DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	DATE FILED: December 6, 2013 10:08 AM CASE NUMBER: 2013CV34235
Plaintiffs: KELI RABON and SCRIPPS MEDIA, INC d/b/a KMGH-TV v. **Defendant:** JOHN SUTHERS, in his official capacity as Colorado Attorney General	▲ **COURT USE ONLY** ▲ Case Number: 13CV34235 Ctrm: 215
ORDER	

THIS MATTER is before the Court on an Application for an Order to Show Cause issued pursuant to C.R.S. § 24-72-204(5) upon Defendant John Suthers in his official capacity as Colorado's Attorney General. Upon consideration of the Application and Answer thereto, as well as the testimony and exhibits received at the evidentiary hearing conducted on November 20, 2013, and having considered the arguments and authorities submitted by counsel for the parties through their respective briefs and oral arguments, and having reviewed applicable authorities and being fully advised in the premises, the Court issues the following findings of fact, conclusions of law and order.

Preliminary Statement

It should be understood that all findings of fact and conclusions of law made herein are based on what the Court finds to be a preponderance of admissible, credible, and persuasive evidence. The Court's findings of fact reflect the Court's assessment of credibility of the witnesses in accordance with the standards set forth in CJI 4th 3:16.

Findings of Fact

1. The Colorado Consumer Protection Act vests the Attorney General with responsibility to enforce the state's consumer protection laws. C.R.S. § 6-1-103. As part of its

consumer protection responsibilities, the Attorney General has the authority to investigate, gather information about, seek injunctive relief against, and/or commence civil action against persons or entities who are believed to have engaged in deceptive trade practices. *See* C.R.S. §§ 6-1-107 – 110; 6-1-112.

2. The Office of the Colorado Attorney General, through its Consumer Protection Services Unit, historically receives tens of thousands of consumer inquiries and thousands of consumer complaints annually. [*See* Exhibit B.] The inquiries and complaints are received by the Attorney General in written and mailed forms, through submissions via an online form on the Attorney General's website, and through referrals from other intra and interstate agencies. Jan Zavislan, Deputy Attorney General for Consumer Protection Services, testified credibly that such consumer complaints and inquires constitute the "primary source of investigative material" in exercising the Attorney General's consumer-protection efforts.

3. Information received from consumers assists the Attorney General in identifying individuals and business entities that generate frequent or egregious complaints, which may lead to investigations and exercise of the Attorney General's law enforcement authority. However, due to the high volume of consumer complaints received and the limited resources of the Consumer Protection Unit, the Attorney General also seeks to exercise its consumer-protection efforts through public awareness, education and prevention programs. To this end, the Attorney General partners with other agencies and organizationd to further its prophylactic mission and to permit the Attorney General to focus its limited resources on the investigation and potential prosecution of the most egregious cases.

4. Mr. Zavislan testified credibly that victims of deceptive trade practices are often greatly embarrassed by the fact that they were victimized and frequently express anger or humiliation for having failed to recognize signs of potentially fraudulent conduct. While some complaints submitted by defrauded consumers are brief, others contain in depth exposition of aggrieved consumers' personal and financial lives and the hardships they have endured as a result of their victimization. Consumers lodging complaints are often elderly or financially strapped individuals who do not want to publicize their victimization, fearing that public disclosure would subject them to judgment or ridicule by others or expose their vulnerability to perpetrators of other schemes.

5. The Office of the Attorney General has historically and consistently regarded consumer-related inquiries and complaints as confidential. Mr. Zavislan testified that throughout his 25 years with the Consumer Protection Services Unit, the Attorney General has regarded consumer complaints as non-public information, and the Attorney General has consistently refused to publically disclose such complaints regardless of the source seeking disclosure. Mr. Zavislan opined that maintaining the confidentiality of consumer complaints furthers the Attorney General's law enforcement function by encouraging consumers to file as many legitimate complaints as possible without fear

that such complaints will be released to anyone requesting access. Conversely, Mr. Zavislan expressed the Attorney General's concern that public disclosure of consumer complaints would stifle complainant activity and discourage consumers from providing personal and financial information about potentially deceptive practices, thereby frustrating the Attorney General's ability to gather intelligence, investigate deceptive practices, and pursue its responsibilities under the Consumer Protection Act. Maintaining the confidentiality of consumer complaints also protects businesses and other entities from being maligned or otherwise harmed by complaints that are nefarious in nature or without legitimate grounds or purpose.

