

DISTRICT COURT, CITY AND COUNTY OF DENVER,  
COLORADO

Court Address: 1437 Bannock Street  
Denver, CO 80202

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**Plaintiff: JOHN GLEASON, in his official capacity as  
Supreme Court Attorney Regulation Counsel**

vs.

**Defendant: JUDICIAL WATCH, INC.**

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**Consolidated with:**

**Plaintiff: JUDICIAL WATCH, INC., a District of  
Columbia not-for-profit corporation**

vs.

**Defendants: OFFICE of ATTORNEY REGULATION  
COUNSEL, a Colorado state agency, and JOHN S.  
GLEASON, in his capacity as the State of Colorado  
Regulation Counsel**

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**Case Number: 2010 CV 8996**

Consolidated with:  
2010-CV-9052

Div.: Ctrm.: 8

**JUDICIAL WATCH'S OPENING BRIEF**

## INTRODUCTION

In September 2010, Judicial Watch, Inc. (“Judicial Watch”) sent a Colorado Open Records Act (“CORA”) request to the Office of the Attorney Regulation Counsel (“the OARC”) and the Attorney Regulation Counsel (“the ARC”) seeking access to records created, maintained, or kept by the OARC and the ARC. The OARC and the ARC refused to provide access to such records. Subsequently, in November 2010, the ARC filed an Application in this Court under § 24-72-204(6)(A), C.R.S. This section of CORA authorizes an official custodian of public records to apply to a district court for an order permitting him to restrict disclosure of public records. By filing his Application with this Court seeking to withhold public records, the ARC has effectively conceded that he is the custodian of such public records. Hence, for this reason alone, the OARC and the ARC can no longer plausibly argue that the records at issue are not public records.

In any event, the Court has asked the parties to brief whether the requested records are public records. To be public records, the requested records must be created, maintained, or kept by the OARC or the ARC, and the records must be for use in the performance of public functions or involve the receipt and expenditure of public funds. Under Colorado law, the initial burden of proof is on the requesting party to demonstrate that the requested records are *likely* to be public records. Once the requesting party demonstrates that the records are *likely* public records, the burden of proof shifts to the custodian of the records. The custodian of the records then must demonstrate that the records are not public records.

As set forth below, Judicial Watch satisfies the initial burden and makes the threshold showing that the requested records are likely public records. The records requested by Judicial Watch in September 2010 were created, maintained, and/or kept by the OARC. Similarly, if the

ARC is the custodian of the records, he undoubtedly created, maintained, and/or kept the requested records in his official capacity as ARC. Moreover, the requested records were for use in the performance of public functions and/or involved the receipt and expenditure of public funds.

## **FACTUAL BACKGROUND**

### **I. The Arizona Supreme Court Appointed the OARC.**

On March 23, 2010, Chief Justice Rebecca White Berch of the Arizona Supreme Court issued an administrative order appointing “The Colorado Supreme Court, Office of the Regulation Counsel under the direction of Regulation Counsel, John Gleason” as Independent Bar Counsel to the State Bar of Arizona for purposes of investigating allegations of professional misconduct by Andrew Thomas, the former County Attorney of Maricopa County, Arizona, and other lawyers formerly employed in the Maricopa County Attorney’s Office. Judicial Watch’s Complaint and Application for Order to Show Cause (Case No. 2010-cv-9052) (“JW Complaint”) at ¶ 6; Office of Attorney Regulation Counsel and Attorney Regulation Counsel Answer (Case No. 2010-cv-9052) (“Answer”) at ¶ 4; Attorney Regulation Counsel’s Application Pursuant to Section 24-72-204(6)(A), C.R.S. (Case No. 2010-cv-8996) (“ARC Application”) at ¶ 4; *see also*, Supreme Court of the State of Arizona Administrative Order No. 2010-41 at 1, ¶ 1 (Exhibit A to ARC Application). The Arizona Supreme Court also issued a press release stating that “Arizona Supreme Court Chief Justice Rebecca White Berch has appointed John Gleason and the Colorado Office of Attorney Regulation to serve as Independent Bar Counsel.” Press Release, *New Independent Counsel Appointed to Review Allegations of Misconduct by Maricopa County Attorney Andrew Thomas*, Arizona Supreme Court (March 23, 2010) (attached as Exhibit

1). Moreover, the press release quotes Chief Justice Berch as stating: “We appreciate the Colorado Supreme Court’s willingness to assist us.” *Id.*

