

**DISTRICT COURT, ELBERT COUNTY,
COLORADO**

Court Address:
751 Ute Ave.
Kiowa, CO 80117

Plaintiffs:

AARON ADELSON, reporter at *KUSA-9 News*; and
KUSA-9 NEWS, a division of MULTIMEDIA
HOLDINGS CORP.

v.

Defendant:

MICHELLE M. OESER, in her official capacity as Clerk
of the Town of Elizabeth.

Attorney for Plaintiff:

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COURT USE ONLY

Case Number:

Division:

COMPLAINT/APPLICATION FOR ORDER TO SHOW CAUSE

Plaintiffs Aaron Adelson, a reporter for KUSA-9 News, and Multimedia Holdings Corporation d/b/a KUSA-9 News, an affiliate of the National Broadcasting Corporation (“NBC”), by and through undersigned counsel, hereby state as follows:

INTRODUCTION

1. In this civil action under the Colorado Open Records Act (“CORA”), §§ 24-72-201 *et seq.*, C.R.S., Plaintiffs seek access to a public record in the possession, custody, or control of the Town of Elizabeth (the “Town”), namely, a memorandum created by the Town regarding former Town Police Chief Melvin Berghahn (the “Berghahn Memo”) and related disciplinary documents in the Town’s possession. Plaintiff seeks an order directing the Town records

custodian to appear and show cause why she should not make this public record available to Plaintiffs and the public.

2. The record at issue is a public record that was “made, maintained or kept” by the Town “for use in the exercise of functions required or authorized by law or administrative rule” and the content of the record solely concerns the conduct of former Town Police Chief Melvin Berghahn acting in his official capacity. *See* § 24-72-202(6)(a)(I), C.R.S.

3. As more fully set forth *infra*, the Berghahn Memo is not an exempt personnel file because the exception only applies to ***personal demographic information***. § 24-72-204(3)(a)(II)(A), C.R.S. Section § 24-72-202(4.5), C.R.S. of the CORA defines personnel files to include “home addresses, telephone numbers, financial information, a disclosure of an intimate relationship filed in accordance with the policies of the general assembly, [and] other information maintained because of the employer-employee relationship.” Colorado courts interpret this provision narrowly and limited ***only*** to the disclosure of “personal demographic information” or information similar in nature. *Daniels v. City of Commerce City*, 988 P.2d 648, 651 (Colo. App. 1999) (interpreting “maintained because of the employer-employee relationship” to be the same type of information as the demographic information that is exempt from disclosure); *Jefferson Cty. Educ. Ass’n v. Jefferson Cty. Sch. Dist. R-1*, 378 P.3d 835, 839 (Colo. App. 2016). Plaintiffs seek a final memorandum regarding disciplinary action of a police chief, which falls outside of the “personnel files” exemption.

4. Accordingly, Plaintiffs respectfully request that the Court enter an Order directing Defendant to allow Plaintiffs to inspect and copy the Berghahn Memo and related disciplinary documents in the Town’s possession, as requested by Plaintiffs, with any necessary redactions. And, as further set forth herein, the Court should also direct Defendant to waive any costs associated with retrieving the requested record, and award Plaintiffs reasonable costs and attorney’s fees associated with this matter, pursuant to § 24-72-204(5), C.R.S.

JURISDICTION & PARTIES

5. This Court has jurisdiction over the claims herein under section § 24-72-204(5), C.R.S. of CORA, §§ 24-72-201 et seq., C.R.S. On information and belief, the public record that is the subject of this action can be found in this judicial district.

6. Plaintiff Aaron Adelson is a reporter for KUSA-9 News, an NBC affiliate. Mr. Adelson is a citizen of the State of Colorado in the county of Denver.

7. Plaintiff KUSA 9News is an NBC affiliated, FCC-licensed television station with its principal place of business at 500 E. Speer Blvd., Denver, CO 80203. KUSA 9News is a division of Multimedia Holdings Corporation owned by Tegna, Inc.

8. The record at issue was made, maintained and kept by Town. *See* § 24-72-202, C.R.S.

FACTS

9. On August 11, 2023, Mr. Adelson submitted a CORA request to the Town seeking access to the disciplinary records of former Town police chief Melvin Berghahn (hereinafter “Plaintiff’s Request”). Adelson sought:

[R]ecords related to the employment of Melvin Bergahn [sic]. We are requesting:

- 1) His job application with Elizabeth Police
- 2) Any disciplinary history – Including any associated documents
- 3) His termination/resignation letter

A true and correct copy of Plaintiff’s Request is attached hereto as Exhibit A and incorporated by reference herein.

