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' REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and 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 5,679 words and does not exceed 5,700 words.

The brief complies with C.A.R. 28(c).

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

/s/Rachael Johnson
Rachael Johnson, #43597

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The text and legislative history of the Colorado Open Records Act, §§ 24-72-201, C.R.S. *et seq*. ("CORA") and the Colorado Criminal Justice Records Act, §§ 24-72-301, C.R.S. *et seq*. ("CCJRA"), and the plain language of the POST Act, §§ 24-31-301, C.R.S. *et seq.*—which sets forth POST's purpose and prescribes its statutory duties—all make clear that POST's records are subject to CORA's disclosure requirements. Yet rather than address the relevant statutes, Defendant-Appellee's Answer Brief instead discusses two different agencies with little relevance to this case, and repeats the self-serving testimony of its own witness in a misleading attempt to paint ordinary administrative inquiries conducted by a licensing agency as criminal investigations. Contrary to Defendant-Appellee's revived contention—rejected by the district court below—that POST's location within the Attorney General's Office is dispositive, whether POST is a "criminal justice agency" within the meaning of CORA and CCJRA turns on what the agency does pursuant to statute. POST cannot meet that definition.

Nor does Defendant-Appellee's Answer Brief explain the (at best) vague and contradictory testimony of the records custodian. The entirety of the record below indicates that the custodian did not consider the public interest in release of the POST Database, as required by this Court's precedent; rather than address that failing, Defendant-Appellee offers an incorrect—but ultimately irrelevant—legal

argument about ***when*** it was required to weigh the public interest in disclosure. And, instead of providing this Court with a cogent explanation for the custodian's lack of personal knowledge about the POST Database and its underlying technology, Defendant-Appellee argues against the credibility of Plaintiffs-Appellants' witnesses—both of whom demonstrated far more technological knowledge than the records custodian.

For the reasons in Plaintiffs-Appellants' Opening Brief and herein, this Court should reverse and remand with instructions for the district court to require release of the POST Database.

I. The district court incorrectly determined that the CCJRA applied.

CORA's disclosure requirements codify a strong public policy favoring transparency. § 24-72-201, C.R.S. ("It is declared to be the public policy of this state that all public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise specifically provided by law."). Defendant-Appellee wrongly argues that only the exceptions to CORA found in § 24-72-204, C.R.S. need be "narrowly construed" in favor of those disclosure requirements—not the exceptions found in the "definitions" section, § 24-72-202, C.R.S., or any other section of the act. Answer Br. 18. But as the Colorado Supreme Court has made clear, "[t]he legislature passed [CORA] to declare and implement the public policy that 'all public records shall be open for

inspection' ***except as provided by the Act or otherwise specifically provided by law***." *City of Westminster v. Dogan Constr. Co*., 930 P.2d 585, 589 (Colo. 1997) (emphasis added) (quoting § 24-72-201, C.R.S.). "[E]xcept as provided by the Act," does not refer ***solely*** to § 24-72-204, C.R.S. ***Any*** "exceptions" to application of CORA's "broad, general policy" favoring disclosure must be "narrowly construed." *Id.* at 589 (citation omitted); *see also* § 24-72-201, C.R.S. The definitional carveout for "criminal justice records" in § 24-72-202, C.R.S. is no different; it is a statutory exception to CORA's disclosure requirements and must be construed narrowly.

In construing and applying CORA and the CCJRA, courts must "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 v. Denver Post Corp.*, 123 P.3d 1166, 1170 (Colo. 2005). Defendant-Appellee's proffered analysis of § 24-72-302(3), C.R.S. fails to do so, effectively ignoring the legislature's intent.

A. Many state agencies require criminal background checks; that does not make them criminal justice agencies.

Defendant-Appellee argues that POST's facilitation, review and evaluation of criminal background checks or arrest records for the purpose of determining whether a peace officer is qualified to serve falls "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.'" Answer Br. 19 (quoting TR 08/03/21, p. 89:6–7). But this ignores the remainder of the statutory text, which connects those activities to "the detection or investigation of crime." § 24-72-302(3), C.R.S. It also ignores what Colorado courts—contrary to Defendant-Appellee's argument that "there are no Colorado cases interpreting 'criminal justice agency,'" Answer Br. 19—have found to be archetypical criminal justice agencies: police departments, criminal courts, and correctional departments. *See In re T.L.M.*, 39 P.3d 1239 (Colo. App. 2001); *Madrigal v. City of Aurora*, 2014 COA 67; *Office of the State Ct. Adm'r v. Background Info. Servs., Inc.*, 994 P.2d 420 (Colo. 1999); *Kopec v. Clements*, 271 P.3d 607 (Colo. App. 2011).

Defendant-Appellee cites a non-binding[1] Attorney General opinion from 1983 purportedly in support of its argument. Answer Br. 19 (citing *John R. Enright*, No. OHR8300666/JR, 1983 WL 167498 (Colo. Att'y Gen. Mar. 24, 1983) (the "1983 AG Opinion")). But that forty-year-old opinion—which indicates that a federal agency that requires background checks as part of its human resources role

[1] Attorney General opinions are entitled to "respectful consideration" but are not binding on courts. *Beinor v. Industrial Claim Appeals Office*, 262 P.3d 970, 974 (Colo. App. 2011) (citation omitted).

to vet federally appointed employees "may" be "similar" to a criminal justice agency—is of little, if any, relevance here. *See id.*

The 1983 AG Opinion was occasioned when the director of the Colorado Bureau of Investigation ("CBI") inquired whether the CBI could share arrest records of certain individuals with the United States Office of Personnel Management ("OPM"). At the time—but not today—disclosure of those records was controlled by § 24-72-308, C.R.S. (1981), which limited their release in most cases to "the person in interest or to a criminal justice agency of this state or to a similar agency of the United States government or any of the states." 1983 AG Opinion, 1983 WL 167498, at *2 (quoting § 24-72-308, C.R.S. (1981)).

