DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	
Applicant: JOHN GLEASON, in his official capacity as Supreme Court Regulation Counsel v. **Interested Party:** JUDICIAL WATCH, INC.	**▲COURT USE ONLY▲** Case Number: 2010 CV 8996; Consolidated with 2010 CV 9052 Courtroom: 414

ORDER

Before the Court is an issue of apparent first impression arising from unusual circumstances. The issue is whether the Colorado Open Records Act ("CORA"), C.R.S. section 24-72-200.1, *et seq.*, applies to administrative and billing records maintained by John Gleason, the Attorney Regulation Counsel ("ARC"), and his Office. The unusual circumstances are Mr. Gleason's appointment in March 2010 by former Chief Justice Mullarkey – upon the request/order of the Arizona Supreme Court – as independent counsel to investigate allegations of misconduct against Maricopa County Attorney Andrew Thomas. Mr. Gleason's investigation recently resulted in an ethics complaint issued to Mr. Thomas and two other Arizona attorneys.

The CORA request was made by Judicial Watch, a non-profit, "government watch-dog" entity. (The quoted language is the Court's description, and not that of Judicial Watch.) Through the course of these proceedings, Judicial Watch reiterated (in its view), or clarified (in the ARC's view), that it is not seeking the work product or other materials the ARC generated in the Arizona investigation, with the possible exception of the ARC's billing records. Instead, Judicial Watch requested, in essence, any internal administrative records leading to, authorizing, or resulting in Mr. Gleason's appointment, as well as subsequent non-investigatory communications regarding his

absence from Colorado while conducting the Arizona investigation. Thus, the ARC's initial assertion that the records in question are subject to Arizona law, rather than CORA, is based on a misapprehension of the requests. Judicial Watch also seeks billing records (including documents showing payments) for the ARC's work in Arizona; payments went to the Office of the Attorney Regulation Counsel, and not to Mr. Gleason personally.

While a party's motivation in seeking records is generally irrelevant to determining a right to inspection, it is apparent that, at a minimum, Judicial Watch questions the use of one state's resources (here, in the person of Mr. Gleason and his staff), to assist another state in a politically-charged ethics probe. Further, in this time of state budget shortfalls, the people of this State no doubt would be interested in how it came to be that a state employee was ordered to work for another jurisdiction and whether Colorado was adequately reimbursed for that work.

I. CORA

The parties dispute the applicability of CORA to the present facts. Although the current issue is one of first impression, Colorado courts have had ample opportunity to interpret CORA generally, finding that (1) in the absence of a specific statutory exception permitting the withholding of information, a public official has no authority to deny any person access to public records, *Denver Publishing Co. v. Dreyfus*, 520 P.2d 104, 109 (Colo. 1974); and (2) there is a general presumption in favor of public access to government documents, exceptions to which must be narrowly construed, *Daniels v. City of Commerce City*, 988 P.2d 648, 651 (Colo. App. 1999).

Despite this, the parties disagree about whether the documents Judicial Watch requested are "public records" accessible via a CORA request. Pursuant to CORA, "'[p]ublic records' means and includes all writings made, maintained, or kept by the state, [or] any agency . . . ." C.R.S. § 24-72-202(6)(a)(I). While the Office of the Attorney Regulation Counsel may not be an "agency," it unquestionably is part of "the state," and Mr. Gleason is a state employee. Thus, records maintained by Mr. Gleason in his official capacity would appear to be subject to CORA. And, it appears beyond dispute that if a similar request had been directed to the executive or legislative branch regarding a State employee directed to assist a sister state, the documents would be "public records" subject to CORA. The only issue then would be whether an exception to inspection might be applicable. Yet, because Mr. Gleason and the Office of Attorney Regulation Counsel are part of the judicial branch, and more specifically because the position of the ARC was created and established through the rule-making authority of the Supreme Court, *see* Rule 251.3, the ARC argues that records in his possession are not subject to CORA .

