SUMMARY
April 27, 2023

2023COA37

No. 21CA1880, *Gazette v. Bourgerie* — Government — Department of Law — Colorado Peace Officer Standards and Training Board (POST); Public Records — Criminal Justice Records Act — Criminal Justice Agency

A division of the court of appeals considers whether the Colorado Peace Officer Standards and Training Board (POST), is a "criminal justice agency" as that term is defined in section 24-72-302(3), C.R.S. 2022. The division concludes that POST is a criminal justice agency because it collects arrest and criminal records information as part of its revocation process, thereby performing an "activity directly relating to . . . the collection [and] storage . . . of arrest and criminal records information." *See* § 24-72-302(3).

The division then addresses whether the custodian of POST's records abused her discretion in partially denying requests for records of all individuals who have been certified or decertified as

peace officers in Colorado, ultimately concluding that the custodian did not abuse her discretion.

COLORADO COURT OF APPEALS **2023COA37**

Court of Appeals No. 21CA1880
City and County of Denver District Court No. 21CV31519
Honorable J. Eric Elliff, Judge

The Gazette; Christopher N. Osher, reporter for The Gazette; and the Invisible Institute,

Plaintiffs-Appellants,

v.

Erik Bourgerie, in his official capacity as the Director of the Colorado Peace Officer Standards and Training Board,

Defendant-Appellee.

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE HAWTHORNE*
Lipinsky and Schock, JJ., concur

Announced April 27, 2023

Rachel Johnson, Denver, Colorado; Lin Weeks, Katie Townsend, Washington, District of Columbia, for Plaintiffs-Appellants

Philip J. Weiser, Attorney General, Brittany Limes Zehner, Assistant Solicitor General, Leeann Morrill, First Assistant Attorney General, Stefanie Mann, Senior Assistant Attorney General, Denver, Colorado, for Defendant-Appellee

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

¶ 1 This case requires us to decide whether the Colorado Peace Officer Standards and Training Board (POST) is a "criminal justice agency" as that term is defined in section 24-72-302(3) of the Colorado Criminal Justice Records Act (CCJRA). §§ 24-72-301 to -307, C.R.S. 2022.

¶ 2 Because we conclude that POST is a criminal justice agency, we must determine whether the custodian of POST's records abused her discretion by partially denying requests for records of all individuals who have been certified or decertified as peace officers in Colorado. We conclude the custodian did not abuse her discretion, so we affirm the district court's judgment.

I. POST is a Criminal Justice Agency Under Section 24-72-302(3)

A. Procedural Background

¶ 3 In 1992, the General Assembly enacted the Peace Officers Standards and Training Act (POST Act) to provide uniform training and certification for Colorado peace officers. §§ 24-31-301 to -319, C.R.S. 2022. POST establishes certification standards, certifies qualified officers, and revokes certification for officers who violate its standards. *Id.*

¶ 4 POST is a unit of the Criminal Justice Division, which itself is housed within the Department of Law. At the time of the records requests at issue, the custodian of POST's records was Natalie Hanlon Leh, the state's Chief Deputy Attorney General. At that time, POST's database contained records of over 50,000 active and inactive peace officers.[1]

¶ 5 In August 2019, the Invisible Institute — a nonprofit journalistic production company — submitted a request for POST records of "all officers who have been certified by the state," including the following information:

> a. First name[;] b. Middle name or initial[;]
> c. Last name[;] d. Badge/star number[;]
> e. Employee number[;] f. Date of certification[;]
> g. Date of decertification (if applicable)[;]
> h. Department[;] i. Rank[;] j. Gender[;]
> k. Race[;] l. Year of birth[;] m. Date of separation from department if applicable[;]
> n. Reason for separation (e.g., termination, resignation, retirement), if applicable[; and]
> o. Unique identifier, certification number, badge, and/or employee number.

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[1] The General Assembly later amended the POST Act to require POST to establish a searchable, publicly available database that tracks certain peace officer information. *See* § 24-31-303(1)(r), C.R.S. 2022. This new database, however, does not contain most of the records sought by Plaintiffs.