As an initial matter, any persuasive authority the opinion might have is substantially undercut by a series of subsequent changes to the relevant law the General Assembly made throughout the 1980s and 1990s—*see, e.g.*, 1988 Colo. Sess. Laws 979; 1992 Colo. Sess. Laws 281—including a transformation from a law "automatically" sealing the records in question to one requiring action on behalf of an acquitted or uncharged defendant. *Compare* 1981 Colo. Sess. Laws 1249, *with* 1988 Colo. Sess. Laws 979. The statute was repealed entirely in 2014, *see* 2014 Colo. Sess. Laws 1377, and the recodified law bears little resemblance to the one in effect in 1983. *See* §§ 24-72-701, C.R.S. *et seq.*

In any event, however, whatever conclusion the Attorney General drew in 1983 about the General Assembly's intent to permit CBI to share certain criminal records with a federal agency like OPM is inapplicable here. Defendant-Appellee ignores the distinctions between OPM's authority and powers—as described in the 1983 AG Opinion—and POST's. Unlike OPM, which was apparently "authorized to conduct background and security investigation[s] of persons appointed or retained in federal positions," *see* 1983 AG Opinion, 1983 WL 167498, at *3, POST lacks any such authority. The legislature has mandated that the POST Board require a background check by means of fingerprint checks ***conducted by*** the CBI and FBI. § 24-31-303(1)(f), C.R.S. Simply put, with respect to background checks, POST reviews the results as part of its duties to ensure that peace officers meet certification qualifications. *See* Opening Br. Section I.B. In short, Defendant-Appellee has contorted a narrow, forty-year-old, distinguishable opinion to support an argument that, if accepted, would make any state agency that requires a background check a "criminal justice agency"—an absurd result that would exclude broad swaths of records from CORA's disclosure requirements.

Similarly unavailing is Defendant-Appellee's claim that POST's facilitation of background checks is similar to that of the Colorado Department of Education ("Department of Education" or "CDE")—an agency that, unlike POST, is expressly mentioned in § 24-72-302(3), C.R.S. The comparison fails for several

reasons. First, there is no statutory (or other) support for Defendant-Appellee's assertion that the Department of Education was included in the CCJRA's definition of "criminal justice agency" ***because*** it conducts background checks for employees. To the contrary, the legislative history makes clear that was ***not*** the reason for CDE's inclusion.

While POST's statutory duties are limited to facilitating, reviewing and evaluating fingerprint-based criminal history checks conducted by CBI and FBI, *see* TR 08/03/21, pp. 47:18–24, 48:3–5; § 24-31-303(1)(f), C.R.S., CDE has a much broader set of statutory responsibilities with respect to the background information they must obtain about their potential employees, *see* § 22-2-119, C.R.S. Indeed, the legislative history of the bill that led to CDE's inclusion within the CCJRA's definition of "criminal justice agency," S.B. 08-208[2], indicates that the General Assembly intended to address a narrow problem

[2] The Colorado Supreme Court has taken judicial notice of the history of a statute. *Indus. Comm'n v. Milka*, 410 P.2d 181, 183–84 (Colo. 1966); *see also* Colo. R. Evid. 201(f). Here, Plaintiffs-Appellants ask this Court to take judicial notice of an April 14, 2008 legislative hearing on S.B. 08-208. This audio testimony is on file with the State Archives, which houses the state's legislative records. *Legislative Records*, Colorado State Archives, https://archives.colorado.gov/collections/legislative-records (last visited June 17, 2022). For the Court's convenience, a verified transcription of that recording is submitted herewith as Exhibit A to the Declaration of Rachael Johnson. Per Colo. R. Evid. 901(b)(7), a public record obtained in any form from the public office where it is kept (such as the State Archives) is sufficient to support a finding that it is authentic, and this Court may consider the issue of authentication of a record for the first time on appeal. *People v. Bernard*, 305 P.3d 433, 434 (Colo. App. 2013).

related to CDE's non-fingerprint-based background checks. *See Hearing on S.B. 08-208, Before the H. Educ. Comm.*, 66th Gen. Assemb., at 2:55 (Colo. Apr. 14, 2008); TR 04/14/08, p. 4:11–16. According to testimony given to the legislature by two Department of Education employees, CDE's non-fingerprint-based background check responsibilities required it to have direct access to information maintained by local law enforcement agencies, some of which were refusing to provide that requisite access to CDE.

> Because the Department of Education was not listed [in the definition of "criminal justice agency"], some local law enforcement offices have interpreted that to mean that the [D]epartment is not intended to be included within that definition . . . . So the Attorney General's Office suggested that we just try to clarify that we do in fact have access to those records for purposes of background checks.

