

DISTRICT COURT, CITY AND COUNTY OF DENVER,
COLORADO

Court Address: 1437 Bannock Street
Denver, CO 80202

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

vs.

Defendant: JUDICIAL WATCH, INC.

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, INC.'S ANSWER BRIEF

INTRODUCTION

During its February 9, 2011 conference in chambers, the Court requested that the parties brief whether the records that are the subject of Judicial Watch's Colorado Open Records Act ("CORA") request are "public records" under the terms of the statute. In its opening brief, Judicial Watch did just that. Instead of limiting their brief to the specific question asked by the Court, however, the Office of the Attorney Regulation Counsel ("OARC") and the Attorney Regulation Counsel ("ARC") (collectively "OARC/ARC") raised new, additional, and unpersuasive arguments about why the OARC/ARC believe that they may continue to withhold the requested public records from Judicial Watch.¹ Nevertheless, Judicial Watch has demonstrated and continues to demonstrate that the records it requested are Colorado public records created, maintained, and/or kept by the OARC/ARC in their capacities as a public entity and public official, respectively, of the State of Colorado.

ARGUMENT

I. The Requested Records are Colorado Public Records under CORA.

The current posture of the instant matter is simple. Judicial Watch asserts that the records it requested on September 2, 2010 are Colorado public records subject to CORA. The OARC/ARC disagree. The OARC/ARC assert that the requested records are not Colorado public records at all because, they claim, in serving as Independent Bar Counsel for the Supreme

¹ Judicial Watch's Complaint named both the OARC and the ARC as defendants, and neither the OARC nor the ARC assert that the OARC is not a proper defendant. Consequently, there is no dispute that both the OARC and the ARC are parties to this action. Nonetheless, the brief submitted by "John Gleason, in his official capacity as Supreme Court Attorney Regulation Counsel" makes no reference to the OARC. Judicial Watch assumes this omission was merely an oversight and, for the sake of convenience, will refer to the brief as having been submitted by both the OARC and the ARC.

Court of Arizona, they are not acting in a “Colorado public capacity.” *See* ARC Opening Brief at 7.

As Judicial Watch outlined in its opening brief, if there is any dispute as to whether the requested records are public records subject to CORA, Colorado law places the initial burden on the requestor to demonstrate that the records are likely to be 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)).

This demonstration varies depending on whether the custodian of the records is a public entity or a public official. If the custodian of the requested records is a public entity, the initial burden is unquestionably met and no further inquiry is necessary. *Denver Publishing*, 121 P.3d at 199; *see also Denver Post Corp. v. Ritter*, 230 P.3d 1238, 1241 (Colo. App. 2009). If, however, the custodian is a public official, then the requestor satisfies the burden by showing that the records are “made, maintained, or kept” in a public, as opposed to a private, capacity. *Denver Publishing*, 121 P.3d at 199 (*citing Wick*, 81 P.3d at 366); *Ritter*, 230 P.3d at 1241. Once a requestor has demonstrated that it is likely that the requested records are public records, the burden shifts to the public official to demonstrate that this is not the case. *Id.*

In its opening brief, Judicial Watch satisfied both tests. Rather than rebutting Judicial Watch’s demonstration by showing that the requested records are the private records of the ARC -- a showing the OARC/ARC obviously cannot make -- the OARC/ARC invented a new classification of records, then claimed that this new classification applies to the records requested by Judicial Watch. Specifically, the OARC/ARC assert that records of a Colorado public official are not subject to CORA if the official is acting in a “non-Colorado public capacity.” ARC Opening Brief at 7. Therefore, the OARC/ARC argue, in order for a record to be subject to

CORA, a requestor must demonstrate that the records are made, maintained, or kept in a “Colorado-public capacity.” *Id.* at 8.

Judicial Watch has found no Colorado law or authority recognizing any such classification of records, or indeed any circumstances at all, in which a Colorado public official acting in a public capacity was acting in anything other than a “Colorado public capacity.” There simply is no such classification under CORA, nor is there any such concept under Colorado law. This Court should not be the first to recognize such a counterintuitive, novel, and problematic concept. It should reject the OARC/ARC’s argument for this reason alone.

