA—including its statutory carveout for "criminal justice records" that fall within the scope of the CCJRA, *see* § 24-72-202(6)(b)(I), C.R.S.—must be narrowly construed. *See City of Westminster v. Dogan Constr. Co.*, 930 P.2d 585, 589 (Colo. 1997).[5] "Criminal

[5] Defendant-Appellee argued below that *City of Westminster*'s holding is limited only to those exceptions to CORA's disclosure mandate found in § 24-72-204, C.R.S., and not those found in § 24-72-202, like the "criminal justice records" exception. *See* TR 08/03/21, p. 67:1–18. Plaintiffs-Appellants are unaware of any authority supporting this contention. The Colorado Supreme Court was clear — "exceptions *to the broad, general policy* of [CORA] are to be narrowly construed." *City of Westminster*, 930 P.2d at 589 (emphasis added) (citation omitted). That "broad, general policy" is set forth explicitly in the statute: "It is declared to be the public policy of this state that all public records shall be open for inspection by any

justice records" are statutorily defined as those "made, maintained, or kept by any criminal justice agency in the state for use in the exercise of functions required or authorized by law or administrative rule." § 24-72-302(4), C.R.S. In turn, a "criminal justice agency" is an entity "directly" tasked with enforcing Colorado's criminal laws, including:

> [A]ny court with criminal jurisdiction and any agency of the state . . . that performs any activity ***directly relating to*** the detection or investigation of crime; the apprehension, pretrial release, posttrial release, prosecution, correctional supervision, rehabilitation, evaluation, or treatment of accused persons or criminal offenders; or criminal identification activities or the collection, storage, or dissemination of arrest and criminal records information.

§ 24-72-302(3), C.R.S. (emphasis added).

After hearing the evidence submitted during the August 3 hearing (discussed *infra*, Section I.A), the district court found:

> that it does seem to me that the main function of POST is a public facing function. They're there to make sure that police officers are certified and are qualified and to provide assurance to the public that that is the case. In fact, there are citizen members on the Board[,] which sort of underlie[s] what I view as the principle [sic] purpose of POST.

TR 08/03/21, p. 88:1–7. The district court thus did not find that POST performs any function "directly relating to" criminal investigation, prosecution, or corrections or the maintenance of criminal records information. *See* § 24-72-

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person at reasonable times, except as provided in this part 2 or as otherwise specifically provided by law." § 24-72-201, C.R.S.

302(3), C.R.S. However, Defendant-Appellee advanced, and the court erroneously credited, two theories under which POST purported to fit within the CCJRA's definition of criminal justice agency: namely, that POST facilitates and collects criminal background checks (discussed *infra*, Section I.B), and that it performs administrative investigations (discussed *infra*, Section I.C).

Had the district court "effectuate[d] the General Assembly's intent . . . in a way that implements the legislature's purpose," *Harris*, 123 P.3d at 1170, its finding as to POST's "public facing function" as a licensing agency ought to have ended the inquiry in favor of Plaintiffs-Appellants. Instead, the district court expanded the scope of the CCJRA well beyond that intended by the legislature by concluding that POST's oversight of the certification of law enforcement officers made it a criminal justice agency. TR 08/03/21, p. 89:20–23 ("And there's no—there's no mathematical qualifier in this description. It's any—any—activity, however minimal [that] puts this—puts the organization under the definition of criminal justice agency.").

This Court should reject the district court's expansive reading of the "criminal justice records" exception to CORA's disclosure mandate. *See City of Westminster*, 930 P.2d at 589. Neither the finding that POST requires and maintains criminal background check information, nor the finding that it conducts administrative investigations for peace officer certification purposes makes POST

a "criminal justice agency," especially in view of the General Assembly's clear legislative intent that the CCJRA be a narrowly limited scheme outside of CORA to control records of agencies, such as police departments, that ***directly*** investigate, deter, detain, and identify criminals and those accused of crimes.

A. POST is a regulatory licensing agency.

The district court's finding that "the main function of POST" is to "make sure that police officers are certified and are qualified and to provide assurance to the public that that is the case," TR 08/03/21, p. 88:2–5, is consistent with the statute establishing POST's duties, §§ 24-31-301 – 307, C.R.S. (the "POST Act"), and case law examining that statute, *see Fraternal Order of Police, Colo. Lodge No. 27 v. City & Cty. of Denver*, 926 P.2d 582, 585 (Colo. 1996). Accordingly, POST's strategic plan notes that it is a "***regulatory agency*** . . . created to establish certification and training requirements for law enforcement agencies and officers." CF, p. 153 & n.11 (emphasis added); EX, p. 12; CF, p. 153 & n.11; TR 08/03/21, pp. 32:21–33:1. Simply put, pursuant to its statutorily prescribed duties, POST is a licensing, training, and certification body—not a "criminal justice agency."

