DISTRICT COURT, LARIMER COUNTY, COLORADO Larimer County Justice Center 201 Laporte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 498-6100 **Plaintiff: STACY LYNNE** **v.** **Defendants:** **CITY OF FORT COLLINS: City Manager City Attorney Carrie Daggett, Rachel Askeland (Acting Records Custodian), Karen Burke (Records Custodian)**	DATE FILED: June 1, 2020 4:29 PM FILING ID: 9A561ECC3C9A8 CASE NUMBER: 2020CV116 COURT USE ONLY
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DEFENDANTS' PRE-HEARING BRIEF

COME NOW Defendants, the City of Fort Collins (the "City"), Carrie Daggett, Rachel Askeland and Karen Burke, by and through counsel, and respectfully submit the following Pre-Hearing Brief for the hearing set for June 8, 2020, at 9:00 a.m.:

This matter comes before the Court on Plaintiff Stacey Lynne's Complaint and Application for Order to Show Cause against the named Defendants, including the City. The issue to be decided by this Court is whether the City properly withheld under the Colorado Open Records Act ("CORA") narrative performance evaluations prepared by City employee Noah Beals about

himself and narrative performance evaluations prepared by his direct supervisor regarding Mr. Beals' job performance. These narrative performance evaluations are known within the City organization as Quarterly Performance Assessments ("QPAs").

This lawsuit appears to be related to Plaintiff's two separate complaints alleging a claim for defamation against Noah Beals. Both lawsuits have now been dismissed with prejudice in favor of Defendants. *See, Stacey Lynne v. Noah Beals,* Larimer County District, 2018 CV 220 and *Stacey Lynne v. Noah Beals,* Larimer County District Court, 2020 CV 115.

Plaintiff's CORA request is included as Defendants' Exhibit 1 and requests "the personnel/employment file of Noah Beals for the dates August 1, 2018 through December 4, 2019." In response to this request, the City produced thirty-one pages of documents including Noah Beals' employment application, employment agreements, performance ratings, and compensation, including expense allowances and benefits. Those documents are included as Defendant's Exhibit 3. In a supplemental production, the City provided a document indicating changes to Noah Beals' paygrade. This document is Defendant's Exhibit 5. The only documents withheld by the City are Mr. Beals' QPAs for the requested time period which the City believes are not subject to public disclosure under CORA. These documents have been provided to the Court for an *in camera* review as previously ordered by the Court.

The QPAs are a confidential employee evaluation narrative which allows for the free and open exchange of unfiltered opinions, ideas, and suggestions to flow between City employees and their direct supervisors and upper level management. The QPAs are exempt from public disclosure under a CORA request for three reasons. First, these QPAs are personnel files as that term is defined in C.R.S. §24-72-202(4.5). Second, the QPAs were properly withheld by the City under

the common-law deliberative process privilege exception to disclosure, which has been codified in C.R.S. Section 24-72-204(3)(a)(XIII). Third, Mr. Beals' QPAs were lawfully withheld by the City under C.R.S. §24-72-204(6)(a) because disclosure of these documents would do substantial injury to the public interest. For each and all three reasons, the City properly withheld production of the QPAs under CORA, and Plaintiff's Application for Order to Show Cause should be denied.

I. Defendants' Anticipated Evidence

The City intends to call two witnesses in support of its case. First, Karen Burke is the Director of Human Resources for the City of Fort Collins. She is the custodian of personnel records, including the records at issue in this case. She will testify as to the City's receipt of the CORA request, the City's response and all documentation produced, and the reasons for withholding the QPAs. Ms. Burke will testify as to the nature of the QPAs and why the City uses QPAs in their ongoing employee assessments. She will explain how QPAs are filled out by both employees and managers, and describe the communications that the City provides to their employees which would generate a reasonable expectation of privacy in the comments made in the QPAs. Second, the City intends to call Noah Beals to testify as to his understanding of the purpose of the QPAs and his expectation that they are confidential.

II. Plaintiff's Anticipated Evidence and Potential Evidentiary Issues.

Plaintiff did not file a witness list but in response to an email inquiry stated that she intended to call city employees Carrie Daggett, Rachel Askeland, and Karen Burke. The City will voluntarily produce these individuals at the hearing. Plaintiff also did not file an exhibit list. In response to an email from Defendants' counsel requesting a list of exhibits, Plaintiff stated "If I wanted exhibits in the CORA case, I would have done so in accordance with Judge Jouard's

directions as provided during the telephone conference . . . but I appreciate your concern." The City interprets this response to mean that Plaintiff does not intend to utilize any exhibits, and the City reserves the right to object to any exhibits Plaintiff seeks to introduce.

There are two evidentiary issues that may come up at the hearing which the City believes it would be appropriate to address here. First, Carrie Daggett is the City Attorney, and confidential communications between her (and others in the City Attorney's office) and employees of the City are covered by the attorney-client privilege. By voluntarily producing Ms. Daggett for the hearing, the City is not waiving any attorney-client privilege. To the extent Plaintiff intends to elicit testimony regarding communications between Ms. Daggett or her office and City employees, or legal advice provided to City employees, the City will object on the basis of attorney-client privilege.