Regardless, Judicial Watch can easily satisfy this newly-created standard. In their opening brief, the OARC/ARC produce what is alleged to be a March 25, 2010 “Order of Appointment” in which Chief Justice Mary J. Mularkey of the Colorado Supreme Court directs the OARC/ARC to assist the Arizona Supreme Court. *See* ARC’s Opening Brief at Exhibit B. The Order of Appointment notes that “the Supreme Court of Arizona has requested assistance from the Supreme Court of Colorado to investigate possible attorney misconduct in Arizona.” *Id.* It states that the OARC is “under the direction of the Colorado Supreme Court” and “perform[s] such duties as assigned by the Court.” *Id.* It then formally orders the ARC “and his staff” to serve as Independent Bar Counsel pursuant to the March 23, 2010 Administrative Order issued by the Chief Justice of the Arizona Supreme Court. *Id.*

The Order of Appointment could not demonstrate any more clearly that, in being appointed as Independent Bar Counsel in Arizona, the OARC and the ARC -- a Colorado public entity and a Colorado public official, respectively -- are purportedly carrying out a directive of and performing duties assigned by the Colorado Supreme Court. In doing so, the Order of Appointment also makes clear that the OARC/ARC are acting in their official capacities as a

public entity and a public official, respectively, of the State of Colorado, not in any non-Colorado public capacity, whatever that might mean. Indeed, if the OARC/ARC were not acting allegedly in their official capacities as a Colorado public entity and Colorado public officer, then their activities in Arizona would likely be *ultra vires* and may constitute both a misuse of public resources and an abuse of public office. For the OARC/ARC to claim that the Colorado Supreme Court's Order of Appointment directing them to serve as Independent Bar Counsel in Arizona somehow means the the ARC is no longer acting in a "Colorado public capacity" is not only completely unsupported by Colorado law, but it is contrary to the express language of the Order of Appointment cited by the OARC/ARC in their opening brief.

Moreover, the OARC/ARC's argument ignores the fact that the Colorado public records requested by Judicial Watch do not concern or relate to the substance of OARC/ARC's actual work as Independent Bar Counsel in Arizona.² First, Judicial Watch requested communications between the OARC/ARC, the Arizona Supreme Court, and/or the Arizona State Bar concerning the OARC/ARC's appointment as Independent Bar Counsel in Arizona. *See* Judicial Watch's CORA Request Item No. 1. The Colorado Supreme Court's March 25, 2010 Order of Appointment notes that the OARC

has received Administrative Order 2010-42, dated March 23, 2010, issued by Chief Justice of the Arizona Supreme Court Rebecca White Berch authorizing the [OARC] to investigate, and, if necessary, prosecute specified lawyer misconduct cases to the State Bar Association of Arizona.

ARC Opening Brief at Exhibit B. Presumably, the Arizona Administrative Order did not simply appear at OARC/ARC without any prior communications between the OARC/ARC and the Arizona Supreme Court or the Arizona State Bar about the pending appointment. Thus, the

² As Judicial Watch has repeatedly asserted, it has not and does not seek access to any work product, working files, deliberations, or internal communication created, maintained, or kept by the OARC/ARC in serving as Independent Bar Counsel in Arizona.

requested records include records of communications prior to the issuance of the Arizona Administrative Order. These communications would likely detail the scope of the proposed appointment, facts and circumstances surrounding the appointment, costs and expenses associated with the appointment, and other logistical matters. The OARC/ARC cannot claim that such records were made, maintained, or kept in an “Arizona public capacity” as opposed to a “Colorado public capacity” because the OARC/ARC had not yet been appointed by the Colorado Supreme Court to serve as Independent Bar Counsel in Arizona. For these same reasons, such records also would not reflect any of the actual work product, working files, deliberations, or internal communications of the OARC/ARC as Independent Bar Counsel in Arizona.

Second, Judicial Watch also requested records of communications between the OARC/ARC and the Colorado Supreme Court about the Arizona Administrative Order. *See* Judicial Watch’s CORA Request Item No. 2. Like the first category of records requested by Judicial Watch, at some point, the Colorado Supreme Court must have become aware of the Arizona Supreme Court’s request for assistance. Otherwise, the Colorado Supreme Court would not have issued its March 25, 2010 Order of Appointment. Presumably, the OARC/ARC and the Colorado Supreme Court communicated with each other about the Arizona Supreme Court’s request for assistance, as well as the subsequent Order of Appointment issued by the Colorado Supreme Court. Any such records are responsive to Judicial Watch’s request. Certainly the Colorado Supreme Court’s Order of Appointment is one such record responsive to the request. To claim that the Order of Appointment issued by the Colorado Supreme Court to the OARC/ARC is not a Colorado public record would be absurd. The OARC/ARC cannot claim that records responsive to Request No. 2 were made, maintained, or kept in anything other than a “Colorado public capacity.”