According to the OARC and the ARC, on March 25, 2010, the Chief Justice of the Colorado Supreme Court issued an Order authorizing the ARC to act in conformance with the Arizona Supreme Court’s Administrative Order.<sup>1</sup> ARC Application at ¶ 4. The ARC and at least one other attorney of the OARC spent considerable time in Arizona conducting a bar investigation. Answer at ¶¶ 4, 10. This investigation, according to media reports, lasted “over eight months” and consisted of the ARC and at least one other attorney of the OARC “interview[ing] about 100 people, review[ing] thousands of documents and review[ing] pleadings and grand-jury transcripts.” Yvonne Wingett, Craig Harris and Michael Kiefer, *Investigator to Recommend Disbarment in Thomas Ethics Case*, THE ARIZONA REPUBLIC, Dec. 6, 2010.<sup>2</sup> At the end of this investigation, the ARC filed an 82-page, formal complaint against the targets of the investigation. *See generally*, Arizona Independent Bar Counsel Complaint (Attached as Exhibit 2). The formal complaint was signed:

John S. Gleason  
Independent Bar Counsel  
Chief Justice Order No. 2010-14  
COLORADO SUPREME COURT  
OFFICE OF ATTORNEY REGULATION COUNSEL  
1560 Broadway, Suite 1800  
Denver, Colorado 80202  
303-866-6400

*Id.* at p. 82.

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<sup>1</sup> Curiously, the Colorado Supreme Court’s Office of the Clerk as well as the Office of the State Court Administrator have represented to Judicial Watch that no such order exists, and the OARC and the ARC have refused to provide a copy of the alleged March 25, 2010 order to Judicial Watch.

<sup>2</sup> This article is available at <http://www.azcentral.com/news/election/azelections/articles/2010/12/06/20101206andrew-thomas-discipline-arizona-supreme-court.html>.

Evident from this signature, the ARC was acting in an official capacity, not in a personal capacity, when he conducted his bar investigation and filed the bar complaint. Therefore, the records concerning the facts and circumstances surrounding the appointment of the OARC to investigate are records created, maintained, and/or kept by the ARC in his official capacity.

## **II. Judicial Watch Requested Public Records from the OARC and the ARC.**

On September 2, 2010, Judicial Watch sent a CORA request to the OARC and the ARC seeking access to records created, maintained, or kept by the OARC and the ARC concerning the facts and circumstances surrounding the appointment of the ORAC to conduct the above-described investigation. *See* CORA Request (Exhibit B to ARC Application). Specifically, Judicial Watch requested copies of:

(1) Any and all records of communications between OARC/ARC, the Arizona Supreme Court, and/or the Arizona State Bar concerning or relating to the March 23, 2010 appointment of OARC/ARC by Arizona Supreme Court Chief Justice Rebecca White Berch to serve as Independent Bar Counsel for purposes of investigating and/or prosecuting allegations of misconduct against former Maricopa County Attorney Andrew Thomas and/or lawyers formerly in his employ (hereinafter “the Thomas Charges”);

(2) Any and all records of communications between OARC/ARC, the Colorado Supreme Court, and/or the Attorney Regulation Committee of the Supreme Court of Colorado concerning or relating to the March 23, 2010 appointment of OARC/ARC by Arizona Supreme Court Chief Justice Rebecca White Berch to serve as Independent Bar Counsel for the Thomas Charges;

(3) Any and all records concerning or relating to the authority of OARC/ARC, under Colorado law, to accept the appointment of Arizona Supreme Court Chief Justice Rebecca White Berch to serve as Independent Bar Counsel for the Thomas Charges;

(4) Any and all records concerning or relating to the authority of OARC/ARC, under Colorado law, to investigate or prosecute allegations of attorney misconduct for a entity other than the Supreme Court of Colorado;

(5) Any and all records concerning or relating to the authority of OARC/ARC, under Colorado law, to investigate or prosecute allegations of

attorney misconduct against non-Colorado attorneys or attorneys who are not alleged to have engaged in misconduct in the State of Colorado;

(6) Any and all bills, invoices, or statements for services rendered or expenses incurred by OARC/ARC in serving as Independent Bar Counsel for the Thomas Charges; and

(7) Any and all records of payments received by OARC/ARC, the Colorado Supreme Court, or the State of Colorado for services rendered or expenses incurred by OARC/ARC in serving as Independent Bar Counsel for the Thomas Charges.

