August 13, 2018

VIA Email

W. Eric Kuhn
Senior Assistant Attorney General
Health Care Unit, State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, CO 80203
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Re: July 24, 2018 Colorado Open Records Act Request

Dear Mr. Kuhn:

We received your letter, dated August 9, 2018, responding to our request under the Colorado Open Records Act ("CORA), C.R.S. § 24-72-201 *et seq*., dated July 24, 2018.

On the substance of our CORA request, you state that "the documents responsive to your request have already been produced to you" in discovery in the case *TABOR Foundation v. HCPF*, Denver District Court case number 15CV32305. We note, however, that the documents produced in discovery do not include the records we seek relating to the Colorado Healthcare Affordability and Sustainability Enterprise ("CHASE"). The documents provided relate to the Department of Health Care Policy and Financing ("HCPF"). But, in addition to HCPF-related documents, our CORA request specifically sought all materials that CHASE submitted to the Centers for Medicare and Medicaid Services ("CMS") in support of any waiver request, as well all communications with CMS regarding the CHASE waiver request.[1]

To the extent that CHASE-related records responsive to our CORA request do not exist, we ask for your confirmation of that fact. To the extent that your clients are refusing to produce CHASE-related records, we ask that you reconsider your clients' obligations under CORA and produce the requested records forthwith. In any event, please confirm which of these two scenarios applies in this case.

On procedural grounds, you object to our CORA request to the extent that we "are seeking to supplement discovery in the TABOR Foundation case," and in support of that proposition you cite a Colorado Supreme Court case, *Martinelli v. District Ct.*, 612 P.2d 1083 (Colo. 1980). Your reliance on *Martinelli* is misplaced. That case does not discuss or even

[1] *See* Letter from CoA Inst. to HCPF at 1–2 (July 24, 2018) (seeking "All records approving, denying (including provisional approvals or denials), or seeking further information from [HCPF] and/or [CHASE] seeking a waiver from CMS of any requirement under the broad based, uniformity, or hold harmless provisions of Section 1903 of the Social Security Act" and "All records submitted by any governmental entity in Colorado to CMS in support of any waiver request identified by Item 1.").

mention the use of CORA to "supplement" discovery; rather, in that case, defendants in a civil action tried to use CORA to *prevent* the discovery of certain documents. The Court denied defendant's claim, explaining that the laws governing discovery and CORA requests serve separate functions and therefore CORA may not be used to "*supplant* discovery practice in civil litigation." *Id*. at 1093 (emphasis added). Discovery is governed by its own set of laws, whereas "[t]he open records laws are directed toward regulation of the entirely different situation of the general exploration of public records by any citizen[.]" *Id.* (citation and internal quotation marks removed); *see also Morrison v. City & Cnty. of Denver*, 80 F.R.D. 289, 291 (D. Colo. 1978) ("[CORA] was never intended to thwart discovery in litigation.").

In the present case, unlike in *Martinelli* and *Morrison,* we are not trying to use CORA to deny or thwart a discovery request; we are using it to add to the documents already in our possession. As a matter of Colorado law, that is a right we have regardless of the status of any pending litigation. *People v. Interest of A.A.T.*, 759 P.2d 853 (Colo. App. 1988) (CORA does not "limit access to any records merely because a person is engaged in litigation with the public agency from which access to records is requested."); *see also id.* (holding that CORA "provide[s] the exclusive procedures for persons requesting records and record custodians to resolve disputes concerning record accessibility"); C.R.S. § 24-72-204(5)(b) (making a contingency in the CORA rule governing the recovery of costs and fees for a party who also is in non-CORA litigation with the custodian of the requested records). Further, our use of CORA in this instance is all the more appropriate because, as you know, we entered this case as counsel only after the close of discovery and our request is targeted at a limited number of documents relating to only one aspect of the pending case.

Martinelli makes clear that CORA regulates "the inspection and copy of governmental records by 'any person,' *without limitations to the reason or reasons for which the inspection is undertaken*." 612 P.2d at 1093 (emphasis added). There is therefore no basis in Colorado law to argue that a valid request for public records under CORA becomes invalid simply because the requestor is in litigation with the custodian of the records at issue. Indeed, it has long been recognized under federal law that the use of the Freedom of Information Act, which the *Martinelli* court referenced as "the federal counterpart to the [Colorado] open records laws," *id.*, may be used as a discovery tool in litigation. *See* Dept. of Justice, FOIA Update, Vol. III, No. 1 (Jan. 1, 1981) ("Discovery and the Freedom of Information Act are two entirely distinct means by which information may be obtained from the federal government. . . . [T]here is no statutory prohibition to the use of FOIA as a discovery tool. The Supreme Court found in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975), that . . . a requester's rights are not diminished by his or her status as a litigant."); Dept. of Justice, FOIA Update, Vol. III, No. 2 (Jan. 1, 1982) ("[P]arties to litigation can freely use the Freedom of Information Act to duplicate, or even supplement, their discovery rights.").

Finally, your suggestion that Colorado's Rules of Professional Conduct prohibit us from requesting records from those government entities you are representing in the TABOR Foundation case is outrageous. Colorado RPC 4.2 prohibits lawyers from "communicat[ing] about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter," unless the lawyer "is authorized to do so by law." As the comments to this provision explain, a communication is not prohibited when the lawyer is

"exercising a constitutional or other legal right to communicate with the government." RPC 4.2, comment 5. A request under CORA meets that exception, and the fact that CORA itself, as confirmed by the Colorado courts, contemplates submission of a CORA request during the pendency of a litigation with the relevant government entity confirms our right to make the CORA request that we did.

In light of the foregoing, we ask that you reconsider our request as it relates to CHASE, confirm whether or not responsive CHASE-related records exist, and, if such records do exist, provide us with those records without further delay.

Sincerely,

Lee A. Steven
Assistant Vice President
Cause of Action Institute