Hearing on S.B. 08-208, Before the H. Educ. Comm., 66th Gen. Assemb., at 7:44 (Colo. Apr. 14, 2008); TR 04/14/08, p. 9:11–18; Johnson Decl. Exhibit A. The CDE is authorized to access background check information about teachers from law enforcement agencies, and is, in turn, statutorily obligated to *provide* it to school districts, charter schools, and other boards that are part of its department. § 22-2-119, C.R.S. POST, however, is not statutorily authorized to work with law enforcement agencies in the same manner that the CDE is required to. Nor is POST statutorily obligated to provide background check information to other offices or departments under POST; it merely reviews the information and revokes or certifies peace officer licenses. Moreover, there is no evidence in the record, nor

in the legislative history, that the General Assembly intended for CDE's inclusion in the CCJRA definition to redound beyond that specific agency. As such, Defendant-Appellee's argument that this Court should assume the legislature's specific, unique intent to make CDE a "criminal justice agency" somehow applies to POST is baseless.

Indeed, that the legislature expressly included the Department of Education, but not POST, in the definition of "criminal justice agency" under § 24-72-302(3), C.R.S. only undercuts Defendant-Appellee's argument. The absence of any "criminal justice agency" language in the relevant statutory authorities applicable to POST (statutory language that exists for the Department of Education), §§ 24-31-301 – 307, C.R.S., strongly supports the conclusion that the General Assembly ***did not*** intend POST to be a "criminal justice agency."

B. POST does not investigate crime; it determines whether to issue, suspend, or revoke peace officers' certifications.

Plaintiffs-Appellants' analysis of POST's duties is based upon the language of the POST Act, Opening Br. 15, and the testimony of Defendant-Appellee Mr. Bourgerie. And it is not, as Defendant-Appellee claims, *see* Answer Br. 23, a misstatement to point out that the investigations POST conducts are of violations of POST's own rules—not violations of the Colorado Criminal Code. Indeed, Mr. Bourgerie himself testified that 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. TR 08/03/21, pp. 50:22–51:3, 53:1–54:1. Mr. Bourgerie admitted that the POST Board cannot prosecute crimes or levy fines. *Id*. at 55:8–11. And, as stated in Plaintiffs-Appellants' Opening Brief, in the two examples Defendant-Appellee offered of POST making a referral to prosecutors, Mr. Bourgerie conceded that a criminal investigation was conducted by the relevant law enforcement agency ***after*** that referral. Opening Br. 20.

Importantly, for each violation Defendant-Appellee now claims to have investigated, there is a POST Rule directly on point. "Providing false information to obtain certification," Answer Br. 24, is a violation of POST Rule 10(a)(III), which states that "[t]he POST Board is authorized to issue POST Basic Peace Officer Certification to any applicant who," *inter alia*, "[t]ruthfully completes and submits the POST Form 1 — Application for Basic Peace Officer Certification." *POST Rules*, POST Manual (May 2022), https://post.colorado.gov/sites/post/files/documents/May%202022%20POST%20Manual.pdf (hereinafter "*POST Rules*"). "Misrepresenting . . . past certifications in other states," *see* Answer Br. 24, is a violation of POST Rule 11, which establishes the rules for the provisional certification of peace officers who obtained training in other states, *see POST Rules* at 209, or of POST Rule 10(a)(III)(A),

which controls the certification of officers previously certified in other states who are ineligible for provisional certification under Rule 11, *POST Rules* at 205. "[M]isrepresenting . . . employment history," *see* Answer Br. 24, is a violation of Rule 10(a)(III), *supra*, and possibly Rule 29, which requires a hiring agency to complete an "employment history check," *POST Rules* at 290. And "altering information on an official report," *see* Answer Br. 24, is something POST would identify as part of its statutory duty, in accordance with POST Rule 32, to record incidences of "untruthfulness" by officers in the POST Database, *POST Rules* at 298; *see* § 24-31-305(2.5), C.R.S. While some of these violations may have been appropriately referred to criminal justice agencies to conduct criminal investigations of potential violations of the Colorado Criminal Code, POST's own authority to investigate them is administrative and limited to violations of the *POST Rules*.

C. POST's status as a type 2 transfer board is irrelevant to whether it is a criminal justice agency.

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. But by Defendant-Appellee's lights, *see* Answer Br. 25, every unit housed within the Attorney General's Office could claim its records are criminal justice records exempted from CORA's disclosure requirements—a self-evidently extreme position that the Attorney General's Office itself, rightly, has not

previously taken. *See* Opening Br. at 18. The district court's failure to make any findings on this issue—and its outright dismissal of a line of questioning on this point by counsel for Defendant-Appellee, TR 08/03/21, p. 16:11–15—is indicative of its irrelevance.

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

A. POST's records custodian did not consider the public interest in disclosure of the POST Database.

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, and credited the custodian's vague, unsupported testimony to the contrary. *See 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."). The district court's factual finding that POST's records custodian considered the public interest, on the record before the district court, is reversible as clear error. The district court's conclusion that POST did not abuse its discretion in denying Plaintiffs-Appellants' requests in their entirety is a conclusion of law reviewable *de novo*. There is no dispute that this issue was preserved for appellate review. Answer Br. 33.