Although nothing in CORA specifically exempts the judiciary and its records from inspection requirements, CORA does refer to the Supreme Court's power to limit access: "the custodian of any public records shall allow any person the right of inspection . . . *except [when] such inspection is prohibited by rules promulgated by the supreme court* . . . ." C.R.S. § 24-72-204(1)(c) (emphasis added). The ARC argues, in essence, that this language allows the Supreme Court, through rulemaking, to exempt the entire judicial branch from CORA's reach. Given CORA's general presumption in favor of public access to government documents, however, it is not clear why section 204(1)(c) should be interpreted so broadly. Nevertheless, it is fair to say that the mere language and general purpose of CORA do not end the inquiry as to whether CORA applies to the ARC,

First, the ARC cites *Office of State Court Administrator v. Background Info. Services*, 994 P.2d 420 (Colo. 1999) [hereinafter *BIS*], for the proposition that judicial records (such as those held by the ARC) can be inspected only if the General Assembly has enacted a statute that specifically refers to identifiable records of the judiciary, which it has not done in this case. According to the ARC, *BIS* reverses CORA's presumption of access with respect to judicial records, i.e., unless otherwise clearly defined as public record, judicial materials are not accessible.

Second, the ARC argues that "all records and materials of the Judicial Branch are exempt from requirements and procedures of [CORA]," because "C.R.C.P. chap. 38, Rule 1, sets the general standards for public access to records and information held by the Judicial Department." Furthermore, "Rule 1 also effectively removed all records and materials of the judicial branch from the scope of [CORA]." Therefore, "the [ARC's] records and materials can be inspected and copied only under the auspices of Rule 1 and the applicable Chief Justice Directives." And, according to the ARC, neither of those allow for Judicial Watch to inspect the ARC's records.

Third, the ARC argues that Chief Justice Directive 05-01 "allows only the release of court records," and, since the definition of "[c]ourt records does not include other records maintained by the Judicial Branch," the records sought by Judicial Watch "cannot be released without specific authorization from the [Colorado Supreme] Court," which has not occurred.

The Court will address each of these arguments.

A. THE APPLICABILITY OF THE *BIS* DECISION

The ARC broadly interprets *BIS* as holding that court rules and procedures exclusively govern the release of all judicial records, unless the General Assembly acts with specificity to the contrary. According to the ARC, since the legislature did not explicitly make CORA applicable to the judiciary, neither the courts nor any other part of the Judicial Branch fall within CORA's requirements.

This Court disagrees with the ARC's reading of *BIS*. In reaching the conclusion that "it rests within the authority of the Chief Justice, acting by Chief Justice Directive, to direct and control the release of computer-generated bulk data containing court records," 994 P.2d at 431, the Supreme Court never analyzed the applicability of CORA to the judicial branch as a whole. Thus, *BIS* contains no interpretation of the language of CORA, nor any rationale (such as separation of powers) for excluding the judiciary from CORA's reach.

The decision must be evaluated within the context of the issues presented to the Supreme Court. *BIS* enumerated three issues for decision – all of which concerned whether the Court and Chief Justice acted properly *pursuant to CORA*. *Id.* at 425. The first issue was whether, pursuant to CORA, a court-adopted rule change was a rule or order that exempted the State Court Administrator from CORA's inspection and disclosure requirements. *Id.* The second issue was whether, pursuant to CORA, a Chief Justice Directive was a rule or order of the Court permitting the State Court Administrator to deny a request for inspection, disclosure or transfer of bulk electronic information kept by the Judicial Branch. *Id.* The third issue was whether CORA mandates that a custodian of records manipulate a record to a form not ordinarily used by the department or agency, in response to a request for inspection or disclosure of records. *Id.*

It is true that, in addressing these issues, the Court concluded, "the courts are not included as public agencies for all purposes under [CORA]." *Id.* at 431. But, in reaching that conclusion, the Court was addressing concerns that make its holding of limited value here. First, the decision emphasized that *the courts* are not included as public agencies under CORA. Here, the ARC does not qualify as a "court."