*Id.*

The OARC and the ARC denied access to all records responsive to Item Nos. 1-2 and 6-7. *See* September 20, 2010 Letter (Exhibit C to ARC Application). Although Judicial Watch plainly had not sought access to any work product, working files, deliberations, or internal communications, the OARC and the ARC nonetheless asserted that records responsive to Item Nos. 1-2 and 6-7 were protected from disclosure because they allegedly “constitute work product, working files and records of attorneys employed by the Arizona judiciary in general and for purposes of prosecuting disciplinary cases in general.” *Id.* With respect to Item Nos. 3-5, the OARC and the ARC simply failed to respond. *Id.*

To alleviate any confusion about its request, Judicial Watch sent a follow-up letter to the OARC and the ARC on September 23, 2010. *See* September 23, 2010 Letter (Exhibit D to ARC Application). With respect to Item Nos. 1, 2, 6, and 7, Judicial Watch specifically stated that it was not seeking access to any work product, working files, deliberations, or internal communications. *Id.* Judicial Watch explained that Item Nos. 1 and 2 requested external communications concerning the facts and circumstances surrounding this appointment of the OARC by the Arizona Supreme Court and that such communications are obviously materially different from the actual work undertaken by the OARC or the ARC. *Id.* With respect to Item

Nos. 6-7, Judicial Watch similarly explained that bills, invoices, or statements sent to the State Bar of Arizona for services rendered or expenses incurred by the OARC or the ARC, and records of payments received from the State Bar of Arizona for such services or expenses, are obviously materially different from work product, working files, deliberations, or internal communications. *Id.* Judicial Watch also stated that the response by the OARC and the ARC was non-responsive with respect to Item Nos. 3-5. *Id.*

Despite these clarifications, the OARC and the ARC continued to refuse to produce the requested records. *See* September 28, 2010 Letter (Exhibit E to ARC Application). Judicial Watch therefore informed the OARC and the ARC that Judicial Watch intended to apply to the Court for an order compelling production of the requested records created, maintained, and/or kept by the OARC and the ARC in the performance of their public functions. *See* November 15, 2010 Letter (Exhibit F to ARC Application).

### **III. Litigation Commenced Concerning Judicial Watch's CORA Request.**

#### **A. The ARC, as the official custodian of the requested records, applied to the Court for a determination as to whether disclosure of the public records is prohibited.**

Prior to Judicial Watch filing suit, on November 17, 2010, the ARC, as the official custodian of the requested public records, preemptively sued Judicial Watch. *See* ARC Application. As the ARC avers in his Application, "A records custodian may apply to this court for a determination of whether disclosure is required or prohibited." ARC Application at ¶ 10.

Specifically, the ARC applied to the Court under 24-72-204(6)(a), C.R.S., which states:

[I]f 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.

*Id.* (citing 24-72-204(6)(a), C.R.S.) (emphasis added). As the ARC also avers, “Applicant is unable to determine whether disclosure is prohibited.” Application at 10. In other words, the applicant is “John Gleason, *in his official capacity* as Supreme Court Attorney Regulation Counsel[,]” and he is unable to determine whether he may legally deny access to the public records requested by Judicial Watch. ARC Application at p. 1 (emphasis added). In contrast, if the ARC was in possession of records in his personal capacity, under Colorado law, he could not have applied to the Court under CORA.

Subsequently, Judicial Watch filed both an Answer to the Application and a counterclaim. Judicial Watch’s Answer and Counter Claim (Case No. 2010-cv-8996). The ARC responded to the counterclaim. Attorney Regulation Counsel’s Reply to Counterclaim (Case No. 2010-cv-8996).

**B. Judicial Watch filed a complaint with the Court under CORA.**

Shortly after the action commenced by the ARC, Judicial Watch filed its own Complaint on November 19, 2011. *See* JW Complaint. The OARC and the ARC answered the Complaint on December 1, 2010. *See* Answer. The case brought by Judicial Watch was subsequently consolidated with the case brought by the ARC on January 7, 2010. Order to Consolidate (Case No. 2010-cv-8996). Thereafter, on February 9, 2011, the Court directed the parties to brief whether the requested records are public records under CORA.

