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SUMMARY
October 5, 2023

2023COA93

No. 22CA1119, *Brookhart v. Reaman* — Public Records — Colorado Open Records Act — Allowance or Denial of Inspection — Library Records Disclosing the Identity of a User; Libraries — Privacy of User Records

A division of the court of appeals considers, as a matter of first impression, whether a records custodian of a public library district must disclose under the Colorado Open Records Act, §§ 24-72-200.1 to -205.5, C.R.S. 2023, the identifying information of individuals who used the library district's form to request that a book be removed from the library's collection or that only adults be permitted to access the book. The division concludes that, because the individuals who completed the forms "requested or obtained . . . [a library] service," within the meaning of section 24-90-119(1), C.R.S. 2023, the portions of the forms containing the requesters'

identifying information are exempt from disclosure under section 24-72-204(3)(a)(VII), C.R.S. 2023.

COLORADO COURT OF APPEALS **2023COA93**

Court of Appeals No. 22CA1119
Gunnison County District Court No. 22CV30017
Honorable J. Steven Patrick, Judge

Andrew Brookhart, in his official capacity as the executive director and custodian of records of the Gunnison County Library District,

Plaintiff-Appellee,

v.

Mark Reaman, in his capacity as editor of the Crested Butte News,

Respondent-Appellant.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE LIPINSKY
Schutz, J., concurs
Taubman*, J. dissents

Announced October 5, 2023

Seter & Vander Wall, PC, Kim J. Seter, Elizabeth Dauer, Greenwood Village, Colorado, for Plaintiff-Appellee

Rachael Johnson, Denver, Colorado, for Respondent-Appellant

The Law Office of Steven D. Zansberg, Steven D. Zansberg, Denver, Colorado, for Amicus Curiae Colorado Freedom of Information Coalition

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 Four individuals (the requesters) asked the Gunnison County Library District (the library district) to remove a book titled *Gender Queer: A Memoir* (the book) from the shelves of the Gunnison County Public Library (the library) or, alternatively, to prevent children from accessing it. The requesters used the library district's own "Request for Reconsideration of Materials" form (the reconsideration form) to submit their requests. The library makes the reconsideration form available to the public through its website. Any person may complete and submit a reconsideration form to the library district to ask that an item be removed from the library's collection or that access to the item be restricted.

¶ 2 Respondent, Mark Reaman, in his capacity as the editor of the Crested Butte News, submitted a request under the Colorado Open Records Act, §§ 24-72-200.1 to -205.5, C.R.S. 2023 (CORA), to the library district to obtain unredacted copies of the requesters' reconsideration forms. The library district responded by filing this case in district court, with its executive director and custodian of records, Andrew Brookhart, as the named plaintiff, under section 24-72-204(6)(a), C.R.S. 2023, to obtain guidance on how it should respond to Reaman's CORA request. That statute allows "the

official custodian of any public record" to "apply to the district court of the district in which such record is located for an order permitting him or her to restrict . . . disclosure [of the record] or for the court to determine if disclosure is prohibited," if, for purposes of this case, "the official custodian is unable, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if disclosure of the public record is prohibited" under CORA. § 24-72-204(6)(a).

¶ 3 The district court entered an order (the order) holding that Reaman was entitled to obtain the requesters' reconsideration forms, but only with the requesters' identifying information redacted. The court concluded that such identifying information needed to be withheld from disclosure under section 24-72-204(3)(a)(VII) of CORA; section 24-90-119(1), C.R.S. 2023, which protects the privacy of library user records; and *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002), in which our supreme court held that the government cannot compel a bookseller to turn over records of an individual's book purchases. After issuing the order, the court entered a final judgment. Reaman appeals the judgment.

¶ 4 The narrow, but important, issue before us is whether the library district is required to keep the requesters' identifying information confidential under section 24-90-119(1), which prohibits the disclosure of "any record or other information that identifies a person as having requested or obtained specific materials or service or as otherwise having used the library." Section 24-72-204(3)(a)(VII) links section 24-90-119(1) to CORA, providing that a records custodian shall deny disclosure of "[l]ibrary records disclosing the identify of a user as prohibited by section 24-90-119." This case involves the apparent conflict between two principles embodied in the Colorado Revised Statutes: the mandate that "all public records . . . be open for inspection by any person at reasonable times," except as "specifically provided by law," § 24-72-201, C.R.S. 2023, and library users' right of privacy protected through section 24-90-119(1).

¶ 5 Section 24-90-119(1) does not prohibit the disclosure of any portion of a library record other than specific information that "identifies a person as having requested or obtained specific materials or service or as otherwise having used the library." *See, e.g.*, *Denver Publ'g Co. v. Bd. of Cnty. Comm'rs*, 121 P.3d 190, 205

(Colo. 2005) ("CORA does not mandate that . . . records be disclosed in complete form or not at all."). Thus, our review is limited to whether the district court erred by ordering Brookhart to redact the requesters' personal identifying information before producing the reconsideration forms to Reaman.

¶ 6 We are not asked to decide, and do not rule on, the merits of the requesters' objections to the inclusion of the book in the library's collection; the artistic or social merit of the book; or whether readers, regardless of age, have a First Amendment right to access the book through a public library. We leave these issues for another case and another day.

¶ 7 We affirm the judgment, albeit on slightly different grounds from those on which the district court relied.

I. Additional Background Facts and Procedural History

¶ 8 The library district created the reconsideration form and posted it on its website. A person completing the reconsideration form may, but is not required to, disclose his or her name, phone number, and address on the form.

