| | |
|---|---|
| District Court, County of Denver, Colorado<br>1437 Bannock Street, Room 256<br>Denver, CO 80202 | DATE FILED: March 4, 2024 5:11 PM<br>CASE NUMBER: 2023CV31854 |
| **Petitioner:**<br>SHERRIE PEIF<br><br>v.<br><br>**Respondents**:<br>COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING AND KATHY SNOW, in her official capacity | **COURT USE ONLY**<br>Case No.: 23CV31854<br><br>Courtroom: 203 |
| **ORDER RE: AMENDED PETITION TO SHOW CAUSE AND REGARDING IN-CAMERA REVIEW** | |

THIS MATTER comes before the Court upon a Petition to Show Cause filed by Sherrie Peif in this action on June 26, 2023 (amended on June 30, 2023). The Court issued its Order Re: Petition to Show Cause on July 6, 2023 and conducted a hearing on September 5, 2023. At the hearing the Court ordered Respondent Colorado Department of Health Care Policy and Financing ("Department" or "HCPF") and Kathy Snow to file an Amended Vaughn Index.

The Court has reviewed all of the parties' filings, and the documents submitted for the in-camera review, and, after giving the matter full and complete consideration, hereby enters its Order on the Petition to Show Cause and the review:

## I. FACTUAL BACKGROUND

1. Petitioner Sherrie Peif is a citizen journalist working with CompleteColorado.com. She regularly covers matters of public concern throughout Colorado.
2. HCPF is the principal department of the Colorado state government responsible for administering a variety of other programs.
3. Kathy Snow is the custodian of records for HCPF and its Colorado Open Records Act ("CORA") officer. She is sued only in her official capacity.
4. On March 7, 2023, Peif delivered a request for information pursuant to the Open Records Act seeking the production of the following documents pursuant to C.R.S. § 24-72-101 to 24-72-402:

All hard-copy memoranda, letters or other correspondence, including Slack, Teams or Zoom chats, text messages, WhatsApp, Signal messages and/or email sent or received at any time from January 1, 2023 through March 1, 2023, inclusive, by one or more of the following twelve (12) employees, which include any of the stated terms:

**Employees**: Kim Bimestefer, Tom Massey, Rachel Reiter, Alec Garnett, Conor Cahill, Melissa Dworkin, Iris Hentze, Ciara O'Neill, Bettina Schneider, Marc Williams, Ralph Choate, Nancy Dolson

**Terms**: "Hospital Expenditure Report", "Hospital Community Benefit Annual Report", and "Colorado Healthcare Affordability and Sustainability Enterprise (CHASE) Annual Report", "Annual Report", "Hospital Insights", "State of the State", "CHASE Report", "community benefits", "hospital reserves", and/or "hospital profits".

5. Although Ms. Snow initially indicated there were almost two thousand records that fit within the search parameters, the number was reduced to 1,550 emails potentially responsive to the request.
6. Ultimately, on April 13, 2013, after reviewing their records, Ms. Snow produced 318 documents with an affidavit and a Vaughn Index, listing each document that was being withheld as attorney-client privilege and deliberative process privilege.
7. A Vaughn Index is a document that agencies prepare in response to CORA requests and litigation to justify each withholding of information under an open records act exemption. The term arose from a case captioned *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), in which the court required such an index to determine the validity of the agency's withholdings in the case.
8. The Vaughn Index requires a specific and detailed assertion of the privilege, although the index need not be so detailed that it compromises the purposes served by the privilege. *See City of Colo. Springs v. White*, 967 P.2d 1042, 1053 (Colo. 1998) (citing *Church of Scientology v. U.S. Dep't of Army*, 611 F.2d 738, 742 (9th Cir. 1979)); *Vaughn I*, 484 F.2d at 826.
9. After producing the Vaughn Index and the documents, Ms. Peif indicates there were only 283 records withheld, for a total of 601 documents.
10. On June 9, 2023, Respondent provided an additional six documents for a total of 324. Petitioner claims there are 272 documents over which the deliberative-process privilege is claimed. As such, Petitioner claims the

response to the Request is woefully insufficient and the documents were wrongfully withheld.

11. Respondents claim it properly responded to the CORA request with the responsive public documents, the Vaughn Index, and the affidavit pursuant to C.R.S. § 24-72-204(4). It further avers it properly withheld communications related to legislation and draft legislative reports under the deliberative-process privilege and produced an affidavit describing each deliberative document and why "disclosure would cause substantial injury to the public interest." C.R.S. § 24-72-204(3)(a).
12. Petitioner brought this Open Records Act suit on June 26, 2023, challenging the failure of the Respondent to produce more documents in response to the Open Records request.
13. The Court held a hearing on September 5, 2023, at which time the Court ordered Respondents to submit an amended Vaughn Index with additional information regarding the deliberative-process privilege.
14. Respondents filed the Second Amended Vaughn Index on September 11, 2023, and provided all documents for an in-camera review. The Response to the Amended Vaughn Index and Request for Ruling on the In-Camera Review was filed on January 12, 2024. The Reply was filed on January 19, 2024.

