District Court of Larimer County, Colorado 201 LaPorte Ave. Suite 100 Fort Collins, CO 80521-2721 (970) 494-3500	DATE FILED: June 29, 2020 2:57 PM CASE NUMBER: 2020CV116
Plaintiff/Petitioner**:** **STACY LYNNE** v. Defendants/Respondents: **CITY OF FORT COLLINS; CARRIE DAGGETT, RACHEL ASKELAND and KAREN BURKE**	▲ **COURT USE ONLY** ▲ Case Number: 2020 CV 116 Division: 3C Courtroom:

ORDER

THIS MATTER came before the court for a show cause hearing pursuant to C.R.S. § 24-72-204 (5)(b) of the Colorado Open Records Act. A hearing was conducted by the court on June 8, 2020. Plaintiff/Petitioner Stacy Lynne was present for the hearing and appeared *pro-se*. Defendants the City of Fort Collins; Carrie Daggett; and Rachel Askeland and Karen Burke, the alleged records custodians for the City of Fort Collins, appeared at the hearing, represented by Andrew Callahan, Esq. and Assistant City Attorney, John Duval, Esq. Based upon the evidence presented at the hearing and an *in-camera* review of records withheld from disclosure by the Defendant City of Fort Collins, the court makes the following findings and order:

PROCEDURAL HISTORY

This matter is before the court regarding Plaintiff/Petitioner, Stacy Lynne's (hereafter "Lynne") request for production of certain records from the City of Fort Collins under the Colorado Open Records Act (CORA), C.R.S. § 24-72-201 et seq. On December 4, 2019, Lynne made a written request for production of certain records maintained by the City of Fort Collins. In her written request, Lynne specifically requested that Defendant produce:

1. The personnel/employment file of Noah Beals for the dates August 1, 2018, through December 4, 2019.
   a. Please provide any and all documents that are contained in Noah Beals' personnel/employment file including and not limited to his department transfers, employment application, employment agreement, performance ratings, performance evaluation narratives, compensation, expense allowances and

benefits, and any and all other documents that are not specifically exempt under the law.

In response to Plaintiff's CORA 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. The documents produced are included in what was marked as Defendant's Exhibit 3. In a supplemental production, the City disclosed a document indicating changes to Noah Beals' paygrade. [Defendant's Exhibit 5]. The only documents withheld from production by the City were Mr. Beals' quarterly performance assessments ("QPA's") for the requested time period, which the City contends are not subject to public disclosure under CORA. These withheld documents have been provided to the Court and the Court has undertaken an *in-camera* review of the documents withheld.

Defendant City of Fort Collins argues that the QPA's or performance narratives are confidential and are not required to be disclosed for three reasons. The City argues that the QPA's are (1) exempt from public disclosure because such records fall within the definition of "personnel files" under C.R.S. § 24-72-202(4.5), (2) that the QPA's were properly withheld under the deliberative process privilege, and finally (3) that Mr. Beals' performance narratives were properly withheld under C.R.S. § 24-72-204(6)(a) because disclosure of the performance narratives would do substantial injury to the public interest.

The show cause hearing was conducted before the court on June 8, 2020. At the time of the hearing, the parties presented testimony from several witnesses as well as introducing certain documents into evidence. Further, the Court heard additional argument from both parties with regard to their respective positions.

LEGAL STANDARD OF REVIEW

The Colorado Open Records Act ("CORA") establishes a fundamental presumption that records of all local and state government entities that relate in any way to the discharge of governmental authority shall be open for public review. See § 24-72-201, C.R.S. The CORA implements this basic public policy by declaring that "[A]ll public records shall be open for inspection [and copying] by any person," unless a specific exemption under the CORA applies. See § 24-72-203(1)(a), C.R.S. Moreover, the purpose of open records statutes is to assure that the workings of government are not unduly shielded from the public eye. *See, Int'l Bhd. of Elec. Workers Local 68 v. Denver Metro. Major League Baseball Stadium Dist*., 880 P.2d 160, 165 (Colo. App. 1994). The strong presumption of disclosure requires any exceptions to CORA's disclosure requirements be narrowly construed. *City of Westminster v. Dogan Constr. Co*., 930 P.2d 585, 592 (Colo. 1997); *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150 (Colo. App. 1998).