Yet, for purposes of this case, POST asserted it is a "criminal justice agency" and, in doing so, relied heavily on the fact that it conducts administrative investigations for purposes of suspending and revoking certifications. *See, e.g.*, TR 08/03/21, pp. 7:23–8:5, 18:4–12, 26:1–28:11, 29:21–30:7. POST's decision to

characterize itself, incorrectly, as a "criminal justice agency" is, at best, a relatively new development. First, POST previously granted public records requests for access to the POST Database pursuant to CORA. *See* TR 08/03/21, pp. 45:22–46:23. In the POST Board's September 17, 2015 work session, then-POST Director Cory Amend presented an update to the POST Board, explaining that "[a] CORA request was granted in 2004 seeking the entire database of law enforcement officers maintained by Colorado POST." *Id.*; EX, pp. 59–60. Moreover, "[s]everal CORA requests [were] granted since [that] first inquiry." TR 08/03/21, p. 46:3–9; EX, pp. 59–60. And to this day, POST expressly requires recipients of its grants to make certain records—including POST training application materials and contracts pertaining to POST funds—publicly available under CORA. EX, p. 38; TR 08/03/21, pp. 39:2–40:15.

Moreover, Defendant-Appellee's characterization of POST as a criminal justice agency was not supported by testimony describing the agency's occasional role as an administrative investigatory body. *See infra*, Section I.B. Indeed, POST's investigations cannot be "activity directly related to the detection or investigation of a crime," because under the POST Act, the agency's duties are circumscribed to regulatory and administrative obligations. *See* § 24-31-303(1), C.R.S.

That a subset of POST Board members are law enforcement officers, TR 08/03/21, p. 12:9–13; § 24-31-302(3), C.R.S., and that Defendant-Appellee and one other member of POST's full-time staff are peace officers, TR 08/03/21, p. 11:7–18; § 16-2.5-130, C.R.S., does not alter the analysis. Peace officer members of the POST Board do not act in a criminal justice or law enforcement capacity while overseeing a licensing agency with no statutory remit to perform law enforcement activities. To the contrary, despite the Attorney General's position as the POST Board Chair, TR 08/03/21, p. 13:3–4, Defendant-Appellee admitted that the POST Board cannot prosecute crimes or levy fines. *Id*. at 55:8–11 ("POST is not a court and the ability to levy fines is solely that of the Attorney General's not the POST Board."). And, there are citizen members on the POST Board.

Further, although some (but not all) members of the POST Board—including Defendant-Appellee—are peace officers, the POST Board does not investigate the guilt or innocence of peace officers alleged to have committed crimes, even for purposes of suspending or revoking their certification. Instead, POST relies on the work of ***actual*** criminal justice agencies—police and sheriffs' offices, prosecutors, courts, and the like—to make that determination. *Id.* at 50:22–51:3, 53:1–54:2.[6]

[6] Entities that courts have previously found to be "criminal justice agenc[ies]" under the CCJRA include police departments, *see In re T.L.M.*, 39 P.3d 1239 (Colo. App. 2001); *Madrigal v. City of Aurora*, 349 P.3d 297 (Colo. App. 2014);

Finally, POST's location within the Criminal Justice Section of the Attorney General's Office does not determine whether it is a "criminal justice agency" under the CCJRA. The CCJRA defines a "criminal justice agency" not by where the agency is housed, but by the activities the agency "directly" undertakes. § 24-72-302(3), C.R.S. Indeed, by Defendant-Appellee's view, every unit housed within the Attorney General's Office could plausibly claim its records are "criminal justice records" exempt from CORA's disclosure mandate, a self-evidently extreme position that the Attorney General's Office itself, rightly, does not take. *See* Colorado Open Records Act & Colorado Criminal Justice Records Act, Colorado Office of the Attorney General, https://perma.cc/C65K-QRCW (last visited July 28, 2021) (Attorney General's Office's policy is "to implement [CORA] and the [CCJRA] in a uniform manner and better serve the people of Colorado").

B. POST performs administrative investigations that are not directly related to the detection, investigation, or prosecution of crime.

Calling an administrative investigation a criminal investigation does not make it so. Conducting an administrative investigation to determine whether an

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criminal courts, *see Office of the State Ct. Adm'r v. Background Info. Servs., Inc.*, 994 P.2d 420 (Colo. 1999); and the Department of Corrections, *see Kopec v. Clements*, 271 P.3d 607 (Colo. App. 2011). These agencies—in contrast to POST—are directly involved in the detection, investigation, and prosecution of crimes.

individual has violated professional licensing standards, writing a report on the findings, and referring any conduct that may appear criminal in nature to a police department or prosecutor for investigation, TR 08/03/21, pp. 26:24–27:4, simply is not the same as detecting or investigating a suspected violation of the Colorado Criminal Code. POST's investigations are to identify possible violations of the rules it is permitted to adopt, §§ 24-31-303(1)(g), -303(1)(m), C.R.S., in order to carry out its statutory duty to establish procedures for determining whether its certification standards—including conduct and training—have been met. *See, e.g.*, §§ 24-31-303(1)(c), -303(1)(f), -303(1)(l), -303(1)(m), C.R.S.