6. Prior to 2001, the Attorney General endeavored to adjudicate many of the thousands of consumer complaints it received annually through informal intervention and mediation. Mr. Zavislan testified credibly, however, that, in many respects, the Office of the Attorney General was under-staffed and lacking in resources to effectively mediate consumer complaints. Then Attorney General Ken Salazar was also of the view that the power and authority of the Office of Attorney General was not a proper vehicle for effecting private mediation of disputes, particularly since other agencies, such as the Better Business Bureau, were also and more effectively engaged in the same activity.

7. Accordingly, in or about January 2001, the Attorney General met with and ultimately partnered with the then-Mountain States Better Business Bureau [hereafter "the BBB"[1]] so as "to maximize resources, more effectively and efficiently use personnel and equipment, exchange information of mutual interest in a timely manner, and reduce duplication and efforts concerning consumer complaint intake and dispute resolution services in Colorado," thereby allowing "the Attorney General to focus its limited resources on the investigation and prosecution of the most egregious consumer fraud cases." [Exhibit B at 2.] The partnership is evidenced by a written five-year contract[2] [hereafter "the Agreement"] that, *inter alia*, contemplated a consumer complaint intake process wherein the BBB "will receive, review, and otherwise process consumer complaints referred to the . . . BBB by the Attorney General" and "undertake dispute resolution services in an attempt to resolve consumer complaints against businesses, including those consumer complaints referred to it by the Attorney General." [Exhibit B at 2.] The Agreement contains a confidentiality provision such that both parties agree to conduct their complaint intake and dispute resolution services "in accordance with their respective public information policies" and, further, that the BBB would "use its best efforts to honor the Attorney General's request to keep certain investigative information confidential when appropriate." Mr. Zavislan testified credibly that the partnership with the BBB furthered the Attorney General's law enforcement and

[1] Reference in this Order to the "BBB" is made with the understanding that records were shared by the Attorney General with several different regional offices of the Better Business Bureau in Colorado, Wyoming, and New Mexico.

[2] A written contract was necessary because state funding was being provided "for the specific purpose of assisting the Mountain States BBB to implement this Agreement and as part of the Attorney General's authority to further the consumer education and law enforcement purposes set forth in this Agreement." [Exhibit B at 3.]

consumer protection function by improving its ability to identify entities in need of investigation and prosecution and enhancing its ability to target populations in need of outreach and education.

8. Thereafter, and consistent with the Agreement, the Attorney General has shared thousands of consumer complaints with the BBB for dispute resolution purposes,[3] but with the expectation that the complaints would otherwise remain confidential. Although the Agreement expired by its terms in 2006, the relationship between the Attorney General and the BBB continued unchanged, including the referral by the Attorney General of selected consumer complaints for dispute resolution purposes with the understanding that they would not be made publically available. Consumers filing complaints through the Attorney General's website are specifically advised that, "when applicable, your complaint will be handled by the [BBB] . . . ." [Exhibit C.] However, consumers are cautioned, "[t]o protect your privacy, we strongly recommend that you remove all personal confidential information, such as Social Security numbers, bank account and credit card numbers, and medical information from copies of any documents you include with your complaint." [*Id*.]

9. The BBB is a private not-for-profit entity with a stated mission of "advancing marketplace trust [by] creating a community of trustworthy businesses; setting standards for marketplace trust; encouraging and supporting best practices; celebrating marketplace role models, and; denouncing substandard marketplace behavior." [Exhibit E.] In addition to its dispute resolution function, the BBB also "provide[s] information about marketplace fraud through alerts on scams to the public" [Exhibit 11] through means such as a "news center" that is maintained on its public website. [*See* Exhibit 12.] Regional offices, including the BBB for Northern Colorado and Wyoming, retain staff with journalism backgrounds who write and disseminate articles and press releases on consumer and consumer fraud-related issues. The BBB also maintains policies regarding the privacy and sharing of information provided to the BBB by consumers. [*See* Exhibit D.]

