

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-03204-RBJ-NRN

LORI FRANK,

Plaintiff,

v.

CITY OF FORT COLLINS, a municipality; and  
JEROME SCHIAGER, former Deputy Chief of Police, in his individual capacity,

Defendants.

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**DEFENDANT CITY OF FORT COLLINS' OPPOSED MOTION TO MAINTAIN  
LEVEL 1 RESTRICTION FOR DOCS ## 60-2 THROUGH 60-4**

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Defendant City of Fort Collins, by and through its attorneys Cathy Havener Greer, and Kathryn A. Starnella, of Wells, Anderson & Race, LLC and Jenny Lopez Filkins, Senior Assistant Attorney, City of Fort Collins, hereby asks the Court to maintain the Level 1 restriction for three documents (Docs. ## 60-2, 60-3, and 60-4) filed under restriction on November 8, 2019, pursuant to D.C.COLO.LCiv R 7.2. These three documents are confidential executive summaries for investigations of certain workplace complaints made by non-parties. These summaries are marked, “Attorney’s Eyes Only” and “Confidential.”<sup>1</sup>

D.C.COLO.LCivR 7.1 conferral: On November 27, 2019, undersigned counsel conferred with Plaintiff’s counsel and this motion is opposed.

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<sup>1</sup> On November 4, 2019, the Court ruled that only the “Confidential” designation applies to these documents. (Doc. # 54 at 2).

### **PRELIMINARY STATEMENT**

On November 8, 2019, Plaintiff’s counsel filed three confidential executive summaries for investigations of certain workplace complaints made by non-parties. (Docs. ## 60-2 through 60-4).

The Protective Order in this case limits the disclosure of “Confidential Material” to certain individuals and entities. (Doc. # 32, ¶ 6.) It does not permit disclosure of “Confidential Material” to the public. The Protective Order also directs parties to file any “Confidential” documents “as a restricted document in accordance with the requirements of D.C.COLO.LCivR 7.2.” *Id.* at ¶ 14.

Under D.C.COLO.LCivR 7.2(b), Level 1 restriction limits access to the parties and the Court. To maintain the Level 1 restriction, a party must file a motion to restrict within 14 days of the restricted document’s filing. D.C.COLO.LCivR 7.2(e). That deadline was November 22, 2019. On the City’s motion, the Court extended the deadline to and including December 2, 2019. (Doc. # 68.)

### **NATURE OF THE CASE**

This case concerns claims of gender discrimination and pay inequity. Plaintiff Lori Frank is a Crime Analyst for the City of Fort Collins Police Services. *See* Complaint, Doc. # 2, at ¶ 37. For approximately 14 years, she allegedly received high praise for the quality of her work. *Id.* at ¶ 37. When she was assigned to a different supervisor, Defendant Jerome Schiager, in November 2015, however, she received constructive criticism to improve the quality and accuracy of her work. *Id.* at ¶ 82. Defendant Schiager eventually placed Plaintiff Frank on a performance improvement plan in November 2016 because of her consistent errors and lack of analysis. *See id.* at ¶¶ 107, 117-19, 123, 124.

Ms. Frank speculatively attributes Defendant Schiager's constructive criticism to gender discrimination and retaliation for a complaint she made about him two years prior. *Id.* at ¶¶ 70-74; *see also* ¶¶ 235, 242-43. She theorizes that a culture of gender discrimination and pay inequity pervades the City's Police Services.

### STANDARD OF REVIEW

It is well established that the public has a general right to inspect and copy public records and documents, including judicial records and documents. *Nixon v. Warner Commc'ns*, 435 U.S. 589, 597 (1978). Further, "secret court proceedings are anathema to a free society." *M.M. v. Zavaras*, 939 F. Supp. 799, 801 (D. Colo. 1996). Despite the presumption that court proceedings should remain open, documents may be restricted from public access when the public's right of access is outweighed by interests that favor nondisclosure. *See United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997). The Court has discretion to determine whether a particular document should be restricted from public access. *See Nixon*, 435 U.S. at 599.

### ARGUMENT

**Public disclosure of the investigative summaries concerning non-parties would chill the City's future investigative efforts, is offensive and objectionable, and would undermine employees' trust in an investigation's confidentiality.**

The at-issue summaries of confidential workplace investigations (Docs. ## 60-2 through 60-4) are summaries of three of the 19 workplace investigations the City conducted from early 2017 to January 2018, through workplace investigation firms that the City retained. The City retained these firms at the request of the City Attorney's Office to investigate exhaustively workplace complaints, regardless of the complaints' merits and to provide Police Services with legal advice and in anticipation of litigation.