Second, Plaintiff has filed two separate lawsuits against Noah Beals alleging defamation against the Plaintiff. Both of these lawsuits have now been dismissed with prejudice. The City anticipates that Plaintiff may attempt to use this hearing as an opportunity to cross-examine one or more of the witnesses about the facts alleged in Plaintiff's former lawsuits, and whether there are any references to her allegations in Mr. Beals' QPAs. Any such testimony would be irrelevant to the issues presented in this case, and an improper attempt to obtain information to support claims that have been dismissed by the Court. Accordingly, the City intends to object to any testimony or questions regarding Plaintiff's defamation allegations against Noah Beals.

III. Legal Argument

A. Introduction

The City is aware that this Court is familiar with the issues surrounding public employee personnel files, having adjudicated the lawsuit brought by Plaintiff against the Larimer County Sheriff's Office. *See Lynne v. Larimer County Sheriff's Office,* Larimer County District Court, 2018 CV 198. However, there are several important facts which distinguish this case from the disclosures ordered by this Court in the prior lawsuit. First, Mr. Beals is a current employee of the City of Fort Collins, and thus has an increased expectation of privacy in the contents of his personnel file, including confidential narrative assessments made by him and about him.

Second, Plaintiff is seeking the most recent possible information contained in Mr. Beals' personnel file, including QPAs from 2018 and 2019. This is different from the personnel files withheld in the Larimer County case, which ranged from twenty to twelve years old at the time of the CORA request.

Third, the QPAs include not only narrative evaluations of Mr. Beals, but also narrative assessments made by Mr. Beals about himself and his job performance. Because the goal of the QPA process is to encourage employee candor in self-evaluation, Mr. Beals and others have an increased expectation of privacy that the confidential statements they make to their direct supervisors will remain confidential. If these QPAs become subject to public disclosure, it will destroy the purpose of the confidential self-assessments.

Finally, unlike in the previous case decided by this Court, there is no allegation here that Mr. Beals has committed a criminal act. This lawsuit appears to arise out of a personal grievance the Plaintiff has against Mr. Beals. This has been resolved in Mr. Beals' favor twice already, and

Plaintiff is simply attempting another bite at the apple. Accordingly, there is no compelling public interest in disclosure of the contents of Mr. Beals' personnel file.

B. The QPAs are part of Mr. Beals' personnel file as that term is defined in C.R.S. §24-72-202(4.5) and not subject to public inspection under C.R.S. §24-72-204(3)(a)(II)(A).

The City is aware of the Court's prior ruling that narrative performance evaluations are not part of a public employee's personnel files, as that term is defined in C.R.S. §24-72-202(4.5). The Court appears to have been guided by the holding in *Daniels v. City of Commerce City*, 988 P.2d 648 (Colo.App. 1999). To the extent that *Daniels* purports to hold that only a public employee's address, phone number and confidential financial information are covered by the personnel file exemption from disclosure, the City respectively submits that *Daniels* was wrongfully decided.

The plain language of section (4.5) clearly shows that the only exceptions to the personnel file are those items specifically enumerated in the second sentence. The statute states in full:

> (4.5) "Personnel files" means and includes 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*, and other documents specifically exempt from disclosure under this part 2 or any other provision of law. "Personnel files" does not include applications of past or current employees, employment agreements, any amount paid or benefit provided incident to termination of employment, performance ratings, final sabbatical reports required under section 23-5-123, or any compensation, including expense allowances and benefits, paid to employees by the state, its agencies, institutions, or political subdivisions.

C.R.S. §24-72-202(4.5) (emphasis added).

The first sentence of Section (4.5) includes a list of specific information that is part of the personnel file, followed by the phrase "other information maintained because of the employer-employee relationship." There is no dispute that the QPAs are maintained solely because of the

employer-employee relationship. Further, Ms. Burke will testify that the QPAs are maintained as part of the personnel file. This is distinguishable from *Daniels*, in which the defendant admitted the requested records were not maintained in any specific personnel file. *Daniels*, 988 P.2d at 651. QPAs are clearly "other information" contained in the personnel files of the City's employees.

The second sentence of Section (4.5) outlines the specific information which the Colorado General Assembly has determined should not be included in the personnel file. These exceptions all relate to the contractual terms of a public employee's employment, their compensation and expense reimbursement. The only other exception is for performance *ratings*. The City voluntarily produced all of this information. Narrative self-evaluations are not "performance ratings" and clearly do not fall within this narrow exception. If the General Assembly intended for narrative evaluations to not be considered part of a protected personnel file, it would not have used the narrower term "performance ratings" as the exception but would have used the broader term "performance evaluations."

For these reasons, Mr. Beals' QPAs were properly withheld as part of his personnel file as required by C.R.S. §24-72-204(3)(a)(II)(A).