Third, Judicial Watch requested records about the legal authority of the OARC/ARC to accept the appointment as Independent Bar Counsel in Arizona, as well as records about the legal authority generally of the OARC/ARC to investigate or prosecute allegations of attorney misconduct for an entity other than the Supreme Court of Colorado or allegations of misconduct by non-Colorado attorneys outside Colorado. *See* Judicial Watch’s CORA Request Item Nos. 3-5. These requests expressly seek records regarding the OARC/ARC authority to conduct such investigations and prosecutions “under Colorado law.” *Id.* Any records responsive to Request Nos. 4 and 5 are not specific to the the OARC/ARC’s appointment as Independent Bar Counsel in Arizona. Rather, they concern the authority of the OARC/ARC, “under Colorado law,” to conduct non-Colorado or out-of-state investigations in general. It is impossible to conceive how records made, maintained, or kept by a Colorado public entity and a Colorado public official regarding their authority, “under Colorado law” to engage in some activity or undertake some task could be anything but Colorado public records. Thus, because of the specific manner in which Judicial Watch formulated these requests, any responsive records clearly constitute records made, maintained, or kept in a “Colorado public capacity.” They certainly are not records made, maintained, or kept in any specific “Arizona public capacity.”

Fourth, Judicial Watch requested bills, invoices, or statements for services rendered or expenses incurred by the OARC/ARC in serving as Independent Bar Counsel in Arizona, as well as records of payments received by the OARC/ARC, the Colorado Supreme Court, or the State of Colorado for services rendered or expenses incurred by OARC/ARC. *See* Judicial Watch’s CORA Request Item Nos. 6-7. The Arizona Administrative Order, which the Colorado Supreme Court incorporated by reference into its Order of Appointment, directs that “[t]he State Bar of Arizona shall pay reasonable fees, costs for services provided, and expenses incurred by

[OARC/ARC] as necessary to carry out the duties required by this Order.” ARC Opening Brief at Exhibits A and B. The billing records of a Colorado public entity or a Colorado public official and the records of payments for services rendered and expenses incurred by a Colorado public entity or a Colorado public official are quintessential Colorado public records. By way of analogy, when a vendor generates a bill to send to a customer, or when a vendor receives a payment from a customer, both the billing records and any record of payment obviously constitute records of the vendor. At a minimum, they are records of both the vendor and the customer. It certainly cannot be said that such records are the records of the customer exclusively. Likewise here, billing records of service rendered and expenses incurred by OARC/ARC in acting as Independent Bar Counsel in Arizona, as well as records of payments by the Arizona State Bar for these same services and expenses, constitute records of the OARC/ARC. They clearly are made, maintained, or kept by OARC/ARC in a “Colorado public capacity.”

In sum, Judicial Watch has demonstrated that it is at least likely that the requested records are Colorado public records subject to disclosure under CORA. Since Judicial Watch satisfied its initial burden, the burden then shifts to the OARC/ARC to show that the records are not Colorado public records. *Denver Publishing*, 121 P.3d at 199; *Wick*, 81 P.3d at 362-363; *Ritter*, 230 P.3d at 1241. The OARC/ARC did not make this showing in its opening brief, and it cannot make this showing elsewhere. The requested records clearly are Colorado public records subject to disclosure under CORA.

II. The OARC/ARC's New Arguments are Unpersuasive and Irrelevant.

A. The OARC/ARC is subject to CORA.

In their opening brief, the OARC/ARC argue, for the first time since Judicial Watch made its CORA request approximately six months ago, that they are not subject to CORA. *See* ARC's Opening Brief at 11 ("CORA does not apply to the ARC."). The OARC/ARC communicated with Judicial Watch at least twice in response to Judicial Watch's CORA request, and in neither instance did they make the blanket assertion that they are not subject to CORA. *Id.* at Exhibits E and G. Similarly, the OARC/ARC did not assert in any of their pleadings in this litigation that they are not subject to CORA. *See* Defendant's Answer (Case No. 2010-cv-9052) and Plaintiff's Reply to Counterclaim (Case No. 2010-cv-8996).

