Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	
Appeal from: Denver District Court Honorable J. Eric Elliff Case Number: 21CV31519	
PLAINTIFFS-APPELLANTS: THE GAZETTE, CHRISTOPHER N. OSHER, and THE INVISIBLE INSTITUTE v. DEFENDANT-APPELLEE: ERIK BOURGERIE.	
PHILIP J. WEISER, Attorney General STEFANIE MANN, Senior Assistant Attorney General, 43774* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 6th Floor Denver, CO 80203 Telephone: 720-508-6500 FAX: 720-508-6041 E-Mail: stefanie.mann@coag.gov *Counsel of Record *Attorney for Defendant-Appellee Erik Bourgerie*	▲ **COURT USE ONLY** ▲ Case No. 21CA1880

ANSWER 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 applicable word limits set forth in C.A.R. 28(g) **or** C.A.R. 28.1(g)**.**

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> **In response to each issue raised, the appellee** must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

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/ Stefanie Mann

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Appellants issued several records requests to the Colorado Peace Officer Standards and Training Board and Unit (collectively referred to as "POST"), which is housed within the Department of Law ("Department"). Under the Colorado Criminal Justice Records Act ("CCJRA"), the records custodian for the Department partially denied and partially granted Appellants' records requests. Appellants sought district court review of that decision. Because the district court correctly determined that POST is a criminal justice agency under the CCJRA and the Department's custodian did not abuse her discretion when she partially denied and partially granted Appellants' records requests, it properly discharged the order to show case. This Court should affirm.

STATEMENT OF THE ISSUES

1. Whether the district court correctly determined that the CCJRA governs the disclosure of POST records.

2. Whether the district court correctly determined that the Department's records custodian did not abuse her discretion when she partially denied and partially granted Appellants' records requests.

STATEMENT OF THE CASE

I. Nature of the case, relevant facts, and procedural history

A. Statutory Framework

"Criminal justice records" are not considered public records subject to disclosure under the Colorado Open Records Act ("CORA"). § 24-72-202(6)(b)(I), C.R.S. (2021). Instead, the CCJRA governs their disclosure. § 24-72-301, *et seq*. Under the CCJRA, "[c]riminal justice records" are defined as "all books, papers, cards, photographs, tapes, recordings, or other documentary materials, regardless of form or characteristics, that are 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) (emphasis added). A "criminal justice agency" means "any agency of the state . . . or law enforcement authority that performs *any activity* directly relating to [:]

(1) the detection or investigation of crime;

(2) the apprehension, pretrial release, posttrial release, prosecution, correctional supervision, rehabilitation,

evaluation, or treatment of accused persons or criminal offenders; *or*

(3) criminal identification activities or the collection, storage, or dissemination of arrest and criminal records information." § 24-72-302(3) (emphasis added).

The CCJRA creates two categories of records. *First*, records of official action are defined as "an arrest; indictment; charging by information; disposition; pretrial or posttrial release from custody; judicial determination of mental or physical condition; decision to grant, order, or terminate probation, parole or participation in correctional or rehabilitative programs, and any decision to formally discipline, reclassify, or relocate any person under criminal sentence." § 24-72-302(7). Records of official action "*shall* be open for inspection by any person at reasonable times, except as provided [by the CCJRA] or as otherwise provided by law." § 24-72-303(1) (emphasis added).

Second, except for records of official actions, all other criminal justice records, at the discretion of the custodian, *may* be open for

inspection by any person at reasonable times, except as otherwise provided by law. § 24-72-304(1).

The parties agree that the records at issue here fall into the second category. In making a determination on whether to permit inspection of criminal justice records, the custodian must balance: (1) the privacy interests of individuals who may be impacted by a decision to allow inspection; (2) the agency's interest in keeping confidential information confidential; (3) the agency's interest in pursuing ongoing investigations without compromising them; (4) the public purpose to be served in allowing inspection; and (5) any other pertinent consideration relevant to the circumstances of the particular request. *Freedom Colorado Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 899 (Colo. 2008). "The General Assembly has described this public and private interests balancing function as a weighing process involving the public interest verses the harm to privacy or dangers of unwarranted adverse consequences." *Id.* at 898 (quotations and alterations omitted).

The district court reviews the custodian's determination for abuse of discretion. *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1175 (Colo.

2005). In evaluating such a determination, the district court "should not substitute its judgment for that of the agency's . . . [or] redo the custodian's balancing of the interests." *Freedom Colorado Information, Inc.*, 196 P.3d at 900 (emphasis added). Instead, "proper application of an abuse of discretion standard entails the court holding the custodian to its balancing role, which includes adequately explaining the reasons for the custodian's inspection determination." *Id.* at 901.

An agency abuses its discretion only if its decision "is not reasonably supported by any competent evidence in the record; that is, the decision is so devoid of evidentiary support that it is arbitrary and capricious." *Platte River Envtl. Conservation Org., Inc. v. Nat'l Hog Farms, Inc.*, 804 P.2d 290, 291–92 (Colo. App. 1990); *see Freedom Colorado Information, Inc.*, 196 P.3d at 900 (same). A "reviewing court may consider whether the agency misconstrued or misapplied the law," but "[i]f there is a reasonable basis for the agency's application of the law, the decision may not be set aside on review." *Platte River Envtl. Conservation Org. Inc.*, 804 P.2d at 292; *see Freedom Colorado Information, Inc.*, 196 P.3d at 900 (same).

B. The POST Unit and the POST Board

For over fifteen years, the POST Unit has been housed within the Department's Criminal Justice Division due to the criminal law enforcement nature of POST's work. TR 8/03/21, p 10:16-25. The Criminal Justice Division, also known as the Criminal Justice Section, conducts criminal investigations and prosecutions at the state level. TR 8/03/21, p 10:12-15; § 24-31-102(2) ("The division of criminal justice . . . shall prosecute all criminal cases for the attorney general and shall perform other functions as may be required by the attorney general."). The POST Unit currently consists of 13 staff members and a director, including two certified peace officers, who work with the POST Board to regulate peace officer certification and training standards across the state. TR 8/03/21, p 11:4-18.

