

DISTRICT COURT, ELBERT COUNTY, COLORADO 751 Ute Avenue Kiowa, CO 80117 303-621-2131	DATE FILED: January 11, 2019 2:33 PM FILING ID: 604299043987A CASE NUMBER: 2018CV7
Plaintiff: FRANK STURGELL v. Defendant(s): ELBERT COUNTY, ELBERT COUNTY COMMISSIONERS CHRIS RICHARDSON, GRANT THAYER AND DANNY WILCOX, KYREI ZION, ELBERT COUNTY SHERIFF'S DEPARTMENT, ELBERT COUNTY SHERIFF SHAYNE HEAP	
Josh A. Marks, Atty. Reg. # 16953 Heidi C. Potter, Atty. Reg. # 30301 BERG HILL GREENLEAF RUSCITTI LLP 1712 Pearl Street Boulder, CO 80302 Tel: (303) 402-1600 Fax: (303) 402-1601 jam@bhgrlaw.com hcp@bhgrlaw.com	Case Number: 2018CV000007 Div.: 1 Ctrm.:
DEFENDANTS' MOTION TO DISMISS	

Defendants, Elbert County, Elbert County Commissioners Chris Richardson, Grant Thayer, and Danny Wilcox, Kyrei Zion (collectively the “**BOCC Defendants**”) and Elbert County Sheriff’s Department, and Elbert County Sheriff Shayne Heap (collectively the “**Sheriff Defendants**”) (the BOCC Defendants and the Sheriff Defendants are collectively the “**Defendants**”), through their undersigned counsel and pursuant to C.R.C.P. 12(b)(1), hereby move the Court for an order dismissing the Complaint with prejudice. As grounds in support of this Motion, the Defendants state as follows:

Certificate of Conferral. Undersigned counsel conferred with *pro se* Plaintiff, Frank Sturgell, prior to filing this Motion. Plaintiff opposes this Motion.

I. INTRODUCTION

Each of Plaintiff's Claims for Relief seeks an order compelling the Defendants to give him documents he requested under the Colorado Open Records Act, C.R.S. § 24-72-201 *et seq.* ("**CORA**") without requiring him to show a valid form of identification. The allegations of the Complaint establish that the Defendants have already given Plaintiff the only document responsive to his request without requiring him to show a valid form of identification. Therefore, the relief sought, if granted, would have no practical effect on an existing controversy, rendering Plaintiff's claims moot. Because the Court lacks subject matter jurisdiction to hear moot claims, the Complaint must be dismissed with prejudice.

II. PROCEDURAL AND FACTUAL BACKGROUND

- A. On or about September 24, 2018, Plaintiff filed his Complaint for Damages (the "**Complaint**" of "**Compl.**") in the Arapahoe County District Court.
- B. The Arapahoe County District Court granted the Defendants' Motion to Change Venue and the case was transferred to this Court on December 28, 2018.
- C. Plaintiff's Complaint asserts the following allegations:
 1. On July 8, 2018, Plaintiff sent Defendant Heap an email (the "**July 8 Email**"), stating:

I am requesting per CORA any documents asking for Sheriff's Deputy Chris Dickey to resign, demand his firing, and/or be suspended and/or be placed on administrative leave until he can stop killing.

Why is someone who had a record of unnecessary injury and death from a police department that was so out of control that it was under supervision of the US Department of Justice be hired let alone be continued to be allowed to a Deputy in Elbert County after more unnecessary killing and injury?

(Compl., ¶ B2-1, Ex E (emphasis added).)