The Invisible Institute characterized its request as one for "public records" under the Colorado Open Records Act (CORA). §§ 24-72-201 to -205.5, C.R.S. 2022. Under CORA, public records must be disclosed when requested subject to certain exceptions. *See* § 24-72-202(6)(a)(I), C.R.S. 2022 (defining public records); § 24-72-203, C.R.S. 2022 (delineating public records open to inspection).

¶ 6 In response, POST directed the Invisible Institute to a public website containing the minutes from all POST Board meetings since 2012 in which a peace officer was decertified.[2] But it asserted that the request was governed by the CCJRA, which gives the custodian of "criminal justice records" the discretion to deny such a request (in full or in part). *See Harris v. Denver Post Corp.*, 123 P.3d 1166, 1170-72 (Colo. 2005) (discussing the difference between public records and criminal justice records). Chief Deputy Hanlon Leh, the custodian of the records, deemed the remaining materials

[2] POST also provided a PDF of its meeting minutes spanning 2000-2012 in which a peace officer was decertified, apparently because the minutes were not located on the website.

criminal justice records, exercised her discretion, and denied the remainder of the request.[3]

¶ 7 In June 2020, Christopher N. Osher, a reporter with The Gazette, submitted a request for records of "[t]he POST database tracking certification, training, and personnel changes of law enforcement officers in Colorado; [and] any POST database tracking decertification of law enforcement officers in Colorado." POST responded by directing Osher to the same public website of its meeting minutes. But POST again asserted that his inquiry was governed by the CCJRA and denied the remainder of his request.

¶ 8 In August 2020, Osher submitted another request for POST records — specifically, those addressing instances when "any person is appointed or separated as a certified peace officer, as per [POST] Rules 10, 11 and 12." POST responded by providing him with the number of certified peace officers who had been appointed or separated in the preceding eight months. But once again, POST

[3] To be clear, as the custodian of POST records, Chief Deputy Hanlon Leh's decision regarding the records *is* POST's official decision regarding the records.

asserted that his inquiry was governed by the CCJRA and denied the remainder of the request.

¶ 9 Although Osher (on behalf of the Gazette) and the Invisible Institute submitted their requests separately, they sent a joint letter to POST stating their intent to apply for an order to show cause why the custodian should not permit the inspection of the records. *See* § 24-72-204(5)(a), C.R.S. 2022. After the parties failed to reach a resolution during the statutorily mandated two-week negotiation timeframe, the Gazette, Osher, and Invisible Institute (collectively, Plaintiffs) applied for an order to show cause.

¶ 10 The district court recognized it first had to determine whether CORA applied (as Plaintiffs argued) or whether the CCJRA applied (as POST argued). That question turned on whether the requested records were criminal justice records. Under section 24-72-302(4) of the CCJRA, "criminal justice records" means

> all books, papers, cards, photographs, tapes, recordings, or other documentary materials, regardless of form or characteristics that are *made, maintained, or kept by any criminal justice agency in the state* for use in the exercise of functions required or authorized by law or administrative rule.

(Emphasis added.) Thus, whether the requested POST records were criminal justice records depended on whether POST was a "criminal justice agency" within the meaning of section 24-72-302(3). The court scheduled a hearing to make that determination.

¶ 11 Erik Bourgerie, POST's Director, testified at the hearing. After his testimony and counsels' arguments, the court concluded that POST is a criminal justice agency.

¶ 12 Plaintiffs appeal this conclusion.

B. Standard of Review and Applicable Law

¶ 13 Whether POST is a "criminal justice agency" under section 24-72-302(3) presents a question of statutory interpretation that we review de novo. *People v. Sprinkle*, 2021 CO 60, ¶ 12.

¶ 14 In interpreting statutes, we seek to ascertain and give effect to the legislature's intent. *Id.* at ¶ 22. To that end, we first look to the statute's language, giving its words and phrases their plain and ordinary meanings. *Id.* We read words and phrases in context and construe them according to the rules of grammar and common usage. *Id.* If the language is clear, we apply it as written. *Id.*

¶ 15 Under the CCJRA, a criminal justice agency is any agency of the state that performs

> *any activity directly relating to* the detection or investigation of crime; the apprehension, pretrial release, posttrial release, prosecution, correctional supervision, rehabilitation, evaluation, or treatment of accused persons or criminal offenders; or criminal identification activities *or the collection, storage, or dissemination of arrest and criminal records information*.