POST argues that there is neither an express nor implied requirement for an agency to set forth its reason for denying a request for records under the CCJRA. *See* Answer Br. 34–35. But, as Defendant-Appellee concedes, "[u]nder 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*** . . . .'" Answer Br. 35 (emphasis added) (quoting § 24-72-305(6), C.R.S.). Here, Mr. Osher requested such a written statement in the body of his request, asking expressly that "[i]f you deny any portion, or all, of this request, please provide me with a ***written explanation of the reason(s)*** for your denial, including a citation to each specific statutory exemption . . . under the law." EX, pp. 106, 164 (emphasis added). The record is clear that POST did not address the balancing test required by *Freedom Colorado Information, Inc. v. El Paso County Sheriff's Department*, 196 P.3d 892 (Colo. 2008), to explain why it denied Mr. Osher's request, as it previously had done in 2015. *See* TR 08/03/21, pp. 45:22–46:23[3]. And a full explanation of the

[3] 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.

reasons for the denial necessarily would require an articulation of that balancing test, if it were conducted. Thus, POST's argument that it can "cho[ose]" whether to address the "law" or the public interest, Answer Br. 35, is misplaced. The law ***is*** the balancing test set forth in *Freedom Colorado Information*. POST was obligated to provide its legal basis for denying inspection before Plaintiffs-Appellants filed suit, § 24-72-305(6), C.R.S., and its response made no mention of the requisite balancing mandated by *Freedom Colorado Information*.

Moreover, Defendant-Appellee mischaracterizes the applicable case law. Quoting *Freedom Colorado Information* for the proposition that "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, Defendant-Appellee contends that a records custodian can balance the public interest at any time, including ***for the first time*** "before the district court." Answer Br. 37. The quoted phrase "before the district court" in *Freedom Colorado Information*, read in context, plainly does not refer to ***when*** the custodian must conduct the requisite balancing; it refers to ***what the record must show*** for purposes of judicial review by the district court. *Freedom Colo. Info.*, 196 P.3d at 904; *see also id.* ("The General Assembly's ultimate purpose in providing for judicial review of discretionary inspection determinations and authorizing the courts in appropriate

circumstances to order the release or redacted release of the record, section 24-72-305(7), C.R.S. (2008), is 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."). Defendant-Appellee's claim that the "proper stage" for consideration of the public interest is "after a lawsuit is filed," Answer Br. 37, is patently wrong. Section 24-72-304(1), C.R.S. necessarily requires the records custodian's discretionary review—including consideration of the public interest—***before*** the decision to grant or deny a CCJRA request is made.

As set forth in Plaintiffs-Appellants' Opening Brief, the record indicates that the requisite balancing of the public interest ***did not occur***.[4] Repeatedly during her testimony, Ms. Hanlon-Leh claimed either to not remember or to have no documentary evidence of even receiving Plaintiffs-Appellants' requests—let alone reviewing them and applying the requisite balancing test. For example, as to The Invisible Institute's request, Ms. Hanlon-Leh testified:

> Q: Is there any electronic or paper record of you reviewing the Invisible Institute's request prior to Mr. Pacheco's denial . . . on August 21, 2019?
>
> A: You know, I don't know what — what we would have. . . .

[4] Contrary to POST's arguments, Plaintiffs-Appellants do not argue that Ms. Hanlon-Leh's testimony that she balanced the public interest was waived. Answer Br. 36–37. The district court erred by crediting that unsupported testimony notwithstanding the vast weight of evidence that she, in fact, did not.

Q: Well, I'm not asking about typically, I'm asking about this request. Did someone email you this request?

A: Again, if it — if it was in an electronic format, which I can't tell by looking at it, it most likely would have been emailed to me. . . .

Q: Did you review your emails in preparation for this te [sic] — for this testimony?

A: I did not.

TR 10/05/21, p. 59:4–22.

And as to the First Osher Request, she testified:

Q: Is there any electronic or paper record of you reviewing Mr. Osher's request between June 4th, when — when it was sent to Mr. Pacheco[?]

[A:] You know, I don't know whether there is. I didn't look to see if there was any record of that review. . . .

. . . .

Q: If the meeting was virtual, wouldn't there be an electronic record of this meeting taking place?

A: You know, I don't know what kind of information we maintain about electronic meetings on Microsoft Teams. I haven't had to look at that.

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 . . . .

TR 10/05/21, pp. 68:14–21, 69:19–70:2.

And as to the Second Osher Request, she testified:

> Q: Is there any electronic or paper record of you reviewing the second Osher request prior to Mr. Pacheco's response on September 9, 2020?
>
> A: You know, I'm not aware of that and only because I don't have my email dated back that long and I haven't checked it.

TR 10/05/21, p. 73:16–21. This testimony, combined with the fact that the public interest was not mentioned in the POST's written denials of those requests, EX, pp. 100, 104, 108, leads to the conclusion that no such balancing occurred.

In sum, even assuming that Ms. Hanlon-Leh's unsupported (and, indeed, contradicted) testimony that she considered the public interest in disclosure of the POST Database supports a finding that she did, she considered the public interest only after Plaintiffs-Appellants' requests were denied[5] in order to persuade the district court that the denials were justified. And, for the reasons stated above, Defendant-Appellee's contention that such post-hoc rationalization is sufficient is wrong; the denial of Plaintiffs-Appellants' requests was an abuse of discretion. Because no balancing of the public interest occurred, this Court should reverse.

