IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-03204

LORI FRANK,

Plaintiff,

v.

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

Defendants.

PLAINTIFF'S RESPONSE TO MOTION TO MAINTAIN LEVEL 1 RESTRICTION

Plaintiff Lori Frank, through her undersigned counsel, hereby responds to Defendant City of Fort Collins' Motion to Maintain Level 1 Restriction as follows:

I. LEGAL STANDARD

There is a common law right of access to judicial records. *Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007). "Nevertheless, the right of access is not absolute." *United States v. Apperson*, 642 F. App'x 892, 899 (10th Cir. 2016) (unpublished). As a result, a court may exercise its discretion to seal judicial records. *Helm v. Kansas*, 656 F.3d 1277, 1292 (10th Cir. 2011). "In exercising this discretion, we weigh the interests of the public, which are presumptively paramount, against those advanced by the parties." *Id.* (quotation omitted). The party seeking to restrict public access to judicial records has the burden of showing an interest that outweighs the presumption in favor of access. *Helm*, 656 F.3d at 1292.

In addition, the Local Rules of this District require that a party moving to restrict access

to judicial records must, *inter alia*, address the interest to be protected by restriction and why such interest outweighs the presumption of public access, identify a clearly defined and serious injury that would result if access is not restricted, and explain why no alternative to restriction, such as redaction, is practicable. D.C.Colo.L.Civ.R. 7.2(c). Protective orders with regard to discovery are, alone, insufficient to justify restriction. Id. 7.2(c)(2).

II. ARGUMENT

Defendant's motion to restrict fails each required showing. Defendant argues that the documents at issue contain sensitive personal information related to non-parties to this suit and further that public disclosure would undermine employees' trust in the confidentiality of workplace investigations and "chill" employees from coming forward with complaints. Defendants further argue that, "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 with Police Services. Clearly that is a factual issue that has not yet been decided. Moreover, the fact that only two instances of gender discrimination are at issue in this Motion to Restrict does not lessen the public's interest in the actions of its public servants. To the contrary, the case cited by Defendant, *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), strongly supports this conclusion. There in balancing the competing interests at stake the Court held:

> To determine whether releasing certain information "would constitute a clearly unwarranted invasion of personal privacy, "the privacy interest in preventing the disclosure of information that would be embarrassing or shameful when connected to particular, identifiable individuals must be balanced against the public interest in understanding the manner in which the Forest Service performed its statutory duties. The challenge in this case is providing a complete and

> accurate record of whether the Forest Service, as an agency, acted appropriately under the circumstances. *See Stern v. Fed. Bureau of Investigation,* 737 F.2d 84, 92 (D.C. Cir. 1984) (**noting "the public may have an interest in knowing that a government investigation itself is comprehensive, that the report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner"**). That challenge is even greater because the substantive content of the witness statements and summaries has never been disclosed. *Cf. Hertzberg v. Veneman,* 273 F.Supp.2d 67, 87 (D.D.C. 2003) (concluding no public interest in the disclosure of the requested information-i.e. the names, addresses, and telephone numbers of the witnesses-when the substantive content of the witness statements had already been disclosed to the plaintiff).
>
> **Here, the disclosure of certain personal information is necessary to provide an accurate picture of the agency's conduct.** To the extent the information may be disclosed without identifying the witness, revealing references to past disciplinary or grievance actions, or exposing petty interoffice commentary, the public interest in its disclosure outweighs the countervailing privacy interest because it does, as the Ninth Circuit so suggests, **speak directly to the public understanding of the operations or activities of the agency**. *See Kowack,* 766 F.3d at 1134 ("For all we know, the witness statements reveal that the Trapper Creek Center is run by dangerous bullies who shouldn't be allowed anywhere near disadvantaged youth."). **Under these circumstances, the invasion of the individuals' personal privacy is not "clearly unwarranted." The public interest in disclosing most of the substantive content of the witness statements and the summaries is only strengthened by the divergent conclusions one could draw from reviewing the redacted and unredacted documents.** Accordingly, the reasonably segregable portions of the record must be disclosed. 5 U.S.C. § 552(b); *see Rose,* 452 U.S. at 381 (noting that "redaction cannot eliminate all risks of identifiability, as any human approximation risks some degree of imperfection").

(Emphasis supplied.)

Whether or not the supervisors were in the Plaintiff's chain of command as Defendant argues does not warrant restricting the documents. Nor does the fact that the complaints were substantiated or not substantiated. The public is entitled to have an "accurate picture of the agency's conduct." Defendant has not identified any information that would embarrass or otherwise harass any of the witnesses. The mere fact that the documents are summaries of an investigation of complaints of discrimination is insufficient to restrict the public's access to the

documents. To the extent that the Court finds that the names of any of the individuals should be redacted, Plaintiff does not object to that redaction.

RESPECTFULLY SUMBITTED this 2nd day of December 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies that on December 2, 2019 a true and correct copy of the foregoing was electronically served via email to the following:

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