Second, the documents in question here do not contain the kind of "very particularized information about individuals" that were at issue in *BIS*. *Id.* at 422. The *BIS* court's decision was clearly influenced by such privacy concerns, referring to them throughout the decision. For instance, the court stated, "Court files can contain very private emotional, financial, and psychological documents, as well as identifying information such as drivers 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. Moreover, *BIS* involved a request for the release of records in bulk form – significantly multiplying privacy concerns. Here, Judicial Watch is seeking disclosure of communications and billing statements concerning government activity–exactly the type of public records CORA was designed to make available–and which presumably do not invade individual privacy.

Finally, the *BIS* court determined that the General Assembly had not intended CORA to apply to "court records," because other laws more specifically concerned the inspection

and disclosure of such records. *See id.* at 427-29 (discussing whether court records are public records for purposes of CORA since they are otherwise covered by specific statutes). As such, the Court determined that, where the "General Assembly has not chosen to act with specificity, court rules and procedures govern." *Id.* at 429. But the Office of the Attorney Regulation Counsel does not maintain exclusively "court records," and Judicial Watch has not requested "court records." Nor, as shown below, has the Supreme Court developed rules and procedures addressing the kinds of records at issue here. Thus, this Court finds *BIS* inapplicable.

B. RULE 1.

ARC also argues that Chapter 38, Rule 1 of the Colorado Rules of Civil Procedure "sets the general standards for public access to records and information held by the Judicial Department" and "effectively removed all records and materials of the judicial branch from the scope of [CORA]." As such, the ARC concludes, "all records and materials of the Judicial Branch are exempt from requirements and procedures of [CORA]."

On its face, Rule 1 would seem to support the ARC's argument. Rule 1 was enacted "to provide the public with reasonable access to Judicial Branch documents and information while protecting the privacy interests of parties and persons. In addition, [Rule 1] is intended to provide direction to Judicial Branch personnel in responding to public records requests." C.R.C.P. ch. 38, R. 1. It authorizes the Chief Justice of the Colorado Supreme Court "to issue directives regarding access to the public to documents and materials, made, received, or maintained by the courts." *Id.* "Such Directives . . . shall govern release of records to the public." *Id.* For purposes of implementation, Rule 1 authorizes the Chief Justice "to appoint committees and assign custodians of records, and to designate the functions of such committees and custodians of records, as the Chief Justice may determine." *Id.* Furthermore, it prohibits custodians of records within the judicial branch from releasing "any records or material to the public inconsistent with [Rule 1] or the Chief Justice Directives." *Id.* Finally, it states that it "is intended to be a rule of the Supreme Court within the meaning of [CORA]." *Id.*

Nevertheless, the ARC's reliance on Rule 1 suffers from flaws similar to those of his *BIS* argument above. First, it appears to the Court that Rule 1 should be interpreted in conjunction with CORA, rather than as the judiciary's separate corollary to CORA. CORA permits the supreme court to make rules limiting CORA's applicability to certain records. *See* C.R.S. § 24-72-204(1)(c)("the custodian of any public records shall allow . . . inspection . . . except [when] such inspection is prohibited by rules promulgated by the supreme court"). Appropriately, Rule 1 states that it is intended as a rule of the supreme court within the meaning of CORA. Its stated purpose is to provide the public with reasonable access to Judicial Branch documents, and specifically authorizes the

Chief Justice to issue directives regarding access to "court records" – the type of judicial branch documents typically sought by the public, but not at issue here. Importantly, however, it does not state that it provides the exclusive means for access to all judicial branch documents. As such, Rule 1 comports, rather than conflicts, with CORA, and there is no reason to read Rule 1 as generally exempting the judicial branch from the requirements of CORA.

Second, like *BIS*, Rule 1 specifically refers to documents and materials made, received, or maintained *by the courts, i.e., court records*. This reference appears to conflict with, or at least narrow the scope of, the Rule's earlier reference to "Judicial Branch documents." As such, it is difficult to determine whether Rule 1 was intended to cover all judicial branch documents, or only court records. In this Court's view, however, given the genesis of the Rule and that it nowhere states it provides the sole means of access to all other judicial branch documents, the better construction is to apply the Rule only to court records. In other words, the Rule does not control inspection of judicial branch documents that are not "court records".