The POST Board was created within the Department by a type 2 transfer. TR 8/03/21, p 13:6; §§ 24-31-302(1), (2). This means that while the POST Board makes decisions on policy and advises POST Unit staff on the Unit's operations, the Board's "statutory authority, powers, duties, and functions, records, personnel, property, and unexpended

balances of appropriations, allocations, or other funds, including the functions of budgeting, purchasing, and planning, are transferred to the [Department]." § 24-1-105(2); *see* TR 8/03/21, p 13:9-11. Furthermore, the Board's "prescribed powers, duties, and functions, including rule-making, regulation, licensing, promulgation of rules, rates, regulations, and standards, and the rendering of findings, orders, and adjudications are transferred to the head of the [Department]"—namely, the Attorney General. § 24-1-105(4).

The POST Board consists of 24 members determined by statute. TR 8/03/21, p 12:9-10; § 24-31-302(3). Most of the board members are criminal law enforcement agency personnel, including the special agent in charge of the Denver division of the Federal Bureau of Investigation ("FBI"), the executive director of the Department of Public Safety, six active chiefs of police from Colorado municipalities or state institutions of higher education, six active sheriffs, and three active peace officers with a rank of sergeant or below. TR 8/03/21, p 12:12-13; § 24-31-302(3). The chairperson of the board is the Attorney General, who is a designated peace officer with criminal law enforcement authority. TR

8/03/21, p 13:3-4; §§ 16-2.5-128, 24-31-302(3). There is also one local government representative and five lay members, all of whom must attend a citizens' law enforcement academy before appointment or within one year after appointment. TR 8/03/21, pp 12:14-13:2; § 24-31-302(3).

The duties of the POST Board are prescribed by statute. § 24-31-303. The Board is responsible for establishing and maintaining training and certifications requirements for peace officers, including that applicants undergo a background investigation by means of fingerprint checks through the Colorado Bureau of Investigation ("CBI") or the FBI. TR 8/03/21, p 18:6-12; § 24-31-303(1)(a)-(c), (f). The Board also certifies peace officers and, after investigation, revokes the certification of officers who violate certain laws or standards. TR 8/03/21, p 18:6-12; § 24-31-303(1)(d).

In 2020, the General Assembly amended the POST Board enabling statute to allow the Attorney General to bring criminal charges against individuals who knowingly or intentionally violate POST certification requirements. § 24-31-307(3) (as further amended by

House Bill 21-1250). As discussed *infra*, Section I.C, POST Unit staff are responsible for investigating such criminal violations and referring them for prosecution. § 16-2.5-130.

C. POST Databases

As part of its statutory duties, the POST Unit maintains a database containing the records of over 50,000 peace officers. TR 8/03/21, p 18:13-19. The purpose of this database is to document and manage the certification and training process of all active, inactive, and reserve peace officers attached to over 300 law enforcement agencies across Colorado. *See* TR 8/03/21, pp 18:13-19:4.

Both peace officers and law enforcement agencies interface with the POST database to input information, such as training and employment history. *See, e.g.,* 4 C.C.R. §§ 901-1:17(a)-(b), 28(e). The POST database contains personal information about peace officers, including Social Security numbers, home addresses, home telephone numbers, cell phone numbers, email addresses, and emergency contact information. *See* TR 10/05/21, p 17:2-9.

In 2020, the General Assembly amended the POST enabling statute to require the POST Board to establish a separate database tracking certain peace officer information. S.B. 20-217, 72nd Gen. Assemb., 2nd Reg. Sess. (Colo. 2020). The statute requiring the creation of this separate database was further amended in 2021 to require that it be both searchable and publicly available. § 24-31-303(1)(r). Subject to available appropriations, by January 1, 2022, POST was required to establish a database that will provide the public with information regarding a peace officer's: (1) untruthfulness; (2) three or more failures to follow POST training requirements within ten consecutive years; (3) revocation of certification by the POST Board; (4) termination for cause; (5) resignation or retirement while under investigation; (6) resignation or retirement following an incident that leads to opening an investigation; and (7) being the subject of a criminal investigation for a crime that could result in revocation or suspension of POST certification. *Id.* This new database required by statute is separate and distinct from the POST database that POST has long maintained to perform its statutory functions. TR 08/03/21, p 19:20-23. The records

sought by Appellants are contained in the database long maintained by POST. *See* TR 08/03/21, p 18:13-19.

D. Appellants' Records Requests

1. Appellant Invisible Institute

Plaintiff Invisible Institute submitted a records request to the POST Unit in August of 2019 seeking the following information:

> Any data maintained by your agency sufficient to show all officers who have been certified by the state, dating back as far as is maintained, year-by-year, showing as much of the following information as is maintained: a. First name[;] b. Middle name or initial[;] c. Last name[;] d. Badge/star number[;] e. Employee number[;] f. Date of certification[;] g. Date of decertification (if applicable)[;] h. Department[;] i. Rank[;] j. Gender[;] k. Race[;] l. Year of birth[;] m. Date of separation from department if applicable[;] n. Reason for separation (e.g., termination, resignation, retirement), if applicable[; and] o. Unique identifier, certification number, badge, and/or employee number.

CF, pp 55-56. The Department's records custodian's designee responded that the request was governed by the CCJRA and, in exercise of the discretion afforded by the CCJRA, the custodian partially granted and partially denied the request. CF, pp 57-58. Specifically, the custodian declined to produce a report showing all officers that had been certified

by the state. But she did provide information on all officers decertified by the POST Board since 2000. *Id.*

2. Appellants Christopher Osher and the Gazette

First request. Plaintiff Christopher Osher from the Gazette newspaper requested the following records in June of 2020: "the POST database tracking certification, training and personnel changes of law enforcement officers in Colorado; any POST database tracking decertification of law enforcement officers in Colorado." CF, p 59. In follow-up correspondence, Osher referred to his request as "this CCJRA". CF, p 181. The Department's records custodian's designee responded that Osher's request was governed by the CCJRA and, in exercise of the discretion afforded by the CCJRA, the custodian partially granted and partially denied the request. CF, pp 60-61.