Defendant-Appellee testified that in the course of what he claimed are POST's investigations of "crimes referring to the POST certification statutes, such as . . . police impersonation or official misconduct,"[7] he and a POST staffer "review documents, we interview witnesses, we write a report, we make an assessment, and if appropriate, we refer the matter for prosecution." TR 08/03/21, p. 26:17–21. But, as his testimony revealed, such investigations pertain to possible violations of POST *rules*, which in turn might lead a police department or prosecutor to conduct their *own* investigation and/or prosecution. Indeed, in the two examples Defendant-Appellee offered of POST making a referral to

[7] Neither of these criminal provisions refers to the POST Act. § 18-8-112, C.R.S. (impersonating a peace officer), §§ 18-8-404, -405, C.R.S. (official misconduct).

prosecutors, he admitted that a criminal investigation commenced ***after*** POST's referral occurred. Simply put, such referrals by POST for criminal investigation are vanishingly rare, TR 08/03/21, p. 59:16–23, and when they do occur, they only underscore the limitations on POST's authority—POST cannot conduct criminal investigations itself.

For example, Defendant-Appellee testified regarding a peace officer named Dustin Rust, who Defendant-Appellee believed "misrepresented his previous certifications in other states, his work history, and also submitted a falsified document to POST as part of his certification process." TR 08/03/21, pp. 26:22–27:4. These suspected violations of POST's certification rules were uncovered by POST as part of an administrative investigation conducted pursuant to its statutory authority under § 24-31-303(1)(d), C.R.S. Indeed, by Defendant-Appellee's own admission, POST's next step was to submit the administrative report it compiled to the Special Prosecutions Unit within the Criminal Justice Section of the Attorney General's Office because "[t]hey're the portion of the Attorney General's Office . . . ***that conducts criminal investigations and prosecutes crimes*** statewide." TR 08/03/21, p. 27:10–14 (emphasis added). When the Special Prosecutions Unit declined to investigate, citing a conflict of interest, the matter was referred to the Colorado Bureau of Investigation, where according to Defendant-Appellee the matter is "***still under investigation***." *Id.* at 59:10–11 (emphasis added). Simply

put, the referral Defendant-Appellee made in this situation was of the type that any state licensing agency would be expected to make if it uncovered, during the course of an administrative investigation, evidence of criminal wrongdoing.

This referral by POST was not unlike what members of the Colorado Dental Board, Colorado Medical Board or Colorado Office of Attorney Regulation Counsel might do if they suspected that a professional had committed a criminal violation. For instance, a member of the Colorado Dental Board may take *disciplinary* action if a dentist commits fraud, misrepresentation or deception to secure their license. *See* § 12-220-201(1)(a), C.R.S. In certain circumstances, that conduct—including the contents of any administrative investigation undertaken by the licensing board—might be referred for prosecution.[8] Such administrative investigations and referrals are concomitant with those licensing boards' duties to regulate the safe and lawful practice of their respective professions. They do not make these regulatory licensing bodies criminal justice agencies.

The second example offered by Defendant-Appellee also supports that conclusion. The matter involved "records Huerfano County had submitted for training for their officers that appeared to be fictitious." TR 08/03/21, p. 31:8–18.

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[8] For instance, depending on the nature of fraudulent or deceptive behavior in which the dentist engaged, the behavior might constitute an offense under Title 18, Article 5 of the Criminal Code. A criminal investigator or prosecutor might use information from the Dental Board's administrative investigation as it conducts its criminal investigation or prosecutes the alleged fraud.

As with Dustin Rust, POST conducted an administrative investigation into this suspected violation of its rules, then its Board voted—because the agency itself cannot conduct a criminal investigation—"[t]o refer the matter to the Denver District Attorney's Office ***for investigation***." *Id*. at 31:19–25 (emphasis added).

The Rust matter was the only referral to the Special Prosecutions Unit within the Criminal Justice Section of the Attorney General's Office that occurred after June 2020 that Defendant-Appellee could identify. TR 08/03/21, pp. 59:16–60:7. Before June 2020, the Attorney General's Office lacked authority to bring criminal charges against individuals who violated POST certification requirements. *Id*. at 60:3–7; *compare* § 24-31-307, C.R.S. (1994), *with* § 24-31-307(3), C.R.S. (2021) (eff. June 19, 2021); *see also* TR 08/03/21, p. 74:16–19; CF, p. 176. Before June 2020, the Attorney General's Office could only "take civil action against such violations," TR 08/03/21, p. 60:3–7, meaning all of POST's administrative investigations had to either be referred for a civil prosecution within that office or referred to a local criminal justice agency for investigation. *Id*. at 28:4–7. Yet, as Defendant-Appellee repeatedly testified, there was no change in POST's activities vis-à-vis its administrative investigations before or after June 2020. *Id*. at 27:24–28:7, 59:16–60:7, 65:13–17. Nor could there be. The June 2020 amendment modified only the Attorney General's statutory authority to investigate and prosecute crimes. § 24-31-307(3), C.R.S. POST, as ever, has no such authority.

