

<p>Larimer County, Colorado, District Court Larimer County Justice Center 201 La Porte Avenue, Suite 100 Fort Collins, Colorado 80521-2761 (970) 494-3500</p>	<p>DATE FILED: July 26, 2022 3:09 PM FILING ID: DEEC222FE4BE8 CASE NUMBER: 2022CV30489</p>
<p>BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY, STATE OF COLORADO ON BEHALF OF NICHOLAS COLE (CUSTODIAN OF RECORDS FOR LARIMER COUNTY HUMAN RESOURCES)</p> <p>Applicant</p> <p>v.</p> <p>BIZWEST MEDIA, LLC,</p> <p>Requestor.</p>	
<p>David P. Ayraud, Reg. No. 28530 Larimer County Attorney’s Office 224 Canyon Ave., Suite 200 Post Office Box 1606 Fort Collins, Colorado 80522 Telephone (970) 498-7450 dayraud@larimer.org</p>	<p>Case No. 22 CV</p> <p>Courtroom</p>
<p align="center">APPLICATION PURSUANT TO C.R.S. 24-72-204(6)(a)</p>	

Comes now Applicant, by and through their undersigned counsel, and avers as follows:

INTRODUCTION

1. Requesting Party BizWest Media, LLC submitted a records request to Larimer County pursuant to the Colorado Open Records Act (“CORA”) on April 18, 2022. (Exhibit A)
2. Requesting Party was seeking “1. Records, including correspondence, relating to the job performance of Chris Ashby, former director of the Ranch. 2. Records pertaining to Chris Ashby’s departure from his position. 3. Records, including correspondence, pertaining to the performance and/or departure of Diana Frick from her position at The Ranch.”
3. On April 29, 2022 Larimer County produced all responsive documents to reporter Chris Wood on behalf of BizWest Media, LLC. The response resulted in three emails due to size restrictions on attachments. Larimer County provided 41 attachments in response to the request. (Exhibit B)

4. Among documents that could not be released were the narrative portions of evaluations (“performance narratives”) for Chris Ashby and Diana Frick. For clarification, the evaluation ratings were released, only the performance narratives were withheld. On May 17, 2022 Larimer County was contacted by legal counsel for BizWest Media, LLC to voice their opposition to the denial of the narrative portion of evaluations.

LAW AND PRIOR RULINGS ON PROTECTION OF PERFORMANCE NARRATIVES

5. Pursuant to C.R.S. 24-72-204(6)(a) the court may issue an order protecting the requested documents by finding that disclosure of such information would result in substantial injury to the public interest.
6. Relevant to this determination is an employee’s protected expectation of privacy. While public employees have a narrower expectation of privacy, they still maintain a minimal constitutional right to privacy as it relates to the employee-employer relationship¹. See *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d, 1150, 1156 (Colo. App. 1998), citing *Denver Post Corp. v. University of Colorado* 739 P.2d 874 (Colo. App. 1987).
7. In determining whether disclosure of the requested documents would do substantial injury to the public interest by invading an employee’s constitutional right to privacy, the court must consider: (1) whether the individual has a legitimate expectation of nondisclosure; (2) whether there is a compelling public interest in access to the information; and (3) where the public interest compels disclosure of otherwise protection information, how disclosure may occur in a manner least intrusive with respect to the individual’s right to privacy. *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d, 1150, 1156 (Colo. App. 1998), citing *Denver Post Corp. v. University of Colorado* 739 P.2d 874 (Colo. App. 1987). See also *Denver Pub. Co. v. University of Colorado*, 812 P.2d 682 (Colo. App. 1991) (“This court, in *Denver Post Corp v. University of Colorado*, 739 P.2d 874 (Colo. App. 1987), held that the General Assembly intended a blanket protection for all personnel files, except applications and performance ratings.”)
8. Larimer County has previously litigated a similar issue wherein an individual submitted a CORA request for an employee’s personnel file. While another district court judge’s ruling is not binding upon this court, it would be beneficial in analyzing the same issue within Larimer County. In the previous case, 18 CV 198, Larimer County asserted that the performance narratives are part of the “personnel file” exception under C.R.S. 24-72-