Request for reconsideration. Osher asked for reconsideration of the partial denial of his first request. Despite previously referring to his request as "this CCJRA," Osher newly claimed that POST is not a criminal justice agency and thus his request was governed by CORA. CF, pp 62, 179-82. The Department's records custodian's designee

declined to reconsider the first request under CORA, explaining that POST is a criminal justice agency because it is "a unit of the Criminal Justice Section of the Colorado Attorney General's Office, which investigates and prosecutes crime throughout the state." *Id.* POST's Chairperson is the Attorney General, who is a designated peace officer with criminal law enforcement authority. *Id.* Also, POST "establishes and maintains certification and training requirements for peace officers who investigate crime and apprehend criminal offenders on a daily basis" and "[t]he training funded by POST covers various policing issues including crime investigation and arrests." *Id.*

The Department's response further described the records custodian's practice of confirming "the status of an individual officer's certification only after the requestor has obtained the officer's name from another source." *Id.* This practice began in 2015 in response to previous records requests from Osher and was not challenged by Osher or his counsel at the time. EX, pp 115-20; TR 10/05/21, p 161:10-25. "By responding in this way," the response explained, "POST is unlikely to reveal names of undercover officers and jeopardize their safety in

response to open records requests." CF, pp 62, 179-82. The response informed Osher that the records custodian would confirm the status of an individual officer's certification if he provided a specific name. *Id.*

Second request. Approximately two months later, Osher sent a second request seeking separation and appointment notifications made by each law enforcement agency to the POST database since January 1, 2020. CF, p 63. The records custodian's designee responded that Osher's second request was governed by the CCJRA and, in exercise of the discretion afforded by the CCJRA, the custodian partially granted and partially denied the request. CF, pp 64-66.

E. Application for an Order to Show Cause and District Court Review

In December of 2020, the Reporters Committee for Freedom of the Press sent the Department a notice of Plaintiffs' intent to file an application for an order to show cause. CF, pp 67-71. Appellants then filed their Complaint (with Application for Order to Show Cause) in the Denver District Court against Erik Bourgerie, the Director of POST, in his official capacity. CF, p 1.

The district court held a status conference where it determined that it would first hold a hearing on the applicability of the CCJRA. CF, p 113; TR 7/16/2021, p 21:4-13. In advance of the hearing, the parties submitted simultaneous briefing on whether POST is a criminal justice agency whose records are subject to the CCJRA. CF, pp 137 (Appellants' brief), 161 (Appellee's brief). After hearing testimony from the POST Director and oral argument, the district court held that POST was a criminal justice agency and the CCJRA applies to the records at issue, not CORA. TR 8/3/2021, pp 88:24-89:2, 89:24-90:1.

The parties then submitted briefing on whether the Department's records custodian, and consequently POST, abused her discretion under the CCJRA when responding to Appellants' records requests. CF, pp. 203, 227, 3757. At a show cause hearing on October 5, 2021, the Department's record custodian credibly testified how she balanced the relevant factors under the CCJRA. TR 10/05/21, pp. 9-111, 225:12-15, 226:9-13, 227:13-16. The district court ultimately determined that the Department's records custodian did not abuse her discretion and thus denied the motion to show cause. TR 10/05/21, pp. 221:16-227:22.

Appellants timely appealed to this Court.

SUMMARY OF THE ARGUMENT

I. For three reasons, the district court correctly determined that POST is a criminal justice agency under the CCJRA. *First*, POST is a criminal justice agency because it performs activities directly related to the collection, storage, or dissemination of arrest and criminal records information. *Second*, POST is a criminal justice agency because it performs activities directly relating to the detection, investigation, and prosecution of crime and criminal identification. *Third,* POST is a type 2 transfer board housed within the Criminal Justice Division of the Department, which is headed by the Attorney General, making the Division the arm of the Department that is responsible for POST's records and functions. The Criminal Justice Division, and by extension POST, is a law enforcement agency that performs the activities of a criminal justice agency.

II. The district court correctly determined that the Department's records custodian did not abuse her discretion when responding to Appellants' records requests. Looking to the competent

evidence in the record, specifically the credible testimony of the records custodian, the district court determined the custodian weighed the relevant factors, thereby performing her statutory obligations under the CCJRA.

ARGUMENT

I. The district court correctly determined that the CCJRA governs the disclosure of POST records.

For the reasons discussed below, this Court should affirm the district court's holding that POST is a criminal justice agency whose records are subject to the CCJRA.

A. Standard of Review and Preservation

The correct construction and application of CORA and CCJRA is a question of law this Court reviews de novo. *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1170 (Colo. 2005). When interpreting statutes, a court "look[s] first to the plain language of the statute, reads the statute as a whole, and gives its words and phrases their plain and ordinary meaning." *People v. Sprinkle*, 2021 CO 60, ¶ 22 (citation omitted). Words and phrases are read in context and construed according to the rules of

grammar and common usage. *Id.* "If the language is clear, [a court] applies it as written." *Id.*

In discussing the applicable standard of review, Appellants contend that CORA's statutory carveout for "criminal justice records" from the definition of "public records" must be narrowly construed. Op. Br. 12. To support this contention Appellants cite *City of Westminster v. Dogan Constr. Co.*, 930 P.2d 585, 589 (Colo. 1997). Yet, it is instructive that neither that case, nor the case cited by *City of Westminster*, analyze the CCJRA, but rather analyze the withholding of records under CORA. *See City of Westminster*, 930 P.2d at 589; *Sargent School Dist. No. RE-33J v. Western Services, Inc.*, 751 P.2d 56, 60 (Colo. 1988). As those cases explain, narrowly construing exceptions to public disclosure applies to the CORA exceptions found in § 24-72-204, but does not apply to the definition section of CORA, which includes the statutory carveout for "criminal justice records" and is found at § 24-72-202.

