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.: 414

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JUDICIAL WATCH, INC.'S SUPPLEMENTAL BRIEF

INTRODUCTION

At the conclusion of the March 28, 2011 hearing, the Court requested that the parties submit supplemental briefs addressing whether the Colorado Open Records Act ("CORA") applies to the administrative records of the Attorney Regulation Counsel ("ARC"), an entity within the Judicial Branch that clearly is not a "court."[1] The Court asked the parties to focus on Chief Justice Directive 05-01 ("CJD 05-01") and whether open records laws of other states extend to the records of administrative and regulatory entities within their judicial branches. As demonstrated below, CORA applies to the administrative records of the ARC.

ARGUMENT

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 issue presently before the Court, therefore, is whether the ARC, which is not a court of record, but an administrative and regulatory entity within the Judicial Branch, is exempt from the plain meaning of CORA.

I. *BIS* and CJD 05-01 Confirm that CORA Applies to the Administrative Records of the Judicial Branch.

As Judicial Watch demonstrated in its answer brief and at the March 28, 2011 hearing, *Office of the State Court Administrator v. Background Information Services*, 994 P.2d 420 (Colo. 1999) ("*BIS*") addresses the applicability of CORA to "court records," more specifically, "computer-generated bulk data containing very particularized information about individuals ***who***

[1] Judicial Watch continues to maintain that the requested records are records of the Office of the Attorney Regulation Counsel and the ARC. For simplicity and ease of reading, Judicial Watch solely refers to the ARC; Judicial Watch does not concede that the ARC is the only custodian of the requested records.

are parties to criminal or civil cases" in the courts of record of the State of Colorado.[2] *BIS*, 994 P.2d at 422 (Colo. 1999) (emphasis added). The Court in *BIS* did not purport to address the applicability of CORA to the records of the offices and entities within the Judicial Branch that are not courts of record, such as the Office of the State Court Administrator, the various divisions within that office, or the ARC.

In addressing the applicability of CORA to sensitive, computerized bulk data on parties to criminal and civil court proceedings, the Court in *BIS* recognized that CORA does not exist in a vacuum with respect to case-specific "court records." Specifically, it noted that the General Assembly had enacted the Criminal Justice Records Act and the Integrated Criminal Justice Information System Act governing the creation, maintenance, and dissemination of criminal case records. *BIS*, 994 P.2d at 426-27. It also identified specific statutes limiting disclosure of court records of child dependency and neglect proceedings, delinquency proceedings, and mental health case files. *BIS*, 994 P.2d at 427-28. It also noted two "general pronouncements" of the General Assembly "*relating to court records.*" *BIS*, 994 P.2d at 428. Thus, the question before the Court was how to discern the General Assembly's intent with respect to the requested case-specific, personalized bulk data in light of CORA and the other legislative enactments and general pronouncements regarding "court records."

The Court "conclude[d] that the General Assembly has not evidenced its intent that this data should be unqualifiedly available to the public in bulk form, and absent such intent, the

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[2] The Court expressly noted that the records requested in *BIS* included "divorce filings, general civil case filings, probate, mental health, juvenile, dependency and neglect, and water case filings" and that such filings "can contain 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 a party or witness to a civil or criminal case." *BIS*, 994 P.2d at 427, 429.

administrative policies of the supreme court control its release." *BIS*, 994 P.2d at 422 (emphasis added). The Court continued:

> Specifically, we conclude that the General Assembly has enacted various specific statutes that control the release of court record information and has afforded to the courts themselves control over release of the remaining information pursuant to court order or rule.
>
> * * *
>
> . . . 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.

BIS, 994 P.2d 422, 432.

Quite simply, the Court's ruling in *BIS* does not address whether non-court records, such as records created by offices and entities within the Judicial Branch that are not courts of record, are subject to CORA, much less hold that the records of such offices and entities are not subject to CORA. Rather, the logical conclusion to be drawn from the Court's ruling in *BIS* concerning "court records" is that the General Assembly intended CORA to apply to non-court records such as the records of the ARC requested by Judicial Watch. The ARC certainly has not identified any legislative enactment of the General Assembly that would contradict or rebut the clear intent expressed in CORA that "all writings made, maintained, or kept by the state, any agency, institution . . . " are public records subject to disclosure under CORA. § 24-72-202, C.R.S. This Court should not be the first to find that the non-court records of the Judicial Branch fall outside the reach of CORA.

