DISTRICT COURT, LARIMER COUNTY, COLORADO Court Address: 201 LaPorte Avenue, Suite 100 Fort Collins, Colorado 80521-2761	DATE FILED: August 10, 2022 4:41 PM FILING ID: F2CD09FC6AC8D CASE NUMBER: 2022CV30489
BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY, STATE OF COLORADO ON BEHALF OF NICHOLAS COLE (CUSTODIAN OF RECORDS FOR LARIMER COUNTY HUMAN RESOURCES) **Applicant**, v. BIZWEST MEDIA, LLC, **Requestor.**	**COURT USE ONLY** Case Number: 2022CV030489 Division: 4A
Attorney for Requestor: Rachael Johnson, #43597 Reporters Committee for Freedom of the Press c/o Colorado News Collaborative 2101 Arapahoe Street Denver, CO 80205 Telephone: (970) 486-1085 Facsimile: (202) 795-9310 rjohnson@rcfp.org	

REQUESTOR'S BRIEF

Requestor, BizWest Media, LLC ("BizWest"), by and through undersigned counsel, hereby responds to the Board of County Commissioners of Larimer County's ("Larimer County" or "County") Application pursuant to § 24-72-204(6)(a), C.R.S. of the Colorado Open Records Act ("CORA"), § 24-72-200, C.R.S. *et seq*., seeking a court order barring disclosure of the narrative portions of two employees' performance evaluations. An in-person hearing is set on this matter for **August 15, 2022 at 3:00p.m.** To apprise the Court of the legal issues likely to arise during the hearing, Requestor sets forth the following:

INTRODUCTION

This case concerns whether the narrative sections of a public employee's performance evaluation or performance ratings report constitute personnel files exempt from CORA disclosure requirements; and, if they are not exempt personnel files, whether disclosure will cause substantial injury to the public interest. As discussed *infra*, the answer to both of these inquiries is no.

First, the performance narratives within the performance evaluations or ratings at issue are public records and not "personnel files" exempt from disclosure under CORA. Again and again, Colorado courts have declined to hold that personnel files include performance evaluations, and the like, under §24-72-202(4.5), C.R.S. *Guy v. Whitsitt*, 469 P.3d 546, 554 (Colo. App. 2020); *Denver Post Corp. v. Univ. of Colorado*, 739 P.2d 874, 878 (Colo. App. 1987); *Daniels v. City of Commerce City*, 988 P.2d 648, 651 (Colo. App. 1999) (only information akin to an employee's home address, telephone number and personal financial information is properly classified as "personnel file"). Accordingly, the narrative sections that Applicant seeks to withhold here must be disclosed under CORA.

Second, because the narrative sections are not exempt personnel file records, Applicant bears the burden of showing that disclosure will cause substantial injury to the public interest. § 24-72-204(6)(a), C.R.S.; *see also Civ. Serv. Comm'n v. Pinder*, 812 P.2d 645 (Colo. 1991). Applicant cannot meet its burden because, contrary to Applicant's contentions, Colorado courts have declined to extend the personnel files exemption to protect an employee's, much less a public employee's, privacy interests. *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d at 1150, 1156 (Colo. App. 1998); *see also City of Boulder v. Avery*, No. 01CV1741, 2002 WL 31954865, at *2–3 (D. Colo. Mar. 18, 2002) (substantial injury to public interest did not prohibit

disclosure of a city judge's performance evaluations). Indeed, in *Freedom Newspapers*, the Court of Appeals held that public employees have "a narrower expectation of privacy" with regard to their employment history and job performance than non-public employees. 961 P.2d at 1156. Here, Applicant cannot meet its burden of showing that disclosure of the narrative personnel records would impose substantial injury to the public interest because Colorado courts have explicitly rejected the rationale advanced by the Applicant.

In sum, because the records at issue are not "personnel files" and their disclosure will not cause substantial injury to the public interest, they are public records that must be disclosed to the Requestor under CORA.