10. Jim Sidanyez, a complaint intake manager with the Office of the Attorney General, estimates that approximately 2,700 consumer complaints have been sent by the Attorney General to the BBB from January 1, 2011 to present. Among the complaints sent by the Attorney General to the BBB are consumer complaints regarding a business known as First American Monetary Consultants [hereafter "FAMC"]. FAMC was once accredited by the BBB. However, it later received a rating of "F" by the BBB due to the number of complaints filed against it and FAMC's failure to respond to or resolve the pattern of complaints. [Exhibit 7.] FAMC ultimately lost its accreditation with the BBB, after which it was no longer obligated to and, indeed it did not,

[3] It is undisputed that the Attorney General also shares consumer complaints with other governmental and quasi-governmental investigative agencies, such as licensing boards and law enforcement agencies.

participate in the BBB's dispute resolution process. Complaints regarding FAMC were sent by the Attorney General to the BBB both before and after FAMC lost its accreditation and, once the complaints were sent, the Attorney General did not inquire of the BBB as to the status of any ongoing dispute resolution proceedings with FAMC.

11. In late July or early August 2013, the Attorney General learned that the BBB had begun to place consumer complaints that it had received from the Attorney General on its website, albeit in redacted form. The Attorney General thereafter and immediately stopped sharing consumer complaints with the BBB.

12. The business practices of FAMC remain a topic of concern with the BBB. The Board of Directors voted in April 2013 to issue a press release "to warn the public of FAMC's actions" [Exibit 17] and various regional offices have prepared (but not published or disseminated) draft articles outlining FAMC's alleged deceptive practices. [*See* Exhibits 19, 20, 21.] While aware of allegations regarding alleged deceptive practices, the Attorney General has not instituted a formal investigation of FAMC upon the express request of several federal law enforcement agencies. [*See* Exhibit 17 at 2.]

13. In July 2013, Plaintiff Keli Rabon, an investigative reporter employed by Scripps Media, Inc., requested access to complaints filed with the Attorney General regarding FAMC. Ms. Rabon's initial informal requests were denied based upon the Attorney General's determination and policy that the complaints were not public information subject to disclosure. [*See* Exhibit 1.] After more formal efforts for disclosure were similarly denied, Plaintiffs instituted the instant action seeking an order for the Attorney General to show cause, pursuant to the Colorado Open Records Act [hereafter "CORA"], why such information is not being disclosed. Through this action, Plaintiffs seek disclosure of "consumer complaints submitted to the Colorado Attorney General's Office concerning the Colorado business First American Monetary Consultants, and every complaint, including consumer complaints, the Colorado Attorney General's Office has shared between January 1, 2011, and the present with non-governmental third parties, with businesses and nonprofits, including, but not limited to, organizations with a publishing wing, such as the Better Business Bureau, and similar organizations, such as newspapers and television stations."

Conclusions of Law

14. This action involves the interplay of two distinct statutory schemes, both of which implicate important public policy considerations. Colorado's Open Records Act declares it to be "the public policy of this state that all public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise specifically provided by law." C.R.S. § 24-72-201. The Act creates a strong presumption of public access to public records as defined by the statute, and exemptions from disclosure under CORA are to be narrowly construed in favor of public access. *See Marks v. Koch*, 284 P.3d 118 (Colo. App. 2011). The Colorado

Consumer Protection Act [CCPA] is a civil enforcement statute that vests the Attorney General with responsibility to enforce the state's consumer protection laws and protect consumers from victimization by business entities. C.R.S. § 6-1-103. The Act evinces a "broad legislative purpose to provide prompt, economical, and readily available remedies against fraud." *See Western Food Plan, Inc. v. District Court,* 598 P.2d 1038 (Colo. 1979).

15. The Court's primary task when interpreting a statute is to give effect to the legislative purpose underlying it. *East Lakewood Sanitation District v. District Court,* 842 P.2d 233 (Colo. 1992). To determine the legislative intent, the Court must first look to the plain language employed by the General Assembly, giving the words and phrases their plain and ordinary meanings. *Riccatone v. Colorado Choice Health Plans,* ___ P.3d ____, 2013 WL 4875355 (Colo. App. 2013). The Court must choose a construction that serves the purpose of the legislative scheme, and must not strain to give statutory language other than its plain meaning unless the result is absurd. *City of Westminster v. Dogan Construction,* 930 P.2d 585 (Colo. 1997). In construing the meaning of a statutory provision, a commonly accepted meaning is preferred over a strained or forced interpretation, and courts may look to the dictionary for assistance if necessary. *People v. Voth,* 312 P.3d 144 (Colo. 2013). Two statutes concerning the same subject matter must, if possible, be construed together to give full effect to the legislative purpose. *Subsequent Injury Fund v. Trevethan,* 809 P.2d 1098 (Colo. App. 1991).