B. The district court erred in determining that it would be an undue burden for POST to produce the POST Database.

[5] Indeed, it is not clear from the record what role, if any, Ms. Hanlon-Leh had in responding to the requests at issue. Mr. Osher testified that he only corresponded with Lawrence Pacheco, POST's Director of Communications, about his request. TR 10/05/21, p. 137:12–17. Mr. Osher testified that he never received any correspondence from or had any communications with Ms. Hanlon-Leh. *Id.* at 137:12–17.

Plaintiffs-Appellants do not argue that a records custodian must be a database expert to "properly weigh the relevant factors" in *Freedom Colorado Information*. Answer Br. 40.[6] But to the extent a records custodian determines whether to grant or deny access on the basis of the agency's technological capabilities, the records custodian should, at a minimum, have some familiarity with what those capabilities are or, alternatively, the agency should be required to offer as a witness someone who does. Here, Ms. Hanlon-Leh testified about the purported technological capabilities of the POST Database—including whether it was capable of exporting an Excel spreadsheet or CSV file, and whether it would be unduly burdensome to redact or withhold personal information in fields not sought by Plaintiffs-Appellants—while admitting she lacked any knowledge of its capabilities.[7]

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[6] Defendant-Appellee does not contest Plaintiffs-Appellants' preservation of their objection to Ms. Hanlon-Leh's hearsay testimony, Answer Br. 40–41. Defendant-Appellee, in any event, is incorrect that Plaintiffs-Appellants did not object to her failure to establish personal knowledge of the POST Database's capabilities. *See* Answer Br. 41 n.1. The district court did not permit closing arguments, but Ms. Hanlon-Leh was asked by Plaintiffs-Appellants on cross-examination about her experience with databases and her responses constituted admissions that she lacked familiarity. TR 10/05/21, pp. 88:23–90:2. Thus, the issue is preserved.

[7] As the district court noted, Ms. Hanlon-Leh "only knows what IT tells her." TR 10/05/21, p. 224:7–8.

To the extent the district court accorded weight to Ms. Hanlon-Leh's testimony about what she purportedly was told by POST's information technology staff, the district court should have done the same for the testimony of Mr. Osher, who also spoke to POST's information technology staff and received different information. He testified that, in 2015, he met POST's technical staff and deputy attorney general to discuss the feasibility of accessing the POST Database:

> Q: And do you recall what you were told about access to the POST database at that time?
>
> A: I was originally denied under their discretion and was also told that the database couldn't work the way we believed it could work. But subsequent to meeting with them, we were able to show that what they said was technically not feasible, was feasible. . . .
>
> . . . .
>
> Q: Mr. Osher, what did the technical experts tell you about the feasibility of producing the record?
>
> A: We walked them through how it could be done, they told David Blake it could be done, and then he abruptly called the meeting off and said that they were not going to release these records because they believed it violated the privacy of police officers across the state.

TR 10/05/21, pp. 142:21–143:5, 144:15–21.

The credibility of Mr. Osher's testimony was further bolstered by his knowledge, based on his experience as a journalist, of how databases work; he testified, for example, to personally conducting searches of databases, and to his

familiarity with Colorado state agency databases that store public records. TR 10/05/21, pp. 114:21–115:21.

Ms. Hanlon-Leh's testimony, on the other hand, is inconsistent even with Defendant-Appellee's briefing to this Court. While Defendant-Appellee writes that to produce the requested record, "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," Answer Br. 43, Ms. Hanlon-Leh testified only that "screenshotting would be *one way* we would be able to get information." TR 10/05/21, p. 72:8–9 (emphasis added). Her testimony squares with Mr. Osher's testimony that screenshotting is unnecessary.

Defendant-Appellee also misstates Mr. Stecklow's testimony. Mr. Stecklow testified to the capabilities of the Acadis system, which was the system in place at the time Plaintiffs-Appellants made their requests.[8] And, though the district court found that no one had direct experience with the Benchmark system, *see* Answer Br. 44–45, Mr. Stecklow in fact testified that he was familiar with that system as well, TR 10/05/21, pp. 205:25–206:4. In any event, according to Ms. Hanlon-

[8] Mr. Stecklow testified, for example, that the Wyoming POST's Acadis system was able to produce an Excel spreadsheet in response to a public records request. TR 10/05/21, pp. 204:22–205:10.

Leh's testimony, the POST Database may not even yet be transitioned from Acadis to Benchmark. TR 10/05/21, p. 84:4–12.

Finally, Defendant-Appellee's argument that this Court may not take judicial notice of the public record cited by Plaintiffs-Appellants in a news article is unavailing. 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 a public record in a news article because the record underlying the article is not subject to reasonable dispute. Colo. R. Evid. 201(b). The article[9] links to a public record, *see* Law Enforcement Training and Certification Management System Request for Proposal ("the RFP"),[10] that discusses the Benchmark system's capabilities and 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. The public record is the state's own RFP for Benchmark Analytics and shows that the POST Database needs to "allow all reports to be exported to common formats," including Excel spreadsheets and

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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.

10 The public record in *The Gazette*'s report is the state's own request for proposals for Benchmark Analytics. It is available at https://www.documentcloud.org/documents/21118120-benchmark-records#document/p186/a2067312.