Moreover, the OARC/ARC conceded that they are subject to CORA when they applied to this Court for declaratory relief. *See* Application Pursuant to Section 24-72-204(6)(A), C.R.S. 2010 (Case No. 2010-cv-8996). Obviously, the OARC/ARC cannot apply to this Court for a remedy under CORA if CORA does not apply to them. It is incongruous, if not inconsistent and contradictory, for the OARC/ARC to try to take advantage of a procedure made available under CORA while also arguing that CORA does not apply.

Nor did the OARC/ARC even suggest during the February 9, 2011 conference before this Court that they are not subject to CORA. The only issue discussed during the conference was how to proceed in light of the OARC/ARC's claim that the requested records are not Colorado public records. For the OARC/ARC to now argue that they are not even subject to CORA is contrary to all of the assertions they previously made to Judicial Watch and the Court.

Regardless, Colorado law is clear: CORA indeed does apply to the OARC/ARC. CORA defines a public record as "all writings made, maintained, or kept by the state, any agency,

institution” § 24-72-202, C.R.S. CORA also defines an official custodian as “any officer or employee of the state, of any agency, institution” *Id.* In other words, any officer or employee of the state is subject to CORA. The OARC obviously is an agency or institution of the state. *See* Defendant’s Answer (Case No. 2010-cv-9052) at ¶ 3. Similarly, it is undisputed that the ARC is an official and an employee of the state. *See* Defendant’s Answer (Case No. 2010-cv-9052) at ¶ 2. The ARC is created and appointed by the Colorado Supreme Court. C.R.C.P. 251.3(a). Yet, in their opening brief, the OARC/ARC do not cite to any statute or case law to support their assertion that “CORA does not apply to the ARC.”

The best that the OARC/ARC can muster is *Office of the State Court Administrator v. Background Information Services*, 994 P.2d 420 (Colo. 1999) (“*BIS*”), which, they claim, supports the proposition that “the judiciary is not *necessarily* subject to CORA.” *See* ARC Opening Brief at 10 (emphasis added). *BIS* does not address the OARC, the ARC, or records created by administrative offices and officials within the Colorado judiciary such as the OARC and the ARC. Instead, *BIS* addresses the narrow issue of “the release of computer-generated bulk data containing very particularized information about individuals who are parties to criminal or civil cases in the State of Colorado.” *Id.* at 422. In addition to filings in criminal cases, the records at issue in *BIS* included “divorce filings, general civil case filings, probate, mental health, juvenile, dependency and neglect, and water case filings.” *Id.* at 427. In other words, the records at issue contained “very private emotional, financial, and psychological documents, as well as identifying information such as driver’s license numbers, social security numbers, and addresses of many of the people who are party or witness to a civil or criminal case.” *Id.* at 429. In *BIS*, the Court did not hold that the entire Colorado judiciary, or even particular offices or officials within the Colorado judiciary, can never be subject to CORA.

Rather, the Court held “that absent statutory mandate dealing with particular court records, such as records of official action in criminal cases, the courts themselves retain authority over the dissemination of court records.” *Id.* at 432. The Court held only that the *courts*, as custodians of *court records* from case filings, are not subject to CORA.

Unlike the requester in *BIS*, Judicial Watch has not sought access to court records from case filings. Rather, the records Judicial Watch has requested are records about the OARC/ARC’s appointment as Independent Bar Counsel in Arizona, the legal authority of the OARC/ARC to accept this particular appointment and out-of-state appointments in general, and billing records and records of any payments by the Arizona State Bar. The holding in *BIS* clearly does not apply to the records requested by Judicial Watch. If anything, comparing *BIS* to the specific facts of the instant matter demonstrates that the OARC/ARC are flatly incorrect in their newly found assertion that “CORA does not apply to the ARC.”