BACKGROUND

On April 18, 2022, editor and publisher of BizWest, Chris Wood, sent a CORA request to Nicholas Cole, the Larimer County custodian, seeking records related to the job performance and departure of Chris Ashby and Diana Frick from their positions at The Ranch, Larimer County Fairgrounds Complex and Event Center[1] ("The Ranch"). Specifically, Mr. Wood requested "Records, including correspondences, relating to the job performance of Chris Ashby, former director of the Ranch"; "Records pertaining to Chris Ashby's [sic] departure from his position";

[1] According to BizWest, "[v]oters approved an expansion of the Ranch complex in 2017. Between then and 2020, the county sought input from stakeholders and worked on plans to phase expansion of the popular complex that now includes the Budweiser Events Center where the Colorado Eagles play, the Larimer County Fairgrounds, and multiple buildings used during the fair and all year long for business and personal events. Tax revenue from the sales and use tax that voters approved began to be collected in January 2020." Ken Amundson, *Proposed Ranch Hotel, Conference Center Draws no Interest*, BizWest, (Apr. 15, 2022), https://bizwest.com/2022/04/15/proposed-ranch-hotel-conference-center-draws-no-interest/

and "Records, including correspondence, pertaining to the performance and/or departure of Diana Frick from her position at the Ranch." Applicant Exhibit A.

On April 27, 2022, Larimer County provided several responsive documents to Mr. Wood; however, the "narrative" sections of performance review documents were heavily redacted and did not disclose any of Mr. Wood's requested information. In its denial, Larimer County advised that:

> The Performance ratings for both Chris Ashby and Diana Frick are included in the responsive documents. The narratives have been redacted pursuant to CRS 24-72-204(3)(a)(II)(A).
>
> Item 2 regarding Chris Ashby's departure from the County - There are no responsive documents.
>
> Item 3, part 2 regarding Diana Frick's departure from the County - Diana is an active employee at Larimer County, therefore no responsive documents exist.

Requestor's Exhibit 1.

Subsequently, on May 17, 2022, BizWest, via undersigned counsel, sent a letter to Mr. Cole in response to the County's denial requesting that the redactions to the narrative sections of the job performance documents be lifted on the grounds that the performance narrative sections were not subject to the "personnel files" exemption of CORA. **Requestor's Exhibit 2**. On May 24, 2022, Larimer County sent a response letter refusing to unredact the performance narratives; in that letter, however, counsel for Larimer County disclosed Mr. Ashby's and Ms. Frick's resignation letters. *See* **Requestor's Exhibit 3**.

It is not in dispute that Mr. Ashby and Ms. Frick are public employees. Mr. Ashby was the director of The Ranch and Ms. Frick was the assistant director of The Ranch. Both were in charge of overseeing the improvements in a master plan set forth by Larimer County Commissioners to expand sections of The Ranch. According to news reports, projects in the

implementation plan were funded by a sales tax that voters extended in 2017 when they approved the facility's master plan. *See* Kevin Duggan, *16 years after Ranch opening, Larimer County envisions an even bigger future for it*, The Coloradoan (Dec. 23, 2019), https://www.coloradoan.com/story/news/2019/12/23/loveland-larimer-county-major-renovations-the-ranch-events-complex/2673601001/. For example, $420,000 of taxpayer money was set aside for renovations to sections of The Ranch complex. *Budweiser Events Center plans $420K in renovations prior to reopening*, BizWest (Feb. 22, 2021), https://bizwest.com/2021/02/22/budweiser-events-center-plans-420k-in-renovations-prior-to-reopening/. Here, the public voted to approve the expansion in 2017, yet a ceremony to celebrate the start of construction for the *first* component of the Ranch Master Plan was announced just days ago on August 5, 2022. **Requestor's Exhibit 4**. The project delays raise questions about the competency of employees who were overseeing the project. Mr. Ashby and Ms. Frick both resigned from their positions as director and assistant director in 2021 and 2022, respectively, before the expansion project could be completed.

ARGUMENT

1. The records at issue are public records and must be disclosed.

CORA declares that it is the public policy of the State of Colorado that "[a]ll public records shall be open for inspection by any person at reasonable times." § 24-72-203(1)(a), C.R.S.; *see Daniels*, 988 P.2d at 650–51. It is well established that under the CORA all records are presumed to be publicly accessible unless specifically exempted by law. § 24-72-203(1)(a), C.R.S.; *Daniels*, 988 P.2d at 650-51. The presumption in favor of disclosure means that any exemptions to CORA must be construed narrowly. *City of Westminster v. Dogan Constr. Co.*,

930 P.2d 585, 592 (Colo. 1997); *Shook v. Pitkin Cnty. Bd. of Cnty. Comm'rs*, 411 P.3d 158, 160 (Colo. App. 2015).

Under CORA, a "public record" is defined, in pertinent part, as any "writing[]" that is "made, maintained, or kept by . . . any agency . . . of the state . . . for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds." *See* §§ 24-72-202(6)(a)(I), 24-72-202(7), C.R.S. Here, all job performance records of Mr. Ashby and Ms. Frick are writings that were made, maintained or kept by Larimer County's human resources office as part of its function to monitor the job performance of its employees. The Applicant has not disputed that the performance narratives at issue are public records, but seeks to apply an exemption to preclude their release.