In every public records case under the CORA, the party seeking access to a record bears the ultimate burden of persuasion to show that "the public entity in question: (1) improperly; (2)

withheld; (3) a public record." *Wick Commc'ns Co. v. Montrose County Bd. of County Comm'rs*, 81 P.3d 360, 363 (Colo. 2003). Although the ultimate burden of persuasion will always lie with a records requester on all elements of his claim, if a public entity contends that the document being sought is not a "public record" under the CORA, and if the requester meets his prima facie burden of establishing that the requested document was "made, maintained or kept" by the public entity in the discharge of functions authorized by law (see, § 24-72-202(6)(a)(I), C.R.S.), then the burden of proof on this question shifts to the public entity. *See Denver Publ'g Co v. Bd. Of County Comm'rs*, 121 P.3d 190, 199 (Colo. 2005); *Wick*, 81 P.3d at 363 ("[E]ven though the plaintiff has the burden of proof to show that CORA applies, when the parties dispute whether a document fits within the definition of a public record, in most cases the burden will fall on the custodian to show that the record is not a public record."). Here there is no dispute that the records sought are "public records" subject to request under CORA.

Personnel Files. The contents of "personnel files" are one of the few exceptions to the general rule that the public has access to governmental records. *See Denver Pub. Co*. v. *University of Colorado*, 812 P.2d 682 (Colo. App. 1990). CORA makes clear that the custodian of "personnel files" may deny public access to the contents of personnel files. C.R.S. § 24–72–204(3)(a)(II). Subsection (4.5) in section 24–72–202, C.R.S. 2018, of CORA defines "personnel files" as follows:

> "Personnel files" means and includes home addresses, telephone numbers, financial information, and other information maintained because of the employer-employee relationship.... "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 ... or any compensation, including expense allowances and benefits, paid to employees by the state, its agencies, institutions, or political subdivisions.

Deliberative Process Privilege. Records may be protected from disclosure based upon the "deliberative process" privilege "if the material is so candid or personal that public disclosure is likely to stifle honest and frank discussion within the government, unless the privilege has been waived." C.R.S. § 24-72-204(3)(a)(XIII) (emphasis added). The statute provides:

> Records protected under the common law governmental or "deliberative process" privilege, if the material is so candid or personal that public disclosure is likely to stifle honest and frank discussion within the government, unless the privilege has been waived. The general assembly hereby finds and declares that in some circumstances, public disclosure of such records may cause substantial injury to the public interest. If any public record is withheld pursuant to this subparagraph (XIII), the custodian shall provide the applicant with a sworn statement specifically describing each document withheld, explaining why each such document is privileged, and why disclosure would cause substantial injury to the public interest. If the applicant so requests, the custodian shall apply to the district court for an order permitting him or her to restrict disclosure. The application shall be subject to the procedures and burden of proof provided for in

> subsection (6) of this section. All persons entitled to claim the privilege with respect to the records in issue shall be given notice of the proceedings and shall have the right to appear and be heard. In determining whether disclosure of the records would cause substantial injury to the public interest, the court shall weigh, based on the circumstances presented in the particular case, the public interest in honest and frank discussion within government and the beneficial effects of public scrutiny upon the quality of governmental decision-making and public confidence therein.

Accordingly, the premise of exempting such records from disclosure is to encourage open, inner-government discussion. *Land Owners United. LLC v. Waters*. 293 P.3d 86, 96 (2011); *see also City of Colorado Springs v. White*, 967 P.2d 1042 (Colo. 1998). Pursuant to section 24-72-204(3)(a)(XIII), C.R.S., the court is to determine, based on the circumstances of the particular case, whether the public interest in honest and frank discussion with the government is outweighed by the beneficial effects of public scrutiny upon the quality of governmental decision-making and the public confidence therein. A key question for consideration by the court is whether disclosure of the material would expose the decision-making process in such a way as to discourage discussion with government and undermine its ability to perform its function. *Id.*