CSV files. *See supra*, *In Lawsuit Over Access To Colorado Police Data*. Here, Defendant-Appellee does not and cannot contest the authenticity of that record. Nor can Defendant-Appellee argue against this Court taking judicial notice of the RFP by citing the testimony of Ms. Hanlon-Leh who testified that "the database is not designed to [produce] aggregate data." Answer Br. 45 (quoting TR 10/05/21, p. 27:4–8). Defendant-Appellee ignores the fact that Ms. Hanlon-Leh also testified that POST offered to produce aggregate data with respect to Mr. Osher's Second CORA request. TR 10/05/21, p. 49:8–22; *id.* at 40:7–8 ("We were able to provide information about aggregate numbers, so the aggregate numbers of police officers[.]"). And, again, her contradictory testimony makes clear that Ms. Hanlon-Leh does not know POST's own technical capabilities.

In sum, the properly judicially noticeable RFP for the POST Database, along with Ms. Hanlon-Leh's lack of personal knowledge about its technological capabilities and the testimony that Defendant-Appellee offered to produce a spreadsheet to Plaintiffs-Appellants, all show that the district court erred in finding that it would be too burdensome or not feasible for POST to export a spreadsheet of the certification and decertification data in the POST Database.

C. The CCJRA is a disclosure statute; the General Assembly did not intend to grant custodians wholly unfettered discretion to withhold records.

Contrary to Defendant-Appellee's position, 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. v. Bd. of Cty. Comm'rs of Cty. of Arapahoe*, 121 P.3d 190, 205 (Colo. 2005) (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)).

Under the CCJRA, while the Colorado Supreme Court has stated that courts should not "redo the custodian's balancing of the interests," it also has made clear that "[t]he General Assembly has underscored its ***preference for disclosure*** of criminal justice records subject to the sound discretion of the custodian by providing that a district court, on review of the custodian's determination, 'shall order the custodian to permit such inspection' ***unless*** the court 'finds that the denial of the inspection was proper.'" *Freedom Colo. Info.*, 196 P.3d at 899 (emphasis added) (quoting § 24-72-305(7), C.R.S.). Under § 24-72-305(7), "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. Info.*, 196 P.3d at 899. Nothing in *Freedom Colorado Information* suggests that a district court is prohibited from ordering redaction if it concludes that the custodian's wholesale denial of access to a criminal justice record is improper.

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

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 21st day of June 2022.

By */s/Rachael Johnson*

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*Admitted *pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June 2022, a true and correct copy of the foregoing **REPLY BRIEF** was served on the following counsel through the Colorado Courts E-File & Serve electronic court filing system:

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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 USE ONLY

Court of Appeals Case No. 2021CA1880

DECLARATION OF RACHAEL JOHNSON

I, Rachael Johnson, declare as follows:

I am an attorney and counsel of record for Plaintiffs-Appellants in this matter. I am a member in good standing of the Bar of the State of Colorado, and am admitted to practice before this Court. I have personal knowledge of the matters stated in this declaration.

1. The legislative history of SB 08-208 is housed in the Colorado State Archives.
2. I submitted a records request for the legislative history of SB 08-208 to the State Archives on June 10, 2022.
3. In response to that June 10 records request, on June 14, 2022, I received from the Colorado State Archives the committee summaries and audio recordings comprising the legislative history of SB 08-208.
4. At my direction, one of the audio recordings I received from the Colorado State Archives—specifically, an audio recording of the testimony before the House Education Committee of the 66th General Assembly on April 14, 2008 at 2:31pm (the "April 14, 2008 Audio Recording")—was submitted to Veritex, a professional transcription service, for transcription.
5. A verified copy of the transcript of the April 14, 2008 Audio Recording that was prepared by Veritex is attached as Exhibit A to this declaration, and cited in Plaintiff-Appellants' Reply Brief as TR 04/14/08.

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted this 21st day of June 2022.

By _____

Rachael Johnson, *attorney for Plaintiffs-Appellants*

Colorado General Assembly Meeting

SB 08-209 House Education Committee

April 14, 2008

2:31 p.m.

Job No.: 5288482

Pages: 1 - 17

Transcribed by: Jackie Scheer

P R O C E E D I N G S

FEMALE VOICE: The following is the testimony for Senate bill 208 from 2008. This is the testimony before the House Committee on Education. This took place on April 14th, 2008, in House Committee Room Number 112. This begins at 2:31 p.m.

MR. CHAIRMAN: We'll move right on to Senate Bill 208.

(Speaking out of hearing, distorted audio.)

MR. CHAIRMAN: Welcome to your committee, Representative Benefield.

MS. BENEFIELD: Thank you, Mr. Chair. Members, I bring to you Senate Bill 208. This bill does three things. First, it clarifies that charter schools shall do (incomprehensible) background checks. Secondly, it -- it fixes the gap in the statutes that help facilitate charter schools being able to do the background checks that they need to do in order when they are hiring. And the third thing just left my brain.

Oh. And the third thing it does is require the Department of Education to notify charter schools or any educational institute when they deny a license through the Colorado licensing, teacher licensing office. So with that, those are the essence of the bill and I would be glad to take any questions at this time.

MR. CHAIRMAN: Questions for the sponsor? Representative Massey.

MR. MASSEY: Thank you, Mr. Chair, Representative Benefield. What are we doing about Bible schools and seminary?

MS. BENEFIELD: We (incomprehensible).

MR. CHAIRMAN: Any further questions of the sponsor?