2. On July 9, 2018, Plaintiff sent Defendants Thayer, Wilcox and Richardson an email with the identical text as that in the July 8 Email. (*Id.*, ¶ B1-1, Ex. A.)
3. Defendant Richardson responded to the email, stating: “Thank you for contacting me. In regard to your email requesting documents, attached is our current County Policy regarding requests pursuant to [CORA] and our CORA request form. Once we receive a properly documented request, we will process it appropriately.” (*Id.*, ¶¶ B1-2 to B1-3, Ex. B.)
4. The attached Elbert County Open Records Policy (the “**Policy**”) requires that citizens requesting public records do so using a request form which is available at the Elbert County Administrative offices and on the County’s website. (Compl., Ex. D at 2.)
5. The Policy also requires citizens to “present a valid form of identification when collecting the contents of any request” or, if the request is made by email to “include a scanned copy of a valid form of identification” to authenticate identification of the individual making the request and receiving the information. (Compl., Ex. D at 3.)

6. On July 10, 2018, Plaintiff completed the CORA form (dating it July 8, 2018) and sent it to Elbert County. (*Id.*, ¶ B1-6, Ex. C.) On the form Plaintiff stated: “I am requesting per CORA any documents asking for Elbert County Sheriff’s Deputy Chris Dickey to resign, demand his firing, and/or be suspended and/or be placed on administrative leave until he can stop killing, which we can be certain is NEVER...” (*Id.*, Ex. C.)
 7. On July 16, 2018, Defendant Zion, sent an email to Plaintiff stating, “Please find attached the official response letter to your open records request dated 7-11-2018. **Please also find attached the documents in our possession that are responsive to your request.**” (*Id.*, ¶¶ B1-7, B1-8, B2-4, B2-5, Ex. F (emphasis added).) Elbert County’s CORA response letter and the Plaintiff’s July 8 Email were the only documents attached to Defendant Zion’s response. (*Id.*, ¶¶ B1-8, B2-4 to B2-6.)
 8. Plaintiff does not have a driver’s license or identification card. (*Id.*, ¶B-11.)¹
- D. Plaintiff’s First Claim for Relief alleges that the County Defendants are withholding records in violation of C.R.S. § 24-72-203(1). (*Id.*, ¶¶ B1-9, B1-16.) He seeks an order compelling the County Defendants to give him the documents he requested. (*Id.*, ¶A1-1.1, C1-2.)

¹ The State of Colorado issues identification cards which may be obtained without a Colorado driver license and in lieu of a Colorado driver license if the applicant proves his full legal name, identity, date of birth and lawful presence in the United States. *See, e.g.*, C.R.S. §§ 42-2-302, 42-2-303; 1 CCR 204-30, App. A.

- E. Plaintiff's Second Claim for Relief alleges that the Sheriff Defendants are withholding records in violation of C.R.S. § 24-72-203(1). (*Id.*, ¶¶ B2-6, B2-10.) He seeks an order compelling the Sheriff Defendants to give him the documents he requested. (*Id.*, ¶A1-1.1, C1-2.)
- F. Plaintiff's Third Claim for Relief alleges that another individual was given documents by the Defendants in response to a CORA request without having to provide identification, but Plaintiff was not. As a result, he alleges Defendants violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (*Id.*, ¶¶B3-1 to B3-12.) He seeks restoration of those rights in the form of an order compelling the Defendants to give him the documents he requested without showing a valid form of identification. (*Id.*, ¶A1-1.1, ¶ B3-13, C1-2.)
- G. Plaintiff's Fourth Claim for Relief alleges that the Policy requiring him to present a valid form of identification to obtain documents under a CORA request is an unreasonable search in violation of the Fourth Amendment to the United States Constitution. (*Id.*, ¶¶ B4-1 to B4-12.) He seeks restoration of those rights and to "be made whole from the violation" by an order compelling the Defendants to give him the documents he requested without showing a valid form of identification. (*Id.*, ¶¶ A1-1.1, B4-13, C1-2.)
- H. Plaintiff's Fifth Claim for Relief alleges that the Policy's form is burdensome and does nothing to protect County records. (*Id.*, ¶ B5-4.) In addition, the Fifth Claim for Relief alleges that the Policy's requirement that a citizen show a valid form of identification violates Plaintiff's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and is illegal. (*Id.*, ¶¶ B5-10, B5-15.) He seeks restoration of

his rights and to “be made whole for the damage of rights, privileges and liberties that he has incurred” by an order compelling the Defendants to give him the documents he requested without showing a valid form of identification. (*Id.*, ¶¶ A-1.1, B5-15, C-1.)

