

<p>DISTRICT COURT, DENVER COUNTY, COLORADO</p> <p>City and County Building 1437 Bannock Street, Room 256 Denver, Colorado 80202</p> <hr/> <p>JOHN W. SUTHERS, in his official capacity as Colorado Attorney General,</p> <p>Applicant,</p> <p>v.</p> <p>E.W. SCRIPPS COMPANY and SCRIPPS MEDIA, INC., d/b/a KMGH-TV,</p> <p>Interested Parties.</p>	<p style="text-align: center;"><b>^ COURT USE ONLY ^</b></p>
<p>JOHN W. SUTHERS, Attorney General DAVID C. BLAKE, Deputy Attorney General LEEANN MORRILL, First Assistant Attorney General* KATHRYN A. STARNELLA, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 6th Floor Denver, CO 80203 Telephone: 720-508-6176 FAX: 720-508-6041 E-Mail: kathryn.starnella@state.co.us Registration Numbers: 43170, 38742, 43619 *Counsel of Record</p>	<p>Case No.</p>
<p style="text-align: center;"><b>APPLICATION PURSUANT TO SECTION 24-72-204(6)(A), C.R.S. 2013</b></p>	

Applicant John W. Suthers, in his official capacity as Colorado Attorney General, hereby files this Application for an order pursuant to § 24-72-204(6)(a), C.R.S. (2012).

**JURISDICTION AND VENUE**

1. Applicant’s offices are in the City and County of Denver. Pursuant to C.R.S. § 24-72-204(6)(a), the official custodian of a record “may apply to the district

court of the district in which such record is located for an order permitting him or her to restrict such disclosure or for the court to determine if disclosure is prohibited.” *Id.* At least some of the requested records are within the City and County of Denver. Moreover, the decision to deny the records request was made in Denver. C.R.C.P. 98(b)(2). Therefore, jurisdiction and venue lie in the City and County of Denver.

## **PARTIES**

2. Applicant is the duly elected Attorney General of the State of Colorado.

3. Interested Party, the E.W. Scripps Company (“E.W. Scripps”), is a corporation and a person as defined in the Colorado Open Records Act (CORA), C.R.S. § 24-72-101, *et seq.* E.W. Scripps is a media company, which owns 19 television stations throughout the country, including KMGH-TV, in Denver, Colorado. E.W. Scripps, through KMGH-TV’s news division, seeks to inspect and copy certain records alleged to be in the custody and control of Applicant.

4. Interested Party, Scripps Media, Inc., d/b/a KMGH-TV and a subsidiary of E.W. Scripps, is a corporation and person as defined in CORA. KMGH-TV provides news programming through its news division and ABC-affiliate, 7News, in Denver, Colorado, and the surrounding area.

## **BACKGROUND**

5. Pursuant to the Colorado Consumer Protection Act, C.R.S. § 6-1-101, *et seq.*, Applicant is responsible for enforcing the state’s consumer protection laws. Thus, the Office of the Attorney General’s Consumer Protection Section is charged with protecting Colorado consumers from deceptive trade practices and other violations of the Colorado Consumer Protection Act.

6. In an effort to facilitate the investigation of consumer complaints against businesses, creditors, and collection agencies within Colorado, consumers may file complaints with the Attorney General’s Office, including through portals on the Office’s Web site, which is located at [www.coloradoattorneygeneral.gov](http://www.coloradoattorneygeneral.gov).

7. Since at least 2000, the Attorney General’s Office has worked with the Better Business Bureaus serving Colorado (the BBB’s) to assist consumers with the informal mediation of their complaints against businesses and, thereby, to help foster ethical business practices in Colorado.

8. In its long-standing consumer protection-focused relationship with the BBB's, the Attorney General's Office has shared consumer complaints with the BBB's on the condition that they maintain the confidentiality of those complaints. Those complaints do not include complaints that are referred to another state or federal law enforcement agency, to a law enforcement agency located in another state, or are part of an on-going investigation or litigation by the Attorney General's Office.

9. Like the Attorney General's Office, the BBB's advocate for an ethical marketplace where buyers and sellers can trust each other, set standards for marketplace trust, and denounce substandard marketplace behavior.

10. By sharing consumer complaints with the BBB's, the Attorney General's Office provides information about the business practices of the BBB's members, as well as non-member businesses, and enables consumers to obtain informal resolution of their complaints through the BBB's mediation services.

11. The Attorney General's Office is not aware of any instance in which the BBB's have publically disclosed consumer complaints shared by the Attorney General's Office.<sup>1</sup>

12. On or around June 11, 2013, 7News Investigative Reporter, Keli Rabon first contacted the Attorney General's Office seeking access to consumer complaints filed with Office against First American Monetary Consultants. *See* June 11, 2013 e-mail from K. Rabon to C. Tyler, attached as Exhibit A.