¶ 9 After receiving the first reconsideration form challenging the inclusion of the book in the library's collection, the library district's

board of trustees discussed the form at its January 20, 2022, public meeting. At the time, the library district's policy provided that the board would discuss at its public meetings the reconsideration forms it received.

¶ 10 Following the discussion of the first reconsideration form at the public board meeting, Reaman's newspaper requested and received an unredacted copy of that form from the library district. In response, the individual who had submitted the form made a criminal referral to the Gunnison Police Department for Brookhart's alleged violation of section 24-90-119(1). At the time, section 24-90-119(3) provided that "[a]ny library official, employee, or volunteer who discloses information in violation of this section commits a class 2 petty offense and, upon conviction thereof, shall be punished by a fine of not more than three hundred dollars." § 24-90-119(3), C.R.S. 2021. Although, as explained below, a violation of the statute is now a civil infraction, the fine for a violation remains the same — three hundred dollars. § 24-90-119(3), C.R.S. 2023.

¶ 11 The district attorney for the Seventh Judicial District conducted an investigation into the matter. After completing the

investigation, he sent Brookhart a "No File Letter" dated March 16, 2022, stating that his office would not prosecute Brookhart for disclosing the unredacted reconsideration form to Reaman's newspaper. The district attorney stated in the letter that, in his view, the identifying information in the reconsideration form was "not the type of information [section 24-90-119] is attempting to protect." The library district subsequently received the requesters' reconsideration forms, which, as noted above, all challenged the book.

¶ 12 On March 28, 2022, Reaman submitted a CORA request to the library district for "all Requests for Reconsideration Forms filed with the . . . library . . . since January 1, 2022." In response, Brookhart, acting in his official capacity, filed this action pursuant to section 24-72-204(6)(a).

¶ 13 In his application filed in the district court, Brookhart explained that the requesters had submitted reconsideration forms seeking to have the book removed from the library's shelves or access to the book limited to adults. The requesters included their identifying information in the reconsideration forms. Brookhart asked for a judicial determination whether the library district must

(1) disclose the requesters' reconsideration forms to Reaman in their entirety; (2) disclose the reconsideration forms with the requesters' identifying information redacted; or (3) not disclose any part of the reconsideration forms. As Brookhart noted, if he disclosed the unredacted reconsideration forms to Reaman without the protection of a section 24-72-204(6)(a) order authorizing the disclosure, a court that later disagreed with Brookhart's interpretation of section 24-90-119(1) could convict him of a petty offense and fine him three hundred dollars.

¶ 14 Although Brookhart requested such determination in neutral terms by tracking the language of section 24-72-204(6)(a), he also asserted in the application that, in his view, Reaman was entitled to obtain copies of the unredacted reconsideration forms because the requesters were not library "users" for purposes of sections 24-72-204(3)(a)(VII) and 24-90-119(1).

¶ 15 The district court concluded that Brookhart must disclose the requesters' reconsideration forms to Reaman under sections 24-72-204(3)(a)(VII) and 24-90-119(1), but with the requesters' identifying information redacted.

¶ 16 On appeal, Reaman asks us to reverse the order and decide that, under CORA, he is entitled to receive unredacted copies of the requesters' reconsideration forms. Brookhart and amicus curiae the Colorado Freedom of Information Coalition agree with Reaman's position, although Brookhart has not abandoned his assertion that, in good faith, he does not know whether he can disclose the unredacted reconsideration forms under section 24-72-204(6)(a) given the very real possibility that a court would disagree with Reaman's interpretation of the subject statutes. The requesters did not seek to intervene in this case and section 24-72-204(6)(a) does not require that persons whose nonpublic information is contained in the documents requested under CORA be made parties to an action to determine whether the documents must be produced.

II. Analysis

¶ 17 Reaman contends the court erred because a person who seeks to remove, or to restrict access to, a book from the collection of a public library is not a library "user" for purposes of section 24-72-204(3)(a)(VII). Thus, Reaman argues, the requesters' identifying information is not protected from disclosure under

CORA, and he is entitled to obtain unredacted copies of the requesters' reconsideration forms.

A. Jurisdiction

¶ 18 Before we consider whether the district court erred, we must first determine whether we have jurisdiction over this appeal given that both Brookhart and Reaman assert that we should interpret the pertinent statutes to mandate that Reaman receive unredacted copies of the requesters' reconsideration forms. *See Allison v. Engel*, 2017 COA 43, ¶ 22, 395 P.3d 1217, 1222 ("We must determine independently our jurisdiction over an appeal, nostra sponte if necessary."). "A case is moot when a judgment would have no practical legal effect on the existing controversy," typically due to "subsequent events." *Diehl v. Weiser*, 2019 CO 70, ¶ 10, 444 P.3d 313, 316.

¶ 19 "An actual controversy is an essential requisite to jurisdiction. . . . When there is no live controversy between the parties, the trial court lacks subject matter jurisdiction to proceed. Even when declaratory relief is sought, there must be an actual controversy . . . ." *Robertson v. Westminster Mall Co.*, 43 P.3d 622, 628 (Colo. App. 2001) (citations omitted).

¶ 20 We conclude, after reviewing the supplemental briefing we requested on the existence of an "actual controversy," that we have jurisdiction over this appeal. Although the parties both assert that Reaman should receive unredacted copies of the reconsideration forms, the order bars Brookhart from providing such unredacted documents to Reaman and, as we explain below, Brookhart has not advised us that he now believes he can produce the unredacted forms to Reaman without violating section 24-90-119(1).