§ 24-72-302(3) (emphases added). Our appellate courts have recognized other governmental entities as criminal justice agencies under section 24-72-302(3). *See Off. of State Ct. Adm'r v. Background Info. Servs., Inc.*, 994 P.2d 420, 431 (Colo. 1999) (criminal courts); *Kopec v. Clements*, 271 P.3d 607, 610 (Colo. App. 2011) (Department of Corrections); *Madrigal v. City of Aurora*, 2014 COA 67, ¶ 11 (police departments). But the entity's status as a criminal justice agency was not at issue in any of those cases.

¶ 16 And the parties here disagree about who bears the burden to prove that POST is (or is not) a criminal justice agency. As noted, if a record constitutes a "public record" under CORA, it must be made available for inspection subject to certain exceptions. *See* §§ 24-72-202(6)(a)(I), -203. Once the requesting party shows that the agency's records are "'made, maintained, or kept' in a public capacity," the burden shifts to the custodian to demonstrate that

CORA does not apply. *Denver Publ'g Co. v. Bd. of Cnty. Comm'rs*, 121 P.3d 190, 199 (Colo. 2005) (quoting *Wick Commc'ns Co. v. Montrose Cnty. Bd Cnty. Comm'rs*, 81 P.3d 360, 366 (Colo. 2003)).

¶ 17 In this case, CORA's applicability depends on whether the requested materials are "criminal justice records," which itself depends on whether POST is a "criminal justice agency" within the meaning of section 24-72-302(3). Because Plaintiffs have indisputably shown that the requested records are kept by POST in its public capacity, POST bears the burden to demonstrate that it is a criminal justice agency. *See Denver Publ'g Co.* 121 P.3d at 199.

C. Analysis

¶ 18 We conclude that POST is a criminal justice agency under section 24-72-302(3) because it collects and stores arrest and criminal records information when it revokes a peace officer's certification.

¶ 19 Revoking a peace officer's certification is one of POST's express statutory duties. § 24-31-303(1)(d), C.R.S. 2022. During the hearing, its Director explained how POST exercises that statutory authority:

Q: Why would an officer have his certification revoked?

A: For conviction or pleading guilty to a disqualifying offense.

Q: And what begins the process of revocation?

A: POST will normally receive a notice from CBI that a peace officer has been fingerprinted in a criminal case.

Q: And what does POST do after it receives this notification?

A: We go into the courts database and track the case through disposition.

Q: And what kinds of criminal records does POST collect from the database.

A: All records from the court record, including the disposition of the case.

Q: And does POST store these records?

A: If the conviction is for a revocable offense, we do.

Q: Does POST collect any other records?

A: For conviction or pleading guilty to a revocable offense, POST will contact the arresting law enforcement agency in order to receive any law enforcement reports or other documentary evidence to inform us of our revocation decision.

Q: And do you contact the arresting agency for law enforcement reports and other records related to the criminal case every time you

> discover there is a disposition of a revocable offense?
>
> A: We do.
>
> Q: And how often does POST receive these kind of records?
>
> A: Most of the time.

¶ 20 The court found the Director's testimony credible, and Plaintiffs presented no countervailing evidence suggesting that POST does not collect and store arrest and criminal records information during the revocation process.

¶ 21 The Director's credible, uncontroverted testimony shows that POST performs an "activity directly relating to . . . the collection [and] storage . . . of arrest and criminal records information." *See* § 24-72-302(3). This activity is consistent with POST's statutory duty to revoke a peace officer's certification, including for certain criminal convictions, *see* §§ 24-31-303(1)(d), -305(2)(a), C.R.S. 2022, and fits squarely within the plain language of section 24-72-302(3). It therefore qualifies POST as a criminal justice agency.[4]

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[4] We also note that, pursuant to section 24-31-904(3), C.R.S. 2022, law enforcement agencies must share arrest and criminal records information with POST in certain circumstances. While this does not impact our analysis or holding, it underscores the General