C. POST's review of the results of criminal history checks is not an activity "directly related" to "criminal identification activities or the collection, storage, or dissemination of arrest and criminal records information."

Dozens of state agencies or licensing boards require their employees, or those they license, to undergo a criminal history check. The Board of Mortgage Loan Originators and the State Board of Pharmacy, for example, require criminal history checks to license mortgage loan operators. § 12-10-704(6), C.R.S.; § 12-280-304, C.R.S. All state agencies with access to federal tax information are required to obtain criminal history checks for their employees or contractors who access that information. § 24-50-1002, C.R.S. Yet, none of these agencies are "criminal justice agencies" as defined in the CCJRA. And there is nothing to suggest that the General Assembly intended to broadly exempt from CORA's disclosure mandate the records of all agencies and licensing boards that require criminal background checks. To the contrary, it is clear from the statutory language itself that the General Assembly intended to refer to agencies, such as the Colorado Bureau of Investigation ("CBI"), that actually ***conduct such background checks*** and "disseminat[e]" their results to other agencies and licensing boards.[9] § 24-72-302(3), C.R.S.

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[9] The CCJRA references both "criminal identification activities" and "criminal records information." § 24-72-302(3), C.R.S. Together, these terms echo the defined term "criminal history information" in the federal Crime Control Act of 1973, which the Colorado Supreme Court indicated was the catalyst for the

POST does no such thing. It does not maintain a database of criminal records against which it can run criminal history checks. To the contrary, although POST requires a fingerprint check, "those fingerprints are submitted directly to CBI." TR 08/03/21, p. 47:18–24. The CBI and the Federal Bureau of Investigation ("FBI")—not POST—run the fingerprints against state and federal criminal history databases. *Id.* at 48:3–5. And the CBI and the FBI—not POST—maintain the databases used to run those background checks. *Id.* at 48:3–18.

The district court thus erred in concluding that POST's collection and storage of the results of criminal background checks and any related arrest records it receives from the CBI or FBI make it a "criminal justice agency" for purposes of the CCJRA.

Because, for all the foregoing reasons, POST is not a "criminal justice agency" under the CCJRA, this Court should reverse the judgment and order of the district court at the August 3, 2021 hearing, TR 08/03/21, pp. 87:11–90:5, and remand this case to the district court for proceedings under CORA.

II. Even if the CCJRA did apply, POST abused its discretion in denying Plaintiffs-Appellants' requests in their entirety.

CCJRA. *Harris*, 123 P.3d at 1171. Though the term "database" had only just entered modern usage in 1962, *Database,* Oxford English Dictionary (3d ed. 2012), and is not used in the statute, it is clear that the term in the federal law refers to records stored in a criminal history database. Pub. L. No. 93-83, 87 Stat. 297 (1973).

A "criminal justice record" subject to disclosure under the CCJRA falls into one of two categories: (1) a record of "official action" under § 24-72-302(7), C.R.S., which must be disclosed; or (2) any other criminal justice record, which may be open for inspection by any person at reasonable times at the discretion of the official custodian. § 24-72-304(1), C.R.S. As to the latter category, the Colorado Supreme Court has explained that "in granting such discretion, the legislature intended the custodian to consider and balance the *public* and private interests relevant to the inspection request." *Harris*, 123 P.3d at 1174–75 (emphasis added) (balancing test requires the custodian to consider, among other things: "the public purpose to be served in allowing inspection; and any other pertinent consideration relevant to the circumstances of the particular request").

Assuming *arguendo* that the district court was correct to apply CORA's "criminal records" exception and, accordingly, the CCJRA, to the records requested by Plaintiffs-Appellants—which, for the reasons stated above, it was not—the district court's ruling denying access to those records should be reversed for the following reasons. ***First***, the district court committed clear error when it disregarded contemporaneous, documentary evidence demonstrating that the custodian did not consider the public purpose to be served in allowing inspection in favor of the custodian's vague, unsupported testimony. *See infra,* Section II.A. ***Second***, the district court erred in crediting the custodian's testimony that

producing the requested records would impose an undue burden on POST. The custodian's testimony lacked probative value or was altogether inadmissible because, as she admitted, she lacked familiarity with the POST Database and could not answer basic questions about its capabilities. *See infra,* Section II.B. And ***third***, the district court committed an error of law by failing to consider the General Assembly's preference for redaction, rather than wholesale withholding.

A. The district court committed clear error in finding that POST considered the public interest in the requested records.

Standard of law and preservation on appeal:

Whether the custodian abused her discretion by denying Plaintiffs-Appellants' requests in their entirety, including by failing to conduct the requisite balancing that requires consideration of the public interest in access, was raised in the Plaintiffs-Appellants' complaint, in their Response Brief prior to the October 5, 2021 show cause hearing, and was addressed by testimony elicited at cross-examination during the show cause hearing. CF, pp. 11, 234–248; TR 10/05/21, pp. 57:12–74:19.