¶ 21 We do not believe that Brookhart changed his position during the pendency of the case. As in the application, Brookhart contends on appeal that Reaman should be permitted to obtain unredacted copies of the requesters' reconsideration forms. In the application, Brookhart expressed agreement with the district attorney's view that the identifying information in the requesters' reconsideration forms is "not the type of information [section 24-90-119] is intended to protect." Brookhart explained in the application that he was nonetheless seeking guidance from the court pursuant to section 24-72-204(6)(a) because of the number of reconsideration forms targeting the book; the change in the library district's policy governing the review of reconsideration forms, *see*

supra Part II.D; the negative reaction the library district received after disclosing the name of the individual who submitted the first reconsideration form challenging the book; such individual's referral of Brookhart for criminal prosecution based on production of that individual's unredacted reconsideration form to Reaman's newspaper; the ongoing risk of imposition of a civil citation and fine against Brookhart if a court were to find that he improperly produced unredacted copies of the reconsideration forms; and "the somewhat ambiguous language" of section 24-90-119.

¶ 22 This would be a materially different case if Brookhart had informed us that, since filing the case, he no longer has a good faith belief that the statute is unclear or ambiguous and therefore has concluded that disclosure of the unredacted reconsideration forms to Reaman would not violate section 24-90-119(1). Although Brookhart's interpretation of the statute may align with Reaman's position, we see nothing in the record or in Brookhart's briefs to suggest that he has definitively determined that the statute requires him to produce the unredacted forms to Reaman.

¶ 23 Further, it is of no consequence that Brookhart's prayer for relief in his application took the form of a question: whether the

library district must (1) disclose the requesters' reconsideration forms in their entirety; (2) disclose the reconsideration forms with the requesters' identifying information redacted; or (3) not disclose any part of the reconsideration forms. Consistent with the language of section 24-72-204(6)(a), he asked the court to determine whether "disclosure of the public record is prohibited" because he was unable, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if disclosure of the unredacted reconsideration forms is prohibited. Brookhart did not merely parrot this language in his application. Nor has Brookhart represented that he would join Reaman in asking the district court to vacate the order. (We respectfully disagree with the dissent's inference that Brookhart is likely to provide the unredacted forms of any future requesters to Reaman without filing a new section 24-72-204(6)(a) proceeding.)

¶ 24 As we explain above, Brookhart's concern regarding potential liability is not merely theoretical. Section 24-90-119(3) provides that "[a]ny library official, employee, or volunteer who discloses information in violation of this section commits a civil infraction and, upon conviction thereof, shall be punished by a fine of not

more than three hundred dollars." Thus, absent a court order authorizing the disclosure of the requesters' identifying information, Brookhart faces potential civil liability and a fine if he discloses such information and if a court were subsequently to disagree with his reading of section 24-90-119(1). And if a court were to find that Brookhart violated CORA by failing to produce the unredacted reconsideration forms to Reaman, Brookhart would be liable for Reaman's "court costs and reasonable attorney fees" incurred in obtaining an order compelling production. § 24-72-204(5)(b). In any event, so long as Brookhart declines to produce the requesters' identifying information absent an authorizing court order, the existing judgment remains an impediment to Reaman's receipt of the unredacted reconsideration forms and Reaman has the right to challenge the order.

¶ 25 In sum, this appeal implicates the unresolved issue of Reaman's entitlement to receive, and Brookhart's duty to disclose, unredacted versions of the requesters' reconsideration forms. *Cf. Farmers Ins. Exch. v. Dist. Ct.*, 862 P.2d 944, 947 (Colo. 1993) (explaining that a declaratory judgment action is appropriate if "a declaratory judgment would effect a change in the plaintiff's present

rights or status”). Consequently, there is a continuing actual controversy between the parties, and we have jurisdiction over this appeal.

B. Standard of Review

¶ 26 We review “questions of law concerning the correct construction and application of CORA” de novo. *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1170 (Colo. 2005).

¶ 27 When construing a statute, we effectuate the intent of the General Assembly by “look[ing] to the plain meaning of the statutory language and consider[ing] it within the context of the statute as a whole.” *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). We construe “the entire statutory scheme to give consistent, harmonious, and sensible effect to all parts.” *Id.* at 1089. We give effect to “words and phrases according to their plain and ordinary meaning.” *Id.* If the statutory language is clear and unambiguous, we apply it. *Id.*; *see also Jefferson Cnty. Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010) (“If, after review of the statute’s language, we conclude that the statute is unambiguous and the intent appears with reasonable certainty, our analysis is complete.”).

C. The Reconsideration Forms Are "Public Records" Under CORA

¶ 28 We initially note that the parties assert, and we agree, that the reconsideration forms are "public records," which, under CORA, are "open for inspection by any person at reasonable times, except as provided" by CORA or "as otherwise provided by law." § 24-72-203(1)(a), C.R.S. 2023. The reconsideration forms are "public records" because they are "made, maintained, [and] kept by . . . [a] political subdivision of the state." § 24-72-202(6)(a)(I), C.R.S. 2023; *see* § 24-90-103(6), C.R.S. 2023 ("A library district shall be a political subdivision of the state.").

¶ 29 The library district's "Challenged Materials" policy confirms that the reconsideration forms are public documents:

> Despite the care taken to select valuable materials for Library use, and the qualifications of the persons who select the materials, there will undoubtedly be occasional objections to a selection. The principles of freedom to read and of the staff's professional integrity to provide materials of value based on established selection procedure must be defended rather than the materials.
>
> Although materials are carefully selected, differences of opinion often occur regarding suitable materials. *Patrons requesting that material be withdrawn from or restricted within the collection may complete a "Request to*

> *Reconsider Materials" form which is available in the Library.*
>
> The Library Director shall review and consider all "Requests to Reconsider Materials" and provide a written response and decision on the subject material(s) to the patron that submitted the request. Questioned material shall not be withdrawn from circulation until a final decision has been reached.