16. CORA establishes a legislative scheme wherein all public records as defined by the Act are subject to disclosure, subject to specifically defined exceptions. C.R.S. §§ 24-72-203; 24-72 202(6). Plaintiffs contend that, because it is undisputed that consumer complaints filed with the Office of the Attorney General are maintained and kept by the office, which is a state agency, for the use in the exercise of the office's authorized function under the CCPA, complaints are therefore "public records" subject to disclosure, *see* C.R.S. § 24-72-202(6)(a)(I), and that none of the exceptions to disclosure as provided by CORA apply. *See* C.R.S. §§ 24-72-202(6); 24-72-204.

17. However, not all information held by the state is a public record. *Ritter v. Jones,* 207 P.3d 954 (Colo. App. 2009). CORA presumes that all "public records" shall be open for inspection unless excepted by the statute or specifically by other law. C.R.S. § 24-72-201; *Daniels v. City of Commerce City,* 988 P.2d 648 (Colo. App. 1999); *Denver Publishing Co. v. Dreyfus,* 520 P.2d 104 (1974). The CCPA vests prosecution agencies with authority to enforce the state's consumer protection laws. When established, the CCPA contemplated the establishment of a "statewide reporting system by receiving . . . complaints from persons concerning deceptive trade practices [as defined by the Act] and transmitting such complaints to the attorney general." C.R.S. § 6-1-104. The Act empowers the Attorney General to request sworn statements of persons suspected of deceptive trade practices, issue subpoenas for the attendance of witnesses or the production of documents, and to seek injunctive relief or other civil remedies for violations of the Act. C.R.S. §§ 6-1-107 – 110; 6-1-112. Any testimony or derivative

evidence obtained through the compulsory process authorized under the Act is not admissible in evidence in any criminal prosecution against the person so compelled to testify. C.R.S. § 6-1-111(2). The CCPA further provides that "the records of investigations or intelligence information of the attorney general . . . obtained under this article may be deemed public records available for inspection by the general public at the discretion of the attorney general . . . ." C.R.S. § 6-1-111(2).

18. Unlike the legislative scheme of CORA, "records of investigations" and "intelligence information" obtained by the Attorney General pursuant to the CCPA are presumptively non-public records, and may be "deemed public records" only at the discretion of the Attorney General. Because the term "intelligence information" is not specifically defined within the CCPA, the Court first looks to the plain and ordinary meaning of the statutory language. Common and ordinary usages of the term "intelligence" includes concepts such as "the act of understanding;" "the interchange of information;" and the gathering of information in a secret or surreptitious manner such as for military or law enforcement purposes. *See Webster's Third International Dictionary.* General dictionary definitions, as well as the common and ordinary meaning of the terms, thereby suggest that the General Assembly intended the term "intelligence information" to broadly encompass communications such as inquiries and complaints submitted in confidence by aggrieved consumers to a law enforcement agency such as the Office of the Attorney General.

19. The Court is not persuaded by Plaintiffs' assertion that the presumptively non-public records of investigations and intelligence information "obtained under this article," as set forth in section 6-1-111(2), contemplates only that information obtained pursuant to the mechanisms set forth in sections 6-1-107 (powers of the attorney general) and 6-1-108 (subpoenas/hearings/rules). Not only is Plaintiffs' narrow construction contrary to the broad legislative scheme of the CCPA, but it also ignores the clear statutory distinction between information obtained through the affirmative (and compulsory, as regards section 107) activity of the Attorney General and information obtained passively at the behest of aggrieved consumers. *Compare* C.R.S. §§ 6-1-107 and 6-1-108 *with* C.R.S. § 6-1-104. Indeed, it defies logic and common sense to suggest that a law enforcement agency such as the Office of the Attorney General, with its statewide jurisdiction and limited resources, would have the means and impetus to exercise its powers under sections 107 and 108 without having previously obtained "intelligence information" from sources such as aggrieved consumers.