The Department agrees that Appellants preserved this issue for appellate review. Op. Br. 9-10.

B. POST is a criminal justice agency because it performs activities directly related to the collection, storage, and dissemination of arrest and criminal records information.

As the district court held, POST facilitates and collects criminal background checks on officers who are seeking certification and keeps those records in the POST database, thus falling under the portion of the definition of a "criminal justice agency" that "performs activities directly related to "the collection, storage, or dissemination of arrest and criminal records information." TR 8/03/21, p 89:3-7; § 24-72-302(3). Appellants argue that this portion of the definition is limited to agencies that actually conduct the background checks. Op. Br. 23. Appellants misconstrue the law.

While there are no Colorado cases interpreting "criminal justice agency" as defined in the CCJRA, a 1983 opinion by the Colorado Attorney General is instructive. *See John R. Enright,* No. OHR8300666/JR, 1983 WL 167498 (Colo. Atty. Gen. Mar. 24, 1983); *see also Beinor v. Indus. Claims Appeals Office*, 262 P.3d 970, 974 (Colo. App. 2011) ("Since the Attorney General's opinion is issued pursuant to

statutory duty, the opinion is obviously entitled to respectful consideration as a contemporaneous interpretation of the law by a governmental official charged with the responsibility of such interpretation." (quoting *Colo. Common Cause v. Meyer*, 758 P.2d 153, 159 (Colo. 1988))). In that opinion, the Attorney General found the United States Office of Personnel Management ("OPM") constituted a criminal justice agency under the CCJRA. *Enright*, 1983 WL 167498, at *3. Specifically, the Attorney General found "OPM is authorized to conduct background and security investigation of persons appointed or retained in federal positions" and this "function requires access to criminal records information." *Id.* Thus, OPM is an "agency which collects, stores, and/or disseminates arrest and criminal records information." *Id.* And "[e]ven though the primary purpose of OPM may not be the enforcement of criminal laws, its activity falls within the scope of the statutory definition and it qualifies as a 'criminal justice agency.'" *Id.*

Similarly, the Colorado Department of Education ("CDE") collects criminal history record checks on teachers and is the only agency

specifically referenced in the definition of criminal justice agency under the CCJRA. § 24-72-302(3); *see also* § 22-60.5-103(5.5) (providing "the department of education is a criminal justice agency as that term is defined in section 24-72-302(3), C.R.S."). Like peace officers, teachers are required to submit to fingerprint-based criminal history record checks before applying for a teacher's license with CDE, and "[u]pon completion of the criminal history record check, [CBI] shall forward the results to the department of education." § 22-60.5-103(1)(a). Under the statute, CDE is required to provide school boards with information on whether teacher applicants have any disqualifying criminal convictions. § 22-2-119(1)(a). As the district court noted, the inclusion of CDE in the definition of "criminal justice agency" is "telling of what the legislature was trying to do here." TR 8/03/21, p 88:20-23. The legislature was interested in protecting these background checks from public dissemination because they contain sensitive information on individuals. TR 8/03/21, p 88:16-20.

Like CDE, POST is a criminal justice agency because it collects, stores, and disseminates arrest and criminal records information. Not

only does POST collect, store, and disseminate fingerprint-based criminal history, TR 8/03/21, pp 20:20-23, 21:2-8, 22:22-23:2, but when a peace officer is convicted or pleads guilty to a revocable offense, POST collects and stores the criminal records of the officers for decertification purposes, TR 8/30/21, pp 23-24. On many occasions, POST also obtains the applicable law enforcement reports, like an arrest report, to present to the POST Board when deciding whether to revoke an officer's certification. TR 8/3/21, p 25:18-25.

Because POST performs multiple activities, let alone "*any activity*," directly relating to the collection, storage, or dissemination of arrest and criminal records information, *see* § 24-72-302(3), the district court correctly held that POST qualifies as a criminal justice agency under the CCJRA. *See Sprinkle*, 2021 CO 60, ¶ 22.

C. POST is a criminal justice agency because it performs criminal identification activities and functions directly relating to the detection, investigation, and prosecution of crime.

Next, Appellants contend that the criminal investigations POST conducts are administrative investigations that determine whether an

individual has violated professional licensing standards. Op. Br. 18-19. Appellants' argument misstates the record.

In June 2020, the General Assembly amended the POST statute as part of a broad criminal justice reform bill. S.B. 20-217, 72nd Gen. Assemb., 2nd Reg. Sess. (Colo. 2020). It gave the Attorney General authority to bring criminal charges against individuals who knowingly and intentionally violate POST certification requirements. § 24-31-307(3) (as further amended by House Bill 21-1250). POST staff have the authority and are responsible for investigating such criminal violations and referring them to a special prosecution unit of the Criminal Justice Division. *See* § 16-2.5-130. Two staff members of POST, including the POST director, are statutorily designated as peace officers while engaged in the performance of their duties, including the enforcement of laws and rules pertaining to the training and certification of peace officers. § 16-2.5-130; TR 8/03/21, p 26:1-21. The POST director and POST investigator also have the authority to investigate crime, including criminal violations of the POST statute. § 16-2.5-130.

For example, POST investigated a peace officer for providing false information to obtain certification, including misrepresenting his past certifications in other states, misrepresenting his employment history, and altering information on an official report. TR 8/03/21, pp 26:22-27:3. The district court found that the POST Director credibly testified that he employed the same investigative techniques he used when he was a sheriff's deputy in Summit County. TR 8/3/21, pp 88:24-25, 89:16-18. After completing the criminal investigation, the POST Director forwarded his report and investigative materials to the special prosecution unit of the Criminal Justice Division for a charging decision. TR 8/3/21, p 27:6-9. This process is akin to peace officers in local law enforcement agencies investigating criminal activity and then referring the results of that investigation to the local district attorney's office for prosecution. POST staff have long engaged in these types of investigations and referred criminal matters to prosecutors. *See* TR 8/3/21, pp 27:24-28:11, 59:16-60:7, 65:13-24. The 2020 legislation, which was further amended in 2021, simply provided POST staff and the

Attorney General with express authority and further solidified POST as a criminal justice agency.