Nor can the OARC/ARC claim that the Colorado Supreme Court has plenary power to determine the circumstances under which the records requested by Judicial Watch may be disclosed. To the extent that the Supreme Court might have plenary power of disclosure of the records of the OARC/ARC -- and Judicial Watch does not concede that it does -- the OARC/ARC admit that this power is derived from the Colorado Supreme Court’s “exclusive jurisdiction over attorneys and the authority to regulate, govern, and supervise the practice of law in Colorado to protect the public.” *See* ARC Opening Brief at 11 (*citing Colorado Supreme Court Grievance Committee v. District Court*, 850 P.2d 150, 152 (Colo. 1993)). The records requested by Judicial Watch do not concern any Colorado attorneys or the regulation, governance, or supervision of the practice of law in Colorado, however. They concern Arizona attorneys who practice law in Arizona. There is no nexus whatsoever between the Arizona

attorneys under investigation by the OARC/ARC and the practice of law in Colorado, and the Colorado Supreme Court obviously does not have the authority to regulate, govern, and supervise the practice of law in Arizona, much less the exclusive authority to do so. In the instant matter, the alleged “plenary power” of the Colorado Supreme Court to control disclosure of the requested records is a mirage. The Colorado Supreme Court does not have any such “plenary power” with respect to the requested records, which are nothing more than ordinary public records of a Colorado public entity and a Colorado public official. As a result, the public records requested by Judicial Watch are subject to disclosure under CORA.

In addition, the OARC/ARC argue that the “portion of the request seeking documents concerning bills, invoices, or statements of expenses is not subject to CORA.” ARC’s Opening Brief at 11. “‘Public records’ include writings ‘involving the receipt and expenditure of public funds.’” *Id.* (citing § 24-72-202(6)(a)(I), C.R.S.). According to the OARC/ARC, “The question then is whether bills, invoices and statements concerning moneys paid and received by the ARC constitute ‘public funds.’” *Id.* at 12. The OARC/ARC argue that they are not, asserting that registration fees paid by Colorado attorneys, not tax dollars, are used to fund the OARC/ARC’s disciplinary administration and enforcement functions.

As an initial matter, the OARC/ARC have never identified the source of the funds they are using to serve as Independent Bar Counsel in Arizona. Nor have they identified the source of the funds they are using to cover their obviously substantial expenses. Likewise, they have not identified where any monies received from the Arizona State Bar have been deposited. Certainly, monies paid by the Arizona State Bar to compensate the OARC/ARC for their services and to reimburse them for their expenses are not registration fees. Because these monies

are not registration fees paid by Colorado attorneys, the OARC/ARC's "public funds" argument fails *ab initio*.

Moreover, the authority on which the OARC/ARC rely in support of their claim that registration fees paid by Colorado attorneys to the Colorado Supreme Court are not "public funds," *Pensioners Protective Assoc. v. Davis*, 150 P.2d 974 (Colo. 1944), defeats, rather than supports, the OARC/ARC's argument. At issue in *Pensioners Protective Assoc.* was whether a group of plaintiffs who succeeded in restoring certain monies unlawfully diverted from a pension fund could be awarded attorney's fees out of the restored monies. The resolution of the issue depended, at least in part, on whether the monies held in the pension fund were "public funds." The Court declared that they were not, finding that the monies held in the pension fund were held in trust for the pensioners. *Id.* at 538. "The term 'public funds' means funds belonging to the state . . . The term does not apply to special funds, which are collected or voluntarily contributed, for the sole benefit of the contributors, and of which the state is merely the custodian." *Id.* at 541. In the instant matter, it certainly cannot be said that registration fees paid by Colorado attorneys for the privilege of practicing law in the State of Colorado are held in trust for the sole benefit of these same attorneys. As the OARC/ARC have acknowledged, attorney registration, supervision, and discipline are quintessential, if not exclusive, state functions undertaken to protect the public. *See* ARC Opening Brief at 2 ("The Colorado Supreme Court 'has exclusive jurisdiction over attorneys and the authority to regulate, govern, and supervise the practice of law in Colorado **to protect the public.**'") (internal citation omitted)(emphasis added). Therefore, monies associated with attorney registration, supervision, and discipline, including monies paid by Colorado attorneys to the Colorado Supreme Court for the privilege of practicing law in the State of Colorado, unquestionably are public monies.