## II. APPLICABLE LAW

The Colorado Open Records Act contains a broad legislative declaration that all public records shall be open for inspection unless excepted by the statute itself or specifically by other law. *Denver Publishing Co. v. Dreyfus*, 520 P.2d 104 (Colo. 1974); *Sargent School Dist. v. W. Servs.*, 751 P.2d 56 (Colo. 1988); *Freedom News v. Denver and Rio Grande*, 731 P.2d 740 (Colo. App. 1987). "Public records" are "all writings made, maintained, or kept by the state [or] any agency … for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds." C.R.S. § 24-72-202(6)(a)(I). *See Colo. Sun v. Brubaker*, 2023 COA 101, ¶ 11 (Colo. App. 2023).

Respondents do not dispute that the information sought are public records. Still, while the general purpose of CORA is to provide open government through disclosure of public records, its purpose is not to disclose information that falls under an exception in the statute. *See Mountain-Plains Inv. Corp. v. Parker Jordan Metro. Dist.*, 312 P.3d 260 (Colo. App. 2013). In light of the strong presumption in favor of disclosure, exceptions to disclosure are narrowly construed, and the record custodian bears the burden to prove that an exception

applies. *See Brubaker*, 2023 COA 101, ¶ 12 (citing *Shook v. Pitkin Cnty. Bd. of Cnty. Comm'rs*, 411 P.3d 158 (Colo. App. 2015)). The exception to disclosure which is claimed in this case is for material protected by the government's deliberative-process privilege.

The relevant portion of the Colorado Open Records Act found in C.R.S. § 24-72-204 states as follows:

> (1) The custodian of any public records shall allow any person the right of inspection of such records or any portion thereof except on one or more of the following grounds or as provided in subsection (2) or (3) of this section:
>
> (a) Such inspection would be contrary to any state statute.
>
> (b) Such inspection would be contrary to any federal statute or regulation issued thereunder having the force and effect of law.
>
> (5)(a) Except as provided in subsection (5.5) of this section, any person denied the right to inspect any record covered by this part 2 or who alleges a violation of section 24-72-203(3.5) may apply to the district court of the district wherein the record is found for an order directing the custodian of such record to show cause why the custodian should not permit the inspection of such record; except that, at least fourteen days prior to filing an application with the district court, the person who has been denied the right to inspect the record shall file a written notice with the custodian who has denied the right to inspect the record informing the custodian that the person intends to file an application with the district court.
>
> (6)(a) If, in the opinion of the official custodian of any public record, disclosure of the contents of said record would do substantial injury to the public interest, notwithstanding the fact that said record might otherwise be available to public inspection or if 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 pursuant to this part 2, the official custodian may apply to the district court of the district in which such record is located for an order permitting him or her to restrict such disclosure or for the court to determine if disclosure is prohibited. …. In an action brought pursuant to this paragraph (6)(a), the burden of proof shall be upon the custodian. The person seeking permission to examine the record shall have notice of said hearing served upon him or her in the manner provided for service of process by the Colorado rules of civil procedure and shall have

> the right to appear and be heard. The attorney fees provision of subsection (5) of this section shall not apply in cases brought pursuant to this paragraph (a) by an official custodian who is unable to determine if disclosure of a public record is prohibited under this part 2 if the official custodian proves and the court finds that the custodian, in good faith, after exercising reasonable diligence, and after making reasonable inquiry, was unable to determine if disclosure of the public record was prohibited without a ruling by the court.

C.R.S. § 24-72-204 (2024).

The deliberative-process privilege asserted by Respondents is found in the same statute. Specifically, subsection (3) provides, in pertinent part:

> The custodian *shall deny* the right of inspection of the following records, unless otherwise provided by law; *except that the custodian shall make any of the following records*, other than letters of reference concerning employment, licensing, or issuance of permits, *available to the person in interest in accordance with this subsection (3)* ….
>
> (XIII) 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… 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. … 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.