**ARGUMENT**

**I. The Burden of Proof Shifts under CORA.**

CORA defines public records as “all writings made, maintained, or kept . . . for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.” § 24-72-202, C.R.S. If there is a dispute, as there is here, as to

whether requested records are public records as defined by CORA, Colorado law places the initial burden on the requesting party to demonstrate that the records at issue are likely “public records.” *Denver Publishing Co. v. Board of Commissioners of the County of Arapahoe*, 121 P.3d 190, 199 (Colo. 2005) (citing *Wick Communications Co. v. Montrose Daily Press*, 81 P.3d 360, 362 (Colo. 2003)). The Colorado Supreme Court has held that this burden “requires only that the requesting party demonstrate that the document is likely to be a public record for purposes of establishing that the Act applies, not that it is a definitively a public record. *Wick*, 81 P.3d at 364. Moreover, the Court held that “this requirement [is not] overly burdensome.” *Id.*

The demonstration required of the requester depends on whether the custodian of the records is a public official or a government agency. If the custodian is a public official, the requester satisfies the burden if he can show that the records are “made, maintained, or kept” in a public capacity. *Denver Publishing*, 121 P.3d at 199 (citing *Wick*, 81 P.3d at 366); *see also Denver Post Corp. v. Ritter*, 230 P.3d 1238, 1241 (Colo. App. 2009) (“The requesting party must show that the record was likely ‘made, maintained, or kept’ by the custodian in his or her official capacity.”). If, however, a government agency is the custodian of the records, the initial burden is unquestionably met and no further inquiry is necessary. *Id.*; *see also, Ritter*, 230 P.3d at 1241.

Regardless of whether the custodian is a public official or government agency, once a requester satisfies the initial burden and demonstrates that the requested records are likely to be public records, the burden then shifts to the custodian to show that the records are not public records. *Denver Publishing*, 121 P.3d at 199; *Wick*, 81 P.3d at 362-363; *Ritter*, 230 P.3d at 1241.

The burden ultimately falls on the custodian because “it holds the necessary information.” *Ritter*, 230 P.3d at 1241 (citing *Wick*, 81 P.3d at 363-364). The custodian must therefore “look to the content of the records to resolve whether they relate to the performance of

public functions or involve the receipt or expenditure of public funds.” *Denver Publishing*, 121 P.3d at 199. More succinctly, the requested record “must be for use in the performance of public functions or involve the receipt and expenditure of public funds.” *Id.*

**II. The Requested Records that were Created, Maintained, and/or Kept by the OARC and the ARC are Public Records.**

**A. The requested records are *likely* public records.**

Despite their assertions to the contrary (Answer at ¶¶ 2, 3), it is obvious that both the OARC and the ARC are custodians of the requested records. Moreover, the OARC and the ARC are custodians in their official capacities.

As discussed above, the Arizona Supreme Court issued an administrative order appointing the OARC as Independent Bar Counsel. Answer at ¶ 4. The administrative order could not be clearer. The Arizona Supreme Court did not appoint John Gleason, a private attorney, as Independent Bar Counsel. It specifically appointed the OARC. The office, not the individual, was appointed by the Arizona Supreme Court; therefore, the OARC, not the individual, is the custodian of the records. Because the OARC is a government agency, the requested records are likely public records. *Denver Publishing*, 121 P.3d at 199; *Ritter*, 230 P.3d at 1241.

Even if the Court were to find that the OARC is not the custodian of the public records, with respect to the ARC, it is obvious that he is the custodian of the requested records in his official capacity. First, the ARC has conceded that he is the official custodian of requested public records by submitting his Application to the Court. ARC Application at ¶ 10 (“A records custodian may apply to this court for a determination of whether disclosure is required or prohibited.”). Colorado law is clear that the ARC can only apply to the Court for a remedy under CORA if he is the official custodian of public records. § 24-72-204(6)(a), C.R.S. The ARC

applied to the Court *in his official capacity* as ARC because he was unable to determine whether he could legally deny access to the requested public records. *See* ARC Application. If the ARC were in possession of records in his personal capacity, under Colorado law, he would not have been authorized to apply to the Court under CORA.

Second, according to the ARC, the Colorado Supreme Court issued an order authorizing the ARC to act in conformance with the Arizona Supreme Court. As is obvious from the text of the Arizona Supreme Court's administrative order, the Arizona Supreme Court appointed the OARC as Independent Bar Counsel. The Arizona Supreme Court did not appoint John Gleason, private attorney, as Independent Bar Counsel. Once again, it was not John Gleason, private attorney, who was appointed. *See* Administrative Order; Press Release.

Third, the exhaustive investigation undertaken by the ARC and another attorney of the OARC demonstrates that this was an official, not a personal, investigation. The investigation lasted for more than eight months. During that time, the ARC and at least one other attorney of the OARC interviewed approximately 100 people and reviewed thousands of documents. *See* Yvonne Wingett, Craig Harris and Michael Kiefer, *Investigator to Recommend Disbarment in Thomas Ethics Case*, THE ARIZONA REPUBLIC, Dec. 6, 2010. In other words, this was no small investigation. Notably, neither the OARC nor the ARC has asserted that this extensive investigation occurred during personal time or in a personal capacity. For example, there is no evidence that the ARC and the other attorney of the OARC took leave to conduct interviews in Arizona or to research and prepare the 82-page bar complaint. Nor is there any evidence that the ARC and the other attorney of the OARC exclusively used their personal resources to cover the obviously substantial expense of their extensive investigation. Rather, it appears likely that the

ARC and the other attorney of the OARC used at least some resources of the State of Colorado in investigating and prosecuting the attorneys at issue.