POST's performance of criminal identification activities and functions directly relating to the detection, investigation, and prosecution of crime means it falls squarely within the definition of a criminal justice agency under the CCJRA. *See* TR 8/03/21, p 89:8-18.

D. POST is a criminal justice agency because it is a type 2 transfer board housed within the Department's Criminal Justice Division, which is a law enforcement agency.

Due to its creation through a type 2 transfer, the POST Board's "prescribed powers, duties, and functions" are vested in the Attorney General as the head of the Department, who "may allocate and reallocate powers, duties, and functions to divisions, sections, and units under the [Department.]" §§ 24-31-302(2); 24-1-105(4); 24-1-107. In contrast, a type 1 transfer board "exercise[s] its prescribed statutory powers, duties, and functions . . . independently of the head of the principal department[.]" *Id.* § 24-1-105(1). The POST Board's "*records*" also belong to the Department due to its creation through a type 2

transfer. § 24-1-105(2). In fact, the Attorney General designated Chief Deputy Attorney General Natalie Hanlon Leh, who is a peace officer with criminal law enforcement authority, *see* § 16-2.5-128, to serve as the official custodian of records for the POST database. TR 10/05/21, p 11:8. And both historically and currently, the POST Board and Unit are housed within the Criminal Justice Division, which is the criminal law enforcement arm of the Department. CF, p 3823; § 24-31-102(2).

Because POST's records and statutory authority are transferred to the Department and housed within the Criminal Justice Division at the direction of the Attorney General, it is the status of the Department and the specific activities of the Criminal Justice Division that must be examined in determining whether POST is a criminal justice agency. The Department, commonly referred to as the Attorney General's Office, has repeatedly been recognized as a criminal law enforcement agency by the Colorado Supreme Court. *See, e.g., People v. Novotny*, 320 P.3d 1194, 1198 (Colo. 2014) (noting that "[t]he office of the state attorney general has been specifically included in a number of different statutory provisions defining the term 'law enforcement agency'" and

citing §§ 8-47-203.3(2); 8-72-111(2), 24-50-127(2)(b); 26-1-114(3)(a)(III)(B)). Indeed, the Supreme Court in *Novotny* explained that "we have in fact treated the office of the state attorney general as an archetype of a 'law enforcement agency' in express reliance on the aforementioned statutory references." *Id.* (citing *People v. Speer*, 255 P.3d 1115, 1121 (Colo. 2011) (including "the office of the state attorney general" among a list of "governmental bodies as examples or prototypes" of agencies that "enforc[e] the criminal law")). Like assistant attorneys general, POST Unit employees would be subject to a challenge for cause in criminal trials because they are compensated employees of the Department and therefore are considered criminal law enforcement personnel. *See id.*; § 16-10-103. The Court in *Novotny* held that "the analysis [with respect to challenges for cause] is relatively straightforward with regard to employment with an umbrella organization or department that is itself a law enforcement agency." 320 P.3d at 1198.

Similarly here, POST is a unit within an umbrella organization that is clearly a criminal law enforcement agency. Specifically, POST is

housed within the Department's Criminal Justice Division, which investigates and prosecutes a variety of crimes on a statewide basis. § 24-31-102(2). This Division, at the direction of the Attorney General, also has the specific authority to prosecute individuals for violating POST's certification requirements. § 24-31-307(3). POST's chairperson is the Attorney General, who is a designated peace officer with criminal law enforcement authority. §§ 16-2.5-128, 24-31-302(3). Because the Department (and its Criminal Justice Division, specifically) constitutes a criminal law enforcement agency and is responsible for the custody of POST's records and the exercise of its powers, duties, and functions, POST is a "criminal justice agency" under the CCJRA. Its records, which are created and maintained by the Criminal Justice Division, are therefore subject to the CCJRA, not CORA.

Appellants try to categorize POST as a licensing, training, and certification body. *See, e.g.,* Op. Br. 15. But POST is fundamentally different from traditional state licensing boards in both structure and purpose. Appellants argue POST is the same as the Dental Board or the Medical Board, *id.* at 21, but the only similarity is that these agencies

issue credentials. The Dental Board, for example, issues licenses to professionals to practice dentistry in Colorado. The Department of Regulatory Agencies ("DORA") houses the Dental Board under DORA's Division of Professions and Occupations ("DPO"). § 24-1-122(3)(k). DPO is not a criminal justice agency but rather a consumer protection agency. It does not have the authority to exercise the Dental Board's statutory powers, such as rulemaking or the rendering of findings, orders, and adjudications. The Dental Board makes those decisions independent of DPO. *See id*.

More important, however, is that the Dental Board is not statutorily authorized to investigate or prosecute crimes. *See* § 12-220-401; *cf* § 12-220-201(1)(a) (the "board may take *disciplinary* action against an applicant or licensee) (emphasis added). Its functions therefore bear little in common with those of a criminal justice agency.

POST's purpose is also different from the other agencies mentioned by Appellants because it is focused on the regulation of criminal law enforcement officers rather than civilian professionals or the general public. POST funds law enforcement training and regulates

peace officers who investigate crime, identify criminals, and apprehend criminal offenders. Under its statute, POST can also suspend or revoke the certification of peace officers for actions they take while investigating crime or the apprehension of criminal offenders, such as making an untruthful statement concerning a material fact on a criminal justice record, engaging in the excessive use of force, or engaging in other criminal violations. § 24-31-305(2)(a), 2.5(a)(I); § 24-31-904. Not surprisingly, most POST Board members are criminal law enforcement officers who are experienced in criminal justice matters and POST's functions are inextricably linked to criminal law enforcement. Furthermore, because its "umbrella organization" is the Criminal Justice Division of the Department, which investigates and prosecutes crime throughout Colorado, POST is criminal justice agency. Its records, which are in the Division's custody, are therefore subject to the CCJRA.