2. <u>Performance narratives are not subject to the "personnel files" exemption under CORA.</u>

The exemption to CORA for personnel files upon which Applicant relies is inapplicable. By definition, the records requested are not exempt "personnel files" because, as courts have repeatedly confirmed, the exemption set forth at § 24-72-204(3)(a)(II)(A), C.R.S. applies ***only to personal demographic information***. *Jefferson Cnty. Educ. Ass'n. v. Jefferson Cnty. Sch. Dist. R-1*, 378 P.3d 835, 839 (Colo. App. 2016) (sick leave records not the type of personal demographic information included under CORA's personnel file exemption); *Daniels*, 988 P.2d at 650-51 (records relating to complaints of sexual harassment, gender discrimination, and retaliation not the type of personal, demographic information listed in the statute). In fact, § 24-72-202(4.5), C.R.S. defines "personnel files" to "mean[] and include[] home addresses, telephone numbers, financial information, a disclosure of an intimate relationship filed in accordance with the policies of the general assembly, other information maintained because of

the employer-employee relationship."[2] As such, records reflecting narrative sections of performance evaluations are not the sort of personal demographic information subject to the personnel files exemption to CORA.

Indeed, § 24-72-202(4.5), C.R.S. makes it clear that "personnel files" exempt from CORA do not include employee job performance ratings, reviews, evaluations, narratives or the like.[3] For this reason, courts have held that documents or communications concerning an employee's job performance are excluded from the exemption. *Whitsitt*, 469 P.3d at 554 (personnel files exemption does not protect from disclosure "any employment contract … or applications of past or current employees, employment agreements, any amount paid or benefit provided incident to termination of employment, [or] **performance ratings**" (emphasis added) (quoting § 24-72-202(4.5), C.R.S.)); *Denver Post Corp.*, 739 P.2d at 878 (the General Assembly intended a blanket protection for all personnel files, except applications for employment and performance ratings). As pointed out by Applicant, even the Larimer County Court (albeit begrudgingly) held that ***performance narratives*** do not fall under the "personnel files" exemption of CORA. *See* Applicant Application at 3; **Applicant Exhibit C** (emphasis added). If there was any confusion or doubt as to whether "performance ratings" include "performance narratives," the Larimer County Court also reasoned that "the narrative performance evaluations

[2] Colorado courts interpret the "employer-employee" provision narrowly, and limit it ***only*** to the disclosure of "personal, demographic information" or information similar in nature. *Daniels*, 988 P.2d at 651 (interpreting "maintained because of the employer-employee relationship" to be the same type of information as the personally demographic information that is exempt from disclosure); *Jefferson Cnty. Educ. Ass'n*, 378 P.3d at 839 (Colo. App. 2016). It is immaterial if such records are contained in a folder marked "personnel file" or if they are housed outside any such folder.

[3] In this case, the job performance ratings and the performance narratives were incorporated as part of Mr. Ashby's and Ms. Frick's overall Performance of Job Duties report.

are in the nature of 'performance ratings' which are specifically excluded from the definition of personnel files." Applicant Exhibit C at 7.

Therefore, it is well-settled that employee work performance information, such as performance ratings, evaluations, and performance narratives are ***not*** the "personnel files" exempt from CORA; and, as such, the redactions to the performance narratives of Mr. Ashby and Ms. Frick must be lifted, and the unredacted records immediately disclosed to Requestor.

3. <u>Disclosure of a public employee's job performance narratives will not cause substantial injury to the public interest.</u>

Releasing the performance narratives in the job performance report or evaluation of a public employee will not result in substantial injury to the public interest as proscribed under §24-72-204(6)(a), C.R.S. Section 24-72-204(6)(a) which states:

> If, in the opinion of the official custodian of any public record, disclosure of the contents of said record would do substantial injury to the public interest, notwithstanding the fact that said record might otherwise be available to public inspection or if the official custodian is unable, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if disclosure of the public record is prohibited pursuant to this part 2, the official custodian may apply to the district court of the district in which such record is located for an order permitting him or her to restrict such disclosure or for the court to determine if disclosure is prohibited.

