

DISTRICT COURT, ARCHULETA COUNTY,
COLORADO

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CO Archuleta County District Court 6th JD
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Plaintiff:
William Hudson

v.

Defendants:
CLIFFORD LUCERO

COURT USE ONLY

Case Number: 2010 CV 259

Division: Courtroom:

**ORDER
GRANTING DEFENDANT'S MOTION TO DISMISS PURSUANT TO 12(b)(5)**

THIS MATTER having come before the Court on the Defendant's Motion to Dismiss (the Motion) pursuant to CRCP Rules (12)(b)(1) and (5) of Plaintiff's Application to Compel Disclosure of the Minutes of an "Executive Session" (Record) held by the Board of County Commissioners (BoCC) on September 1, 2010, the Court having reviewed the Motion, responses and the record, and being fully advised in the premises, hereby GRANTS the Defendant's Motion to Dismiss as described below.

Plaintiff William Hudson, Pagosa Daily Post editor (Plaintiff) served a formal request for disclosure of the above-described records on Clifford Lucero (Defendant) who in his official capacity serves as BoCC Chairman. The Plaintiff brought the instant action against Defendant in his individual capacity to compel disclosure of this Record after the County Attorney declined to release the records on various grounds not relevant here.¹ The County attorney filed the instant Motion to Dismiss arguing that dismissal is compelled because: 1) Defendant is not the record custodian in his individual (or official) capacity and therefore this action fails to state a claim against the named Defendant; and 2) Plaintiff has shown no injury

¹ The parties stipulated in camera review of the record to expedite, and reduce costs of, the resolution of the Colorado Open Records Act issue, and the BoCC authorized the County Attorney to defend the Defendant. Defendant's denial was asserted on exceptions to the CORA for attorney privilege and negotiation privilege pursuant to C.R.S. S24-72-402(2),(3) and (4). The record did not contain sufficient evidence to support nondisclosure on those grounds. However, since this Motion to Dismiss was pending, the Court did not then Order the Record disclosed.

in fact and so lacks standing to maintain this action, depriving this Court of subject matter jurisdiction.

Defendant also alleged that release of this Record would deny due process to additional parties not before the Court since the Plaintiff's failed to follow the proper statutory procedure in making a public records request. Because the Court grants the Motion on Defendant's first ground, Defendant's other arguments regarding lack of standing and putative due process issues are not considered further.² It has been long established that the Court will not consider constitutional questions unless it is essential to do so and the necessity for such consideration is clear and inescapable. See, People v. Lybarger, 700 P.2d 910, 915 (Colo. 1985).

The legislature has established a detailed process for requesting and obtaining public records pursuant to the Colorado Open Records Act, §24-72-200.1- 206 (CORA). The initial step is to file a written notice with the record custodian requesting the specific record. §24-72-204. Defendant alleges that the legislative declaration makes it clear that CORA is intended to balance a public policy of assuring public access to government with the privacy interest and practical limitation of public officials. Ritter v. Denver Post Corp. v. Ritter, 255 P.3d 1083 (Colo. 2011). Defendant contends that Plaintiff's inability to allege compliance with the statutory prerequisites of C.R.S. §24-72-204 constitutes failure to state a claim pursuant to Rule 12(b)(5). The Court agrees.

Given Colorado's notice pleadings the Court views a C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim "with disfavor." Bly v. Story, 241 P.3d 529, 533 (Colo. 2010). When considering a motion to dismiss for failure to state a claim, the court may consider only the facts alleged in the pleadings, documents attached as exhibits or affidavits, and matters proper for judicial notice. Walker v. Van Laningham, 148 P.3d 391, 397 (Colo. App. 2006). The Court must accept all factual allegations in the complaint as true and view all inferences in the light most favorable to the plaintiff; however this does not apply to legal conclusions couched as factual allegations. See Western Innovations, Inc. v. Sonitrol Corp., 187 P.3d 1155, 1158 (Colo. App. 2008); Bly, id. The Court will grant a C.R.C.P. 12(b)(5) motion to dismiss only when the plaintiff's factual allegations do not, as a matter of law, support the claim for relief. Ritter, id.; Bly, id. That is the case here.

² The Court does, however, acknowledge that the constitutional right to privacy may bar access to public records otherwise disclosable under the Colorado Open Records Act. See Wick Communications Co. v. Montrose Bd. of County Comm'rs, 81 P.3d 360, 365 n. 4 (Colo. 2003). Not only must the Custodian determine whether a record is releasable, it must also notify other persons referenced in the record so that they may assert and defend their own privacy rights. C.R.S. § 24-72-204(5); See Denver Publ'g Co. v. Board of County Comm'rs, 121 P.3d 190 (Colo. 2005).