He also asks the Court to rewrite the illegal policies by entering:

C1-3. [An] Order to remove any reference to any identification card and driver’s license or any method of identifying oneself unless the law specifically states that there is a specific record to protect such as personal records that only that specific person can review.

C1-4. A statement or order that draws clear distinction between when identification can be demanded and when it is unnecessary such as one is asking for their own personal records that only the person asking for can inspect.

(*Id.*, ¶¶ A-1.2, C1-3, C1-4.)²

III. STANDARD OF REVIEW

Mootness is a doctrine that involves a court’s subject matter jurisdiction. *See People ex rel. K.A.*, 155 P.3d 558, 560 (Colo. App. 2006). Rule 12(b)(1) provides the mechanism for seeking dismissal of a claim based on the Court’s subject matter jurisdiction. “[T]he subject matter jurisdiction of a state court concerns that court’s authority or competence to hear or decide a case and is determined solely by the state constitution and statute.” *Tulips Inv., LLC v. State ex rel. Suthers*, 340 P.3d 1126, 1133 (Colo. 2015). The rule normally applicable to Rule 12(b) motions – that courts accept the complaint allegations as true and view them in the non-

² It is worth noting that Plaintiff admits it is appropriate to require identification to protect confidential information. (*See* Compl., ¶ B2-12); *see also* C.R.S. § 24-72-204(3.5)(g) (“Prior to the release of any information required to be kept confidential pursuant to this subsection (3.5), the custodian shall require the person requesting the information to produce a valid Colorado driver’s license or identification card and written authorization from any entity authorized to receive information under this subsection (3.5).”)

movant's favor – does not apply to subject matter jurisdiction challenges under Rule 12(b)(1).

Trinity Broad. of Denver, Inc. v. City of Westminster, 848 P.2d 916, 924 (Colo. 1993).

If the movant presents a factual attack on the complaint allegations, the court may receive any competent evidence pertaining to the motion and resolve any factual disputes necessary to determine its own jurisdiction. *Id.* at 924-25. Absent a factual dispute, the court's subject matter jurisdiction becomes purely a question of law. *State ex rel. Suthers v. Cash Advance and Preferred Cash Loans*, 205 P.3d 389, 408 (Colo. App. 2008). Plaintiff bears the burden of proving jurisdiction under C.R.C.P. 12(b)(1). *See Cash Advance & Preferred Cash Loans v. State ex. Rel Suthers*, 242 P.3d 1099, 1113 (Colo. 2010).

IV. ARGUMENT

Plaintiff's claims are moot because the Defendants have already given him the only document responsive to his CORA request. Therefore, his Complaint must be dismissed because the Court lacks subject matter jurisdiction.

When possible, a court should resolve disputes on their merits. *People in Interest of C.G.*, 410 P.3d 596, 599 (Colo. App. 2015) (citing *Stell v. Boulder Cnty. Dep't of Soc. Servs.*, 92 P.3d 910, 914 (Colo. 2014)). However, when an issue is moot, a court will ordinarily refrain from addressing it. *Id.* (citing *Trinidad Sch. Dist. No. 1 v. Lopez*, 936 P.2d 1095, 1102 (Colo. 1998)); *Colo. Mining Ass'n v. Urbina*, 318 P.3d 562, 568 (Colo. App. 2013) (“The power of judicial review simply does not extend to moot questions.”). An issue is moot when the relief sought, if granted, would have no practical effect on an existing controversy. *Id.* (citation omitted). When a court determines a claim is moot, the appropriate action is to decline to

address its merits and instead dismiss the claim. *See Giuliani v. Jefferson Cty. Bd. of Cty. Comm'rs*, 303 P.3d 131, 136 (Colo. App. 2012).