E. The Department did not depart from past practice of applying the CCJRA to requests for POST records.

Appellants assert that "POST previously granted public records requests for access to the POST Database pursuant to CORA." Op. Br. 16. This assertion is based on ambiguous statements in POST meeting minutes and contrary to other portions of the record here. For example, the Department's records custodian testified that she was aware that past administrations had evaluated requests for POST records under the CCJRA. TR 10/05/21, p 104:10-25. And the POST Director testified that there was no change in policy regarding POST's handling of records requests when he became director in November 2017. TR 8/03/21, p 46:10-12. Moreover, the record shows that the Department's partial denial of Appellants' records requests is consistent with the practices of past administrations. EX, pp 110-120.

II. The district court correctly determined that the Department's records custodian did not abuse her discretion when she partially denied and partially granted Appellants' records requests.

As shown at the show cause hearing, the Department's records custodian properly balanced the relevant factors and did not abuse her

discretion when she partially denied and partially granted Plaintiffs' records requests. After weighing the relevant factors, the records custodian determined the harm to privacy and the dangers of unwarranted adverse consequences, including the significant risk to officer safety, outweighed the public interest in disclosing the entire POST database. Because the records custodian did not abuse her discretion in responding to Appellants' records requests, this district court correctly sustained her decision and dismissed Appellants' Application for an Order to Show Cause.

A. Standard of Review and Preservation

As is the case here, "[w]hen a request is made to inspect a particular criminal justice record that is not a record of an 'official action,' the decision whether to grant the request is consigned to the exercise of the custodian's sound discretion under sections 24-72-304 and -305." *Freedom Colo. Info., Inc. v. El Paso Cty. Sheriff's Dept.*, 196 P.3d 892, 897 (Colo. 2008). While the district court reviews the custodian's determination for an abuse of discretion, an appellate court reviews "de novo whether the district court applied to the correct legal standard to its

review of the custodians' determination." *Id.* (citations omitted). "Whether a trial court or the court of appeals has applied the correct legal standard to the case under review is a matter of law." *Id.* at 897–98.

"Trial courts are afforded considerable discretion in deciding evidentiary issues, so such decisions will not be disturbed absent an abuse of discretion." *People v. Segovia*, 196 P.3d 1126, 1129 (Colo. 2008) (en banc). "It is the function of the trial court and not the reviewing court to weigh the evidence and determine the credibility of witnesses." *People v. Mendoza-Balderama*, 981 P.2d 150, 157 (Colo. 1999) (en banc).

The Department agrees Appellants preserved this issue for appellate review. Op. Br. 24-26.

B. The Department's custodian of records properly weighed the relevant factors, thereby performing her statutory obligations under the CCJRA.

Applying the legal standards above to the records at issue here shows that the Department's records custodian did not abuse her discretion in partially granting and partially denying Appellants' requests. The custodian weighed the relevant factors, thereby performing her statutory obligations under the CCJRA, and determined

the harm to privacy and the dangers of unwarranted adverse consequences outweighed the public interest in disclosure. This brief only addresses the two factors challenged by Appellants on appeal: (1) the public purpose to be served in allowing inspection, and (2) any other pertinent considerations relevant to the circumstances of the particular request, which here include POST's limited resources and the technological limitations of the POST database.

1. The Department's records custodian properly considered the public purpose to be served in allowing inspection at the time she denied the Appellants' requests.

Appellants argue that the evidence demonstrates that the custodian did not consider the public interest because the pre-litigation denials do not mention the public purpose to be served by disclosure. Op. Br. 27-28. Appellants erroneously argue that a lack of "documentary evidence" that the custodian considered the public purpose served by disclosure means the custodian disregarded this factor all together. *See* Op. Br. 28-29. The CCJRA neither expressly nor impliedly demands state agencies explain the balancing they performed

in their response letters, and the Department has located no cases to support Appellants' contention otherwise.

Under the CCJRA, "[i]f the custodian denies access to any criminal justice 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 or the general nature of the public interest to be protected by the denial . . . ." § 24-72-305(6). This section is triggered only if the applicant requests a written statement after receiving the custodian's denial. Even then, nothing in the plain language of this statute requires that the custodian explain any factor of the balancing test or to articulate the public interest served by disclosure. Instead, the statute gives the custodian the choice to cite the law or regulation under which inspection is denied or "the general nature of the public interest to be protected by the *denial*," not the public interest served by *disclosure*. *Id.* (emphasis added).

After receiving the Department's response letters, none of the Appellants in this case requested a written statement under section 24-72-305(6). Even if Appellants had requested a written statement, the

Department's response letters fully complied with the statute, which again requires a custodian to "cite the law or regulation under which access is denied *or* the general nature of the public interest to be protected by the denial." § 24-72-305(6) (emphasis added). In all its letters, the Department cited sections 24-72-304 and 305 of the CCJRA as the statutory authority to partially deny Appellants' requests. CF, pp 57-58, 60-61, 64-66. The Department's pre-litigation responses fully met the requirements of the CCJRA.

By focusing on the lack of "documentary evidence," Appellants seem to imply the Department was obligated to provide all its legal grounds for denying inspection before Appellants filed suit. Because barring legal defenses is an extreme and drastic measure, and one that poses serious due process concerns, the law must clearly and unequivocally require that agencies present any and all grounds in their response upon pain of withdrawing the defense in a future suit. *See Vogel v. Carolina Int'l, Inc.*, 711 P.2d 708, 711-12 (Colo. App. 1985) ("A waiver is a voluntary abandonment of a known right, with the intent that such right shall be surrendered and such persons be forever

deprived of its benefit. Waiver requires a clear, unequivocal and decisive act of a party showing such purpose." (citation omitted)); C.R.C.P. 12 (laying out when and how certain defenses may be deemed waived and therefore barred). Nothing in the CCJRA imposes this requirement. Indeed, requiring agencies to research and assert all grounds for denial within the small amount of time permitted to provide a written statement under the CCJRA would so unduly burden them that it would impede their ability to perform their other functions. *See* § 24-72-305(6) (written statement must be provided within 72 hours).