A prerequisite to a CORA lawsuit is an improper denial of a public record by the record custodian. A lawsuit is properly commenced by requesting the District Court to order the custodian to disclose the record. C.R.S. §24-72-204(5.5) and (6). The Record custodian for all BoCC Records is the Archuleta County Clerk and Recorder (County Clerk). C.R.S. §§30-10-402 and 30-10-405(1). Plaintiff doesn't allege nor is there any record evidence that notice was ever served on the County Clerk. Likewise the record contains no evidence that Plaintiff requested a District Court Order against the County Clerk despite this requirement – a requirement contained in the same statutory régime the Plaintiff argues authorizes his suit. See C.R.S. §24-72-204(5), (5.5) and (6).

Instead, Plaintiff contends that he delivered statutorily compliant correspondence and a notice of potential litigation to Clifford Lucero, who in his official capacity is chairman of the BoCC. Plaintiff apparently contends: 1) Clifford Lucero is an additional custodian of BoCC records in his individual capacity; and/or 2) Defendant's failure to, sua sponte, notify Plaintiff that Defendant did not have custody and control of the requested record waives required compliance with C.R.S. §24-72-203(2)(a) and failure in itself constitutes a cognizable injury justifying a remedy against non-party BoCC. The Court is not persuaded by either argument.

Defendant is not an alternative custodian of BoCC records. The Open Records Act defines "custodian" as "the official custodian or any authorized person having personal custody and control of the public record in question." Section 24-72-202(1.1)(emphasis added). "Official custodian" is defined as inclusive of "any officer [of any political subdivision]...who is responsible for the maintenance, care and keeping of public records regardless of whether records are in his or her actual personal custody and control." C.R.S. §24-72-202(2). The complaint does not allege that Defendant was authorized to maintain or was actually in custody of the Record sought. Plaintiff cites to no authority, nor could the Court find any, suggesting that Defendant as an individual serves as an "alternative custodian" of a public body's records, regardless of his responsibility, custody or control simply because he was elected to a public office.

Clearly the statutory responsibility to maintain records of the board of county commissioners, and to "...keep the [records and papers] of the board of county commissioners, and keep a record of the proceedings of the board, as required by law under the direction of the board of county commissioners" is vested by law in the County Clerk of the Board. C.R.S. §30-10-405(1). The County Clerk position is established by the State Constitution. See Colorado Const. Art XIV, §8. The Colorado Supreme Court has consistently held that the

County Clerk is the official custodian for all public records maintained by a County Board of Commissioners. See Upton v. Catlin, 31 P. 172 (Colo. 1892). While Plaintiff appears to argue that since the BoCC may dictate the manner in which the County Clerk maintains records, it therefore can stand in as a custodian, it's well settled that the Board may exercise official power only as an entire body, not through an individual member. See Nicholl v. E-470 Highway Authority, 896 P.2d 859 (Colo. 1995); C.R.S. §30-10-405. Plaintiff presents no evidence of BoCC authorization of Lucero as a custodian. The Court may not add or delegate constitutional and statutory administrative duties for equitable or public policy reasons. See Skidmore v. O'Rourke, 383 P.2d 473(Colo. 1963).³ The complaint does not name Lucero in his official capacity. Lucero the citizen cannot individually or officially release the public records of the BoCC.


The Court likewise disagrees with Plaintiff's second argument. Defendant asserts that he had no duty to provide such information because identification of the correct official custodian of records must only be given, in writing, "when requested". C.R.S. §24-72-203(2)(a). There is no evidence of such a written request. The Court finds that this statutory clause is somewhat ambiguous, but determines that resolution of its precise meaning is unnecessary. Plaintiff has cited no authority providing that the failure of an elected official in his individual capacity, or by the County attorney as his agent, to identify the official custodian of the BoCC without written request waives statutory requirements or states a cognizable claim for the release of public records.

The Court holds that the Plaintiff's complaint fails to allege facts which, accepted as true, state a claim that Clifford Lucero is an alternative custodian of public records under CORA, improperly denied access, or has the ability to grant the relief requested. Therefore the Court hereby GRANTS Defendant's Motion pursuant to C.R.C.P. Rule 12(b)(5).

IT IS SO ORDERED.

Dated this 12th day of March, 2012.

By the Court:


District Court Judge, Gregory G. Lyman

Served on the Parties via LexisNexis File and Serve

³ If Plaintiff is attempting to argue that the notice given to Clifford Lucero and the subsequent correspondence between the Plaintiff and the County Attorney constitute evidence of actual BoCC notice that excuses strict compliance as a matter of law, even that would not convert his pleadings into a viable claim since there is no evidence of custodial rejection of a request for a public record. See, e.g., Strauch v. Build It and They Will Drink, 226 P.3d 1235 (Colo. App. 2009).