20. The Court therefore concludes that the consumer complaints specified in Plaintiffs' Application are not public records within the meaning of CORA, and that the Attorney General has the discretion under the CCPA to deem the requested consumer complaints public records pursuant to Plaintiffs' request for disclosure.

21. Further, the Court is not persuaded by Plaintiffs' assertion that the Office of the Attorney General exercised its discretion to deem the consumer complaints public

records, or otherwise waived its discretion, when it provided copies of consumer complaints to the BBB. That complaints may be deemed public records "at the discretion" of the custodian necessarily implies an affirmative exercise of judgment on the part of that custodian. Here, the evidence unequivocally establishes that, prior to 2001, the Attorney General did not share consumer complaints with non-law enforcement agencies. After 2001, and until approximately late July or early August 2013, the Attorney General shared selected consumer complaints with the BBB with the express understanding that they would remain confidential and subject to the respective entities' privacy policies. That understanding was first memorialized in a written Agreement, and continued upon the expiration of the Agreement in the respective entities' course of conduct. This understanding continued despite the fact that the BBB, as part of its mission, maintained a news department that disseminated information to the public regarding scams and entities engaged in deceptive practices. The record is devoid of any evidence that, prior to July 2013, the Attorney General had any understanding, expectation or reasonable belief that the complaints supplied to the BBB would be publically disclosed. Upon learning, in late July or early August 2013, that the BBB was in fact placing certain of the supplied consumer complaints onto its website, the Attorney General immediately stopped its practice of sharing consumer complaints to the BBB. These factual circumstances belie any suggestion that the Attorney General's decision to partner with and supply information to the BBB in an effort to further its consumer protection responsibilities constitutes an affirmative judgment to make the information so supplied public and available for inspection by the general public. To the contrary, the record establishes that the Attorney General has consistently regarded consumer complaints to be confidential and not subject to public disclosure.

22. Finally, the Court concludes that the Attorney General did not abuse its discretion in failing to deem the consumer complaints at issue herein to be public records available for inspection by the general public. Looking by analogy to how appellate courts apply an abuse of discretion standard to review the decision of a trial court, the Court finds that an abuse of discretion occurs when the Attorney General's decision is manifestly arbitrary, unreasonable, or unfair. *Hock v. New York Live Ins. Co.,* 876 P.2d 1242 (Colo. 1994). In assessing the Attorney General's decision, the Court does not ask whether it would have reached a different result but, rather, whether the decision fell within a range of reasonable options. *See E-470 Public Highway Authority v. Revenig,* 140 P.3d 227, 230-31 (Colo. App. 2006).

23. In this case, Plaintiffs have an obvious and legitimate interest to learn and inform the general public about nefarious business entities and the manner in which they are monitored and investigated by law enforcement agencies. Likewise, the Attorney General has the statutory duty and responsibility to enforce this state's consumer protection laws. In discharging that responsibility, the Attorney General is cognizant of the sensitive and personal nature of the complaints submitted by those consumers aggrieved by fraud or deceptive trade practices. In exercising its discretion pursuant to

section 6-1-111(2), the Attorney General is legitimately concerned that the primary source of information and intelligence necessary to effectively discharge its responsibilities under the CCPA would be stifled or significantly reduced should consumers fear that their otherwise personal and financial complaints would be subject to public disclosure. The Attorney General also has a legitimate interest in protecting, by maintaining the confidentiality of consumer reports, the reputation of businesses that could be unfairly harmed by complaints that are without legitimate grounds or purpose.

24. The Court therefore finds and concludes that the Attorney General's decision not to deem its consumer complaints to be public records is neither manifestly arbitrary, unreasonable, or capricious, and that the decision falls within the range of reasonable options available pursuant to law.

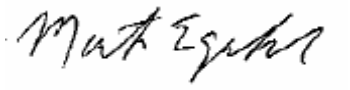
Order

Based on the foregoing, the Order to the Office of the Attorney to show cause is discharged, and the Application issued on behalf of the Plaintiffs is dismissed.

In light of the Court's resolution of this matter on its merits, the motion to quash the subpoena *duces tecum* served upon the Office of the Attorney General as to the materials involved in this case is granted.

SO ORDERED this 6th day of December, 2013.

BY THE COURT:



Martin F. Egelhoff
District Court Judge