10. The Town responded to Plaintiff’s Request on August 15, 2023 denying Plaintiffs access to Berghahn’s disciplinary records, stating:

The town is able to provide you with [Berghahn’s] job application, and attached to this correspondence is a redacted copy of the application. However, the Town is unable to provide you with the remainder of the documents...

The additional information you seek, to the extent any such information may exist, is contained in his personnel file, and the Town is prohibited from disclosing such documents pursuant to C.R.S. 24-72-204(3)(a)(II)(A) of the Act. Although the Town is prohibited from disclosing information in the personnel files of [former] Town employees, pursuant to C.R.S. 24-72-204(3)(a)(II)(A), his employment application is provided to you because the application is excluded from the definition of “personnel file” pursuant to C.R.S. 24-72-202(4.5), and thus may be disclosed (emphasis added).

(emphasis added) A true and accurate copy of the denial is attached hereto as Exhibit B.

11. Upon information and belief, the only document responsive to Plaintiff’s Request to which the Town denied access is a memorandum created by the Town regarding former Town Police Chief Berghahn’s disciplinary record (the “Berghahn Memo”).

12. On August 23, 2023, Mr. Adelson appealed the denial, stating in an email to Ms. Oeser that the disciplinary records requested were not subject to the “personnel file” exemption of §24-72-204(3)(a)(II)(A), C.R.S. and that “personnel files” are limited to “personnel demographic information” and defined “narrowly” under § 24-72-202(4.5), C.R.S. in accordance with the holdings in *Daniels v. City of Commerce City*, 988 P.2d 648, 651 (Colo. App. 1999) and *Jefferson Cty. Educ. Ass’n v. Jefferson Cty. Sch. Dist. R-1*, 378 P.3d 835, 839 (Colo. App. 2016). A true and accurate copy of Plaintiffs’ appeal is attached hereto as Exhibit C.

13. On August 29, 2023, Mr. Adelson received a letter response to his appeal from Deputy Town Clerk Harmony Malakowski which stated, in part:

Nothing in the Act or cases you cite support such a narrow interpretation of the personnel files exception when applied to the records sought by you in this circumstance.

More specifically, no Colorado court case stands for the proposition that any disciplinary records, to the extent such records may exist, are not included in the definition of a personnel file pursuant to C.R.S. 24-72-202(4.5). The *Town believes it is statutorily prohibited from releasing such records* unless directed to do so by the Elbert County District Court, or unless you are able to obtain a waiver from the individual whose privacy interest is implicated by your request, Mr. Berghahn.

...

Accordingly...**please advise the Town pursuant to C.R.S. 24-72-204(5)(a) if you intend to apply to the Elbert County District Court for an order regarding your request.**

(emphasis added). A true and accurate copy of Defendant’s August 29, 2023 letter is attached hereto as Exhibit D.

14. On August 30, 2023, Mr. Adelson again responded to the August 29, 2023 letter stating, among other things, that the disciplinary files requested are not “personnel files” and that “It is also well established that any *exceptions* to the CORA must be “narrowly construed.”

A true and accurate copy of Plaintiffs’ second appeal is reattached hereto as Exhibit C.

15. On information and belief, there was no further reply from the Town.

16. On September 13, 2023, counsel for the Town, Mr. Corey Hoffmann, filed an application with this Court on behalf of Defendants pursuant to § 24-72-204(6)(a), C.R.S. alleging that a court order would be required in order to release the Berghahn Memo, and any other relevant disciplinary records, and that the Town’s custodian was unable to make a reasonable decision under § 24-72-204(6)(a), C.R.S. as to the release of the record due to privacy

concerns. A true and accurate copy of the “September 13, 2023 application/petition packet” re Case no. 2023CV30082 is attached hereto as Exhibit E.

17. In the September 13, 2023 application/petition packet, in the Affidavit of Town Clerk Michelle Oeser, she affirmed, three times that the Town was denying the request on the ground that the records were personnel files: “I withheld the remaining responsive documents because the documents appeared to be “personnel records under CORA because those records are part of Mr. Berghahn’s personnel file,” *Id.* at 18, ¶ 5; “Believing the responsive records to be “personnel records,” which are prohibited from disclosure under CORA, I withheld those records,” *Id.* at ¶ 6; “Mr. Adelson sent an email challenging *the Town’s denial of those portions of his request* withheld as “personnel files” under CORA, *Id.* 19 at ¶ 7. Yet, Ms. Oeser subsequently states in the Affidavit that she was “unable to determine” if disclosure was prohibited as a “personnel record[.]”. *Id.*

18. The Berghahn Memo is attached to Defendant’s § 24-72-204(6)(a), C.R.S. action and filed under seal. Plaintiffs have not received or reviewed the Berghahn Memo.