Chief Justice Directive 05-01 ("CJD 05-01"), issued on April 27, 2005 by Chief Justice Mary J. Mullarkey and entitled "*Directive Concerning Access to Court Records*," reinforces this conclusion by recognizing the distinction between case specific "court records," which are subject to the directive, and non-case specific, administrative records, which are not. Succinctly

put, the purpose of the directive is "to provide a comprehensive framework for public access to court records." CJD 05-01 at 1. It states, "[T]he public may inspect and obtain a copy of information in a court record." *Id.* at 3. The directive expressly states that it applies "to all court records." *Id.* at 4. It defines "court records" as follows:

> For purposes of this policy
>
> (a) "Court record" includes:
>
> (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 record 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.
>
> (b) "Court record" does not include:
>
> (1) other records maintained by the court or clerk of court pertaining to the administration of the court or clerk of court's office not associated with any particular case (i.e., personnel information, travel vouchers, e-mail, etc.);
>
> (2) non ICON/Eclipse probation records;
>
> (3) administrative and management reports;
>
> (4) judges notes and judicial work product related to the deliberative process; and
>
> (5) information gathered, maintained or stored by a governmental agency or other entity to which the court has access but which is not

> part of the court record as defined in section 3.10(a).
>
> (6) other records maintained by the Judicial Branch not expressly defined as court records in 3.10(a).

Id. at 3.

Like *BIS*, the directive defines "court records" as records that contain very particularized, case-specific information, then establishes a framework for how such records are to be made available to the public. It even describes which records may be lawfully withheld. *Id*. at 9-10 ("Court records in the following case types are not accessible to the public . . ."). Like the Court's holding in *BIS*, the directive does not address non-court records. Nor does it purport to authorize or limit the disclosure of non-court records. The directive only establishes a framework for the disclosure of "court records." By not purporting to control the disclosure of non-court records, including "other records maintained by the Judicial Branch not expressly defined as court records" (*Id.* at 3), the directive recognizes that the intent of the General Assembly, as expressed in CORA, governs the disclosure of these non-court records. Indeed, since the Court in *BIS* did not exempt non-court records from the disclosure requirements of CORA, there was no need for Chief Justice Mullarkey to provide guidance to the administrative and regulatory entities within the Judicial Branch on the disclosure of such records. CORA governs the disclosure of these non-court records, which includes the records requested by Judicial Watch.

II. Open Records Laws of Other States Provide Access to Administrative Records of the Judiciary.

The Court also requested that the parties look to other states and analyze whether their open records laws extend to administrative records of their judiciaries. As a preliminary matter,

a review of the open records law of other states reveals that no two states have identical open records laws. However, the same review also reveals that state open records laws routinely apply to the judiciary, and they even more frequently apply to the administrative records of the judiciary.

In Utah, the Government Records Access and Management Act specifically defines a government entity as "courts, the Judicial Council, the Office of the Court Administrator, and similar administrative units in the judicial branch." Utah Code Ann. § 63G-2-103(11)(a)(iii). In Wyoming, an official custodian includes "any officer or employee of the state[,]" and the law does not except the judiciary from that definition. Wyo. Stat. § 16-4-201. Other states that have their entire judiciary covered by their open records laws include: Idaho (Idaho Code § 9-337(13)); Indiana (Ind. Code § 5-14-3-2); Nevada (N.R.S. 239.005); and North Carolina (N.C. Gen. Stat. § 7A-109(A)).