C.R.S. § 24-72-204(6). Even where the Court determines that the requested documents do not fall within the definition of personnel records exempt from disclosure the court may, under certain circumstances, order that the requested records be withheld from production under C.R.S. § 24-72-204(6)(a). In determining whether narrative performance evaluations may be withheld from disclosure under C.R.S. § 24-72-204(6)(a), the court must determine whether disclosure of the requested records would do substantial injury to the public interest. Under this exception 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*, *supra.*

DISCUSSION

A. Records for Which a Privilege is Claimed

In response to Lynne's CORA request, Defendant City of Fort Collins seeks to withhold disclosure of 34 pages of Noah Beals Quarterly Performance Assessments ("QPA's") from November 1, 2017, to October 31, 2019. As set forth above, the City asserts three independent bases to support its decision to withhold production of the QPA's.

At the time of the hearing, the City presented testimony from Karen Burke, the director of human resources for the City of Fort Collins. Ms. Burke testified regarding the reasons that the QPA's were withheld from production in response to Ms. Lynne's CORA request. Ms. Burke testified that City employees had a reasonable expectation of privacy with regard to the performance narratives which was essential to the candid discussions included in the QPA's

regarding job performance, job deficiencies and self-evaluation. She further testified that the performance narratives provided an avenue for discussion and feedback regarding co-employees. Ms. Burke testified that the confidentiality of the process encourages honest and candid feedback by and between the employee and supervisor to improve performance and address any particular deficiencies. Ms. Burke testified that the quality of the evaluation process would be substantially diminished and would cause a substantial injury to the public interest if the QPA's were made public.

The employee subject to Ms. Lynne's CORA request, Noah Beals, also testified at the hearing. Mr. Beals testified that he has been employed with the City of Fort Collins for 9 years.[1] He is currently serving as a Senior City Planner. Mr. Beals' position was described as a mid-level management position with no executive decision-making authority. Mr. Beals similarly testified that he would be concerned about the release of QPA narratives and that it would diminish the process and that as an employee he would be concerned about the public disclosure of sensitive information included in performance narratives.

City Attorney Cary Daggett similarly was called as a witness at the hearing on June 8, 2020. Ms. Daggett testified that it would be detrimental to the public interest to be required to disclose performance narratives as to current employees. She testified that the QPA's encompass not just a review of the employees' performance, akin to a performance rating, but rather involves a two-way conversation that includes the employee's own self-evaluation as well as feedback from a supervisor. Ms. Daggett testified that public disclosure of the QPA's would have a chilling effect on the City's operations and ability to conduct constructive and meaningful employee evaluations and to make appropriate employment decisions.

Plaintiff, Ms. Lynne, testified at the hearing that the QPA's should be properly disclosed and argues that the documents are not personnel records and should be properly produced consistent with the presumption of disclosure in CORA. Ms. Lynne argues that the QPA narrative provides the best information regarding the work performance of public employees and provides necessary information to hold governmental employees and the City properly accountable.

B. Are the Subject Performance Narratives "Personnel Records" Under C.R.S. § 24--72-202(4.5)

Plaintiff argues that Mr. Beals' QPA's should be produced and relies upon the holding in *Daniels v. City of Commerce City*, 988 P.2d 648 (Colo. App. 1999). In *Daniels*, the Petitioner requested from the City of Commerce City, "all public records ... related to complaints of sexual harassment, gender discrimination and retaliation based upon complaints of sexual harassment and gender discrimination for the years 1995 through 1997." The City denied the request.

[1] Mr. Beals was a named Defendant in two separate civil cases filed by Ms. Lynne in Larimer County District Court asserting claims for defamation. Both of those cases have been dismissed.

In support of its denial of access the City, "maintain(ed) that the privacy interests of the victims and accused harassers are paramount to any need [petitioner] may have to access to those records [involving others], and that privacy interest is specifically recognized by the statute." Additionally, the City maintained, the requested records contained work product consisting of records of correspondence between the city attorney and the city's personnel department. Finally, the City argued, disclosure of the information would do substantial injury to the public interest in violation of §§ 24-72-204(6)(a) and (b).