The district court's determination as to whether POST considered the public interest in the requested records is reversible if the court committed clear error, while the district court's conclusion that POST committed no abuse of discretion is a conclusion of law and may be reviewed de novo. *In re Marriage of de Koning*, 2016 CO 2, ¶ 17 ("We review a trial court's findings of fact for clear error or abuse

of discretion, but we review the legal conclusions the trial court drew from those findings de novo.").

Discussion

The district court recognized "there is no paper evidence . . . that the attorney general gave even a moment's thought" to whether disclosure of the requested records would serve an important public purpose, TR 10/05/21, pp. 226:25–227:2. The district court's conclusion, notwithstanding that lack of evidence, that such discretionary review had nonetheless occurred is reversible error because: (1) it was clearly erroneous to conclude on the record before it that the custodian considered all the requisite factors, including public interest, prior to denying Plaintiffs-Appellants' requests; and (2) even assuming *arguendo* that such balancing took place, it was an abuse of discretion to weigh those factors and deny access to the POST Database in its entirety.

"[A]t a minimum, to enable judicial review as contemplated by section 24-72-305(7), C.R.S. (2008), the record of the custodian's inspection request determination before the district court should include an *articulation* of the custodian's balancing of the *public* and private interests in the record." *Freedom Colo. Info.*, 196 P.3d at 904 (emphasis added). The evidence in this case demonstrates that no such balancing occurred. Defendant-Appellee's pre-litigation denials of all three requests made no mention of the "public interest to be served"

by disclosure of the POST Database, despite the legal requirement that the custodian "articulate the grounds" for denial. *Id.* at 903–04 (citations omitted); EX, pp. 100, 104, 108. And, as Mr. Osher testified, no one from POST asked him how he might use the data to inform the public. TR 10/05/21, p. 134:15–20.

Indeed, there is no documentary evidence in the record that anyone at POST gave even passing thought to the public interest until well after Plaintiffs-Appellants brought this lawsuit. Defendant-Appellee offered no documentary evidence indicating that Ms. Hanlon-Leh considered the public interest in The Invisible Institute's request, TR 10/05/21, pp. 59:4–61:11, nor any documentary evidence that Ms. Hanlon-Leh conducted the requisite balancing prior to Defendant-Appellee's denial, *id.* at 61:2–11. Defendant-Appellee likewise offered no documentary evidence indicating that Ms. Hanlon-Leh considered the public interest in the First Osher Request, *id.* at 68:14–23, nor any documentary evidence that Ms. Hanlon-Leh conducted the requisite balancing prior to Defendant-Appellee's denial, *id.* at 69:16–70:12.[10] And Defendant-Appellee offered no documentary evidence that Ms. Hanlon-Leh considered the public interest in the Second Osher Request, *id.* at 73:16–23, nor any documentary evidence that Ms.

[10] "Q: So you're not aware that anyone emailed the first Osher request to you prior to . . . June 22, 2020. Is that — is that correct? A: Yeah, I — I guess what I would say is, I don't know[.]"

Hanlon-Leh conducted the requisite balancing prior to Defendant-Appellee's denial, *id.* at 74:12–19.

It was thus reversible error for the court to give decisive weight to Ms. Hanlon-Leh's contradictory post-decisional testimony given the denial letters—none of which provide the requisite articulation of the balancing of relevant factors, including the public interest in disclosure—and the lack of any contemporaneous documentary evidence supporting Ms. Hanlon-Leh's bare assertions that such balancing did occur.

The conduct and qualifications of peace officers are matters of vital public concern. As an investigative reporter, Mr. Osher previously received the names of decertified officers from public records requests and used this information in his reporting. TR 10/05/21, p. 118:5–25. In one series of articles, Mr. Osher found there were officers working in Denver with transgressions serious enough that they would have been decertified in other states—revelations that led to legislative changes in the police officer hiring process. *Id.* at 119:1–20. Some of the public records provided in that request came from POST. *Id.* at 121:19–25, 122:11–25. Absent greater statewide data, however, Mr. Osher's reporting was limited. *Id.* at 122:11–25.

The work of The Invisible Institute, too, demonstrates the immense public importance of the records requested by Plaintiffs-Appellants. As Mr. Stecklow

testified, The Invisible Institute's investigative journalism won a Pulitzer Prize, and its participation in a documentary garnered the organization an Emmy. TR 10/05/21, p. 183:14–25. As Mr. Stecklow testified, The Invisible Institute "almost exclusively deal[s] in police . . . and generally, public official accountability." *Id.* at 192:13–20. Yet, despite this, there is no credible record of evidence that Ms. Hanlon-Leh considered the immense public benefit in disclosing the requested records before Defendant-Appellee issued its denials, as she was required to by law. As such, the district court's finding that any such balancing of interests occurred was clearly erroneous and is reversible error.