These summaries contain sensitive, personal information about, and mostly unsubstantiated allegations against, *non-parties* to this suit. These investigations concerned personnel matters, *i.e.*, individuals' job performance, interactions with co-workers, and salacious allegations. The disclosure of the highly personal and sensitive information contained in these files "would be offensive and objectionable to a reasonable person of ordinary sensibilities." *Martinelli v. Dist. Ct. of Denver*, 612 P.2d 1083, 1091 (Colo. 1980).

Doc. # 60-2 is an outside investigator's summary of a female officer's complaints of gender discrimination and retaliation by male supervisors. The summary includes statements witnesses provided to the investigator with the understanding that confidentiality would be maintained. Ultimately, the outside investigator deemed all the allegations *un-sustained*. *See* Doc. # 60-2 at 28.

Doc. # 60-3 is an outside investigator's summary of a female officer's complaints of gender-related discrimination and harassment and retaliation by a male supervisor. The investigator sustained only the claim concerning gender-related discrimination and harassment, but not the retaliation claim. *See* Doc. # 60-3 at 3. This male supervisor was not in Plaintiff Lori Frank's chain of command and none of Ms. Frank's allegations concern or relate to this supervisor.

Finally, Doc. # 60-4 is an outside investigator's summary of a female civilian employee's complaints of gender-related discrimination and harassment by a male sworn officer. The summary includes statements witnesses provided to the investigator with the understanding that confidentiality would be maintained. Ultimately, the outside investigator sustained the allegations. *See* Doc. # 60-4 at 7-8. This male supervisor was also not in Plaintiff Lori Frank's chain of command and none of Ms. Frank's allegations concern or relate to this supervisor.

Police Services employees have a privacy right in these personnel investigations in the same way that employees have a privacy right in their personnel records sufficient to warrant quashing of a subpoena. *See Pub. Serv. Co. v. A Plus, Inc.*, No. CIV-10-651-D, 2011 U.S. Dist. LEXIS 16087, at \*7 (W.D. Okla. Feb. 16, 2011) (unpublished) (noting employees' privacy interests in personnel files to protect them from production in response to a subpoena); *see also Martinelli*, 612 P.2d at 1091-93 (discussing right to confidentiality of personnel files). Failure to maintain the Level 1 restriction would infringe upon these non-parties' privacy rights.

Additionally, public disclosure of these investigative summaries would undermine employees' trust in the confidentiality of workplace investigations and it would chill employees from coming forward with complaints. *See, e.g., Kowack v. U.S. Forest Serv.*, No. CV 11-05-DWM, 2012 U.S. Dist. LEXIS 191469, at \*\*14-15 (D. Mont. Aug. 24, 2012) (unpublished) (noting that public disclosure of certain Forest Service investigative materials "would chill the internal investigative process") (citing Freedom of Information Act, Exemption 5). This would greatly undermine the City's future ability to investigate, evaluate, and address workplace concerns and impair the City's ability to efficiently and effectively serve its constituents.

While the public arguably has a right to know about rampant gender discrimination and pay inequity that pervades a governmental entity, these summaries' two instances of sustained claims of gender-related discrimination and harassment—among a department of 325 employees—do not demonstrate a discriminatory and inequitable culture within Police Services. Accordingly, the public's common law right of access is outweighed by non-party privacy interests and the need to maintain employees' trust in the confidentiality of workplace investigations. In the event the Court is inclined to lift the Level 1 restriction, however, the City requests that the Court

maintain the Level 1 restriction on Docs. ## 60-2 through 60-4 while ordering Plaintiff to re-file Docs. ## 60-2 through 60-4 with all identifying information of witnesses, complaints, and persons subject to investigation redacted, including individuals' names, rankings, and job titles. The City further requests that the Court order Plaintiff to confer with the City about the necessary redactions in advance of re-filing these summaries.

### **CONCLUSION**

For the foregoing reasons, the City of Fort Collins respectfully requests that the Court maintain the Level 1 restriction for three documents (Docs. ## 60-2, 60-3, and 60-4) filed under restriction on November 8, 2019. Alternatively, the City requests that the Court order Plaintiff to re-file Docs. ## 60-2 through 60-4 with all identifying information of witnesses, complaints, and persons subject to investigation redacted, including individuals' names, rankings, and job titles. The City further requests that the Court order Plaintiff to confer with the City about the necessary redactions in advance of re-filing these summaries.

Respectfully submitted this 2<sup>nd</sup> day of December, 2019.

S/ Kathryn A. Starnella

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***Attorney for Defendant City of Fort Collins***

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on December 2, 2019, a true and correct copy of the above and foregoing **DEFENDANT CITY OF FORT COLLINS' OPPOSED MOTION TO MAINTAIN LEVEL 1 RESTRICTION FOR DOCS ## 60-2 THROUGH 60-4** was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following email addresses:

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