The trial court in *Daniels* ordered the City to produce the requested records with certain redactions with regard to the identity of involved parties who had been exonerated of any such charges. The court further ordered the City to produce a privilege log with regard to any documents for which a work-product or attorney-client privilege was being asserted.

The City appealed the trial court's ruling. On appeal, the City first maintained that the trial court erred in failing to find that the records were exempt from disclosure under the "personnel files" exception to CORA. In addressing this issue, the Court narrowly construed the language defining "personnel files" holding:

> "Maintained because of the employer-employee relationship" is a general phrase following a list of specific types of personal information. "If general words follow the enumeration of particular classes of things, the rule of *ejusdem generis* provides that the general words will be construed as applicable only to things of the same general nature as the enumerated things." *Board of County Commissioners v. Martin*, 856 P.2d 62, 66 (Colo. App. 1993). Thus, we construe the phrase at issue to mean that the information must be of the same general nature as an employee's home address and telephone number or personal financial information. The information at issue does not meet that criterion; it is not the type of personal, demographic information listed in the statute.

Relying on *Daniels*, Plaintiff here argues that the only information that can be withheld with regard to the personnel file exemption must be in the nature of personal and demographic information listed in the statute. Relying on the holding in *Daniels*, another division of the Colorado Court of Appeals in *Jefferson County Education Association v Jefferson County School Dist. R-1*, 378 P.3d 835 (Colo. App. 2016) determined that teacher sick leave records were not protected under the "personnel file" exemption and ordered their release.

Defendant City of Fort Collins argues that *Daniels* is wrongly decided and that this court should not follow it. The City further argues that *Daniels* is distinguishable insofar as the requested incident reports in *Daniels* were not part of any personnel file. The City argues that there is no dispute that the QPA's are maintained solely because of the employee-employer relationship and should fall within the exemption for personnel files under C.R.S. § 24-72-202(4.5), notwithstanding the holding in *Daniels* which narrowly construed what should be considered as part of a personnel file. Finally, the City argues that the QPA's are not "performance ratings" which it has properly disclosed to Ms. Lynne.

The Court has reviewed additional authority regarding construction of CORA as it relates to "personnel files," including the holding in *Jefferson County* and *City of Boulder v. Avery*, 2002 WL 31954865, a decision from the U.S. District Court in Colorado, in which the Court noted:

> It is safe to assume that all people have an interest in the privacy of their own job performance evaluations. Public employees have a narrower right and expectation than other citizens however, [citations omitted] and elected or appointed figures in positions of leadership and high visibility have the narrowest, legitimate expectation of job-related privacy of all. These public figures still retain though, a constitutionally protected privacy interest in intimate, personal and sensitive information the disclosure of which would be objectionable to any reasonable person. *Denver Post v. University of Colorado, supra*, at 878.

In *Avery*, the U.S. District Court ordered the disclosure of a consultant's report which investigated the administrative functioning of the City of Boulder Municipal Court and its judge. The court determined that to the extent that the consultant's report reviewed or evaluated the municipal judge's leadership of the court, the document was not a protected personnel file document under C.R.S. § 24-72-202(4.5). The court in *Avery* also considered whether disclosure of the consultant's report should be protected from disclosure under C.R.S. § 24-72-204(6)(a). In evaluating these issues, the court made the observations quoted above. Ultimately, the court determined that the compelling public interest in the disclosure of the consultant's report (with limited redactions) outweighed the municipal judge's protected privacy interests.

A plain reading of the definition of "personnel files" contained in C.R.S. § 24-72-202(4.5) would suggest that performance narratives which are clearly maintained as a result of the employer/employee relationship fall within this definition. However, case authority narrowly construing the statute suggests otherwise. Based upon a reading of the opinions in *Daniels*, *Jefferson County*, and *Avery*, this court is persuaded that the narrative performance evaluations of a public employee do not fall within the definition of "personnel files" as set forth in C.R.S. § 24-72-202(4.5). Case authority requires the exemption for personnel files to be narrowly construed and, according to *Daniels*, applies only to the type of personal and demographic information listed in the definition. Accordingly, the Court finds that the City may not withhold production of Mr. Beals' QPA's under C.R.S. § 24-72-202(4.5).