B. The district court committed clear error in determining that it would be an undue burden for POST to produce the requested records because POST did not submit credible evidence demonstrating that supposed burden.

Standard of review and preservation on appeal:

No closing arguments were permitted during the October 5, 2021, hearing; this issue was preserved for appeal through Plaintiffs-Appellants' cross-examination of Ms. Hanlon-Leh, and through an oral motion to strike portions of Ms. Hanlon-Leh's testimony. TR 10/05/21, pp. 84:13–90:2. In addition, Plaintiffs-Appellants argued in briefing that POST's denial of their requests represented an arbitrary departure from its past practice of releasing portions or the entirety of the POST Database. CF, p. 238. The district court failed to state findings on that issue.

The district court's determination as to the admissibility of and weight given to the evidence submitted by Defendant-Appellee on this issue is reversible upon a finding of clear error. *In re Marriage of de Koning*, 2016 CO 2, ¶ 17. However, this Court can determine de novo whether POST's departure from its past practice of releasing portions or the entirety of the POST Database was arbitrary, rather than discretionary, because that question concerns a purely legal application of § 24-72-304(1) of the CCJRA. *Harris*, 123 P.3d at 1170. Decisions that are "manifestly arbitrary, unreasonable, or unfair" necessarily amount to an abuse of discretion. *Freedom Colo. Info.*, 196 P.3d at 899.

Discussion

The district court should not have admitted testimony from Ms. Hanlon-Leh on the technological capabilities of the POST Database, including (i) whether the POST Database was capable of exporting an Excel spreadsheet or CSV file, and (ii) whether it would have imposed an undue burden on POST to redact or withhold personal information not sought by Plaintiffs-Appellants. Ms. Hanlon-Leh readily admitted that her testimony relayed information that was not within her personal knowledge. Yet, the district court nonetheless admitted her testimony over Plaintiffs-Appellants' objections. TR 10/05/21, pp. 88:23–90:2.

As Ms. Hanlon-Leh admitted, she is not a database expert. TR 10/05/21, p. 84:13–14. Indeed, she had never accessed the POST Database until after denying

Plaintiffs-Appellants' requests. *Id.* at 79:21–80:3. She did not know the functional differences between two POST Database systems used during the period of Plaintiffs-Appellants' requests. *Id.* at 84:18–21. She did not know what company or companies made the database systems. *Id.* at 84:22–23. She could not instruct the court on even the very basics of database technology, such as the file formats in which data would typically be exported from a database. *Id.* at 84:24–85:11. Indeed, Ms. Hanlon-Leh admitted that any knowledge she shared with the court was based on the statements of others—and she could not state with any clarity who those people were. *Id.* at 85:12–20 ("My knowledge is, based upon talking with the POST group and our IT department and being briefed[.]"); *id.* at 85:21–25 ("Q: Someone in your department knows, but — but that person isn't in this room, they're not on the stand, correct? A: Yeah, I presume somebody knows. I don't know if they know or if Benchmark knows."); *id.* at 86:5–15.

Ms. Hanlon-Leh's statements regarding the technological capabilities of the POST Database evince a lack of personal knowledge, were largely hearsay, and did nothing to "facilitate an understanding of" her opinion as a lay witness. *See People v. Stewart*, 55 P.3d 107, 122–123 (Colo. 2002). The court should have struck these portions of Ms. Hanlon-Leh's direct testimony, as Plaintiffs-Appellants requested. TR 10/05/21, pp. 88:3–90:2; *see* Colo. R. Evid. 602, 801, 802. Indeed, the court concluded that Ms. Hanlon-Leh "only knows what IT tells

her." TR 10/05/21, p. 224:7–8.[11] Instead of drawing the legally sound conclusion that Defendant-Appellee had thus failed to enter admissible testimony on the subject, the court held that although "[i]t would have been great to have heard from somebody either on the IT side from the AG's office or somebody from Benchmark or some expert that could have explained this," *id.* at 223:25–224:3, the court could nonetheless conclude as a factual matter that "it would take literally, hundreds of hours of POST staff time to call up, look at, redact, and produce in some form or another, the information that the Plaintiffs are requesting," *id.* at 224:25–225:4. The court's determination that "there appears to be credible evidence that it would be an undue burden . . . on the POST staff to produce the information requested," *id.* at 225:12–15, was thus reversible error.