¶ 22 Plaintiffs contend that POST is not a criminal justice agency because many of its duties are unrelated to section 24-72-302(3)'s operative conduct. But the General Assembly deemed "any" activity directly related to the described conduct sufficient to qualify an entity as a criminal justice agency. And we decline to read a requirement into the statute that would be inconsistent with its plain language. *See Dep't of Revenue v. Agilent Techs., Inc.*, 2019 CO 41, ¶ 16 ("[W]e must respect the legislature's choice of language, and we will not add words to a statute or subtract words from it."). Moreover, POST need not perform any of the other activities enumerated in section 24-72-302(3) to qualify as a criminal justice agency. The General Assembly unambiguously used the word "or" in the disjunctive sense. *See Armintrout v. People*, 864 P.2d 576, 581 (Colo. 1993) ("[W]hen the word 'or' is used in a statute, it is presumed to be used in the disjunctive sense, unless legislative intent is clearly to the contrary."). In doing so, the General Assembly sought to convey that a criminal justice agency is one that performs *any* of the enumerated activities.

Assembly's intent that POST be designated as a criminal justice agency within the meaning of section 24-72-302(3).

¶ 23 POST advances other reasons why it should be considered a criminal justice agency under section 24-72-302(3) — including that it (1) collects and stores criminal background check information when it certifies a peace officer and (2) performs investigations of POST rule violations and refers them for criminal prosecution. Indeed, the court based its ruling on these proffered reasons. But we need not decide whether those grounds are sufficient because, as discussed, POST's collection and storage of criminal records information during its revocation process alone qualifies it as a criminal justice agency. *See Deutsche Bank Tr. Co. Ams. v. Samora*, 2013 COA 81, ¶ 38 ("An appellate court may affirm the trial court's ruling based on any grounds that are supported by the record.").

¶ 24 Having concluded that POST is a criminal justice agency under section 24-72-302(3), we now turn to whether Chief Deputy Hanlon Leh abused her discretion by partially denying Plaintiffs' records requests.

II. POST's Custodian of Records Did Not Abuse Her Discretion by Partially Denying the Records Requests

A. Background

¶ 25 POST provided written letters for each of the three partial denials. Each letter contained the following language:

> Because the requested records do not fall within the definition of official action, the decision whether to grant the request is consigned to the exercise of the custodian's sound discretion under sections 24-72-304 and 305.

The letters did not provide detailed, substantive explanations for why the custodian exercised her discretion to partially deny the requests.

¶ 26 After concluding that the CCJRA applied, the district court ordered briefing and scheduled a show cause hearing consistent with section 24-72-204(5)(b). In its briefs, POST provided detailed, substantive explanations for why Chief Deputy Hanlon Leh had partially denied the requests. It couched its analysis within the framework outlined in *Harris v. Denver Post Corp.*, which requires the custodian of criminal justice records to weigh the public and the privacy interests implicated by the desired records inspection in making a disclosure decision. 123 P.3d at 1175. *Infra* Part II.B.

¶ 27 POST provided essentially two justifications. First, it noted that it would be exceedingly time-consuming to create such a list using its database technology. Second, it asserted that disclosing every certified peace officer's name would threaten undercover officers' safety and the viability of their ongoing investigations. Since POST did not know who was undercover, it would need to coordinate with over 250 law enforcement agencies across the state to obtain those identities. But even if it performed this labor-intensive process, that list would be immediately obsolete because covert investigations are routinely launched, concluded, or revived. Thus, because POST could not redact its dataset to protect the identities of undercover officers, it could not ensure their safety or the viability of their investigations.

¶ 28 Chief Deputy Hanlon Leh testified at the show cause hearing. She explained that she was personally involved in all records requests directed to and concerning the records within the custody of the Department of Law, including the three at issue here. In handling these requests, she testified that she considered the "very serious public interest" advanced by Plaintiffs' common goal of using the records to hold institutions accountable, enhance

transparency, and increase public awareness about policing. But she concluded that this public interest was outweighed by logistical and privacy concerns — specifically, (1) the technological challenges of producing such a record and (2) the risk to undercover officers' safety and the viability of their ongoing investigations.

¶ 29 A journalist with the Invisible Institute also testified at the hearing. He said that he had received records from other states' equivalent agencies after making similar requests and that it was feasible for POST to create such a record with its current database technology.

¶ 30 In its oral ruling, the court recognized that it was limited to deciding whether Chief Deputy Hanlon Leh had abused her discretion — not whether it would have weighed the interests differently. It also observed that while Chief Deputy Hanlon Leh was not an information technology (IT) expert, she credibly testified that POST's IT expert informed her that such a record could not be created without a significant expenditure of POST resources. The court made this factual finding despite the conflicting testimony from the journalist.