The custodian bears the burden to show that the release of the record will cause substantial injury to the public interest. § 24-72-204(6)(a), C.R.S.; *Civ. Serv. Comm'n*, 812 P.2d 645. This is a burden that the Applicant cannot meet.

Under Colorado law such a showing—substantial injury to the public interest—requires that the unique circumstances surrounding a particular record must be "so extraordinary" that the legislature can be presumed not to have reasonably anticipated such a set of circumstances. *Bodelson v. Denver Publ'g Co.*, 5 P.3d 373, 377 (Colo. App. 2000) ("the substantial injury to the

public interest exemption contained in § 24-72-204(6)(a) is to be used only in those extraordinary situations which the General Assembly could not have identified in advance . . . The custodian of records has the burden to prove an extraordinary situation ***and*** that the information revealed would do substantial injury to the public.")(emphasis added); *Freedom Newspapers, Inc. v. Bowerman*, 739 P.2d 881 (Colo. App. 1987); *Denver Publ'g Co. v. Dreyfus*, 520 P.2d 104 (Colo. 1974). Merely having a "good faith belief" is insufficient to warrant non-disclosure or avoidance of the mandatory attorney's fees provision. *See* § 24-72-204(6)(a), C.R.S. Courts have identified "extraordinary circumstances" to include the unique public grieving in the immediate aftermath of the Columbine High School massacre to justify the non-disclosure of victims' autopsies reports. *Denver Publ'g Co.*, 5 P.3d 377-79[4]. The privacy of a public employee is not such an extraordinary circumstance. It, for example, did not prevent the Court of Appeals in *Freedom Newspapers* from ordering the disclosure of individual names and amounts paid by public employees under the municipal utility's program. *Freedom Newspapers*, 961 P.2d 1150; *see also Avery*, 2002 WL 31954865, at *3 (The substantial injury to public interest exception did not prohibit disclosure of a city judge's performance evaluations.). Although the Court of Appeals found that an employee has a minimal privacy interest, it also found that a *public employee* has a *narrower* privacy interest in comparison to other citizens. *Freedom Newspapers*, 961 P.2d at 1156 (emphasis added). Putting this holding in the context of this case, as public employees, Chris Ashby and Diana Frick are entitled to only a narrow

[4] The Court in *Denver Publ'g Co.* held that the substantial injury to the public interest exception does not apply to an entire category of records to create a categorical exemption. *Denver Publ'g Co.*, 5 P.3d at 379 (…"[W]e do not hold, that every public record that is deemed highly offensive or objectionable must or even may be categorically exempt. Rather, we conclude that each petition must be decided on a case-by-case analysis.").

privacy interest in the records at issue, for which there is plainly no extraordinary public interest in protection.

Moreover, CORA contains no exception for disclosure of information that may violate an individual's privacy interest. *Todd v. Hause*, 371 P.3d 705, 711 (Colo. App. 2015). Nevertheless, when determining whether the disclosure of a record under CORA invades an employee's privacy interest such that its disclosure results in a substantial injury to the public interest, the Court considers several factors:

> (1) whether the individual has a legitimate expectation of nondisclosure; (2) whether disclosure nonetheless is required to serve a compelling public interest; and (3) if so, how disclosure may occur in the least intrusive manner with respect to the individual's privacy right.

Id. at 712 (citing *Denver Post Corp.*, 739 P.2d at 878–79).

First, while courts have recognized that public employees have a narrow legitimate expectation of privacy in their "personnel files," *Whitsitt*, 469 P.3d at 554, such expectation is inapplicable in this case because, as discussed *supra*, performance narratives are not personnel files. Moreover, public employees have a "narrower expectation of privacy than other citizens," such that disclosure of their job performance records would not cause a substantial injury to the public interest. *Freedom Newspapers*, 961 P.2d at 1156. For similar reasons, in *Todd*, the Court confirmed that "expectations of privacy are legitimate if the information which the state possesses is highly personal or intimate." *Todd*, 371 P.3d at 713(quoting *Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995)); *Avery*, 2002 WL 31954865, at *2–3 (job performance evaluations are not "intimate, personal information at all"). In citing *Freedom Newspapers*, the *Todd* court pointed out that public employees' pension rights were not "so intimate, personal, or sensitive that disclosure of such information would be offensive and objectionable to a

reasonable person." *Todd*, 371 P.3d at 713. Here, the performance narratives of a public employee's job performance report are also not personal matters or sensitive such that disclosure would be offensive to a reasonable person. *Cf. Martinelli v. District Court*, 612 P.2d 1083, 1091 (Colo. 1980) (disclosure of a personal sexual relationship is intimate, or sensitive information that need not be disclosed). In releasing the performance evaluations of the Chief Judge of a municipality, the *Avery* Court reasoned that the judge "is a person with a direct impact on the lives of a great many people in the community. When that person abruptly resigns there is a valid, civic-based curiosity about why that occurred. It is not a matter of unwarranted or gossip-driven interest. Given that there can be only a miniscule, legitimate expectation of privacy about how one performs in such a public position and given that there is a legitimate and compelling public interest in the same topic, the balance here favors disclosure. *Avery*, 2002 WL 31954865, at *3.