Beyond this evidentiary deficiency, the court's conclusion was belied by the record before it. Record evidence shows that POST has previously been able to export data from the POST Database in the form requested by Plaintiffs-Appellants. The court admitted minutes of the POST Board's September 17, 2015 work session, in which then-POST Director Cory Amend presented an update to the Board explaining that "[a]fter copious discussions with the Attorney General

[11] This is not an accurate summation of Ms. Hanlon-Leh's testimony, which was that she did not know whether anyone in her department had the relevant knowledge to make an assessment on how burdensome it would be to fulfill Plaintiffs-Appellants' requests. TR 10/05/21, pp. 85:21–86:24.

and the requesting party, a report was sent out by Deputy Attorney General Scott Turner on 9/16/15 including the PIDs (POST Identification number) of all officers in the Acadis record-keeping database." EX, pp. 59–60. Moreover, the same meeting minutes indicate that the POST Database was released to a requester in its entirety in 2004. TR 08/03/21, pp. 45:22–46:23. And, Amend informed the Board, "several CORA requests [were] granted since [that] first inquiry." TR 08/03/21, p. 46:3–9; EX, pp. 59–60. Contrary to Defendant-Appellee's assertions that it lacks the technological capability to produce the information Plaintiffs-Appellants requested in a manner that would not be unduly burdensome, this discussion demonstrates that (i) POST was able to produce a report based on exported data about all peace officers maintained in its Database, and (ii) POST was able to release the database in its entirety, presumably with any necessary redactions.

These conclusions are further supported by an offer made by Defendant-Appellee to Plaintiffs-Appellants to produce an Excel spreadsheet listing decertified officers. TR 10/05/21, p. 86:16–21. Ms. Hanlon-Leh could not reconcile this fact with the testimony she had given that the POST Database was incapable of producing such a list. *See id.* at 86:16–21 ("Q: The Departments of Law offered Plaintiffs an Excel spreadsheet of decertified officers, correct? A:

Yes, we did. Q: How would the Department of Law have created that Excel spreadsheet? A: You know, I don't actually know that.").

Moreover, the testimony of one of Plaintiffs-Appellants' witnesses, Mr. Stecklow, offered further support for the conclusion that it is feasible and not unduly burdensome for POST to produce the requested information. Mr. Stecklow testified that in his experience as a reporter for The Invisible Institute where he has submitted public records requests to numerous other states for access to POST Database information (or the equivalent), TR 10/05/21, p. 219:12–22, he was aware that the Wyoming Peace Officer Standards and Training Commission ("Wyoming POST") uses the Acadis Database system to house the certification and decertification data of police officers. Mr. Stecklow testified that the Wyoming POST's Acadis system was able to produce an Excel spreadsheet in response to a public records request. *Id.* at 204:22–205:10. It is thus reasonable to conclude that the Colorado POST Database, which was also historically an Acadis system, could likewise produce the requested information in the desired format.

While the vendor for the Colorado POST Database was previously Acadis, the agency (according to Ms. Hanlon-Leh) is in the midst of transitioning to a new system called Benchmark. TR 10/05/21, pp. 83:16–84:12. Defendant-Appellee submitted no admissible evidence that the capabilities of the new Benchmark system are different from those of Acadis. When directly asked about the

differences between the two systems, Ms. Hanlon-Leh could not respond. *Id.* at 84:15–21.

However, public records, of which this Court may take judicial notice, indicate that Colorado's Benchmark system has or will have the capability to readily export its data in spreadsheet or CSV file form.[12] A recent news article published by Plaintiffs-Appellants relies on public records to report additional information about the Benchmark system's capabilities that directly contradicts Ms. Hanlon-Leh's testimony that "you can't just export data from these databases." TR 10/05/21, pp. 84:24–85:9; *In Lawsuit Over Access To Colorado Police Data, Attorney General's Office Is Contradicted By Its Own Records*, The Gazette (Dec. 5, 2021), https://perma.cc/Y6Q6-PT36; *accord* Law Enforcement Training and Certification Management System Request for Proposal (produced via public records request to Mr. Stecklow).[13] The public records in *The Gazette*'s report include the state's request for proposal (RFP) for Benchmark Analytics and show that POST specifically included requirements that "all data fields shall be

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[12] Judicial notice may be taken at any stage of a proceeding. *See* Colo. R. Evid. 201(f); *Prestige Homes, Inc. v. Legouffe*, 658 P.2d 850, 852–53 (Colo. 1983). This Court may take judicial notice of news articles or the contents of a webpage on a specific date and time because they are not subject to reasonable dispute. Colo. R. Evid. 201(b).

[13] Available at https://www.documentcloud.org/documents/21118120-benchmark-records#document/p186/a2067312.

searchable and reportable" and that the system needs to "allow all reports to be exported to common formats," including Excel spreadsheets and CSV files. *Id.*

Here, based on the state's own proposal—a document Ms. Hanlon-Leh or the POST Board's IT department had, or should have had, knowledge of—the Benchmark system ***does*** have the capability to produce Excel spreadsheets and CSV files. This, coupled with Ms. Hanlon-Leh's lack of personal knowledge, and confirmed testimony that Defendant-Appellee offered to produce a spreadsheet to Plaintiffs-Appellants, together show that the district court erred in its finding that it would be too burdensome or not possible for the POST Board to export a spreadsheet of the certification and decertification data in the POST Database.