(Emphasis added.)

¶ 30 We next turn to the central issue in this appeal: whether the CORA exception for library user records protects the requesters' reconsideration forms from disclosure.

D. The CORA Exception for Library User Records Applies to the Requesters' Reconsideration Forms

¶ 31 Focusing on the use of the term "user" in section 24-72-204(3)(a)(VII), the parties argue that the requesters did not become library "users" by submitting the reconsideration forms. Specifically, the parties contend that library "users" are only those persons who access "books and other materials in the pursuit of searching out and obtaining information for [their] own purposes," and do not encompass "those who request the removal of library books and other materials."

¶ 32 Reaman and Brookhart premise their interpretation of "user" on its context in section 24-72-204(3)(a)(VII); the legislative history of sections 24-72-204(3)(a)(VII) and 24-90-119(1); the library district's alleged need to disclose the reconsideration forms in their entirety for its "reasonable operation," § 24-90-119(2)(a) (providing that section 24-90-119(1) does not apply when the disclosure of the subject records is "necessary for the reasonable operation of the library"); and the general rule that courts "construe any exceptions to CORA's disclosure requirements narrowly," *Jefferson Cnty. Educ. Ass'n v. Jefferson Cnty. Sch. Dist. R-1*, 2016 COA 10, ¶ 14, 378 P.3d 835, 838.

¶ 33 The General Assembly chose not to define the key words in this case. CORA lacks definitions of "user" or "services." *See* § 24-72-202 (the definitional section of CORA). Further, section 24-90-119(1) does not elucidate what it means for a person to "request[] or obtain[] specific material or services or . . . otherwise . . . use[] the library." The district court determined that "user in the statute under this analysis is not limited to someone who reads [or checks out] material in the library . . . , but [is] inclusive of any person 'using' library services." The court reached this conclusion

by defining the term "service" as used in section 24-90-119(1) broadly. We agree with the court's interpretation of "service" and that the key to resolving this case is the meaning of "service" in section 24-90-119(1).

¶ 34 Section 24-72-204(3)(a)(VII) unequivocally provides that a library "user" is a person who satisfies the requirements of section 24-90-119: a "person [who] requested or obtained specific materials or service or . . . otherwise . . . used the library." § 24-90-119(1). Thus, if a person's identifying information is protected under any clause of section 24-90-119(1), such information is necessarily exempt from disclosure under CORA pursuant to section 24-72-204(3)(a)(VII). Applying these statutes compels the conclusion that, in this case, the requesters "requested or obtained [a] specific . . . service" from the library for four reasons.

¶ 35 First, in section 24-90-119(1), the General Assembly employed the disjunctive "or" in listing the three categories of persons whose identifying information is protected from disclosure: persons who (1) "requested or obtained specific materials"; (2) "requested or obtained [a] specific . . . service"; *or* (3) "otherwise . . . used the library." *See Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d

565, 571 (Colo. 2008) ("Generally, we presume the disjunctive use of the word 'or' marks distinctive categories."); *see also Colo. Dep't of Lab. & Emp. v. Esser*, 30 P.3d 189, 196 (Colo. 2001) ("We do not presume that the General Assembly used language idly; rather, we give effect to the statute's words and terms.").

¶ 36 We hold that the identifying information in the requesters' reconsideration forms may not be disclosed under the second category of section 24-90-119(1): persons who "requested or obtained [a] specific . . . service."

¶ 37 Second, a "service" is (1) "[t]he official work or duty that one is required to perform" or (2) labor performed "in the interest or under the direction of others; specif[ically], the performance of some useful act or series of acts for the benefit of another." Black's Law Dictionary 1643 (11th ed. 2019). The second definition "denotes an intangible commodity in the form of human effort, such as labor, skill, or advice." *Id.* We conclude that both dictionary definitions of "service" encompass the library district's promulgation and the requesters' submission of the reconsideration forms.

¶ 38 The first definition of "service" is satisfied because the library district's creation, dissemination, and use of its reconsideration

form established a procedure whereby any person could request that certain books or other items be removed from the library's collection or made unavailable to underage library patrons. As the library district's "Challenged Materials" policy states, the "library director" will "review and consider all 'Requests to Reconsider Materials' and provide a written response and decision on the subject material(s) to the patron that submitted the request." (We do not consider whether the outcome of this case would have been different if the library district had not developed and promulgated the reconsideration form or if the requesters had not employed the library's own form to submit their requests.)

¶ 39 The requesters' identifying information is also protected under the second dictionary definition of "service." Although the parties challenge the societal benefit of removing books from a public library's collections, the dictionary definition of "service" is value neutral. Our application of the governing statutes must be value neutral, as well.

¶ 40 The library district's review and consideration of the reconsideration forms required "human effort" to perform a "useful act or series of acts for the benefit" of the requesters, and arguably

for the benefit of any resident of the library district who may agree with the views of the requesters. *Id.* The meaning of "useful act," like the definition of "service," does not depend on whether the library district agrees with the requesters that removing, or limiting access to, the book is "useful."

¶ 41 Third, the library district's own actions compel affirmance of the order. It would defy logic to conclude that the library district engaged in a "useless act" when it created and promulgated the reconsideration form, or that the library district believed submission of its own form would result in harm to the library or violate the rights of its patrons.

¶ 42 The die was cast when the library district created and posted a form to allow any person to seek the removal or restriction of any item in the library's catalogue. The parties' disagreement with the requesters' opinions regarding who should be permitted to access the book does not change the nature of the "service" the library district provides to members of the public who use the library district's own reconsideration form to question an item in the library's collection. Thus, the requesters' completion and submission of the library's reconsideration forms satisfy the plain

meaning of requesting or obtaining a library "service" for purposes of section 24-90-119(1).