C. The QPAs were properly withheld under the common-law deliberative process privilege exception to disclosure.[1]

The deliberative process exception is a common law exception which provides that certain information will not be subject to disclosure under CORA. "The privilege rests on the ground that public disclosure of certain communications would deter the open exchange of opinions and recommendations between government officials, and it is intended to protect the government's

[1] This common-law privilege has been codified in C.R.S. §24-72-204(3)(a)(XIII).

decision-making process, its consultative functions, and the quality of its decisions." *City of Colorado Springs v. White*, 967 P.2d 1042, 1047 (Colo. 1998).

"The deliberative process privilege is a qualified privilege." *Id.* "The primary purpose of the privilege is to protect the frank exchange of ideas and opinions critical to the government's decision-making process where disclosure would discourage such discussion in the future:

> [The privilege] serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action."

Id., quoting Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

"Thus, a key question in a deliberative process privilege case is whether disclosure of the material would expose an agency's decision-making process in such a way as to discourage discussion within the agency and thereby undermine the agency's ability to perform its functions." *Id.* "In light of the purposes of the privilege, it protects only material that is both pre-decisional (*i.e.*, generated before the adoption of an agency policy or decision) and deliberative (*i.e.*, reflective of the give-and-take of the consultative process)." *Id.*

Here, the QPAs meet all of the criteria for the deliberative process exception to disclosure. The narrative evaluations required by the QPAs are an invitation for the City employees to provide frank feedback on themselves and how they have met their "job responsibilities, goals and objectives" through both "Results" and "Behaviors" and for their supervisors to provide frank feedback on the same issues. (Defendant's Exhibit 7, Employee Portal). This honest feedback is necessary to guide the City's policies and procedures, both for their employees and for ongoing

services provided to it citizens. This is also a process City supervisors rely on to decide their employees' future compensation. The value of this employee and supervisor input would be destroyed if the narrative sections were to be subject to public disclosure. For this reason, the City properly withheld the narrative assessments under the common-law deliberative process exemption to disclosure.

D. The QPAs were properly withheld pursuant to C.R.S. §24-72-204(6)(a) because disclosure of the City's confidential performance evaluations would do substantial injury to the public interest.

As this Court has previously found, narrative performance evaluations may, under certain circumstances, be withheld from production under C.R.S. §24-72-204(6)(a) when disclosure would do substantial harm to the public interest. Here, the public interest is in the protection of a legitimate privacy interest public employees have in their confidential personnel records. In applying the public interest exemption, the court must weigh (1) whether there is a legitimate expectation of non-disclosure, (2) whether there is a compelling public interest in access, and (3) if there will be disclosure, how to ensure that it will be done in the least intrusive manner. *Todd v. Hause*, 371 P.3d 705, 712 (Colo. App. 2015); *Denver Post Corp. v. University of Colorado*, 739 P.2d 874 (Colo. App.1987).

Here, all three factors weigh in favor of limiting disclosure of the narrative QPAs. First, Mr. Beals, and all public employees, have a legitimate interest in maintaining the confidentiality of their self-assessment narratives and the narrative assessments of their supervisors. In fact, candor in this situation justifies a reasonable expectation of confidentiality. Without City employees and their supervisors being willing to be candid in sharing their written thoughts in the

QPA process about the employee's performance, there is little or no benefit in using the process. Second, there is no compelling public interest in disclosure of this information. As has been stated above, Plaintiff is searching for information to support a personal grievance against Mr. Beals. He has not been accused of any illegal acts or wrongful conduct which might create a compelling public interest. Also, Mr. Beals job with the City is not a higher-level management position or a policy-making position, so there is less of a public interest in his QPAs being subject to public inspection. Third, there is no way to limit the intrusiveness of this disclosure. Because this information is narrative, it is either disclosed or it is not. There is no middle ground, and based on the individual nature of Plaintiff's request, there is no way to shield the identity of Mr. Beals. All of the policy considerations set forth by *Todd* and *Denver Post Corp.* strongly support protecting this information from being disclosed under C.R.S. § 24-72-204(6)(a).

IV. Conclusion

After hearing the evidence and reviewing *in camera* the materials that have been withheld, Defendants respectfully request that this Court deny Plaintiff's Application for Order to Show Cause, and enter judgment in favor of Defendants holding that the contested documents were properly withheld.

Respectfully submitted this 1st day of June, 2020.

WICK & TRAUTWEIN, LLC

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CERTIFICATE OF ELECTRONIC FILING

The undersigned hereby certifies that a true and correct copy of the foregoing **DEFENDANTS' PRE-HEARING BRIEF** was filed via the Colorado Courts E-Filing System and served this 1st day of June, 2020, on the following:

Stacy Lynne
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Served via email to stacy_lynne@comcast.net & U.S. Mail.

s/ Jody L. Minch

[The original certificate of electronic filing signed by Jody L. Minch is on file at Wick & Trautwein, LLC)