Regardless, Judicial Watch has never argued that the only reason the bills, invoices, and statements it requested from the OARC/ARC are subject to disclosure under CORA is because these records involve “the expenditure of public funds.” Judicial Watch has already demonstrated that records concerning monies expended by OARC/ARC in serving as as Independent Bar Counsel in Arizona, as well as records of any monies received from the Arizona State Bar for this same service, are public records subject to disclosure under CORA because they were made, maintained, and/or kept by the OARC/ARC in performing an assignment allegedly ordered by the Colorado Supreme Court. Public records are “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. (emphasis added). The OARC is a public institution, and the ARC is a public official. Moreover, the OARC/ARC themselves claim that the Colorado Supreme Court’s March 25, 2010 Order of Appointment authorizes them to serve as Independent Bar Counsel in Arizona. Thus, based on the OARC/ARC’s own assertions, CORA applies to them and to all of the public records requested by Judicial Watch.

B. The requested records are not exempt from disclosure.

The ARC’s remaining three arguments are not only improper, but also incorrect. The Court specifically stated that it would first address whether the requested records are public records. The Court also stated that, if it found that the requested records are public records under CORA, then it would schedule additional briefing to address whether the public records could be withheld from disclosure pursuant to exemptions. Because the OARC/ARC apparently realized that they could not successfully argue that the requested records are not public records under

CORA, they ignore this directive and argue in the alternative that they may lawfully withhold the public records requested by Judicial Watch. The OARC/ARC are wrong.

First, the OARC/ARC argue that C.R.C.P. 31 prevents them from disclosing the Colorado public records requested by Judicial Watch. The OARC/ARC's argument ignores the plain text of the C.R.C.P. 31, which does not apply to the requested records. The rule expressly applies to information and records of *Colorado* disciplinary proceedings. Obviously, the OARC/ARC's appointment as Independent Bar Counsel in *Arizona* does not concern or relate to any *Colorado* disciplinary proceedings. Nor does it concern or relate to any disciplinary proceeding against Colorado attorneys. Consequently, C.R.C.P. 31 simply does not apply to records regarding the OARC/ARC's appointment as Independent Bar Counsel in Arizona. Moreover, even if C.R.C.P. 31 were deemed to apply -- and Judicial Watch does not concede that it does -- the OARC/ARC acknowledge that a formal ethics Complaint was filed against the targets of the OARC/ARC's Arizona investigation in February 2011. ARC's Opening Brief at 4 and Exhibit C. Therefore, even in the unlikely event that C.R.C.P. 31 were found to apply to the particular records requested by Judicial Watch, which, again, do not include any work product, working files, deliberations, or internal communications of the OARC/ARC, the rule would require that the records "be available to the public." C.R.C.P. 251.31(a).

Second, the OARC/ARC argue that Rule 70 of the Rules of the Arizona Supreme Court prevents the disclosure of the requested records. While the assertion that a rule of the Arizona Supreme Court can prevent the disclosure of Colorado public records is certainly novel and counterintuitive at best, even assuming that Rule 70 might apply -- and, again, Judicial Watch does not concede that it does -- the OARC/ARC fail to demonstrate that Rule 70 prevents the disclosure of the particular records requested by Judicial Watch. The OARC/ARC appear to rely

on the provision in Rule 70 that states that the “state bar file . . . shall be open to the public” upon the occurrence of certain circumstances.³ A.R.S., Sup. Ct. R. 70(a). However, OARC/ARC completely fail to identify what constitutes the “state bar file” under Arizona law or demonstrate that the records requested by Judicial Watch should properly be considered part of any “state bar file.” Judicial Watch submits they clearly do not. Again, the records requested by Judicial Watch are records about the OARC/ARC’s appointment as Independent Bar Counsel in Arizona, the legal authority of the OARC/ARC to accept this particular appointment and out-of-state appointments in general, and billing records and records of any payments by the Arizona State Bar. Judicial Watch has not requested any work product, working files, deliberations, or internal communications of the OARC/ARC. Rather than being part of any “file” of the State Bar of Arizona, the records requested by Judicial Watch are public records of the OARC/ARC. Because the OARC/ARC has failed to demonstrate that Rule 70 applies, the Arizona rule does not prevent the disclosure of the records requested by Judicial Watch. At a minimum, in the unlikely event that the Court determines that Rule 70 applies, Judicial Watch should be allowed the opportunity to obtain a waiver from the respondents. A.R.S., Sup. Ct. R. 70(a)(1).