Finally, the Rule refers to concerns for "privacy interests of parties and persons" – the same concerns at issue in *BIS*. The reference to privacy concerns further bolsters the "court records" interpretation, because the identities of "parties and persons" primarily exist in court records, not in other Judicial Branch documents.

Thus, this Court finds Rule 1 inapplicable.

C. CHIEF JUSTICE DIRECTIVE 05-01

Assuming that Rule 1 controls over CORA, the ARC argues that Chief Justice Directive 05-01 provides public access only to court records, and excludes inspection of all other records maintained by the Judicial Branch.

Even if Rule 1 does control over CORA, and this Court has determined the contrary, the ARC's argument would still fail. The Directive explicitly states that its purpose is to "provide reasonable access to court records while simultaneously ensuring confidentiality in accordance within [sic] existing laws, policies and procedures." Chief Justice Directive 05-01, at 1. The Directive defines "court records" to include (1) any document, information, or other item that is collected, received, or maintained by a court or clerk of court in connection with a judicial proceeding; (2) any index, calendar, docket, register of actions, official records of the proceedings, order, decree, judgment, or minute order, that is related to a judicial proceeding; and (3) the electronic record (ICON/Eclipse) is an official court record, including the probation ICON/Eclipse files. Its purpose in excluding other judicial documents from this definition is for clarity, and not to exempt all other records from inspection under CORA. Like the previous arguments, nothing in the Directive indicates that it is to be the sole means of disclosure

for all judicial branch documents. Rather, the Directive is concerned only with the release of court records, and its exclusion of other documents means such documents are not included within the Directive's purview. In other words, whether such other documents are subject to inspection must be determined pursuant to other laws, such as CORA.

As is the case with both *BIS* and Rule 1, the Directive is consistent with CORA, rather than in conflict, and does not preclude a conclusion that the ARC's documents should be disclosed.

Having considered, and rejected, the ARC's arguments as to why CORA does not apply, this Court returns to the definition of "public records" contained in CORA and holds that the documents sought by Judicial Watch are public records subject to inspection , absent an exception under CORA. In doing so, the Court has reviewed cases from other jurisdictions, which support the Court's holding. The most analogous decisions are from New York. There, in several cases decided in the early 1980s, judges distinguished between documents maintained by courts *qua* courts (i.e., "court records"), and records maintained by the judiciary's administrative arms, including the Office of Court Administration and Board of Law Examiners. Despite the judiciary's express exclusion from New York's freedom of information law, these decisions found the administrative records subject to inspection. *See Quirk v. Evans*, 455 N.Y.S.2d 918, 921 (N.Y. Sup. Ct. 1982) ("The Office of Court Administration, it is clear, is an agency, not a court, and it is therefore subject to the Freedom of Information Law"); *Pasik v. State Board of Law Examiners*, 451 N.Y.S.2d 570, 575 (N.Y. Sup. Ct. 1982) (concluding that the State Board of Law Examiners is not part of the judiciary for FOIL purposes); *Babigan v. Evans*, 427 N.Y.S.2d 688, 689 (N.Y. Sup. Ct. 1980) (concluding that the administrative arm of the court is not part of the judiciary and not exempt from FOIL). *See also Henderson v. Bigelow*, 982 So. 2d 941, 951 (La. Ct. App. 2008) (holding that the public is entitled to inspect the records of the judiciary through a records request, with the exception of documents that a court, in the exercise of the inherent authority and plenary power vested in the judiciary by the Louisiana Constitution, determines should remain confidential).