13. On June 12, 2013, Ms. Rabon informally requested electronic copies of the consumer complaints filed with the Office against First American Monetary Consultants. *See* Ex. A, June 12, 2013, 3:06 p.m., e-mail from K. Rabon.

14. On June 12, 2013, the Office of the Attorney General's Communications Director, Carolyn Tyler, declined to produce copies of the consumer complaints, noting the broad discretion afforded to the Attorney General under the Consumer Protection Act, C.R.S. § 6-1-111(2), to withhold production of the Offices' investigative or intelligence information. Ms. Tyler, however, informed Ms. Rabon that, since 2008, the Office has received 32 complaints against First

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<sup>1</sup> As a result of a recent change in policy, the BBB's now share basic, albeit redacted, versions of all consumer complaints they receive. As a result, the Attorney General's Office has suspended the sharing of its consumer complaints with the BBB's pending a further review of this new policy.

American Monetary Consultants, and about half of those complaints were received in the last two years. *See* Ex. A, June 12, 2013, 3:03 p.m., e-mail from C. Tyler. Ms. Tyler also offered to provide general summaries of the complaints received. *See id.*, June 12, 2013, 3:10 p.m., e-mail from C. Tyler.

15. On June 14, 2013, the Attorney General's Office, through Ms. Tyler, declined a further request for production of the consumer complaints, reiterated the Attorney General's broad discretion under the Consumer Protection Act, and noted complainants' expectation of confidentiality. *See* Ex. A, June 14, 2013, 3:09 p.m., e-mail from C. Tyler.

16. On July 19, 2013, Ms. Tyler declined another request by Ms. Rabon for the production of consumer complaints filed against First American Monetary Consultants. *See* Ex. B, July 19, 2013, 12:45 p.m., e-mail from C. Tyler.

17. One week later, on July 25, 2013, Interested Party E.W. Scripps, through its deputy general counsel, David M. Giles, demanded production of the consumer complaints, asserted that the decision to withhold production was "arbitrary and capricious and counter to the letter and spirit of CORA," and warned that it "will consider all available options, including pursuing litigation." Mr. Giles represented that his office serves as corporate counsel to KMGH-TV. *See* Ex. C, July 25, 2013 letter from E.W. Scripps.

18. In an August 2, 2013 response to E.W. Scripps' July 25, 2013 letter, the Attorney General's Office discussed: (1) the confidential nature of consumer complaints; (2) the Attorney General's discretion to prohibit public inspection of consumer complaints under C.R.S. § 6-1-111(2); and (3) why consumer-protection interests are served by sharing consumer complaints with the BBB's, but are undermined by sharing the same information with other parties, including the media. The letter also restated the offer to provide a generic description of the complaints provided. *See* Ex D, Letter to David Giles. This is entirely consistent with the long-standing policy of the Attorney General to protect and preserve the privacy of victims of consumer fraud who file complaints with his Office.

19. On August 6, 2013, Michael de Yoanna, a senior producer from 7News, submitted a new CORA request for "Every complaint, including consumer complaints, the Colorado Attorney General's Office has shared between Jan. 1, 2011[,] and today 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." *See* Ex. E, August 6, 2013 e-mail from M. de Yoanna.

20. On August 9, 2013, Ms. Tyler informed Mr. de Yoanna that that the Attorney General's Office had received correspondence from E.W. Scripps' attorney regarding Ms. Rabon's similar CORA requests and that the professional rules of ethics required the Attorney General's Office to cease further communications concerning the two CORA requests without approval from E.W. Scripps' attorney. *See Ex. E, August 9, 2013, 3:39 p.m., e-mail from C. Tyler.*

21. On August 13, 2013, the Attorney General's Office responded to Mr. de Yoanna's subsequent communications by declining his request for every consumer complaint, pursuant to the discretion afforded to the Attorney General's Office, as custodian of records, under the Consumer Protection Act and CORA. Additionally, Mr. de Yoanna was reminded that ethics rules prohibited further unauthorized communications concerning the Mr. de Yoanna's and Ms. Rabon's CORA requests. *See Ex. E, August 13, 2013 e-mail from D. Blake.*

22. On August 14, 2013, E.W. Scripps' deputy general counsel, David M. Giles, authorized the Attorney General's Office to communicate directly with KMGH-TV personnel regarding their CORA requests. *See Ex. E, August 14, 2013, 1:12 p.m., e-mail from D. Giles.*

23. That same day, Mr. de Yoanna renewed his request – for a third time – for copies of consumer complaints that the Colorado Attorney General's Office has shared with “non-governmental third parties with business and non-profits, 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.” *See Ex. E, August 14, 2013, 3:02 p.m., e-mail from M. de Yoanna.*

24. Pursuant to the Colorado Open Records Act, C.R.S. § 24-72-204(2)(a)(I), the custodian of records may deny the right of inspection of any records of the investigations conducted by any sheriff, prosecuting attorney, or police department, any records of the intelligence information or security procedures of any sheriff, prosecuting attorney, or police department, or any investigatory files compiled for any other law enforcement purpose.