¹ This expectation of privacy has long been held to exist, even for public employees. The Colorado Legislature noted such privacy expectation exists in 1968 when it began the process of adopting the Colorado Open Records Act, when in reference to “Personnel Files” the legislative committee noted, “Except for applications and performance ratings (which are to be made available for public inspection), the personnel files of employees in public agencies may not be released except to the person in interest and to the duly elected and appointed public officials who supervise his work. Upon consent of the person in interest, however, the files may be made available for inspection by others. Here too the disclosure might constitute an invasion of personal privacy.”

204(3)(a) and could not be released, and independently that employees maintain a separate expectation of privacy and that the court should deny release of the performance narratives pursuant to C.R.S. 24-72-204(6)(a).

9. The court in the prior litigation issued an order on both issues. (Exhibit C) The court held that performance narratives do not fall under the “personnel file” exception².
10. In regard to denial of the performance narratives pursuant to C.R.S. 24-72-204(6)(a), the court stated:

The court agrees with Defendants [Larimer County] that public employees have a legitimate expectation of privacy in their personnel files. This expectation of privacy is not, however, without limits. The reasonable expectation of privacy may depend significantly upon the nature of the position. For example, a high ranking or elected official may have a far lesser expectation of privacy given their specific position. An ordinary employee would likely have a far greater expectation of privacy. Further, the job performance of a high ranking public employee may be imbued with significant public interest, resulting in diminished privacy expectations. The opposite is true for a rank and file employee.

11. Ultimately, predominantly because the performance narratives in question were from 1998 through 2006 – a range of 12 to 20 years ago at the time of litigation, the court determined the passage of time diminished the expectation of privacy too much to deny release. However, the court specifically stated:

In making this determination, the court’s order should not be read to conclude that performance narratives must be produced in response to every CORA request. Indeed, the court believes that in most cases, the privacy interests of the public employee in maintaining the privacy of performance narratives will outweigh the public’s right to disclosure. In only very limited circumstances would disclosure be appropriate, and this would need to be determined on a case-by-case basis, considering the factors set forth above. (emphasis in original)

CURRENT APPLICATION

12. Pursuant to C.R.S. 24-72-204(6)(a) the custodian of records is unable to determine if the performance narratives for Chris Ashby and Diana Frick fall within the expectation of privacy sufficiently to deny release as outlined by the previous court. Larimer County believes these employees maintain an expectation of privacy and that the performance narratives **should** be denied, however the statutory section is a determination made by the

² It should be noted Larimer County does not agree with the determination that evaluation narratives do not fall under the “personnel file” exception, and in fact the District Court did not agree as it stated in a footnote “This court does not necessarily agree with the analysis of the court in *Daniels* or to the use of the doctrine of *ejusdem generis* or as to the statutory construction of C.R.S. § 24-72-202(4.5), but is compelled to follow it.” Despite this, Larimer County does not seek a review of the “personnel file” exception in this application.

court and therefore the custodian cannot determine how the court would analyze the expectation of privacy.

13. Therefore, the custodian of records for Larimer County Human Resources, Nicholas Cole, submits this matter to the district court where the record is located for an order permitting the custodian to restrict such disclosure or to determine if disclosure is prohibited.
14. Larimer County requests a hearing at the earliest practical time, as required by statute. The requesting party is being provided a copy of this application and shall be notified of the hearing date and shall have the right to appear and be heard.

WHEREFORE, Applicant requests this court set a hearing date and after the hearing issue an order restricting or prohibiting release of the performance narratives of Chris Ashby and Diana Frick.

Dated: July 26, 2022

LARIMER COUNTY ATTORNEY'S OFFICE

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing APPLICATION PURSUANT TO C.R.S. 24-72-204(6)(a) was served on the following through the Colorado Courts e-file system, on the 26th day of July, 2022:

Rachael Johnson
Local Legal Initiative Attorney (Colorado)
Reporters Committee for Freedom of the Press
rjohnson@rcfp.org

s/ Jessica Ryan