Although the ARC cites an Arizona Court of Appeals case, *Arpaio v. Davis*, 210 p.3d 1287 (Ariz. Ct. App. 2009), as providing the most pertinent analysis, this Court disagrees. The *Arpaio* case involved a situation where "[t]he Sheriff requested thousands of random, unidentified electronic messages (e-mails) and documents, without regard to subject matter, sent to or from certain individuals, within a range of dates . . . contain[ing] no other limiting criteria." *Id.* at 1288-89. As such, the court concluded, "[s]uch an untargeted review would seriously impede the court's performance of its core functions with no discernable public benefit." *Id.* at 1289. Here, Judicial Watch's request is narrow and direct in scope, raises no concerns of impeding a

court's core functions, and has a discernable public benefit. Therefore, the New York and Louisiana cases cited above clearly provide the more relevant analysis.

The Court also rejects another broad assertion made by the ARC—that the Supreme Court has exclusive and plenary power over the ARC and the practice of law in Colorado, and therefore this Court "does not have the legal authority to determine the scope of the Supreme Court's plenary power." This Court agrees with the general proposition and would not, for example, entertain a claim that it should enjoin the Supreme Court from ordering Mr. Gleason to assist with an investigation in another state. But this assertion is largely beside the point. While the Supreme Court has enacted rules governing access to records of investigations of Colorado lawyers by the ARC—see Rule 251.31—the investigation in question was not of a Colorado lawyer, nor in any event is Judicial Watch seeking investigative records. Further, the Supreme Court is not a party to these consolidated cases, and the Deputy Attorney General, who is representing the ARC, specifically informed this Court during oral argument that he was not presenting the Supreme Court's position on whether the records were subject to inspection. As such, it is clear that this Court is not determining or infringing on the scope of the Supreme Court's plenary powers.

II. Exceptions

While primarily relying on the inapplicability of CORA, the ARC also invokes several exceptions to inspection under CORA. First, he asserts that the records were compiled for a law enforcement purpose. *See* section 24-72-204(2)(a)(I). The ARC does not explain how an ethics investigation constitutes a law enforcement purpose. In any event, the exception would apply, at best, to the types of investigatory records generated in Arizona, which the Court agrees are beyond the reach of CORA, and not to those sought by Judicial Watch.

Second, citing section 24-72-204(6)(a), the ARC argues that inspection would harm the public interest. The ARC's argument once again depends on his misapprehension that Judicial Watch sought records of the Arizona investigation. The ARC has not shown, as is its burden, that disclosure of the more limited records at issue would be harmful.

Finally, with respect to billing records and payments, the ARC asserts that they contain work product and privileged information. He also argues that, while the payments for his work went to the Office of the ARC (and not to him individually), these amounts are not "public funds" as referenced in section 202(6)(a)(I). This Court disagrees with the latter, but accepts the ARC's representation regarding the former.

While it is true that the Office of the ARC is not funded by the Legislature, the funds in question are used for a public purpose—the regulation of Colorado attorneys by the Supreme Court. In comparison, the Colorado Attorneys' Fund for Client Protection, as

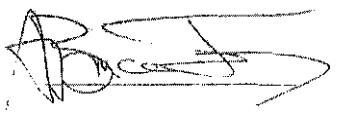
established by Rule 252, might not be "public funds." Absent a showing that payments from Arizona went to this or a similar segregated fund with a non-public purpose, this Court rejects the ARC's argument.

However, the Court agrees that any detailed billing records from the ARC to the Arizona Supreme Court should not be available for inspection. First, these records are arguably outside the scope of CORA as part of the Arizona investigation. Second, the ethics charges have not been resolved and thus it would be inappropriate to reveal details of the ARC's investigation at this time. The amount paid is another matter. The ARC has not asserted that this information is privileged, and inspection of records reflecting payments is proper under CORA, which refers not only to expenditure, but also "receipt," of public funds.

Accordingly, the ARC is ordered to allow inspection of documents as requested in items 1 through 5, and 7, of Judicial Watch's CORA request. This order is final for appellate purposes. Any motions for costs, attorneys fees, or stay shall be filed within 15 days of this date.

Dated this 22nd day of April, 2011.

BY THE COURT



A. Bruce Jones
District Court Judge