Seeing none, we'll go right into witness testimony. And we have nobody's opposed so we'll just go through the list. Jim Griffin?

MS. BENEFIELD: Mr. Chair, the two ladies from CDE are here for amendment 03 and 04.

MR. CHAIRMAN: Okay.

(Speaking out of hearing.)

MR. CHAIRMAN: Welcome, Jim. Just state your name and (incomprehensible).

MR. GRIFFIN: Jim Griffin, Colorado League of Charter School chair. So we're here in support of the bill. I will be the first to say that this is at least what I -- this past summer basically we -- we kind of collectively caught a bit of a hole in the background check data print system as it regards certainly in this instance charter school employees, but it can also apply to some other circumstances as well. Essentially this field is broken up into balance checks and fingerprints, and fingerprints are done through the FBI/CDI databases, and that searches felony backgrounds. That (incomprehensible) is done pretty well and is consistent and consistently applied.

There's a second part -- part of the process that kind of gets confused sometimes with fingerprinting, though, and that's the background checks. And this is a check that the Department of Education in Colorado does. Licensure actions taken in other states against teacher candidates that may

be negative licensure actions. They differ from the felony (incomprehensible) taken through the CDI/FBI process. The background check process that CDE does, this is -- that's where we found the hole. A charter school hired somebody that had not gone through the Colorado -- not completed Colorado licensure process. Hired them, the person's background check with their fingerprints were clean, everything was fine. Then after the fact, after the charter school hired this person, this person was denied a licensure in Colorado because of the Negative Licensure Act had been taken in a (incomprehensible) state. The charter school had no idea, had no reason to know that that licensure action had taken place. CDE had no reason to know to go and notify the charter school that they had subsequently (incomprehensible) this thing. So we had a bit of a hole. Now, it came out and things went on course and the school's situation did everything right and it's worked itself out. But clearly identified a bit of a hole in (incomprehensible).

So my -- my suspicion is that there might be some things with this bill -- my -- my, you know, bottom line suspicion is that there may be some things in this bill that are redundant, there might be a bit of overkill in this thing, and I'm all for potentially, you know, coming back and seeing how this all works. But in the short run, if it's a little overkill in the short term in order to make sure that -- that the holes are plugged and everything's cleaned up, then that -- that -- that's all right. And with that, happy to take any questions, but we're -- we certainly support this bill and get in the spotlight.

MR. CHAIRMAN: Questions for the witness?

Seeing none, thank you very much, Jim. Appreciate you coming.

The next two witnesses are here to talk about the amendments, apparently. So (incomprehensible) it -- any further testimony? Anybody in the audience who wishes to testify at this time? And you'll -- we will go to the amendment portion of the hearing and I'll allow

questions for -- for definitions of -- about the amendments from the witnesses who have not yet testified. So, Representative Benefield.

MS. BENEFIELD: Thank you, Mr. Chair. Members, amendment 003 and 004 come to you through CDE, and what they're doing is clarifying for them so they can do the fair background checks with other departments within the state that they couldn't get the information from. So that's what those amendments are doing and I would ask to speak to those two amendments.

005 comes from CEA, and they are just for consistency purposes, changing the definition that comes under the law right now so that we use the same language throughout all of the statutes on definition and negative licensure. So that's what 005 is and that's coming from CEA. So with that, I believe you would like to hear from Anne Barkis and --

MR. CHAIRMAN: -- okay. Why don't you move the amendment first.

MS. BENEFIELD: Thank you. Mr. Chair, I

would love to. I move 003.

MS. SOLANO: Second.

MR. CHAIRMAN: Seconded by Representative Solano.

And Anne Barkis, for some explanation on 003. Also --

MS. GOETZ: Jamie Goetz.

MR. CHAIRMAN: James Get -- is it Jamie Goetz? Jamie Goetz? Please introduce yourselves and who you represent for the record.

MS. BARKIS: Thank you, Mr. Chair, members of the committee. Anne Barkis, Colorado Department of Education.

MS. GOETZ: Jamie Goetz, Director of the Office of Professional Services, Colorado Department of Education.

MR. CHAIRMAN: Thank you.

MS. BARKIS: And just to give the committee some background on this, we were addressed by the Attorney General's Office and they made the suggestion that we may wanna seek this change in statute. Really it's a clarification. Apparently

there have been multiple instances in which the department has had trouble accessing the appropriate background records because some local law enforcement agencies look at the statute, and I would refer you on 004.

(Speaking out of hearing.)

MS. BARKIS: So it was essentially a statute that talks about the criminal justice agency being (incomprehensible) agency at the state; however, it goes on to list some specific examples. Because the Department of Education was not listed in that list, some local law enforcement officers have interpreted that to mean that the department is not intended to be included within that definition of criminal justice agency. So the Attorney General's Office suggested that we just try to clarify that we do in fact have access to those records for purposes of background checks. And Jamie can offer more detail on the process and how it's currently done and -- and what's been the trouble with them.

MR. CHAIRMAN: Jamie, any

(incomprehensible) on 003?

MS. GOETZ: Not unless there's questions.

MR. CHAIRMAN: Questions for the witness?

Seeing none, thank you very much. We might -- why don't you stay there, we'll have other questions, but we shall move on this amendment? It's been moved, it's been seconded. Any further questions?

Is there any objection to this amendment?