Instead, the proper stage at which a custodian must articulate its balancing of the public and private interests is after a lawsuit is filed, when a record is developed before the district court. *See Freedom Colo.*, 196 P.3d at 904 ("[T]he 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."). In its briefing and during the hearing, the Department provided the district court with an articulation of its balancing of the public and private interests the custodian performed for each of

Appellants' records requests. CF, pp 203, 3757; TR 10/05/21, pp 9-111. And the Department's records custodian testified that the public purpose to be served in allowing inspection is a factor she always considers. TR 10/05/21, p 20:18-22. The custodian further explained that as a government agency, the Department takes the public purpose very seriously and recognizes the duty it has to the public to have records that are open and available for public inspection. TR 10/05/21, p 20:21-25; TR 10/05/21, p 37:1-9; TR 10/05/21, pp 46:21-47:8. And she was aware at the time she partially denied Appellants' records requests of the "public's interest in knowing more about police officers, their training, their standards, decertification," TR 10/05/21, p 21:1-9, and her "greater perspective of the interest that there is in police accountability," TR 10/05/21, p 29:13-14.

Because the public has a strong interest in knowing about the certification and decertification of peace officers, the custodian also discussed the information from the POST database that the Department will provide to requesters. TR 10/05/21, pp: 21:10-22:8. Certification information, as well as information regarding an officer's

employment history, is provided by the Department if a requestor submits the officer's name. TR 10/05/21, p 22:6-8. Decertification decisions are made by the POST Board in public meetings, and these meeting minutes are available online. TR 10/05/21, p 21:12-21; https://post.colorado.gov/about-post/post-board (last visited May 24, 2022); *see also* CF, pp 58, 61.

While Appellants argue there is no credible evidence that the custodian considered the public purpose served by disclosure, Op. Br. 30, this argument ignores the records custodian's testimony. Based on this testimony, the district court found that there was "credible evidence in the record that the [Department] through the [custodian] adequately considered the public [] interest." TR 10/05/21, p 227:14-16. As such, the district court properly determined that the Department's custodian did not abuse her discretion when denying Appellants' records request. *See Platte River Envtl. Conservation Org. Inc.*, 804 P.2d at 291-92 (an agency abuses its discretion only if its decision "is not reasonably supported by any competent evidence in the record."); *see also Mendoza-Balderama*, 981 P.2d at 157 ("It is the function of the trial

court and not the reviewing court to weigh the evidence and determine the credibility of witnesses.").

2. The Department's records custodian properly considered other pertinent considerations, including POST's limited resources and the database's technological limitations.

Appellants argue that the district court should not have admitted testimony from the Department's custodian on the technological capabilities of the POST database. Op. Br. 31. Appellants' argument appears to imply that records custodians for criminal justice agencies that house databases must be database experts and know the ins-and-outs of databases to properly weigh the relevant factors. *See* Op. Br. 31-32. But no such requirement exists in the CCJRA, and reading in such a requirement would hamstring custodians of criminal justice agencies across the state when it comes to performing their statutory duties under the CCJRA.

Appellants specifically argue that the custodian's testimony regarding the technological capabilities of the POST database should have been stricken because the testimony showed a lack of personal

knowledge and was largely hearsay.[1] Op. Br. 32. In denying Appellants' motion to strike portions of the custodian's testimony as to the burdensomeness of exporting data from the POST database, the district court ruled:

> "she is the chief deputy of the Department of Law. It's not unlike a COO or CFO testifying; those people rely on information they get from their underlings. It's – it's not considered hearsay and I don't consider this to be hearsay. I consider this to be within the ambit of [the custodian's] knowledge."

TR 10/05/21, p 89:19-24. Because the district court is afforded considerable discretion in deciding evidentiary issues, *see Segovia*, 196 P.3d at 1129, there was competent evidence in the record to support the district court's determination that "based on the evidence before [the district court], there appears to be credible evidence that it would be an undue burden on the – the POST staff to produce the information requested." TR 10/05/21, p 225:12-15; Op. Br. 33; *see Platte River Envtl.*

[1] Appellants now argue that the custodian's testimony also "did nothing to 'facilitate an understanding of' her opinion as a lay witness." Op. Br. 32 (citation omitted). But Appellants did not make this objection at the district court level, and thus, have failed to preserve it for appellate review.

Conservation Org. Inc., 804 P.2d at 291-92. Specifically, the evidence in the record shows that the Department's custodian properly considered other pertinent factors in responding to Appellants' records requests, including POST's limited resources and the technological limitations of the POST database.

With respect to POST's limited resources, for example, the custodian testified that to release a list of all certified peace officers while withholding or redacting the names of officers currently working undercover or subject to active threats – so as not compromise officer safety or ongoing investigations[2] – POST would have to coordinate with over 250 local law enforcement agencies. TR 10/05/21, pp 23:25-24:9. Only those agencies have information on the status of specific officers, including which officers are currently performing undercover or covert

[2] The custodian decided not to disclose the entire POST database because publicly disclosing the name of every peace officer in Colorado threatens harm to ongoing investigations and officer safety. *E.g.*, TR 10/05/21, pp 18:14-19:8, p 20:11-17. Both of these considerations were properly considered by the custodian under two of the other pertinent factors: (1) the agency's interest in keeping confidential information confidential, and (2) the agency's interest in pursuing ongoing investigations without compromising them. *See Freedom Colo.*, 196 P.3d at 899.

operations. TR 10/05/21, p 24:1-9. This inquiry would likely consume over approximately 80 to 100 hours of staff time, and the information gathered would become almost immediately outdated considering the everchanging nature of covert operations. TR 10/05/21, p 24:10-17.

