

DISTRICT COURT, CITY AND COUNTY OF DENVER,
COLORADO
1437 Bannock Street
Denver, CO 80202

PLAINTIFF:

TODD SHEPHERD,

vs.

DEFENDANT:

JENA GRISWOLD, in her official capacity as
Colorado Secretary of State.

Attorneys for Todd Shepherd:
Scott E. Gessler (28944)
sgessler@klendageslerblue.com
Geoffrey N. Blue (32684)
gblue@klendageslerblue.com
KLENDAGESSLER & BLUE LLC
1624 Market Street, Suite 202
Denver, Colorado 80202
Phone: 720-432-5705

▲ COURT USE ONLY ▲

Case Number:

Div.: Ctrm.:

COMPLAINT AND APPLICATION FOR ORDER TO SHOW CAUSE

INTRODUCTION

In February 2019, Todd Shepherd sought documents under the Colorado Open Records Act (“CORA”) from the Colorado Secretary of State, concerning her testimony before the Colorado General Assembly. The Secretary provided some documents, but she illegally withheld others, citing the “work product” privilege. Shepherd now asks this Court to compel the Secretary to produce documents to the public.

PARTIES, JURISDICTION, AND VENUE

1. Todd Shepherd is a reporter who works for the Washington Free Beacon. Originally from Colorado, he currently resides in Alexandria, Virginia, and continues to report

on Colorado issues and people. He qualifies as a “person” under § 24-72-202(3), C.R.S. and may bring a claim for access to public records under the CORA.

2. Defendant Colorado Secretary of State is a Colorado state agency and is the custodian of the public records to which Shepherd seeks access.

3. Defendant Jena Griswold is the Colorado Secretary of State and has unlawfully withheld public documents, and is being sued in her capacity as custodian of the public records to which Plaintiff seeks access.

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

5. Venue is proper in the City and County of Denver under C.R.C.P. 98(b)(2).

GENERAL ALLEGATIONS

6. On January 4, 2019, Senate Bill 19-042 was introduced into the Colorado State Senate. Under this bill, Colorado would join eleven other states and the District of Columbia in what is referred to as the National Popular Vote Interstate Compact. Under that agreement, Colorado would award its presidential electors to the winner of the national popular vote, regardless of whether Colorado’s voters chose that candidate.

7. Colorado Secretary of State Jena Griswold chose to enter the debate on this issue, and to that end on January 23, 2019, she testified in support of the bill before the State Senate Committee on State, Veterans, and Military Affairs.

8. The bill later passed the full State Senate on January 29, 2019, and was introduced into the House of Representatives the next day on January 30, 2019.

9. On February 4, 2019, Plaintiff sent a CORA request to Defendants seeking access to the following public records:

A copy of all writings created or received by any of the named persons below, between and including the dates of January 14-30, 2019, which contain any of the following keywords (ignoring case): “national popular vote” or “national popular vote interstate compact” or “NPV” “NPVIC” or “SB 42” or “SB-042” or “SB-42” or “19 42” or “19-42” or “Electoral College”

The request sought these records from the following persons: Secretary Griswold, Ben Schler, Jud Choate, Jennie Flannigan, Serena Woods, and Shad Murib. For the same dates and persons in the Secretary of State’s office, Plaintiff also requested all writings to or from Mark Grueskin and/or Ted Trimpa. For the same dates and persons in the Secretary of State’s office, Plaintiff

also requested any email which includes any email address as a sender or receiver ending in @rklawpc.com, and @trimpagroup.com.

10. In the request Shepherd also requested that “[i]f you choose to deny any single document within the request for any reason, please identify the document and provide a written explanation as required by CRS §24-72-204(4) for the denial, including a reference to the specific statutory reasons and/or exemption(s) upon which you rely as the grounds for your denial.”

11. By email dated February 8, 2019, the Secretary of State’s office produced some records. The office withheld other documents, but did not immediately inform Shepherd of the withheld documents.

12. Later that day, Shepherd asked if any documents had been withheld. Only then did the Secretary’s office state that it had withheld documents, asserting the “work product” exemption over an unknown number of documents, and asserting the attorney-client privilege with respect to one document.

13. On February 12, 2019, the Secretary of State’s office sent Mr. Shad Murib, the government and public affairs manager, to testify in favor of the bill before the House Committee on State, Veterans, and Military Affairs.

14. On March 15, 2019, Colorado Governor Jared Polis signed the bill into law.

15. Following up on his records request, on May 24, 2019, Shepherd informed the Secretary under C.R.S. § 24-72-204(5)(a) that he intended to initiate court action to compel the Secretary to produce documents withheld under the work product privilege, and to compel the Secretary to provide a “Vaughn Index” for the document withheld under the attorney-client privilege.

16. Under C.R.S. § 24-72-204(5)(a), any potential complainant must wait 14 days before initiating legal action. Likewise, during that period the public official must attempt to resolve the issue in a meeting or telephonic conference. Accordingly, the Secretary scheduled a telephonic conference call to resolve the issue, which was held on May 30, 2019. The Secretary remained unwilling to provide documents withheld under the work-product privilege and remained unwilling to provide a Vaughn Index.

17. On June 7, 2019 the Secretary provided additional information regarding her assertion of attorney-client privilege. She stated that two documents were withheld because they contained communications with her attorneys about pending litigation. Shepherd does not challenge this assertion of attorney-client privilege.

18. The 14 day waiting period under Section 204(5)(a) expired on June 7, 2019. As of the date of this complaint and application, Defendants continue to deny Plaintiff access to the requested public records.

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

19. Plaintiff incorporates paragraphs one through eighteen.

20. Under the Colorado Open Records Act, all documents held by government officials are public documents, subject to specific, limited exceptions. C.R.S. § 24-72-201.

21. When responding to a CORA request, the Secretary must narrowly construe all exceptions to disclosure.

22. Any person may request access to inspect and obtain copies of any public record. C.R.S. § 24-72-203(1)(a).

23. 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. C.R.S. 24-72-203(1)(a).

24. “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.” C.R.S. § 24-72-204(5).

25. “Unless 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.” C.R.S. § 24-72-204(5).

26. The records requested by Plaintiff in its February 4, 2019, CORA request are “public records” within the meaning of § 24-72-202(6)(a)(I).

27. Because Defendants have unlawfully denied Plaintiff 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 fees and costs in enforcing its right of public access to these public records, as authorized by § 24-72-204(5).