Third, and finally, the OARC/ARC attempt to invoke two exceptions to disclosure under CORA. “Exceptions to CORA must be narrowly construed.” *Bodelson v. Denver Publishing Co.*, 5 P.3d 373, 377 (Colo. App. 2000). The OARC/ARC mention only in passing what it describes as CORA’s exception for “records . . . compiled for a law enforcement purpose.” See ARC’s Opening Brief at 16 (*citing* § 24-72-204(2)(a)(1), C.R.S.). The actual text of the exception is narrower, however. It does not apply to all “records” compiled for a law enforcement purpose, but only to “investigatory files” compiled for a law enforcement purpose.

³ One of these circumstances is waiver of confidentiality by the respondent to the proceeding. A.R.S., Sup. Ct. R. 70(a)(1).

§ 24-72-204(2)(a)(1),), C.R.S. Regardless, OARC/ARC make no effort to demonstrate that this exception applies at all, much less that the particular Colorado public records requested by Judicial Watch constitute “investigatory files” compiled for a law enforcement purpose. As Judicial Watch has demonstrated repeatedly, the Colorado public records that it requested are not “investigatory files.” Records about an appointment, the legal authority of a public entity and public officer, and billing and payment records are not “investigatory files” compiled for law enforcement purposes.

In addition, the OARC/ARC attempt to invoke CORA’s catch all “substantial harm to the public interest” exception. *See* ARC’s Opening Brief at 16 (*citing* § 24-72-204(6)(a), C.R.S.). In order to withhold a public record under this particular exception, the custodian of the record “has the burden to prove an extraordinary situation and that the information revealed would do substantial injury to the public.” *Bodelson*, 5 P.3d at 377. Far from satisfying this high burden, the OARC/ARC baldly assert that “given the highly-controversial nature” of the Arizona investigation, “premature disclosure of any facts could have impaired or delayed the investigation.” *Id.* at 17. Not only has the OARC/ARC failed to prove that an “extraordinary situation” exists, but, particularly given the substantial information about the investigation that has already been disclosed, including in a press release issued by the Arizona Supreme Court (*see* Judicial Watch’s Opening Brief at Exhibit A) and publication of the OARC/ARC’s Complaint (*see* ARC’s Opening Brief at Exhibit C), and given that the ARC himself has given interviews to the media about the investigation (*see* ARC’s Opening Brief at Exhibit P), it was incumbent upon the OARC/ARC to substantiate their generalize, broad brush claims of harm to the public interest if they were to have any chance of satisfying their burden. Instead, the OARC/ARC fail to make any particularized showing of how disclosure of the requested records

would cause substantial harm to the public interest in Arizona, and they make no showing whatsoever of how disclosure would cause substantial harm to the public interest in Colorado. After all, the OARC/ARC are a Colorado public entity and a Colorado public official, respectively, and are charged by law with regulating, governing, and supervising the legal profession in Colorado in order to protect the people of Colorado. See ARC Opening Brief at 2, 11. If anything, the public interest in **Colorado** demands that the records requested by Judicial Watch be made public in order to shed light on the OARC/ARC's obviously substantial involvement in this "highly controversial" **Arizona** investigation. The requested records must be produced.

CONCLUSION

For the reasons set forth in Judicial Watch's opening brief and for the additional reasons set forth above, the Court should find that the records requested by Judicial Watch are Colorado public records subject to disclosure under CORA and order the OARC/ARC to disclose to Judicial Watch, without further delay, all responsive public records not subject to a claim of withholding. In addition, and to facilitate the determination of whether any responsive public records may be lawfully withheld from Judicial Watch under CORA, the Court should order the OARC/ARC to produce an index of all public records responsive to Judicial Watch's CORA request that remain subject to a claim of withholding.

Dated: March 14, 2011

Respectfully submitted,

(original signature on file)

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2011 a true and correct copy of the above JUDICIAL WATCH, INC.'S ANSWER BRIEF was e-filed using LexisNexis File and Serve which will serve the persons below by e-mail addressed to:

JOHN W. SUTHERS, Attorney General
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(original signature on file)

James P. Rouse