C. The Deliberative Process Privilege Under C.R.S. § 24-72-204(3)(a)(XIII)

The deliberative process privilege is a qualified privilege designed primarily to protect "the frank exchange of ideas and opinions critical to the government's decision-making process where [public] disclosure would discourage such discussion in the future," if such disclosure would be harmful to the public interest. *City of Colorado Springs v. White*, 967 P.2d 1042, 1049, 1051 (Colo. 1998). This common law privilege may be asserted by the government in regard to certain communications; it does not automatically apply. *Id.* at 1047, 1050.

In order for the privilege to apply, the material claimed to be privileged must be both pre-decisional and deliberative in nature; "pre[-]decisional" refers to material generated before adoption of an agency policy or decision and "deliberative" refers to material reflective of the back-and-forth of the consultative process. *Id.* (*citing In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). Pre-decisional material can lose protected status if incorporated either by reference or expressly adopted into a final governmental decision. *Id. (citing NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 161, 95 S. Ct. 1504, 44 L.Ed.2d 29 (1975; *Bristol–Meyers Co. v. Federal Trade Comm'n,* 598 F.2d 18, 23 (D.C. Cir. 1978)).

Deliberative material is not protected if it is purely factual or investigative material that does not rise to the level of advisory materials reflecting the policymaking process of a governmental agency, but it may become so if the factual components are inextricably intertwined with policymaking materials to the point that disclosing the factual materials would be to disclose the government's deliberations. *Id. (citing Environmental Protection Agency v. Mink,* 410 U.S. 73, 86-91, 93 S. Ct. 827, 35 L.Ed.2d 119 (1973); *In re Sealed Case*, 121 F.3d 729 at 737; *Schell v. United States Dep't of Health & Human Servs*., 843 F.2d 933, 940 (6th Cir. 1988); *Wolfe v. Department of Health & Human Servs*., 839 F.2d 768, 773-74 (D.C. Cir. 1988); *see also Martinelli v. Dist. Ct in and for City and County of Denver*, 612 P.2d 1089 (Colo. 1980)). The court may also look to other factors when determining whether certain materials may fall within the purview of the deliberative process privilege, such as significance to the governmental decision-making process and the level of decision-making authority of the person who issued the materials in question. *Id.* at 1052.

In this case, the City asserts the deliberative process privilege for the QPA's for Noah Beals. The City argues that the QPA's exist to "encourage the frank exchange of opinions and evaluations by public employees and their direct supervisors, in order to assist in the ongoing decision-making process with regard to public employees' positions," etc., and that disclosure of these document would chill those communications and cause substantial injury to the public interest by intruding upon the interest of public employees in not having their private work-review communications disclosed. [Answer, p. 3-4]. Based on these assertions, the City argues that the deliberative process privilege presumptively applies if the QPA's qualify as both pre-decisional and deliberative material.

The evidence before the Court is that the City utilizes QPA's on a quarterly basis for self-assessment and supervisor performance reviews of employees. [Defendant's Exhibit 6, 9]. The process begins with employees "set[ting]/revis[ing] Individual Goals and Individual Development Plans that are aligned with the City's Strategic Plan Objectives," and after going through a feedback discussion with supervisors, employees are assigned a rating for that quarter. [Defendant's Exhibit 9]. QPA's primarily enable a conversation between supervisor and employee as to their mutual performances, which means the conversations in these documents reflect the back-and-forth of supervisors and employees. If QPA feedback discussions with multiple employees lead to changes in policy or direction by the City in accordance with its City Plan, then those conversations/QPA's might arguably be deliberative in nature. To the extent

that such communication would lead to any specific policy changes, they would also be pre-decisional, making them documents that could qualify for the deliberative process privilege.