19. In its § 24-72-204(6)(a), C.R.S. action, Defendant alleges: “...the Town believes, after exercising reasonable diligence and after reasonable inquiry, that a request for a portion of a ‘personnel file,’ as that term is defined in CORA, must be denied based on the privacy interests of the former employee at issue.” *See* Exhibit E at ¶ 6.

20. On September 29, 2023, Plaintiffs provided written notice to Defendant’s counsel Mr. Corey Hoffmann as required by § 24-72-204(5)(a), C.R.S.

21. The parties subsequently met and conferred pursuant to § 24-72-204(5)(a), C.R.S.

APPLICABLE LAW

22. The Colorado Open Records Act (“CORA”), §§ 24-72-201 et seq., C.R.S., declares that it is the public policy of the State of Colorado that “all public records shall be open for inspection by any person at reasonable times,” unless specifically excepted by statute, and that there is a general presumption in favor of public access to records. *See Daniels v. City of Commerce City*, 988 P.2d 648, 650–51 (Colo. App. 1999); § 24-72-203(1)(a), C.R.S.

23. Under CORA, a public record “means and includes all writings made, maintained, or kept by the state, any agency, institution, a nonprofit corporation incorporated pursuant to section 23-5-121(2), C.R.S., or political subdivision of the state, or that are described in section 29-1-902, C.R.S., and held by any local-government-financed entity for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.” § 24-72-202(6)(a)(I), C.R.S. (emphasis added).

24. “Writings” are defined under CORA to include “all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics.” § 24-72-202(7), C.R.S. Writings also includes “digitally stored data,

including without limitation electronic mail messages, but does not include computer software.” § 24-72-202(7), C.R.S.

25. Under § 24-72-204(3)(a)(II)(A), C.R.S. of the CORA, the personnel files exception applies only to personal demographic information.

26. Section § 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, [and] other information maintained because of the employer-employee relationship.” *Daniels*, 988 P.2d at 651 (interpreting “maintained because of the employer-employee relationship” to be the same type of information as the demographic information that is exempt from disclosure).

27. If the custodian denies access to a public record, the requesting entity may file an application in court—after notice and meet and confer with custodian who denied inspection—directing the custodian to allow access. § 24-72-204(5)(a), C.R.S. A hearing on the application must be held at the earliest practical time. § 24-72-204(5)(a), C.R.S.

28. § 24-72-204(6)(a), C.R.S. is limited to mandatory non-disclosure provisions set forth in § 24-72-204(3)(a), C.R.S., which Defendant has not alleged

29. The custodian under CORA must pay the requesting party’s reasonable costs and attorney’s fees unless the court determines that denial of access was proper. § 24-72-204(5)(a)–(b), C.R.S.

30. If defendant does not meet its burden of proving that they are “unable to determine” whether disclosure is prohibited, a court must award mandatory attorney’s fees. § 24-72-204(6)(a), C.R.S.; *Colorado Republican Party v. Benfield*, 337 P.3d 1199, 1208-09 (Colo. App. 2011).

FIRST CLAIM FOR RELIEF

Request for Access to Public Records under CORA (§ 24-72-204(5), C.R.S.)

31. Paragraph Nos. 1 through 30 above are incorporated herein by reference and made a part hereof with the same force and effect as if fully set forth herein.

32. The Berghahn Memo constitutes “writings” under CORA and therefore constitutes a public record under CORA. *See* § 24-72-202(6)(a)(I), C.R.S.; § 24-72-202(7), C.R.S. as described under statute.

33. The Berghahn Memo was made, maintained, and kept by the Town for use in the exercise of Defendant’s official function of documenting Berghahn’s disciplinary history acting in his official capacity. § 24-72-202(6)(a)(I), C.R.S.

34. The Berghahn Memo falls outside the “personnel files” exemption to CORA’s public access requirements and is not otherwise exempt from disclosure under any of the statutory exemptions set forth in the CORA or in any other state or federal statute. *See* § 24-72-204 (3)(a)(II)(A), C.R.S.

35. The Berghahn Memo does not meet the definition of a “personnel file” under § 24-72-202(4.5), C.R.S. which 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, [and] other information maintained because of the employer-employee relationship” or personal demographic information.

