DISTRICT COURT, ADAMS COUNTY, COLORADO Court Address: 1100 Judicial Center Drive, Brighton, CO, 80601	
Plaintiff(s) THE PICCONE LAW FIRM LLC et al. v. **Defendant(s)** BOARD OF COUNTY COMMISSIONERS ADAMS	DATE FILED: November 4, 2016 1:11 PM CASE NUMBER: 2016CV31479 ⚠ **COURT USE ONLY** ⚠ Case Number: 2016CV31479 Division: A Courtroom:

Order Denying Motion to Dismiss and Holding Request for Sanctions in Abeyance

This matter is before the Court for resolution of Plaintiff's request under the Colorado Open Records Act (CORA), C.R.S. §§ 24-72-201, et. seq. On June 27, 2016, the Court held a hearing on Plaintiff's CORA request pursuant to C.R.S. §24-72-204(5). At the hearing, the parties presented legal argument a number of issues. However, based on the facts alleged in the Complaint, many of those issues are not ripe for adjudication.

According to the Complaint, Plaintiff requested documents related to the detention of her client's dog in Defendant's animal shelter. Defendant's initial production indicated that some documents were being withheld or redacted based on an assertion of attorney client privilege and/or work product. Based on responses Plaintiff had received to CORA requests to another governmental entity, Plaintiff had reason to believe that Defendant was inappropriately withholding some emails. At Plaintiff's request, Defendant supplemented the initial production but again stated it was withholding certain documents protected by attorney/client privilege or the work product doctrine.

Plaintiff responded by asserting that attorney-client privilege and work product protections are not available to the government in a CORA request. She asked Defendant to "identify exactly what documents [the County refuses] to provide" and the basis upon which they rely, specifically invoking C.R.S. § 24-72-204(4). When the County responded by simply reiterating that the asserted privileges are, in fact, applicable, Plaintiff declared that the County was refusing to provide the written statement of the grounds for denial as required. She then brought this case seeking production of the withheld documents.

If at the hearing, the court determines that the custodian's denial of inspection was improper the court "shall order the custodian to permit such inspection." C.R.S. §24-72-204. Here, the Court is unable to determine whether Defendant's partial denial of Plaintiff's request was proper. Defendant argues that approximately 64 documents are privilege but neither Plaintiff nor the Court is aware of what those documents are or what legal advice they may contain.

At issue in this hearing are several nuances within the CORA regime. Plaintiff first argues that the County is obligated in the first instance to provide redacted versions of any withheld document. Plaintiff, however, cites to no statutory language requiring this, and the Court finds none. Alternatively, Plaintiff asserts that the County must affirmatively provide a privilege log without awaiting a request. Again, the statute does not support Plaintiff's claim. The statute specifically places the burden on the requesting party to make a further request "a written statement of the grounds for the denial." C.R.S. § 24-72-204(4). If the governmental entity were required to affirmatively provide a privilege log, this statutory language would be unnecessary. Such interpretations of statute are to be avoided. Colorado Ins. Guar. Ass'n v. Sunstate Equip. Co., LLC, 2016 COA 64, ¶ 81.

One form in which a requesting party may request the written statement of grounds is through a privilege log. Mountain-Plains Inv. Corp. v. Parker Jordan Metro. Dist., 2013 COA 123. Because such a request requires manipulation of data and the creation of a record that does not already exist, the government is entitled to charge a reasonable fee for preparing such a log. Id.; C.R.S. § 24-72-205(3). Albeit belatedly, the parties have discussed a privilege log in this matter, though not until after the litigation was commenced. Further, once the privilege log was requested, the County unilaterally deemed that to be a new CORA request. As of the date of the hearing, the privilege log had not been compiled or provided.

Both parties have misread the law in this case. Plaintiff's initial position that attorney-client privilege and work product are not available to the government as a basis to withhold production in response to a CORA request was simply incorrect. See,

e.g., City of Colo. Springs v. White, 967 P.2d 1042 (Colo. 1998); Denver Post Corp. v. University of Colo., 739 P.2d 874 (Colo. App. 1987). At the hearing, Plaintiff made clear that she concedes that point.

The County, on the other hand, mischaracterized the privilege log request as a new request, rather than as seeking a specific method of complying with the obligation to provide a written basis for the denial. This Court is aware of no case law that would permit the privilege log issue to be treated in such a way.

In addition, Defendant is correct that it has the ability to charge a reasonable fee for creation of a privilege log. C.R.S. §24-72-205(3); Mountain-Plains Inv. Corp., 2013 COA 123, ¶ 55. However, Defendant stated at the hearing it has already identified the 64 documents that were withheld, most of which are emails. Since the search is complete, it should not take much additional effort to create a privilege log. In addition, the parties are currently engaged in litigation in another court. Both parties admitted that the documents at issue in this case would be available as discovery in that case, if the matter proceeds past the initial motion to dismiss phase. Since Defendant would have to create a privilege log anyway, it is not reasonable on the facts of this case for Plaintiff to bear the costs of creating the log.

IT IS THEREFORE ORDERED:

The County's Motion to Dismiss is DENIED. Sufficient grounds were alleged in the complaint to conduct a hearing. Indeed, the Court cannot determine at this time that no violation occurred.

The County shall produce a privilege log to Plaintiff within seven days. Plaintiff's motion for sanctions due to a CORA violation is held in abeyance at this time. Within 14 days of receipt of the privilege log, Plaintiff may file a renewed motion for sanctions if Plaintiff still believes that Defendant violated CORA by withholding any specific record.

Issue Date: 11/4/2016

TED C TOW III
District Court Judge