The City presumably uses QPA's for all of its public employees, regardless of authority or decision-making level. In this case, Noah Beals is a Senior City Planner. He has been described as a mid-level manager. There is no evidence before the Court that Mr. Beals' role includes substantial authority in the formulation of City policy. There is a lack of information before the Court that the communication contained in Mr. Beals' QPA's has any particular significance to the City's policy or decision-making processes. The City has not cited any specific authority, and the Court has not found any, that suggests that performance evaluations involving a mid-level manager in a governmental organization are subject to the deliberative process privilege. Accordingly, the Court finds that the City may not withhold Mr. Beals' QPA's under the deliberative process privilege adopted in C.R.S. § 24-72-204(3)(a)(XIII).

D. May Defendant Withhold the Requested Documents under C.R.S. § 24-72-204(6)(a).

Notwithstanding this court's determination that the withheld documents do not constitute "personnel files" or fall within the deliberative process privilege, the court finds that narrative performance evaluations may, under certain circumstances, be withheld from production under C.R.S. § 24-72-204(6)(a). In determining whether narrative performance evaluations may be properly withheld from disclosure under C.R.S. § 24-72-204(6)(a), the court must determine whether disclosure of the requested records would do substantial injury to the public interest. Under this exception, 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* at 712; *Denver Post Corp. v. University of Colorado*, *supra*.

The City urges that the QPA's must maintain confidentiality to allow for the necessary and candid dialogue between supervisor and employee. The City argues that confidentiality of performance evaluations allows evaluators and employees to speak more frankly about an employee than they might if the evaluations were known to be open to public disclosure. In addition, performance evaluations contain a great deal of personal information both about the employee, co-employees, and frequently the information is of no particular interest to the public.

The court agrees with the City that public employees have a legitimate expectation of privacy in their personnel files and their performance evaluations. As noted by the Court in *Avery*, the expectation of privacy may depend significantly upon the nature of the employee's position. A high ranking or elected official may have a far lesser expectation of privacy given their specific position. An ordinary employee would likely have a far greater expectation of privacy. Further, the job performance of a high-ranking public employee may be imbued with significant public interest, resulting in diminished privacy expectations. The opposite is true for a rank and file employee or, in this case, a mid-level manager.

The second factor the court must weigh is whether there is a compelling public interest in access to Mr. Beals' QPA's. In argument before the Court, Petitioner was asked what compelling public interest would be served by disclosure of Mr. Beals' performance assessments. Other than general statements related to transparency and governmental accountability, Petitioner was unable to articulate a specific compelling public need for disclosure of Mr. Beals' QPA's. Based upon the evidence before the Court, Petitioner has failed to establish any particular compelling public interest in the production of Mr. Beals' QPA's.

The third factor requires to the Court to determine if there will be a disclosure and how to ensure that it can be done in the least intrusive manner. Here, the City has pursuant to the statute disclosed performance "ratings" which are part of the QPA process. This information allows for a public disclosure of the grading provided through the process and gives insight into employee performance without disclosing what may be highly sensitive or personal information contained in narratives.

In weighing the factors set forth above, the court must ultimately determine whether disclosure of Mr. Beals' QPA's would do substantial injury to the public interest. This determination must be the result of specific fact finding made on a case-by-case basis. In this case, the court finds that disclosure would have a chilling effect on the City's operations and ability to conduct constructive and meaningful employee evaluations particularly involving rank and file employees and mid-level managers such as Mr. Beals. Disclosure of performance narratives in this setting would likely have a significantly determinantal effect on the quality of both self-evaluation and constructive critique of work performance. In the Court's view this would result in substantial injury to the public interest in a frank and honest exchange between City supervisors and their respective employees. Accordingly, the Court finds that the City may properly withhold from production Mr. Beals' QPA's under C.R.S. § 24-72-204(6)(a).

ORDER

Based upon the above findings, the court orders that Petitioner's request for production of Noah Beals' Quarterly Performance Assessments for the period of November 1, 2017, to October 31, 2019, under the Colorado Open Records Act is hereby denied.

SO ORDERED this 29th day of June, 2019.

BY THE COURT:

COMBINED COURT SEAL LARIMER COUNTY COLORADO

District Court Judge