

DISTRICT COURT, LARIMER COUNTY
Court Address: 201 LaPorte Avenue, Ste. 100
Ft. Collins, CO 80521

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

vs.

Defendants: CITY OF FORT COLLINS, a home rule municipality in the State of Colorado, and DARIN ATTEBERRY, in his capacity as the City Manager of Fort Collins, CO.

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Case Number:

Div.: Ctrm.:

COMPLAINT AND APPLICATION FOR ORDER TO SHOW CAUSE

COMES NOW the Plaintiff, by and through its undersigned counsel, and for its Complaint and Application for Order to Show Cause, states as follows:

INTRODUCTION

Plaintiff brings this action under the Colorado Open Records Act (“CORA”), §§ 24-72-201, *et seq.*, C.R.S., to compel access to public records in the custody of the City of Fort Collins (“Ft. Collins”) and the City Manager of Fort Collins, Darin Atteberry (“Manager Atteberry”).

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Judicial Watch, Inc. is a not-for-profit, educational foundation that seeks to promote integrity, transparency, and accountability in government and fidelity to the rule of law. In furtherance of its public interest mission, Plaintiff regularly requests access to the public

records of federal, state, and local government agencies and officials and disseminates its findings to the public. Plaintiff is a “person” as that term is defined by § 24-72-202(3), C.R.S., and as such it has standing to bring a claim for access to public records under the CORA and for an award of reasonable attorneys’ fees.

2. Defendant City of Fort Collins is a home rule municipality located in Larimer County, Colorado and organized by a City Charter adopted in accordance with Article XX section 6 of the Colorado constitution. Defendant City of Fort Collins is the custodian of the public records to which Plaintiff seeks access.

3. Defendant Darin Atteberry is the City Manager for the City of Fort Collins, Colorado. The City of Fort Collins operates within a council-manager form of government and the City Manager is the chief executive officer of the City responsible for the overall management of City operations. Defendant Atteberry is being sued in his official capacity as custodian of the public records to which Plaintiff seeks access. See § 24-72-302(5) & (8), C.R.S. (2009).

4. This Court has jurisdiction over Defendants and the subject matter of this action pursuant to § 24-72-204(5), C.R.S.

5. Venue is proper in the County of Larimer pursuant to C.R.C.P. 98(b)(2).

GENERAL ALLEGATIONS AND GROUNDS FOR MOTION TO SHOW CAUSE

6. Following the resignation of Police Chief John Hutto in April 2017, the City of Fort Collins engaged in an employment selection process for a new Fort Collins Police Department Chief of Police.

7. On September 12, 2017, Plaintiff sent a CORA request to Defendants seeking access to the following public records:

(1) Copies of any/all Fort Collins employment/application packets and/or resumes of the last six (6) finalists/applicants in the current Fort Collins Police Chief selection process up to September 12, 2017.

(2) A copy of the Fort Collins Police Chief recruitment brochure and/or Fort Collins employment requirements for the Chief of Police of the Fort Collins Police Department.

(3) Copies of any/all communications, memos, letters, directives and/or emails from May 12, 2017 to September 12, 2017 between the City Manager (Darin Atteberry), the city Manager’s staff, the Fort Collins city Council and/or council staff, the City Attorney and/or legal staff, Greg Nelson, and/or employees or representatives of Ralph Andersen and Associates regarding the

public positions and professional qualifications (or lack thereof) of the last six (6) police chief finalists/applicants regarding illegal immigration and/or federal border/immigration enforcement.

(4) Copies of any/all communications between the City of Fort Collins and the last six (6) police chief finalists/applicants for the Fort Collins Police Chief position.

(5) Copies of any/all background and media information of the last six (6) police chief finalists/applicants provided to the City of Fort Collins by Ralph Andersen and Associates.

(6) Copies of any/all communications between Ralph Andersen and Associates and the last six (6) police chief finalists/applicants for the Fort Collins Police Chief position.

A true and correct copy of Plaintiff's CORA request is attached as Exhibit 1

8. By email correspondence dated September 19, 2017, Defendants acknowledged receipt of Plaintiff's record request regarding the employment selection process for the Fort Collins Police Department Chief of Police. A true and correct copy of Defendants' September 19, 2017 email is attached as Exhibit 2

9. By email correspondence dated September 22, 2017, Defendants informed Plaintiff that they had not completed the finalist list for the Police Chief position and that access to records requested in numbers 1 and 3 through 6 was prohibited from disclosure under the Colorado Open Records Act. Defendants produced the City of Fort Collins Police Chief recruitment brochure in response to item number 2 of Plaintiff's request. A true and correct copy of Defendants' September 22, 2017 email is attached as Exhibit 3.