36. Because Defendant has denied a valid request under the CORA for inspection of the requested public records, Plaintiffs are entitled to an Order from the Court directing Defendant to show cause “at the earliest practical time” why they should not provide access to the Berghahn Memo. *See* § 24-72-204(5), C.R.S.

37. Plaintiffs provided Defendant with written notice, pursuant to § 24-72-204(5), C.R.S., prior to filing this Complaint and Application for Order to Show Cause.

38. Plaintiffs are entitled to an award of reasonable attorney’s fees and costs in enforcing the right of public access to these public records, pursuant to § 24-72-204(5)(b), C.R.S., should the Court find that Defendant’s denial of access was improper.

SECOND CLAIM FOR RELIEF

Hearing under § 24-72-204(5), C.R.S.
(§ 24-72-204(5), C.R.S.)

39. Paragraph Nos. 1 through 38 above are incorporated herein by reference and made a part hereof with the same force and effect as if fully set forth herein.

40. Defendant has improperly filed a petition under § 24-72-204(6)(a), C.R.S.

41. Such a petition is only to be use in circumstances in which a custodian is, in good faith, “unable to determine” if disclosure of the public record is permitted, *id.*, but Defendant has made a determination and denied Plaintiffs’ Requests on four occasions.

42. Defendant’s August 15, 2023 denial of Plaintiffs’ Request indicated the Town had already determined that the public record at issue is an exempt “personnel file.” *See* Exhibit B.

43. Defendant’s August 29, 2023 letter denial of Plaintiff Adelson’s appeal indicated the Town had, again, already determined that the public record at issue is an exempt “personnel file.” *See* Exhibit D.

44. Defendant’s September 13, 2023 petition to this Court further indicated that the Town determined that disclosure “*must be denied* based on the privacy interests of the former employee at issue.” See Exhibit E ¶ 6.

45. And, in the Affidavit of Town Clerk Michelle Oeser, she affirmed, three times that the Town was denying the request on the ground that the records were personnel files. *Id.* at 18, ¶ 5, ¶ 6; *Id.* 19 at ¶ 7.

46. Thus, because the custodian has made its determination after “reasonable inquiry” and denied Plaintiff’s requests on *four* separate occasions, § 24-72-204(6)(a), C.R.S. is not applicable because the custodian has already made its determination, and this Court should proceed under § 24-72-204(5)(a)-(b), C.R.S.

47. Further, § 24-72-204(6)(a), C.R.S. is limited to mandatory non-disclosure provisions in § 24-72-204(3)(a), C.R.S.; thus, Defendant must point a mandatory nondisclosure provision, or she cannot meet the burden of showing that the custodian was “unable to determine” whether she was prohibited from releasing The Berghahn Memo to Plaintiff.

PRAYER FOR RELIEF

WHEREFORE, pursuant to § 24-72-204(5), C.R.S., Plaintiffs pray that:

- a. The Court proceed under § 24-72-204(5), C.R.S.; or alternatively
- b. The Court set a status conference and briefing schedule for the parties to determine whether to proceed under § 24-72-204(5), C.R.S. or § 24-72-204(6)(a), C.R.S.¹; and
- c. The Court enter an Order directing Defendant to provide Plaintiffs access to the Berghahn Memo in the format requested by Plaintiffs because § 24-72-204(3)(a)(II)(A), C.R.S. is not applicable; and
- d. The Court enter an Order awarding Plaintiffs their costs and reasonable attorney’s fees associated with the preparation, initiation, and maintenance of this action, as mandated by § 24-72-204(5)(b), C.R.S.; and
- e. The Court award such other and further relief as the Court deems proper and just.

¹ The Court has set a 30 minute status conference for December 15, 2023 in the related matter brought by Petitioner Town of Elizabeth and Aaron Adelson as an Interested Party: Case No. 2023CV30082. Should the court find that the parties must proceed under 24-72-204(6)(a), C.R.S.—it should not—please let this complaint serve as the response to the Petitioner’s September 13, 2023 Petition for which Plaintiff signed a waiver of service on September 27, 2023.

Respectfully submitted this 6 day of October 2023.

By /s/Rachael Johnson

Rachael Johnson
Reporters Committee for Freedom of the Press
*Attorney for Plaintiffs, Aaron Adelson &
KUSA/Multimedia Holdings Corporation.*

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October 2023, a true and correct copy of the foregoing **COMPLAINT/APPLICATION FOR ORDER TO SHOW CAUSE** as 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:

/s/Rachael Johnson _____

Rachael Johnson

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