¶ 31 Finally, the court addressed whether Chief Deputy Hanlon Leh had considered the public interest in partially denying the requests. It noted that while "there is no paper evidence that the attorney general gave even a moment's thought to [the public interest]," Chief Deputy Hanlon Leh testified that she had, in fact, considered the public interest and had determined that it did not outweigh the privacy interests. For this reason, the court concluded that there was "credible evidence in the record" that Chief Deputy Hanlon Leh had performed the requisite balancing and therefore did not abuse her discretion by partially denying the requests.

B. Applicable Law and Standard of Review

¶ 32 The CCJRA governs the public's access to criminal justice records. *See Freedom Colo. Info. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 899 (Colo. 2008). It distinguishes between two categories of records: (1) records of "official action" and (2) all other criminal justice records. §§ 24-72-301(2), -302(7); *see Freedom Colo. Info.*, 196 P.3d at 898. An "official action" includes, for example, an arrest, indictment, or release from custody. § 24-72-302(7). In general, records of official action "shall be open to inspection." § 24-72-301(2). By contrast, all other criminal justice records "may

be open for inspection" at the custodian's discretion (save for some exceptions barring disclosure). §§ 24-72-304(1), -305, C.R.S. 2022.

¶ 33 The parties do not dispute that, if POST comes within the definition of "criminal justice agency" in section 24-72-302(3), then the requested records would constitute "criminal justice records" under section 24-72-302(4) — not records of "official action." Given our conclusion that POST is a criminal justice agency, the decision on disclosure was left to Chief Deputy Hanlon Leh's sound discretion.

¶ 34 The custodian "must balance the public and private interests involved in the inspection request and determine whether to allow full disclosure, redacted disclosure, or no disclosure of the record." *Freedom Colo. Info.*, 196 P.3d at 895. Such balancing entails an analysis of the relevant factors, including

1. the privacy interests of individuals who may be impacted by a decision to allow inspection;
2. the agency's interest in keeping confidential information confidential;
3. the agency's interest in pursuing ongoing investigations without compromising them;

4. the public purpose to be served in allowing inspection; and
5. any other pertinent consideration relevant to the circumstances of the particular request.

Harris, 123 P.3d at 1175.

¶ 35 Although the CCJRA empowers the custodian to withhold such records, the statute "favors making the record available for inspection." *Freedom Colo. Info.*, 196 P.3d at 898-99. Consistent with this purpose, redaction is a preferred alternative to prohibiting inspection when possible. *Id.* at 900 n.3.

¶ 36 The district court was obligated to review the custodian's decision for an abuse of discretion. *Id.* at 897. We review de novo whether the court applied the correct standard of review. *Id.* However, to the extent the court made factual findings based on evidence presented at the show cause hearing (e.g., findings as to the witnesses' credibility or factual bases for the custodian's determination), we defer to those findings unless they are clearly erroneous. *See City of Fort Morgan v. E. Colo. Publ'g Co.*, 240 P.3d 481, 485 (Colo. App. 2010).

¶ 37 Because the ultimate decision of whether to disclose the records here was consigned to the custodian's discretion (not the

district court's), we review the custodian's determination for an abuse of discretion. *Madrigal*, ¶ 13. An abuse of discretion occurs when the decision is "manifestly unreasonable, arbitrary, or unfair." *Freedom Colo. Info.*, 196 P.3d at 899.

C. Analysis

¶ 38 We conclude that Chief Deputy Hanlon Leh did not abuse her discretion by partially denying the three requests. Our conclusion is based on the district court's finding that, in making her decisions, Chief Deputy Hanlon Leh considered the public interest and balanced it against bona fide privacy interests. We reach this conclusion notwithstanding the absence of contemporaneous documentary evidence of that balancing.

¶ 39 Plaintiffs contend that the court erred by considering the justifications POST offered at the show cause hearing for partially denying disclosure. They argue that POST was required to articulate the balancing it performed in the written letters that informed them of the partial denials. They rely on section 24-72-305(6), which provides that, if a custodian denies access to any criminal justice record,

> the applicant may request a written statement of the grounds for the denial, which statement shall be provided to the applicant within seventy-two hours, *shall cite the law or regulation under which access is denied or the general nature of the public interest to be protected by the denial*, and shall be furnished forthwith to the applicant.