¶ 43 Fourth, section 24-90-119(1) distinguishes between "request[ing] or obtain[ing] specific materials" and "request[ing] or obtain[ing] [a] specific . . . service." As noted in our discussion above, by using "or" in section 24-90-119(1), the General Assembly intended that, for purposes of the statute, "request[ing] or obtain[ing] specific materials" and "request[ing] or obtain[ing] [a] specific . . . service" must be considered independently. We therefore reject the parties' arguments that section 24-90-119(1) only protects the identifying information of a person who "requested or obtained specific materials" — in other words, a person who asks for, reads, listens to, views, or checks out items from the library's collection.

¶ 44 For these reasons, we conclude that the identifying information in the requesters' reconsideration forms is protected from disclosure under the second category of section 24-90-119(1). Under the plain language of the statute, the identifying information of a person who "requested or obtained [a] specific . . . service" from the library may not be disclosed. The requesters "requested . . . [a]

specific . . . service" from the library district when they submitted their reconsideration forms and "obtained" a benefit from such service by initiating the process of determining whether the book should be removed from the library's collection or placed in a restricted status.

¶ 45 Because a person's identifying information protected under section 24-90-119(1) is exempt from disclosure under CORA pursuant to section 24-72-204(3)(a)(VII), we conclude that Brookhart is barred from disclosing the requesters' identifying information to Reaman.

¶ 46 Given our conclusion that the identifying information in the requesters' reconsideration forms is protected from disclosure to third parties under the plain language of sections 24-72-204(3)(a)(VII) and 24-90-119(1), we need not consider the legislative histories of those statutes. *See Ritter*, 255 P.3d at 1089.

¶ 47 In addition, at oral argument, counsel for Brookhart sought to bolster his argument by directing us to the Colorado Public Library Standards (the standards), which he contended shed light on the nature of the identifying information the General Assembly intended to keep anonymous through section 24-90-119. *See* Colo. State

Libr., Colo. Dep't of Educ., Colorado Public Library Standards (2016), https://perma.cc/BG8C-YKAW. The Colorado Department of Education promulgated the standards, which provide "minimum standards" for public libraries in this state and "developmental standards" for increasing libraries' level of service to local communities. Colo. Dep't of Educ., *Colorado Public Library Standards: Overview*, https://perma.cc/VSF3-J9ZW.

¶ 48 But we need not look beyond the plain language of the statute to glean its meaning, *see Ritter*, 255 P.3d at 1089; the standards are not binding legal authority; and we do not ordinarily "consider arguments first asserted in oral argument." *McGihon v. Cave*, 2016 COA 78, ¶ 10 n.1, 410 P.3d 647, 651 n.1. But even if we were to consider the standards, they do not alter our conclusion that the requesters used a library "service" when they submitted the reconsideration forms:

- The standards expressly provide for public comments to assist with development of the library's collection; the reconsideration form is one means by which the library allows members of the public to participate in this

process. *See* Colo. State Libr., Colorado Public Library Standards.

- The standards state that the library's "collection must be continually updated to meet the changing needs and interests of the community. Materials are selected in anticipation of, *as well as in response to, requests from library users*." *Id.* at 5 (emphasis added).
- Although the library must provide services that meet the needs of the community, the term "service" is value neutral. The reconsideration forms are a library-provided service that allow members of the public to express their views on whether a particular book, recording, or other item should remain part of the library's collection or be restricted to adults.

¶ 49 We next turn to Brookhart's argument focusing on the statutory reference to the disclosure of a person's identifying information "[w]hen necessary for the reasonable operation of the library." § 24-90-119(2)(a). We disagree with Brookhart's interpretation of this language.

¶ 50 Section 24-6-402(2)(b), C.R.S. 2023, provides that "[a]ll meetings . . . of any local public body . . . at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times." The record shows that, at one time, the library district's procedures stated that discussion of a submitted reconsideration form would be "placed on the agenda of the next regular meeting of the [district's] Board of Trustees."

¶ 51 Under the library's current procedures, which apply to the requesters' reconsideration forms, "[t]he Library Director shall review and consider all 'Requests to Reconsider Materials' and provide a written response and decision on the subject material(s) to the patron that submitted the request." Similarly, under CORA, Brookhart, as the records custodian for the library district, possesses the authority to grant or deny a third party's request to inspect the library district's public records, subject to an applicable court order. *See* § 24-72-204(1), (3)(a). Because Brookhart possesses the decision-making authority over disclosure of the reconsideration forms, and the library district's Board of Trustees

no longer routinely discusses reconsideration forms at its public meetings, section 24-6-402(2) is inapplicable.

¶ 52 More importantly, the disclosure at a public meeting of the identifying information of a person who submitted a reconsideration form is of no consequence to our analysis of whether such information is protected from disclosure under section 24-90-119(1). Brookhart does not argue, and nothing in section 24-90-119(1) or CORA suggests, that the statutory protections for a requester's identifying information are waived if the information is disclosed, without the requester's consent, at a public meeting of a public body. Such a rule would circumvent section 24-90-119(1), as it would allow library districts to strip the statutory protections for the information simply by revealing it at a meeting open to the public.

¶ 53 Moreover, the library's new procedures for addressing reconsideration forms undercut Brookhart's argument. He does not allege that, under the new procedures, maintaining the confidentiality of the identifying information of people who submit reconsideration forms hampers the "reasonable operation of the library," and he does not otherwise explain how the disclosure of

the requesters' identifying information to third parties is "necessary" for the library's operation. § 24-90-119(2)(a).