Subject to several exceptions, CORA provides that the custodian of any public records shall allow any person the right of inspection of such records or any portion thereof. *See* C.R.S. § 24-72-204(1). Any person denied the right to inspect any record covered by CORA 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). 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. *Id.* In the event the Court finds that the denial of the right of inspection was proper, the Court shall award court costs and reasonable attorney fees to the custodian if the Court finds that the action was frivolous, vexatious, or groundless. *Id.*

All of Plaintiff's Claims for Relief seek an order compelling Defendants to provide Plaintiff with documents responsive to his CORA request. Defendant Zion's email unequivocally states, "Please also find attached the documents in our possession that are responsive to your request" and attaches Plaintiff's July 8 Email as the only responsive document to Plaintiff's CORA request. (*Id.*, ¶¶ B1-7, B1-8, B2-4, B2-4 to B2-6, Ex. F.) Plaintiff's Complaint alleges that his July 8 Email is not responsive to his CORA request, but the Exhibits attached to his Complaint establish otherwise. Plaintiff requested "any documents asking for Elbert County Sheriff's Deputy Chris Dickey to resign, demand his firing, and/or be suspended and/or be placed on administrative leave until he can stop killing, which we can be certain is

NEVER...” (*Id.*, B1-6, Ex. C.) The second paragraph of his July 8 Email is just such a document, stating: “Why is someone who had a record of unnecessary injury and death from a police department that was so out of control that it was under supervision of the US Department of Justice be hired let alone be continued to be allowed to a Deputy in Elbert County after more unnecessary killing and injury?” (Compl., ¶ B2-1, Ex E.)

Since Plaintiff has already been given the only document responsive to his CORA request, an order compelling the Defendants to give Plaintiff that document would have no practical effect on the existing controversy and is, therefore, moot. *People in Interest of C.G.*, 410 P.3d at 599. Stated differently, the Plaintiff cannot establish that a custodian has actually *denied* his request for public records and, therefore, there is no claim or controversy to be remedied under C.R.S. § 24-72-204(5).

Plaintiff’s request that the Court declare the Policy improper, or order that the Policy be rewritten, does not save his Complaint from dismissal. (Compl., ¶¶ A-1.2, C1-3, C1-4.) Plaintiff has no injury resulting from the application of the Policy, so any further adjudication would result in an improper advisory opinion. Furthermore, remedies for wrongful withholding of documents under CORA are limited to an order to produce the documents for inspection and an award of costs and attorney fees. *Sierra Club v. Billingsley*, 166 P.3d 309, (Colo. App. 2007) (citations omitted). “Any other remedy for such a violation would need to be enacted by the General Assembly, and in the absence of such legislation, [courts] are not at liberty to craft such a remedy.” *Id.* (citations omitted).

V. CONCLUSION

WHEREFORE, in light of the foregoing, the Defendants respectfully request this Court to enter an Order dismissing this case with prejudice. A proposed Order granting this Motion is filed herewith.

Respectfully submitted this 11th day of January, 2019.

BERG HILL GREENLEAF & RUSCITTI LLP

*[Pursuant to Rule 121, the signed original is on file at
Berg Hill Greenleaf & Ruscitti LLP]*

s/ Heidi C. Potter

Josh A. Marks
Heidi C. Potter

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of January, 2019, a true and correct copy of the foregoing **DEFENDANTS' MOTION TO DISMISS** was served via electronic mail and via U.S. Mail to the *pro se* Plaintiff, addressed to the following:

Frank Sturgell
P.O. Box 150609
Lakewood, CO 80215
fsturgell@yahoo.com

*[Pursuant to Rule 121, the signed original is on file at
Berg Hill Greenleaf & Ruscitti LLP]*

s/ Cheryl Stasiak

Cheryl Stasiak