As for the POST database's technological limitations, the custodian testified that database is not designed to produce aggregate data; it is "designed to help POST do its function of certifying and reflecting training and other information about individual officers." TR 10/05/21, p 27:4-8. To provide the training information or a complete employment history for each certified peace officer, POST would have to pull each peace officer's record one-by-one and produce screenshots of the officer's profile and a report of the officer's training record or employment history.[3] TR 10/05/21, pp 27:8-28:7. Each screenshot of an

[3] Even if POST could somehow query and excise fields from its database, POST would be manipulating data from a broad database to extract exempt information and release the balance of the data.[3] This is exactly what the Colorado Supreme Court held criminal justice agencies were *not* required to do in *Office of the State Court Administrator v. Background Information Services, Inc.*, 994 P.2d 420, 431-32 (Colo. 1999).

officer's profile would have personal data on it, such as date of birth, home phone number, and email address. TR 10/05/21, p 28:8-17. POST would then have to redact the private data from over 50,000 individual records. TR 10/05/21, p 28:8-17. The custodian determined that POST does not have the resources or capacity to perform this overly burdensome task. TR 10/05/21, p 28:22-25.

To rebut this competent and credible evidence in the record, Appellants (1) rely on the testimony of one of Appellants' witnesses, Mr. Stecklow, and (2) request that this Court take judicial notice of a news article published by the Gazette, an Appellant in this case, after the district court issued its decision. Op. Br. 35-36.

Appellants' arguments fail for two reasons. One, this Court should not give any weight to Mr. Stecklow's testimony because the district court essentially rejected it in its findings. *See* TR 10/05/21, p. 224:4-16; *see Mendoza-Balderama*, 981 P.2d at 157 ("It is the function of the trial court and not the reviewing court to weigh the evidence and determine the credibility of witnesses."). In discussing Mr. Stecklow's experience making records requests from other agencies with similar databases,

the district court determined that "nobody else, other than [the custodian's] IT person, apparently, had any direct experience with the . . . database." TR 10/05/2021, p 224:14-16. And the custodian "talked to IT and IT said it couldn't be done and she accepted that, which is reasonable." TR 10/05/21, p 224:5-7. These findings by the district court show that it gave no weight to Mr. Stecklow's contrary testimony.

Two, the Rules of Evidence prevent this Court from taking judicial notice of Appellants' self-serving newspaper article or the contents of the webpage, neither of which are in the record. CRE 201(b) states:

> "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably questioned."

Here, the facts are subject to reasonable dispute based on the custodian's credible testimony, TR 10/05/21, p 27:4-8 ("the database is not designed to [produce] aggregate data"), and the district court's holding, TR 10/05/21, p 225:12-15 ("there appears to be credible evidence that it would be an undue burden on the – the POST staff to produce the information requested."). Moreover, the purported "facts" in

the news article are neither "generally known" nor "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." *See Davidson Oil Co. v. City of Albuquerque*, 545 F. Supp. 3d 1039, 1044 (D.N.M. 2021) ("Judicial notice of newspaper articles is not appropriate, however, when the reported facts are not capable of easy verification.").

Finally, with respect to Appellants' arguments that the Department's denial was an "arbitrary departure from its past practice of releasing portions or the entirety of the POST database," Op. Br. 30, the record does not support this contention. *See supra*, Section I.E.

3. The district court applied the correct legal standard when reviewing the custodian's determination.

Last, Appellants argue that the district court "erred as a matter of law by failing to consider its own ability to order redaction of the records in question." Op. Br. 40. While "[r]edaction, as an alternative, *may* often be a proper choice to carry out the General Assembly's intent," *Freedom Colo.*, 196 P.3d at 900 n.3 (emphasis added), the CCJRA does not require redaction, nor does it permit a district court to

substitute its judgment for that of the custodian and order redaction of the requested records, *id.* at 900.

Appellants rely on *Freedom Colorado* for the proposition that a district court should order inspection of criminal justice records unless it "finds that denial of the inspection was proper." Op. Br. 39 (citing *Freedom Colo.,* 196 P.3d at 899). They fail, however, to mention the next sentence of the opinion, which explains: "While [§ 24-72-305(7)] might suggest that the district court has the authority to redo the custodian's balancing of the interests, the General Assembly utilized the word 'proper' to underscore that the district court's role primarily consists of holding the custodian accountable for performing his or her role." *Freedom Colo.*, 196 P.3d at 899.

Tellingly, both cases Appellants cite to support their urged theory—that a district court ordering an agency to redact certain information is not substituting its judgment for that of the agency—were decided under CORA, not the CCJRA. *See* Op. Br. 39-40 (citing *Land Owners United, LLC v. Waters*, 293 P.3d 86, 89 (Colo. App. 2011)

and *Denver Publ'g Co. v. Bd. of Cty. Comm'rs of Cty. of Arapahoe*, 121 P.3d 190, 205 (Colo. 2005)).

If a district court finds that a custodian failed to engage in the required balancing or did not adequately articulate the rationale for partially denying the requests, the remedy is not to release redacted records but to remand the matter back to the custodian so she can balance the competing interests and then adequately articulate the justification to the requesting party. *See Freedom Colo.*, 196 P.3d at 899. But such a remedy is unnecessary here because, as the district court found, the custodian properly balanced the competing interests and adequately articulated her justification for partially granting and partially denying Appellants' records requests.

CONCLUSION

This Court should affirm the district court's order discharging the order to show cause because the district court correctly determined (1) that the CCJRA governs the disclosure of POST records; and (2) the custodian of records for the Department did not abuse her discretion

when she partially denied and partially granted Appellants' records requests.

Respectfully submitted this 31st day of May, 2022.

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s/ Stefanie Mann
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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ERIK BOURGERIE's ANSWER BRIEF**, upon all parties herein electronically via Colorado Courts E-filing, at Denver, Colorado, this 31st day of May, 2022 addressed as follows:

s/ Xan Serocki