Fourth, Colorado law mandates that the ARC must be acting in his official capacity.

Rule 251.3 of Colorado Rules of Civil Procedure, clearly states:

The Regulation Counsel, while serving in that capacity, shall not hold any other public office or engage in the private practice of law.

C.R.C.P. 251.3(b). In other words, the ARC cannot be acting in anything but his official capacity, as he otherwise would be violating Colorado law.

Fifth, even if the ARC claims he was acting as a private attorney, his actions are to the contrary. Specifically, the ARC signed the Arizona Independent Bar Counsel Complaint as “John S. Gleason, Colorado Supreme Court, Office of Attorney Regulation Counsel.” *See* Arizona Independent Bar Counsel Complaint at p. 83.

Sixth, pursuant to Colorado law, the ARC must maintain and supervise a permanent office, the OARC, which serves as a central office for the filing of requests for investigations and the coordination of such investigations, as well as for the administration of all disciplinary and disability enforcement proceedings against Colorado attorneys, among other purposes. *See* C.R.C.P. 251.3(c)(1). The OARC solely and exclusively exists because of the ARC. The ARC therefore is the custodian of the OARC’s records.

For all these reasons, the ARC is the official custodian of the requested records in his official, not personal, capacity, and those records are public records. Moreover, the case law is consistent with this conclusion. In *Wick*, the requested records were pages from a personal diary of a County Manager. *Wick*, 81 P.3d at 361. In *Denver Publishing*, the requested records were personal email messages between a County Clerk/Recorder and an Assistant Chief Deputy Clerk, which happened to be maintained and kept on a county’s email system. *Denver Publishing*, 121

P.3d at 191-193. In *Ritter*, the requested records were personal cell phone billing statements of the governor. *Ritter*, 230 P.3d at 1239. As each court properly concluded, those records were created, maintained, or kept by public officials, albeit in their obviously personal capacities. In contrast to these cases, the facts in this case do not indicate in any way that the ARC has created, maintained, and/or kept the requested records in his personal capacity. There is nothing “personal” about the records requested by Judicial Watch. Indeed, bar investigations and the disciplining of lawyers – officers of the court – is a distinctively governmental function.

The ARC created, maintained, and/or kept the requested records in his official capacity as the ARC. At no time was he acting as a private attorney during his Arizona investigation. Therefore, all records concerning the facts and circumstances surrounding the appointment of the OARC by the Arizona Supreme Court are *likely* to be public records. Judicial Watch therefore has satisfied the initial burden. *Denver Publishing*, 121 P.3d at 199; *Wick*, 81 P.3d at 366; *Ritter*, 230 P.3d at 1241.

**B. The OARC and the ARC cannot show that the requested records are not public records.**

Because Judicial Watch has shown that the requested records are *likely* to be public records, the burden shifts to the custodian of the records – the OARC and/or the ARC – to show that the records are not public records. *Denver Publishing*, 121 P.3d at 199; *Wick*, 81 P.3d at 362-363; *Ritter*, 230 P.3d at 1241. For the reasons stated above, the requested records are, in fact, “public records” under CORA.

The requested records were created, maintained, and/or kept by the OARC and the ARC for use in the performance of public functions or involved the receipt and expenditure of public funds. To date, neither the OARC nor the ARC has shown that it was acting in a personal capacity when it conducted the investigation. Judicial Watch has not and does not seek access to

any work product, working files, deliberations, or internal communications. Judicial Watch has solely requested records in the possession of the OARC and the ARC concerning the facts and circumstances surrounding the appointment of the OARC by the Arizona Supreme Court. The requested records therefore are public records under CORA.

### CONCLUSION

For the foregoing reasons, the Court should rule in favor of Judicial Watch and find that the requested records are public records under CORA.

Dated: February 28, 2011

Respectfully submitted,

(original signature on file)  
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## CERTIFICATE OF SERVICE

I do hereby certify that on this 28th day of February, 2011 a true and correct copy of the above **Judicial Watch's Opening Brief** was e-filed using LexisNexis File and Serve which will serve the persons below by e-mail addressed to:

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