10. By email correspondence dated September 29, 2017, Plaintiff requested a reason for the denial of access to the records requested. A true and correct copy of Plaintiff's September 29, 2017 email is attached as Exhibit 4.

11. On October 3, 2017, Defendants responded, via email, citing Colorado Revised Statutes, §24-72-204 (3)(a)(XI). A true and correct copy of Defendants' October 3, 2017 email correspondence is attached as Exhibit 5.

12. On October 4, 2017, via email correspondence, Plaintiff stated that it did not wish to obtain the names of any applicants and would not object to the redaction of personal information within the public records requested. Plaintiff more specifically clarified the public records it was seeking:

(1) Copies of any/all communications, memos, letters, directives and/or emails from May 12, 2017 to October 4, 2017 between the City Manager (Darin Atteberry), the City Manager's staff, the Fort Collins City Council and/or council staff, the City Attorney and/or legal staff, Greg Nelson, and/or employees or representatives of Ralph Andersen and Associates regarding the recruitment and/or hiring of a police chief.

(2) Copies of any/all communications between the City of Fort Collins and any applicants for the police chief's position from May 12, 2017 to October 4, 2017.

(3) Copies of any/all communications between the City of Fort Collins and Ralph Anderson and Associates regarding the recruitment and hiring of a police chief between May 12, 2017 to October 4, 2017.

(4) Copies of any/all communications to include but not limited to emails and Police Department notifications from September 4, 2017 to September 15, 2017 between Deputy Chief Greg Yeager of the Fort Collins Police Department and/or the Fort Collins Police Department and the Northern Colorado Fraternal Order of Police Lodge #3 and/or Fort Collins Police Department employees regarding the police chief selection process, to include but not limited to discussions concerning:

a. Police chief candidates visit to Fort Collins being rescheduled from September 21st to October 25th with the purpose of accommodating schedules of 5-6 candidates;

b. Requests for a list of the names of the police chief finalists;

c. References to state law requiring the public release of the candidates' names; and

d. Confirmation and/or notice that October 25-27, 2017 had been confirmed for the site visit for the police chief candidates and/or that Anderson and Associates was working with to make travel arrangements.

(5) Copies of any/all communications from May 12, 2017 to October 4, 2017 to include but not limited to emails exchanged between Kim Baker Medina, Fuerza Latina, Jackie Kozak-Thiel (Fort Collins' chief sustainability officer), the Fort Collins' City Manager's office, the Fort Collins' Police Department, the Northern Colorado Fraternal Order of Police Lodge #3 and/or the Larimer County Sheriff's Office.

A true and correct copy of Plaintiff's October 4, 2017 email correspondence is attached as Exhibit 6.

13. By email correspondence dated October 5, 2017, Defendants acknowledged receipt of Plaintiff's October 4, 2017 CORA request clarification. Defendants' October 5, 2017 acknowledgment appears to be a "form" response to any CORA request as it is identical to the September 19, 2017 acknowledgment correspondence. A true and correct copy of Defendants' October 5, 2017 email correspondence is attached as Exhibit 7. Compare Exhibit 2 (para. 8 above).

14. On October 13, 2017, Defendants notified Plaintiff that a response to its request involved a large volume of records constituting extenuating circumstances requiring more than the three-day statutory period to make the records available. Defendant asserted that the records would be made available within seven (7) working days. See C.R.S. §24-72-203(3)(b). A true and correct copy of Defendants' October 13, 2017 email correspondence is attached as Exhibit 8.

15. By letter dated October 19, 2017, Defendants stated that they would not disclose several responsive records for the following reasons:

1) The communications or documents are not "records" in that they meet the definition of "work product" (see Colorado Revised Statutes §24-72-202 (6)(II)(A) and (6)(b)(II) and (6.5) (a) and (b));

2) The records are privileged, such as under the attorney-client privilege, or contain confidential commercial information and must not be disclosed pursuant to Colorado Revised Statutes §24-72-204 (3)(a)(IV); and

3) The records were submitted by or on behalf of an applicant who is not a finalist and cannot be disclosed pursuant to Colorado Revised Statutes §24-72-204 (3)(a)(XI)(A).