Finally, Defendant-Appellee represented to the district court that it "is not privy to the names of officers who may be working undercover" and did not have the capability, without significant time expenditure, to identify who its undercover officers are in order to redact their names. CF, pp. 65, 213; TR 10/05/21, p. 166:14–25. Yet, POST's 2015 meeting minutes indicate that it is capable of redacting the names of undercover officers as it fulfills a public records request. *See* EX, pp. 59–60 (explaining that officer names could be "redacted to protect undercover and employed officers" to comply with CORA). The district court failed to consider this evidence and instead issued a contradictory finding that it would take "hundreds of hours of POST staff time to call up, look at, redact,

and produce" the information that Plaintiffs-Appellants requested. TR 10/05/21, p. 225:1–15.

C. The CCJRA is a disclosure statute, and the General Assembly did not grant custodians' unfettered discretion to withhold criminal justice records.

Standard of review and preservation on appeal:

This issue was preserved for appeal in Plaintiffs-Appellants' brief submitted prior to the October 5, 2021, show cause hearing. CF, pp. 232–234, 246–248. As a matter of statutory interpretation, this Court can review the issue de novo. *People v. Sprinkle*, 2021 CO 60, ¶ 12; *Harris*, 123 P.3d at 1170.

Discussion:

The CCJRA "generally favor[s] broad disclosure of records" and thus "favors making" the POST Database "available for inspection." *Freedom Colo. Info.*, 196 P.3d at 899. And "[w]hile . . . [the Colorado Supreme Court has] construed the CCJRA to favor somewhat less broad disclosure," it has made clear that a "custodian should redact sparingly to promote the CCJRA's preference for public disclosure." *Id.* at 899, 900 n.3 (redaction is "an effective tool" to withhold not only "names, addresses, social security numbers, and other personal information, [the] disclosure of which may be outweighed by the need for privacy," but also the "identities of informants or undercover police officers").

Yet, at the outset of his oral order and judgment, the district court judge held that under *Freedom Colorado Information*, "my hands here, legally, are somewhat tied . . . . [A]ll I can do is look and see what the attorney general's office did and determine whether an abuse of discretion has occurred." TR 10/05/21, pp. 222:4–223:18. This conclusion is at odds with the General Assembly's intent, which as the Colorado Supreme Court found was to "prevent the custodian from utilizing surreptitious reasons for denying inspection of law enforcement records or reasons which, though explained, do not withstand examination under an abuse of discretion standard." *Freedom Colo. Info.*, 196 P.3d at 904; *see also* § 24-72-305(7), C.R.S. ("Unless the court finds that the denial of inspection was proper, it ***shall order the custodian to permit such inspection***[.]" (emphasis added)). Thus, the specific facts of *Freedom Colorado Information*—in which the Colorado Supreme Court reversed a district court's unilateral disclosure of records subject to the CCJRA that a record custodian had arbitrarily withheld—must necessarily be limited to the extreme and rare circumstance in which a reviewing court "substitute[s] its judgment for that of the agency's." *Freedom Colo. Info.*, 196 P.3d at 900.

But ordering an agency to redact certain information from a record is not substituting the reviewing court's judgment for that of the agency. *See Land Owners United, LLC v. Waters*, 293 P.3d 86, 99 (Colo. App. 2011) (citing

Freedom Colorado Information and holding the district court has "discretion to direct redaction of specific confidential information" when custodian improperly withholds records in entirety under CORA's confidential information exemption); *cf. Denver Publ'g Co.*, 121 P.3d at 205 (for records containing both public and private information, "[w]e see no problem . . . requiring that such messages be *redacted* by the district court to exclude from disclosure those communications within the messages that do not address the performance of public functions," under CORA (emphasis added)).

Here, the district court's hands were not tied by *Freedom Colorado Information* such that it was required to defer completely to Defendant-Appellee's unsupported, post hoc justifications for withholding the POST Database in its entirety. Even if the custodian had conducted the required balancing, which she did not, the district court nonetheless erred as a matter of law by failing to consider its own ability to order redaction of the record in question.

CONCLUSION

The POST Board is not a "criminal justice agency" because it does not meet the General Assembly's definition of that term. As such, the record at issue, the POST Database, is a "public record," the disclosure of which must be assessed under CORA. For that reason, alone, the August 3, 2021 order and judgment of

the district court should be reversed, and this matter remanded back to the district court for reconsideration under CORA.

Even if this Court concludes that the POST Board is a "criminal justice agency"—which it should not—it should conclude that the district court committed clear error in determining that the record custodian conducted an adequate discretionary review that properly considered all relevant factors, including the public interest in disclosure, before denying Plaintiffs-Appellants' requests in their entirety under the CCJRA. And this Court should further conclude that the district court's finding that it would be an undue burden for POST to produce portions of the POST Database was error.

For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court reverse and remand this case with directions for the district court to oversee Defendant-Appellee's release of the POST Database, allowing for the redaction of any pertinent private or confidential information, as well as to hear argument regarding attorneys' fees.

Respectfully submitted this 10th day of March 2022.

By */s/Rachael Johnson*

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March 2022, a true and correct copy of the foregoing **OPENING BRIEF** was served on the following counsel through the Colorado Courts E-File & Serve electronic court filing system:

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