25. The Colorado Court of Appeals has narrowly construed C.R.S. § 24-72-204(2)(a)(I) to apply to records concerning criminal, not civil, investigations. *See Land Owners United, LLC v. Waters*, 293 P.3d 86, 94-95 (Colo. App. 2011).

26. The Colorado Consumer Protection Act is primarily a civil, not criminal, enforcement statute.

27. Pursuant to the Colorado Open Records Act, C.R.S. § 24-72-204(2)(a)(IX)(a), the custodian of records may deny the right of inspection of any records of *ongoing* civil or administrative investigations conducted by the state or a state agency, unless the investigation focuses on a person or persons inside the investigative agency.

28. In 2012, the General Assembly added the provisions contained within C.R.S. § 24-72-204(2)(a)(IX)(a) via House Bill 12-1036, which became effective on June 7, 2012.

29. As a result of the 2012 amendments to CORA, not all consumer complaints received or maintained by the Attorney General's Office involve ongoing civil or administrative investigations conducted by the state or an agency of the state. However, those amendments did not affect the Attorney General's separate discretion to withhold such records from public inspection under C.R.S. § 6-1-111(2).

30. Pursuant to the Colorado Consumer Protection Act, C.R.S. § 6-1-111(2), the Applicant has the discretion to make available for public inspection records of investigations or intelligence information obtained under the Act.

31. The provisions contained in the Colorado Consumer Protection Act, at C.R.S. § 6-1-111(2) existed prior to the 2012 amendments to CORA.

32. Consumer complaints filed with the Attorney General's Office, including those filed against First American Monetary Consultants, comprise intelligence information obtained under the Colorado Consumer Protection Act. C.R.S. § 6-1-101, *et seq.*

33. A records custodian may apply to this court for a determination of whether disclosure is required or prohibited under the following circumstances:

[I]f the official custodian is unable, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if disclosure of the public record is prohibited pursuant to this part 2, the official custodian may apply to the district court of the district in which such record is located for an order permitting him or her to restrict such disclosure or the court to determine if disclosure is prohibited.

C.R.S. § 24-72-204(6)(a).

34. Applicant brings this case in good faith. After exercising reasonable diligence and after reasonable inquiry, Applicant is unable to determine whether

disclosure is prohibited. In particular, this case presents the following issue of first impression:

Whether the earlier-added and more specific provisions of the Consumer Protection Act, at C.R.S. § 6-1-111(2), which afford the Applicant with discretion to deny public inspection of consumer protection intelligence information, trumps the later-added and more general provisions of the Colorado Open Records Act, at C.R.S. § 24-72-204(2)(a)(IX)(A), which allow the Attorney General to deny public inspection of records concerning “ongoing civil or administrative investigations.”

### **FIRST CLAIM**

35. Applicant adopts and incorporates paragraphs 1-34 of this Application as if fully set forth herein.

36. A custodian may refuse inspection of records if disclosure would be contrary to state statute. C.R.S. § 24-72-204(1)(a).

37. The consumer complaints, which E.W. Scripps seeks to inspect, constitute records of investigations or intelligence information that Applicant obtained under the Consumer Protection Act.

38. Pursuant to the Consumer Protection Act, C.R.S. § 6-1-111(2), the Applicant has the discretion to grant or deny requests for public inspection of consumer complaints obtained under the Act.

39. The provisions of C.R.S. § 6-1-111(2) preceded the 2012 amendments to CORA, which included the addition of C.R.S. § 24-72-204(2)(a)(IX)(A).

40. The provisions of C.R.S. § 6-1-111(2), which concern “the records of investigations or intelligence information of the attorney general . . . obtained under [the Consumer Protection Act],” are more specific than the provisions contained in C.R.S. § 24-72-204(2)(a)(IX)(A), which concern “[a]ny records of ongoing civil or administrative investigations conducted by the state or an agency of the state.”

41. The Applicant is entitled to a declaration that the more-specific and earlier provisions of C.R.S. § 6-1-111(2) trump the more general and later-added provisions of C.R.S. § 24-72-204(2)(a)(IX)(A), and that the Applicant has discretion under C.R.S. § 6-1-111(2) to grant or deny requests for public inspection of consumer complaints.

WHEREFORE, the Applicant requests that the Court issue a declaration that he has complied with CORA in all respects.

Respectfully submitted this 15th day of August, 2013.

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