¶ 54 For similar reasons, we disagree with Brookhart's suggestion that the unredacted reconsideration forms are subject to disclosure under CORA in furtherance of the principle that the people should be protected from "secret government." General principles of government transparency, no matter how noble, cannot rewrite the specific language the General Assembly chose to include in the statutes we must interpret in this appeal. Similarly, while we "construe any exceptions to CORA's disclosure requirements narrowly," *Jefferson Cnty. Educ. Ass'n*, ¶ 14, 378 P.3d at 838, we may not redraft statutory language to do so, *see Ritter*, 255 P.3d at 1089. Moreover, there is no dispute that the content of the reconsideration forms, without the requesters' personal identifying information, is a public record and, therefore, should be made available to the public. We perceive no persuasive argument that the library's objective assessment of the requests or the public good would be enhanced by revealing the identity of the requesters.

¶ 55 As we conclude above, the plain language of sections 24-72-204(3)(a)(VII) and 24-90-119(1) unambiguously forbids the

disclosure of the identifying information of persons who "requested or obtained . . . [a] service" that the library district offers to the public. The submission of a reconsideration form is a request for such a service. Contrary to Reaman's *reductio ad absurdum* argument, our interpretation of the statutes does not provide anonymity to, "effectively, any person who contacts a library for any purpose." Not every person who contacts a public library "request[s] or obtain[s] . . . [a library] service." § 24-90-119(1).

¶ 56 In sum, we hold that the court did not err by determining that Reaman is not entitled to obtain the requesters' identifying information under CORA.

¶ 57 In light of our conclusion based on the plain language of sections 24-72-204(3)(a)(VII) and 24-90-119(1), we need not address the court's reliance on *Tattered Cover* and *Martinelli v. District Court*, 199 Colo. 163, 612 P.2d 1083 (1980), to determine whether the requesters' identifying information is subject to disclosure.

E. We Agree with the District Court that the Reconsideration Forms May Be Disclosed So Long as the Requesters' Identifying Information Is Redacted

¶ 58 As explained above, sections 24-72-204(3)(a)(VII) and 24-90-119(1) do not forbid the disclosure of an entire public record

— only those portions of a public record "that identif[y] a person as having requested or obtained specific materials or service or as otherwise having used the library." § 24-90-119(1). Because "CORA does not mandate that . . . records be disclosed in complete form or not at all," *Denver Publ'g Co.*, 121 P.3d at 205, we conclude that the court did not err by ruling that the library district must redact the requesters' identifying information before disclosing the reconsideration forms to Reaman. *Cf. Land Owners United, LLC v. Waters*, 293 P.3d 86, 99 (Colo. App. 2011) (holding that "it falls within the district court's discretion to direct redaction of specific confidential information"). Our conclusion is consistent with the General Assembly's declaration in CORA that "all public records shall be open for inspection by any person at reasonable times." § 24-72-201.

III. Disposition

¶ 59 The judgment is affirmed.

JUDGE SCHUTZ concurs.

JUDGE TAUBMAN dissents.

JUDGE TAUBMAN, dissenting.

¶ 60 I agree with the majority that this case raises the narrow, but important, question of whether a library district is required to keep confidential the identifying information of individuals requesting that the library district remove or restrict circulation of a book they find objectionable. Although the majority addresses the merits of this dispute, I do not believe we should do so because the Gunnison County Library District has changed its position in this appeal, now agreeing that the identifying information should be disclosed, thus eliminating a case or controversy between the parties. Accordingly, I would dismiss the appeal and vacate the district court's judgment. Therefore, I respectfully dissent.

I. Background

¶ 61 As the majority notes, this case arose from four individuals (the requesters) submitting forms asking the Gunnison County Library District to remove from the library a book entitled *Gender Queer: A Memoir*, or, in the alternative, prevent children from accessing it. Respondent, Mark Reaman, in his capacity as editor of the Crested Butte News, submitted a request under the Colorado Open Records Act (CORA), §§ 24-72-200.1 to -205.5, C.R.S. 2023,

to the library district to obtain the forms the requesters had submitted seeking removal or restricted circulation of the book in question.[1] In response, plaintiff, Andrew Brookhart, in his capacity as the library district's executive director and custodian of records, filed a lawsuit under section 24-72-204(6)(a), C.R.S. 2023, of CORA requesting the district court to determine if he must disclose the unredacted forms in their entirety, disclose the forms with the requesters' identifying information redacted, or not disclose the forms at all.

¶ 62 The district court adopted the second alternative, concluding that the requesters' forms should be disclosed to Reaman, but without their identifying information.

¶ 63 Reaman has now appealed, requesting that we reverse the district court's order and conclude that he is entitled to receive

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[1] The majority and the parties refer to the forms as "reconsideration forms," the term the library district uses to describe them. I have referred to them, however, as "the requesters' forms" because the term "reconsideration forms" is somewhat of a misnomer. The term sounds as if it refers to a second request by the requesters to have the library remove certain books or restrict their circulation. It actually refers to the requesters' initial request. It is only a "reconsideration" of the library's initial decision to include the book in its inventory and place it in the adult section of the library.

unredacted copies of the requesters' forms. Surprisingly, in his answer brief, Brookhart agreed with Reaman's position on appeal. He stated, "The Appellee Library District, the Appellant CB [Crested Butte] News, and *Amicus Curiae* Colorado Freedom of Information Coalition all believe that the district court erred by extending [the applicable Colorado statutes] beyond their plain meaning to include privacy protections for those trying to limit or influence the ability of others to 'use' the library."