Moreover, many states distinguish between courts of record, judicial officers, and administrative arms of their judicial branches. For example, Kansas specifically exempts "any municipal judge, judge of the district court, judge of the court of appeals or justice of the supreme court" from complying with its open records law, but it does not exempt the administrative arms of those courts. Kan. Stat. § 45-217(f)(2)(B). Oklahoma similarly created an exception for judges, justices, and the Council on Judicial Complaints from providing access to records except with respect to "records of the receipt and expenditure of any public funds reflecting all financial and business transactions." 51 Okl. St. § 24A.3 and § 24A.4. Additional states that make this distinction include: Connecticut (*Clerk of the Superior Court v. Freedom of Information Commission*, 895 A.2d 743, 757 (Conn. 2006) (For the purposes of its open records act, "the judicial branch's administrative functions consist of activities relating to its budget,

personnel, facilities and physical operations and that records unrelated to those activities are exempt.")); Hawaii (Haw. Rev. Stat. § 92F-12(a)(2)); Mississippi (Miss. Code § 9-1-38); Missouri (Mo. Rev. Stat. § 610.010(4)); and Rhode Island (R.I. Gen. Laws § 38-2-2(4)(i)(T) ("Judicial bodies are included . . . only in respect to their administrative function")).

Finally, the open records laws of several states do not apply to the judiciary. These rare instances are a result of the plain language of the statute exempting the judiciary. Moreover, in each of those states, the courts have recognized a common law scheme or a presumption of disclosure with respect to court records. *See e.g., Nast v. Michaels*, 730 P.2d 54, 58 (Wash. 1986) (The Washington open records law "does not apply to court case files because the common law provides access to court case files."); *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113, 116 (Fla. 1988) (finding that there is "the well-established common law right of access to court proceedings and records" in Florida); *Arkansas Best Corp. v. General Elec. Capital Corp.*, 878 S.W.2d 708, 713 (Ark. 1994) (finding that "there is nothing new about the strong right of public access to court records"). Such state laws are not comparable to Colorado because CORA does not specifically exempt the judiciary from its provisions.

Besides the plain reading of state statutes, case law of various states also demonstrates that the administrative records of their judiciaries are routinely distinguished from court filings. For example, New York's Freedom of Information Law explicitly excludes the judiciary from its definition of a state agency subject to the law. *Babigan v. Evans*, 427 N.Y.S.2d 688, 689 (N.Y. Sup. Ct. 1980). The judiciary means "the courts of the state." *Id*. Therefore, it has been repeatedly held:

> In view of the legislative purpose to promote open government, the court is inclined to construe narrowly any section that would tend to exclude offices of government from the law. [The law] specifically refers to courts when it defines "judiciary." The

> legislature did not include the administrative arm of the court. The Office of Court Administration does not exercise a judicial function, conduct civil or criminal trials, or determine pretrial motions. [It] is not a "court."

Id.; *see also*, *Quirk v. Evans*, 455 N.Y.S2d 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."). Moreover, under New York law, the State Board of Law Examiners is also subject to its open records law. In *Pasik v. State Board of Law Examiners*, the State Board of Law Examiners asserted that "it was the intent of the Legislature not only to exclude the judiciary from [the open records law] but to also exclude agencies performing functions of the judiciary." 451 N.Y.S.2d 570, 571 (N.Y. Sup. Ct. 1982). The court however concluded that such an argument was without merit because the State Board of Law Examiners does not exercise judicial functions. It is not a court; it is solely an arm of it. *Id*. at 575.

Similarly, records of North Dakota's State Board of Law Examiners are subject to disclosure under the state's open records law unless specifically exempted by law. *See generally, Lamb v. State Board of Law Examiners*, 777 N.W.2d 343 (N.D. 2010). In *Lamb*, the North Dakota Supreme Court held that the State Board of Law Examiners could withhold the requested records at issue because a specific court rule prevented such disclosure. *Id*. at 349. Moreover, the court explained, "Other jurisdictions have also concluded that the courts can exempt processes regarding admission to the bar from public disclosure."[3] *Id.* In other words, all records of arms of the courts are subject to the open records laws of their respective states. Specific records therefore are only exempt from disclosure if a statute or rule specifically authorizes the arm of the court to withhold such records.

[3] Such states include Alaska, Arkansas, Connecticut, Florida, and Louisiana. *Id*.