Seeing none, that amendment passes. Representative Benefield.

MS. BENEFIELD: I move 004.

MS. SOLANO: Second.

MR. CHAIRMAN: Seconded by Representative Solano, moved by Representative Benefield.

And next, explanation on 004.

MS. BENEFIELD: Again, it's exactly what Anne Barkis was talking about. If you read on line seven, we all thought that it was very, very clear that CDE was an agency of the state, but there were some departments within the justice system that did not think that meant the Department of Education.

So all this amendment is doing is including those words on line seven and eight to be inclusive of Department of Education for those information purposes.

MR. CHAIRMAN: Representative Massey.

MR. MASSEY: Thank you, Mr. Chair. And, Representative Benefield, this does nothing more than just a -- allow for sharing of information, doesn't expand authority or anything?

MS. BENEFIELD: No.

MR. MASSEY: Like that?

MS. BENEFIELD: That's -- that's correct.

MR. MASSEY: That's it.

MR. CHAIRMAN: Any objection to this amendment?

Seeing none, that amendment passes.

MS. BENEFIELD: Thank you.

MR. CHAIRMAN: Representative Benefield.

MS. BENEFIELD: Mr. Chair, I move 005.

MS. TODD: Second.

MR. CHAIRMAN: Seconded by Representative Todd, moved by Representative Benefield. Tell us

about 005.

MS. BENEFIELD: Again, members, this language, a person's educator license or certification -- certification have never been denied, suspended, revoked, or annulled. That language is the consistent language throughout the statute as opposed to negative licensure. So all it's doing is explaining exactly what negative licensure means, using the same language that's throughout the whole statute.

MR. CHAIRMAN: Any further questions about this amendment?

Seeing none, is there any objection to this amendment?

Seeing none, that amendment passes.

Are there any further amendments from anybody on the committee, Representative Benefield?

We're (incomprehensible) the course of this hearing is concluded. We're to the bill for a wrap up, Representative Benefield.

MS. BENEFIELD: Thank you, Mr. Chair. Members, I ask for your support of this. This is

just something to ensure that when we're doing this, educating our children, the adults that are involved in that process have gone through a thorough process and we're consistent for all of our public schools. And we all know charters are public schools. We must make sure that they can get and access the same information that our neighborhood schools can get, too. And with that, I move --

MR. CHAIRMAN: -- wait a second, sorry. I have a -- a -- a quick letter here from Vickie Neal (phonetic) from PTA that I'd -- that we're supposed to read. So I quickly I will. "As we all know, charter schools are public schools and therefore should be held to the accountability of any public schools. When parents send their children off to school in the morning, it's with the confidence they will be taught and cared for by employees who have their best interest at heart. If parents are not assured this, there would be no children in any of Colorado schools. Incidences over the past years have made it common knowledge that anyone who deals with children must be able to

pass a background check. It is the only responsible thing to do and we certainly have the technology to make it happen. Background checks are not only appropriate with the highly mobile employee population but also good business. The potential -- the potential legal fees in judgments imposed by a court on behalf of children (incomprehensible) administrated by staff at school is probably the cost of these background checks. Lack of a background check speaks to negligence with or without an illegal act occurring. PT asks that you vote yes and send up 208 and protect all of our children at this most basic (incomprehensible) level. Sincerely, Vickie Neal, Director of Public Policy, Colorado PTA.

Anything else?

Representative Benefield.

MS. BENEFIELD: Thank you, Mr. Chair. I move Senate bill 208 to the committee of the (incomprehensible) recommendations.

MR. MASSEY: Second.

MR. CHAIRMAN: Seconded by Representative

Massey. Comments?

Did I miss a comment, Representative Gardner?

MR. GARDNER: Yeah, I just had a question for -- for legal drafting. It seems like there's overlap a little bit between here and Gwen Green's 1344. I just wanna make sure that -- it's -- it's nothing to do with but maybe just make sure everything's on the same page when those get through together.

MR. CHAIRMAN: Keep that in mind, Julie. That's (incomprehensible).

Staff, please call the role.

STAFF: Representative Benefield?

MS. BENEFIELD: Yes.

STAFF: C. Gardner?

MR. GARDNER: Yes.

STAFF: A. Cruz (phonetic)?

MR. CRUZ: Yeah.

STAFF: Massey?

MR. MASSEY: Yes.

STAFF: Representative (incomprehensible)

excused.

Edison?

MS. EDISON: Yeah.

STAFF: Representative Rhodes (phonetic) excused.

Scanlan?

MS. SCANLAN: Yes.

STAFF: Summers?

MR. SUMMERS: Yes.

STAFF: Todd?

MS. TODD: Yes.

STAFF: Representative Litmer, excused.

Solano?

MS. SOLANO: Yes.

STAFF: Mr. Chair.

MR. CHAIRMAN: Yes. I -- it's unanimous. Congratulations, Representative Benefield.

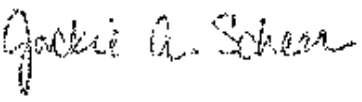
MS. BENEFIELD: Thank you, Committee.

MR. CHAIRMAN: And we're adjourned.

(The recording was concluded.)

CERTIFICATE OF TRANSCRIBER

I, Jackie A. Scheer, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supporting information; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise in its outcome.



JACKIE A. SCHEER

JUNE 17, 2022