¶ 64 As the majority notes, in response to Brookhart's apparent change of position, we asked the parties to submit supplemental briefs addressing whether this case still presented an actual controversy in light of Brookhart's agreement with Reaman that Reaman is entitled to receive unredacted copies of the requesters' forms.

¶ 65 In their supplemental briefs, both Reaman and Brookhart contend that we should address the merits of this controversy, albeit for different reasons. Reaman contends that this case is not moot because he "still has an interest in the outcome of this litigation" because of the pendency of the district court's ruling. In contrast, Brookhart did not address whether this case still presents

an actual controversy, instead asserting that he expressly raised the question in the district court whether CORA requires disclosure of the requesters' unredacted forms.

¶ 66 In addition, Brookhart argues that even if he did not satisfactorily raise the CORA issue, we should nevertheless address the issue Reaman raises on appeal, with which Brookhart now agrees.

¶ 67 Thus, this case presents the rare situation where the parties' positions (and that of the amicus curiae) are aligned, but the majority nevertheless addresses the merits of the case, without either party defending the district court's decision.

II. The Law of Mootness

¶ 68 A case is moot when any judgment would have no practical effect on an existing controversy. *Van Schaack Holdings, Ltd. v. Fulenwider*, 798 P.2d 424, 426 (Colo. 1990). "The general rule is that when issues presented in litigation become moot because of subsequent events, an appellate court will decline to render an opinion on the merits . . . ." *Id.* at 426-27. As the majority acknowledges, when a live controversy between the parties no longer exists, a court lacks subject matter jurisdiction to proceed.

Robertson v. Westminster Mall Co., 434 P.3d 622, 628 (Colo. App. 2001). Further, any decision on the merits in a moot case would result in an advisory opinion, which we should refrain from issuing. *People in Interest of Vivekanathan*, 2013 COA 143M, ¶ 14, 338 P.3d 1017, 1020.

¶ 69 Nevertheless, a court may address issues on the merits under exceptions to mootness — when an issue is capable of repetition yet evading review, when there is an issue of great public importance, or when there is a recurring constitutional violation. *See Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1102 (Colo. 1998).

¶ 70 To show that an issue is not moot, a party must offer facts in its supplemental brief or otherwise to demonstrate that a current issue exists so that an appellate court's ruling would have a practical effect. *See People in Interest of L.O.L.*, 197 P.3d 291, 294 (Colo. App. 2008).

¶ 71 "When a case becomes moot on appeal, the usual practice is to dismiss the appeal and vacate the lower court's judgment." *Van Schaack*, 798 P.2d at 427. The *Van Schaack* court relied on *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), noting that dismissing the appeal and vacating the lower court's judgment

"clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Van Schaack Holdings*, 798 P.2d at 427 (quoting *Munsingwear*, 340 U.S. at 40). Thus, the *Van Schaack* court affirmed the decision of a division of this court to dismiss the appeal and vacate the district court's decision.

¶ 72 Although *Van Schaack* determined that an appellant's change in position can moot an appeal, no Colorado appellate court has apparently determined whether an appellee's change in position on appeal should lead to the same result in a civil case. However, several United States Supreme Court and other federal decisions and a leading federal treatise have concluded that the same result should apply.

¶ 73 In *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), Justice Ginsburg declared for the Court:

> When a civil case becomes moot pending appellate adjudication, "[t]he established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss." Vacatur "clears the path for relitigation" by eliminating a judgment the loser was stopped from opposing on direct review. Vacatur is in order when mootness occurs through happenstance

> — circumstances not attributable to the parties — or, as relevant here, the "unilateral action of the party who prevailed in the lower court."

Id. at 71 (citations omitted); *see also U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994); *Sands v. NLRB*, 825 F.3d 778, 785-86 (D.C. Cir. 2016); *Oneida Indian Nation of N.Y. v. Madison County*, 665 F.3d 408, 424-27 (2d Cir. 2011) ("[T]he winning party in the district court should not be able to prevent appellate review of a perhaps-erroneous decision by attempting to render the district court's judgment unappealable."); *Greater Yellowstone Coal. v. Tidwell*, 572 F.3d 1115, 1131 (10th Cir. 2009).

¶ 74 Similarly, a leading treatise on federal practice explained that "most decisions vacate the judgment to prevent the winner from depriving the loser of the opportunity for appellate review. Although the immediate battle is over, the concern is that the judgment may harm the loser as precedent or preclusion." 13C Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.10.1 (3d ed. 2023). The treatise also noted that vacatur may be ordered even when the winner afforded the relief sought by the loser in the ordinary course of affairs, not in an effort to thwart review. *Id.*

III. Analysis

¶ 75 In my view, a ruling in this case on the merits will have no practical effect on the parties because of Brookhart's change of position on appeal. I agree that Brookhart properly filed his application asserting that he could not in good faith determine whether disclosure of the requesters' unredacted forms was prohibited under CORA. However, in my view, Brookhart has abandoned that position by changing his position in his answer brief and not addressing mootness in his supplemental brief. I do not believe Brookhart was required to formally announce that he is able to determine whether to disclose the requesters' unredacted forms without judicial guidance. Nor do I believe that he needed to state that he would join Reaman in requesting that the district court vacate its order.

¶ 76 Rather, as the majority notes, Brookhart has unequivocally declared that Reaman should be permitted to receive unredacted copies of the requesters' forms. This is sufficient to moot the case.

¶ 77 I disagree with the majority that Brookhart has not changed his position because his initial application said he thought the requesters' identities should be released. Rather, Brookhart

specifically requested in his initial application that the court interpret CORA to allow unredacted disclosure of the requesters' forms, prohibit such disclosure, or permit limited disclosure. On appeal, he asserts only that the district court erred and that he agrees with Reaman that the requesters' names should be disclosed. He does not assert that he still has a good faith concern about how the CORA statute should be interpreted.