Finally, courts of other states have also addressed concerns related to the separation of powers doctrine. In the end, they have concluded that there is no violation of the separation of powers doctrine with respect to open records laws. In Louisiana, for example, courts addressed whether records related to payments and disbursements of funds from the Judicial Expense Fund were subject to the state's open records law. *Henderson v. Bigelow*, 982 So.2d 941, 942 (La. Ct. App. 2008). The judge who administered and controlled the fund argued that the requested records should be exempt from production because "the application of the Public Records Act to the judiciary would violate both the separation of powers set forth in our constitution and the inherent authority of the courts." *Id*. at 946. The court disagreed. *Id*.

Under Louisiana law, public records are defined as records "prepared, possessed, or retained for use in conduct, transaction, or performance of any business, transaction, work, duty, or function ... performed by or under the authority of the constitution or laws of this state." *Id*. Because of this all-encompassing statute – no different from that of Colorado – the court explained:

> The use of public funds collected and deposited into the legislatively created judicial expense funds for the courts of this state concern matters of public business, and concern the receipt or disbursement of monies received or paid under the laws of this state. As such, unless specifically exempted or excepted from the disclosure requirements of the Public Records Act or the Louisiana Constitution, all records relative to the expenditures and disbursements of public monies from the various courts' judicial expense funds fall within the broad definition of public records and are subject to disclosure.

Id. at 947. To reach its conclusion, the court examined precedent as set forth by the Louisiana Supreme Court. In previous cases, the Louisiana Supreme Court had addressed whether bar examinations, model answers, and grading guidelines were exempt from disclosure under its open records law. *Id*. at 948. The state Supreme Court, in those instances, "focused on the

plenary power and inherent authority granted to it in the constitution over matters regulating all aspects of the practice of the law." *Id*. at 949. The court ultimately concluded that the requested records "were confidential and directly related to the regulation of the practice of law, i.e., how the Committee determined which individuals were qualified to be admitted to the state's bar to practice law." *Id*. Yet, as the court in *Henderson* stated,

> Significantly, nowhere in [those cases does] the Supreme Court declare that the Public Records Act does not apply to the judiciary. The Court could have made this ruling, but did not. To the contrary, in reaching its determination, the Court specifically stated that it was creating an additional, limited exception to public disclosure of judicial documents it determines should remain confidential.

Id. at 950 (internal citations omitted). The court therefore held that records related to payments and disbursements of funds from the Judicial Expense Fund were not exempt from production. Access to the administrative records of the judiciary does not interfere with the plenary power or inherent authority of the Louisiana Supreme Court. Finally, the court explained that its decision "reflects a basic tenet of the democratic system that people have a right to know about the operations of their government, including the judicial branch" (*Id*.) and that its decision

> is buttressed by the reality that providing public access to the judiciary's financial records reflecting the use of public funds serves to promote trustworthiness of the judicial process, and provides the public with a better understanding of the judicial system, including a better perception of its fairness. Public access to judicial records further serves to curb judicial abuse.

Id. at 951.

The records of the Judicial Expense Fund are no different than the records requested by Judicial Watch in the instant matter. Judicial Watch seeks access to the administrative records of the ARC to educate the people of Colorado about the operations of their government, specifically

the details about the ARC's investigation of non-Colorado attorneys and how the investigation affected the ARC's ability to perform his duties in Colorado.

Similarly, the ARC incorrectly claims that the Colorado Supreme Court has plenary power to determine the circumstances under which the records requested by Judicial Watch may be disclosed. As Judicial Watch has previously demonstrated, to the extent that the Supreme Court might have plenary power over disclosure of the records of the ARC – and Judicial Watch does not concede that it does – such 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*. Yet, 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. In other words, there is no nexus whatsoever between the Arizona attorneys under investigation by the ARC and the practice of law in Colorado.

CONCLUSION

For the reasons set forth above, the Court should find that CORA applies to the administrative records of the ARC, which are the only types of records requested by Judicial Watch. Moreover, for the reasons set forth in Judicial Watch's opening brief, answer brief, and at the March 28, 2011 hearing, the Court should find that the records requested by Judicial Watch are Colorado public records subject to disclosure under CORA and order the 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 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: April 8, 2011

Respectfully submitted,

(original signature on file)
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2011 a true and correct copy of the above JUDICIAL WATCH, INC.'S SUPPLEMENTAL BRIEF was e-filed using LexisNexis File and Serve which will serve the persons below by e-mail addressed to:

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