(Emphasis added.)

¶ 40 For two reasons, we conclude that, in reviewing whether the custodian abused her discretion, it is appropriate to consider the rationale articulated during the show cause hearing. First, section 24-72-305(6) only requires the custodian to provide a statement that "cite[s]" the law or regulation under which she denied access. Requiring the custodian to comprehensively articulate her rationale in the initial explanation — within seventy-two hours, no less — would impose a duty that is contrary to the statute's language. *See Agilent Techs., Inc.*, ¶ 16. Second, two other divisions of this court have concluded that the custodian may articulate her rationale during the show cause hearing. *See Madrigal*, ¶¶ 17-24; *Romero v. City of Fountain*, 307 P.3d 120, 124-25 (Colo. App. 2011). We see no reason to depart from this sound reading of the statute.

¶ 41 In briefing and in testimony before the court, Chief Deputy Hanlon Leh said that fully granting any of the three requests would compromise the safety of undercover officers and the viability of ongoing investigations. Her concern was based on POST's inability to effectively redact the undercover officers' identities.[5] These are appropriate considerations. *Harris*, 123 P.3d at 1174-75; *Freedom Colo. Info.*, 196 P.3d at 903.

¶ 42 Chief Deputy Hanlon Leh also testified that, although she considered the public importance of investigative reporting on policing, she concluded that interest was outweighed by the risks posed by disclosure. While POST presented no contemporaneous documentary evidence showing that Chief Deputy Hanlon Leh considered the public interest at the time she partially denied the

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[5] Plaintiffs contend that POST has effectively redacted undercover officers' identities in the past and that the court committed clear error by crediting Chief Deputy Hanlon Leh's testimony that POST could not do so. Plaintiffs cite meeting minutes from 2015 suggesting that POST provided records of identification numbers for all peace officers but redacted information on all active officers to protect undercover agents. At most, this amounts to conflicting evidence. Because the court's factual conclusion on this matter has record support, it was not clearly erroneous. *See In re Parental Responsibilities Concerning S.Z.S.*, 2022 COA 105, ¶ 11 ("A court's factual finding is clearly erroneous when it has no record support.").

requests, the court found her testimony credible. Such credibility determinations are binding on us. *In re Estate of Owens*, 2017 COA 53, ¶ 22 ("[A] trial court's 'determination of' a testifying witness' 'credibility [is] entirely within the purview of the trial court as the finder of fact and is binding upon' an appellate court." (quoting *People v. Fordyce*, 705 P.2d 8, 9 (Colo. App. 1985))).

¶ 43 POST also argued that its decisions were based on the technological challenges posed by the requests. The court ultimately concluded, based on Chief Deputy Hanlon Leh's testimony, that complying with such a request either would take "hundreds of hours of POST staff time" or simply "couldn't be done."

¶ 44 Plaintiffs quarrel with this factual finding. Specifically, they argue the court committed clear error by crediting Chief Deputy Hanlon Leh's testimony instead of their witness's contrary testimony. But even if we assume that POST (1) has the technological ability to create the requested datasets and (2) could be required to do so, *but see Off. of State Ct. Adm'r*, 994 P.2d at 432 ("[Criminal justice agencies] do not have an implied duty to manipulate computer-generated data under the [CCJRA] in order to create a new document solely for the purpose of disclosure."), such

an ability does not undermine POST's other articulated rationale for denying the request — namely, to protect undercover officers' safety and the viability of ongoing investigations.

¶ 45 On this record, we conclude that Chief Deputy Hanlon Leh adequately balanced the public and private interests in partially denying the requests and therefore did not abuse her discretion. *See Harris*, 123 P.3d at 1175; *Freedom Colo. Info.*, 196 P.3d at 900. The district court applied the correct legal standard by focusing on whether the custodian balanced the public and privacy concerns in assessing the records requests at issue here. *Freedom Colo. Info.*, 196 P.3d at 897.

III. Disposition

¶ 46 The district court's judgment is affirmed.

JUDGE LIPINSKY and JUDGE SCHOCK concur.