¶ 78 Possible civil or criminal liability against Brookhart or the library district does not warrant a different conclusion. Brookhart did not cite such concerns in his supplemental brief about whether there was still an actual controversy, given his change of position. Although he expressed concerns in his application about a civil penalty for improperly disclosing information and having to pay attorney fees and costs for erroneously withholding the requesters' forms under CORA, he did not express such concerns in his answer brief or supplemental brief. *See Compos v. People*, 21 CO 19, ¶ 35, 484 P.3d 159, 165 (under party presentation principle, we do not consider issues not raised by parties); *see also Glover v. Innis*, 252 P.3d 1204, 1208 (Colo. App. 2011).

¶ 79 In any event, it is not clear that anyone threatened to impose a civil penalty against Brookhart or the library district. Speculative harm is insufficient to warrant a decision on the merits. *See People v. Marquardt*, 2016 CO 4, ¶ 21, 364 P.3d 499, 504. Further, as Brookhart acknowledged in his application, the district attorney for the Seventh Judicial District declined to file criminal charges against him or the library district, and Brookhart stated that he agreed with that analysis. Significantly, as the majority notes, the General Assembly has now eliminated any criminal penalty for violation of section 24-90-119(1), C.R.S. 2023, and a violation of the statute now constitutes only a civil infraction.

¶ 80 Brookhart was not required to change his position on appeal, but he voluntarily chose to do so. He could have stated in his answer brief that while he thought that he was permitted to provide the requesters' unredacted forms to Reaman, he believed that the clarification of the CORA statute that he requested in his application was still necessary. However, he did not do so.

¶ 81 The parties' supplemental briefs are also telling in this regard. While we asked the parties to address whether there was still an actual controversy given Brookhart's change of position on appeal,

Brookhart did not address this issue at all. Rather, he maintained that his application sufficiently raised the statutory issue he wished the court to address.

¶ 82 Although Reaman addressed mootness in his supplemental brief, his only contention was that the case was not moot because of the pendency of the district court decision. He did not assert, based on *Van Schaack*, *Arizonans for Official English*, or any other decision, that we could simply vacate the district court's decision and dismiss this appeal based on Brookhart's change of position.

¶ 83 Even if *Van Schaack* is limited to circumstances in which an appellant's action moots the case, I believe we should follow *Arizonans for Official English* and its progeny and conclude that a prevailing party's action may moot an appeal.[2] Otherwise, if we were to dismiss this appeal without vacating the district court's judgment, our ruling would prejudice Reaman, who would be

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[2] In my view, Brookhart is the prevailing party in the district court, although it may not seem like it in the conventional sense. As noted, Brookhart asked the district court whether he could disclose the requesters' forms in whole or in part or was prohibited from disclosing them under CORA. The district court ruled that he could disclose the forms in part, one of the options Brookhart offered. Thus, he is the prevailing party.

required to follow that decision in any subsequent cases. Conversely, if this appeal is dismissed and the district court's judgment is vacated, it is unlikely that a new CORA request by Reaman would lead to further litigation, as I discuss below.

¶ 84 Following *Arizonans for Official English* would be consistent with *Van Schaack*, as well. There, the supreme court relied on the United States Supreme Court's decision in *Munsingwear* in applying Colorado's mootness jurisprudence.

¶ 85 In addition, I would conclude that this case is moot with respect to the one requester whose identity was disclosed at a public meeting of the library's board of trustees. The majority may be correct in asserting that the statutory protections for a requester's identifying information are not lost if that requester is otherwise identified at a public meeting. Nevertheless, it exalts form over substance to conclude that our court should interpret section 24-90-119(1) of CORA with respect to a requester who has already been publicly identified.

¶ 86 Significantly, the parties did not assert in their supplemental briefs that we should address the merits of this dispute under Colorado's recognized exceptions to mootness — an issue capable of

repetition yet evading review, an issue of great public importance, or an allegedly recurring constitutional violation. Therefore, I do not believe we need to address those exceptions here.

¶ 87 However, I will do so to demonstrate that these exceptions do not provide a basis for addressing the merits in this case. First, I believe that it is a fair inference from Brookhart's change in position on appeal that he is likely to provide the unredacted forms of any future requesters to Reaman without filing a lawsuit. In any event, future requesters seeking to ban books or restrict their circulation may not even provide their names or other identifying information, which are not required by the library district's forms.

¶ 88 Second, this case does not present an issue of great public importance. While whether certain books should be banned or their circulation restricted in public libraries is being litigated and debated across the country, that is not the issue presented here. Instead, the dispute here involves a request for unredacted requesters' form used by the Gunnison County Library District. The record does not indicate whether other library districts in Colorado use similar forms or require similar information.

¶ 89 Third, this case also does not present an issue of recurring constitutional violations. Although Brookhart has suggested that this case involves privacy interests of the requesters, the actual dispute is a statutory one involving interpretation of CORA and library users' right of privacy under section 24-90-119(1). While it is conceivable that the requesters might have intervened and raised constitutional privacy concerns, they have not done so. *See C F & I Steel, L.P. v. Air Pollution Control Div.*, 77 P.3d 933, 939 (Colo. App. 2003).

¶ 90 Accordingly, even if the parties had relied on Colorado's mootness exceptions, I would conclude that they do not apply and determine that the case is moot. Based on *Van Schaack* and *Arizonans for Official English*, I would vacate the district court's decision and dismiss this appeal as moot.