If the individual does not have a reasonable expectation of privacy in the nondisclosure then the inquiry ends, and the records at issue must be disclosed to the requestor. *Id.* Since no reasonable expectation of privacy exists in performance narratives, the inquiry should end here, and the records released to the Requestor. Nonetheless, for the purposes of argument, should the Court find that there is a legitimate expectation of privacy in "performance narratives"—which there is not—the Court must weigh the second and third factors.

The second factor weighs whether the disclosure of the record is required to serve a compelling public interest. Here, there is a compelling public interest in understanding how taxpayer dollars are being used with respect to the completion of a voter-approved project. In this case, the public has a compelling interest in knowing why—almost five years after voters approved of the expansion of the Ranch—Larimer County only recently broke ground on the

first of the promised improvements, **Requestor's Exhibit 4**, why expansions and new developments promised to voters have faltered, been delayed or drawn no interest, and whether the folks put in charge of the project were competent enough to manage the expansion project. Notably, the court in *Whitsitt* held that "the public has an interest in knowing… employee work performance." *Whitsitt*, 469 P.3d at 554; *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 897 (Colo. 2008) ("The public has a legitimate interest in knowing how law enforcement officers behave while doing their jobs…"(citation omitted)). The public interest in a public employee's job performance is even stronger when individuals, in a high-ranking positions, such as Mr. Ashby and Ms. Frick, resign from a taxpayer supported project before its completion. Finally, courts have recognized that there is compelling public interest in knowing that public entities conduct internal reviews efficiently, and accurately. *Daniels*, 988 P.2d at 651-652. In this case, the public has an interest in knowing whether a state or local agency's internal review processes, such as the job performance evaluations in this case, are conducted fairly and accurately. Because there is a compelling public interest in access to work performance records of a public employee, this prong of the *Todd* test is met in favor of disclosure.

As to the final prong—"how disclosure may occur in the least intrusive manner with respect to the individual's privacy right"— a court may review the material at issue *in camera* to determine if its disclosure is appropriate. *Martinelli*, 612 P.2d at 1092. If information is of a highly-sensitive nature, the court may order redactions. *See, e.g.*, *Freedom Colo. Info.*, 196 P.3d at 900 n.3 (in redaction, "the legislature has given the custodian an effective tool to provide the public with as much information as possible, while still protecting privacy interests when deemed necessary," but "[a] custodian should redact sparingly"); *Land Owners United, LLC v.*

Waters, 293 P.3d 86, 99 (Colo. App. 2011) (holding that District Court has "discretion to direct redaction of specific confidential information"). But as discussed above, since the Applicant cannot meet the first prong of this test, and the second prong weighs in favor of disclosure, this Court must release the material without redactions.

In sum, because a public employee has a "at least a minimal privacy interest," albeit a narrower one than that of non-public employees, in their performance evaluations, rankings, narratives, or the like; and, because the job performance of a high-ranking employee, in this case a director and assistant director of a multi-million-dollar public project using taxpayer funds, invokes significant public interest, the Court must find that Mr. Ashby's and Ms. Frick's performance narratives must be disclosed to the public.

CONCLUSION

For the reasons herein, Requestor respectfully requests that the Court find that the performance narratives are not "personnel files", and that the disclosure of these records will not cause substantial injury to the public interest. Thus, the records in this case are public records and the Court must order that the redacted sections of the Performance of Job Duties reports at issue be unredacted and available to Requestor for inspection and copying.

Respectfully submitted this 10th day of August 2022.

By */s/Rachael Johnson*

Rachael Johnson
Reporters Committee for Freedom of the Press
Attorney for Requestor BizWest Media, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August 2022, a true and correct copy of the foregoing **REQUESTOR'S BRIEF** was served on the following counsel through the Colorado Courts E-File & Serve electronic court filing system, pursuant to C.R.C.P. 121(c), § 1-26:

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