Additionally, Defendants elected not to disclose some documents for the reason that they are subject to the deliberative process privilege citing C.R.S. §24-72-204 (3)(a)(XXII).¹ A true and correct copy of Defendants' October 19, 2017 letter is attached as Exhibit 9.

16. Defendants' October 19, 2017 letter included a privilege log identifying seven (7) documents fully withheld from disclosure with an attached affidavit from Manager Atteberry. A true and correct copy of the privilege log and affidavit are attached as Exhibit 10.

17. By email correspondence dated November 15, 2017, Plaintiff sought clarification on the withheld records. Specifically, Plaintiff asked:

¹ Defendants produced some documents via flash drive, received by Plaintiff on or around October 20, 2017.

a. Is the City withholding other records not identified on the privilege log under any of these bases?

b. If so, will the City be providing a privilege log for these other records/claims of withholding?

c. Can it at least tell us how many other responsive documents were located, but have not been produced?

d. If there are no other documents are (sic) being withheld, can the City tell us with (sic) of the 7 are being withheld under these other bases?

A true and correct copy of Defendants' October 19, 2017 letter is attached as Exhibit 11.

18. By email correspondence dated November 15, 2017, Defendants informed Plaintiff they would not provide a privilege log for records withheld on any bases other than the deliberative process privilege and that they have no obligation to identify the number of responsive records located but not produced on any other grounds.

19. As of the date of this complaint and application, Defendants continue to deny Plaintiff full access to the requested public records.

APPLICABLE STATUTORY PROVISIONS

20. Under CORA, any person may request access to inspect and obtain copies of any public record. *See* § 24-72-203(1)(a), C.R.S.

21. Under CORA, if a record constitutes a "public record," the custodian may deny access only if there is a specific exception that requires or permits the withholding of that record. *See* 24-72-203(1)(a), C.R.S.

22. Under CORA, "any person denied the right to inspect any record . . . may apply to the district court of the district wherein the record is found for an order directing the custodian of such record to show cause why the custodian should not permit the inspection of such record." § 24-72-204(5), C.R.S.

23. Under CORA, "[u]nless the court finds that the denial of the right of inspection was proper, it shall order the custodian to permit such inspection and shall award court costs and reasonable attorney fees to the prevailing applicant in an amount to be determined by the court." § 24-72-204(5), C.R.S.

CLAIM FOR RELIEF
(Violation of CORA; § 24-72-204(5), C.R.S.)

24. Plaintiff re-alleges paragraphs 1-23 as if fully stated herein.

25. The records requested by Plaintiff in its September 12, 2017 CORA request are “public records” within the meaning of § 24-72-202(6)(a)(I), C.R.S.

26. Defendants have failed to adequately respond to Plaintiff’s September 12, 2017 CORA request. Consequently, Defendants have unlawfully denied Plaintiff full access to the requested public records.

27. Because Defendants have unlawfully denied Plaintiff full access to the requested public records, Plaintiff is entitled to an order compelling Defendants to allow Plaintiff access to all responsive public records in Defendants’ possession, custody, or control.

28. Plaintiff also is entitled to an award of its reasonable attorney’s fees and costs in enforcing its right of public access to these public records, pursuant to § 24-72-204(5), C.R.S.

APPLICATION FOR ORDER TO SHOW CAUSE

A. Pursuant to § 24-72-204(5), C.R.S., Plaintiff is entitled to, and hereby applies for, an Order to Show Cause directing Defendants to show cause why Plaintiff should not be allowed access to the requested public records. As required by CORA, the Court should set a date for a show cause hearing at “the earliest time practicable.”

B. A proposed Order to this effect is attached for the Court’s convenience.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court:

A. enter forthwith an Order directing Defendants to show cause why Plaintiff should not be allowed access to the public records described in Plaintiff’s September 12, 2017 CORA request;

B. conduct a hearing pursuant to such Order “at the earliest practicable time,” at which time the Court may make the Order to Show Cause absolute;

C. enter an Order requiring Defendants to allow Plaintiff access to all responsive public records in Defendants’ possession, custody, or control;

D. award Plaintiff its reasonable attorneys’ fees and costs associated with the preparation, initiation, and prosecution of this action, as mandated by § 24-72-204(5); and

E. grant such other and further relief as the Court deems proper and just.

DATED this 12th day of April, 2018.

s/ Marc F. Colin
Marc. F. Colin (Atty. # 9597)
Attorney for Plaintiff

Of Counsel:

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