## III. ANALYSIS

Respondents assert that there are approximately 77 documents, mostly emails and email google docs which are exempt from disclosure because they are covered by the deliberative-process privilege. Petitioner disagrees and argues that the deliberative-process privilege should not exempt documents and discussions related to pending legislation on which the Department does not

vote. Those documents are No. 50, 80-81, 87-89, 98-99, 114, 117-121, 126, 148-50, and 200-14. Because the Department does not vote on legislation or make decisions on pending legislation, Petitioner argues that the discussions are not pre-decisional or deliberative. Petitioner also claims the Department failed to sufficiently describe documents related to stakeholder feedback regarding pending legislation because the stakeholders are not identified and they failed to describe why that information is an official policy of the Department subject to the deliberative-process privilege. Those documents are No. 50, 98-99, 148-50, and 258. Finally, Petitioner contends the Department failed to demonstrate that it performed a segregability analysis with respect to the documents withheld wholesale from production. Respondents claim they redacted and produced documents that were segregable and no further redactions were warranted. Petitioner also requests attorney fees under the Act.

*A. Application of the Deliberative-Process Privilege*

First, the Court has reviewed documents No. 50, 80-81, 87-89, 99, 114, 117-21, 126, 148-50, and 200-14 identified in Petitioner's Response to the Second Amended Vaughn Index. The Court has conducted an in-camera review to determine whether the materials Petitioner wishes to discover are privileged under the deliberative-process privilege. The Court finds that they are.

The primary question for the Court is whether the deliberative-process privilege applied to the discussions by the Department staff regarding pending legislation when the Department Staff is not the ultimate decision maker and does not vote on the legislation. Documents No. 50, 80-81, 87-89, 99, 114, 117-21, 126, 148-50, and 200-14. The documents reveal discussions of draft legislation not only among themselves but also working together with legislators and other companies to achieve a common legislative purpose. Because the privilege protects material that is both pre-decisional (i.e., generated before the adoption of an agency policy or decision) and deliberative (i.e., reflective of the give-and-take of the consultative process), the Court finds under the circumstances here the deliberative-process privilege applies to those documents except No. 214. The Court orders Document No. 214 to be produced. Similarly, Documents No. 215-36 do not fall under any deliberative-process privilege. The Court orders those produced as well.

Additionally, Documents No. 50, 99, 148-50, and 258 also reflect similar communications and opinions on pending legislation, including recommendations. Based on the Court's review of the documents, the Court finds the communications facilitated deliberation regarding the pending legislation.

Although the Response to the Second Amended Vaughn Index does not address the following documents, the Court finds Documents No. 3, 63-64, 82-83, 126, 147-51, 199, 257, 259-64 fall within the deliberative-process privilege.

Documents No. 90-92, 96, 98, and 100 shall be produced as the Court finds they do not include any pre-decisional or deliberative discussions. The deliberative-process privilege protects factual material that is "so inextricably intertwined with the deliberative sections of the documents that its disclosure would inevitably reveal the government's deliberations." *White,* 967 P.2d at 1052. These documents are not so intertwined. Further, the Court does not find that disclosure of these documents would result the substantial injury to the public interest.

Therefore, the Court finds that privilege was properly asserted for Documents No. 3, 50, 63-64, 80-83, 87-89, 99, 114, 117-21, 126, 147-51, 199, 200-13, 257, and 259-64.

The Court orders the Department to produce Documents No. 90-92, 96, 98, 100, and 214-36 within seven (7) days of this Order.

*B. Segregability*

The Court recognizes that the question of segregability is completely dependent on the actual content of the documents themselves and that the requesting party is helpless to counter claims that there is no non-exempt and reasonably segregable material within a withheld document. The Open Records Act places the burden of justifying nondisclosure on the agency seeking to withhold information, and this burden cannot be shifted to the courts by sweeping, generalized claims of exemption for documents submitted for in-camera inspection. Here, there are attachments to certain emails which can be produced, such as Document No. 96. Because the Court has identified the documents to be produced the Court need not address segregabilty any further in this Order.

*C. Attorney Fees*

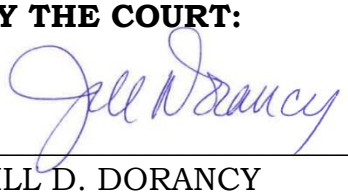
Petitioner Peif requests recovery of its attorney fees and costs under C.R.S. § 24-72-204(5)(b). Section 24-72-204(5)(b) provides, in part, that "[u]nless the court finds that the denial of the right of inspection was proper, it shall … award court costs and reasonable attorney fees to the prevailing applicant in an amount to be determined by the court."

Because the Court has concluded that the denial of the right of inspection of some of the documents was improper, the Court awards attorney fees to Petitioner. Petitioner shall have fourteen (14) days to submit its motion for

attorney fees. Respondents shall have seven (7) days to object to the reasonableness of the fees.

IT IS SO ORDERED this 4th day of March 2024.

**BY THE COURT:**



JILL D. DORANCY
Denver District Court Judge