

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
Plaintiffs: THE INDEPENDENCE INSTITUTE, LLC  v.  Defendants: THE COLORADO HEALTH BENEFIT EXCHANGE aka CONNECT FOR HEALTH COLORADO, AND LINDY HINMAN, BRYCEN BAKER, PROTEUS DUXBURY, KYLA HOSKINS AND JACOB BAUS, in their official capacities.	
<i>Attorneys for Plaintiff:</i> Geoffrey N. Blue #32684 Scott E. Gessler #28944 Steven A. Klenda #29196 Adroit Advocates, LLC 1624 Market Street, Suite 202 Denver, Colorado 80202 Phone: 720-432-5705 <a href="mailto:gblue@adroitadvocates.com">gblue@adroitadvocates.com</a> <a href="mailto:sgessler@adroitadvocates.com">sgessler@adroitadvocates.com</a> <a href="mailto:sklenda@adroitadvocates.com">sklenda@adroitadvocates.com</a>	Case No: 2015CV031310  Courtroom: 376
<b>Plaintiff's Motion for Summary Judgment</b>	

**Introduction**

Connect for Health Colorado (“CFHC”) has used an unprecedented theory to deny CORA records. It has used an internal policy to deny records, and it now justifies that policy as necessary to limit the number of records produced. Both the CORA and the supporting

caselaw do not allow an internal policy to be used to deny records otherwise discoverable under CORA.

Accordingly, this case presents an important issue – whether the agency can carve out new exceptions to the CORA by issuing an internal policy.

### **Factual Overview**

As this case has been postured, the facts are relatively straightforward. Todd Shepherd, an Independence Institute employee, submitted three CORA requests for emails sent by or to employees at CFHC:

1. On January 28, 2015, all emails from four employees, during a two-day time period. CFHC has identified 460 responsive emails with 85 attachments, for a total of 1463 pages;
2. On February 11, 2015, all emails from four employees, during a one-day time period. CFHC has identified 320 responsive emails, with 33 attachments, for a total of 707 pages;
3. On February 23, 2015, all emails from two people, during a two-hour time period. CFHC has identified 171 responsive emails with 19 attachments, for a total of 572 pages.<sup>1</sup>

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<sup>1</sup> *Defendant's Reply Brief in Support of Motion for Summary Judgment pursuant to C.R.C.P. 56(a)*, p. 3. Independence Institute refers to the three requests, collectively as “the CORA Requests.”

Without undertaking any efforts to identify documents responsive to Mr. Shepherd's CORA requests<sup>2</sup>, CFHC refused to produce documents responsive to the CORA Requests. CFHC instead demanded Shepherd submit new requests that included the subject matter of the emails. As authority for its refusal, CFHC pointed to its CORA policy, which required document requests from the public to include the "subject matter." CFHC refused to fulfill Shepherd's CORA requests that form the basis for this current matter.

CFHC justifies its "subject matter" policy as necessary to prevent overly burdensome CORA requests. Specifically, CFHC's claims its burden stems from the need to review the documents, so that it does not release information that violates state or federal law. Without the "subject matter" requirement, it argues that the volume of CORA requests – including these CORA requests – is administratively burdensome.

### **Argument**

#### **A. The CORA contains no statutory exception that allows CFHC to deny documents.**

The CORA favors disclosure, and the governmental entity bears the burden of proving any exception to disclosure.<sup>3</sup> The CORA "creates a presumptive right of public

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<sup>2</sup> Defendant's *Response to Interrogatory No. 3* ("CFHC thus undertook no efforts to identify documents responsive to Mr. Shepherd's broad and non-specific CORA requests.")

<sup>3</sup> *Zubeck v. El Paso County Retirement Plan*, 961 P.2d 597, 600 (Colo. App. 1998); *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1156 (Colo. App. 1998); *Bodelson v. Denver Pub. Co.*, 5 P.3d 373, 377 (Colo. App. 2000); *Shook v. Pitkin County Board of County Commissioners*, 2015 WL 3776876, \*2 (Colo. App. 2015); *see also Marks v. Koch*, 284 P.3d 118, 121 (Colo. App. 2011).

inspection of public records,”<sup>4</sup> and courts “narrowly construe exceptions from CORA’s presumption in favor of public access to public records.”<sup>5</sup> Here, CFHC cannot point to any statutory exemption in CORA that allows it to deny records. Rather, it explicitly relies upon its CORA policy, which requires all requests to contain a “subject matter.” For this reason alone, CFHC must produce the documents.

There is no dispute that CFHC can require Shepherd to pay for retrieval and copying costs, or can refuse to produce documents during non-business hours, or can produce the documents in the form that it maintains them. These types of rules govern the manner of production, not whether the underlying documents themselves can be disclosed.

**B. The CORA does not allow CHFC to carve out a new CORA exemption by administrative policy.**

Colorado Statute allows a custodian of records to make rules governing the inspection of records, subject to very specific limitations. Specifically,

All public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise provided by law, but the official custodian of any public records may make such rules with reference to the inspection of such records as are reasonably necessary for the protection of such records and the prevention of unnecessary interference with the regular discharge of the duties of the custodian or the custodian's office.<sup>6</sup>

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<sup>4</sup> *Mountain Plain Investment Corporation v. Parker Jordan Metropolitan District*, 312 P.3d 260 (Colo. App. 2013).

<sup>5</sup> *City of Ft. Morgan v. Eastern Colorado Pub Co.*, 240 P.3d 481, 487 (Colo. App. 2010).

<sup>6</sup> C.R.S. § 24-72-203(1)(a).

Accordingly, in order to meet this statutory exception, CHFC must prove that its policy is:

- (1) with reference to the inspection of such records
- (2) reasonably necessary for the protection of such records, and
- (3) reasonably necessary for the prevention of unnecessary interference with the regular discharge of its duties.

1. *The “subject matter” requirement has no basis in law, because it is not “with reference to the inspection of such records.”*

According to both the statutory plain language and directly controlling case law, a policy may only be used to regulate the manner of access to the information, not whether a state entity must provide access to the documents sought. Accordingly, a custodian may not create a rule limiting the type of documents available for inspection. Rather, any rules must be “*with reference to the inspection of such records as are reasonably necessary. . .*”<sup>7</sup> Rules may govern the manner in which records may be inspected, like available times for inspection, the timeframe for responding, or the fees charged to find the records.

Consistent with this plain language analysis, the Colorado Court of Appeals has expressly held that an agency’s policy may not be used to deny access to records that are otherwise subject to disclosure under CORA. For example, in upholding a policy that allowed an agency to deny production of records in a specific format, the court in *Tax Data*

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<sup>7</sup> C.R.S. 24-72-203(1)(a) (emphasis supplied).

*Corp. v. Hutt*, emphasized that “the regulations do not *deny* access to electronically stored public records, but merely regulate the *manner* of access to public *information*.”<sup>8</sup>

And in reviewing a delay in producing documents, the Court of Appeals ensured there was:

no provision in the policy that can be read as a denial of access. Moreover, no evidence was presented to the trial court that SWCD had ever failed to provide access in response to record requests conforming with its policy; and although plaintiffs in this case did not receive all responsive documents until nearly three months after their initial request, they were not denied access.<sup>9</sup>

By contrast, CHFC repeatedly argues that it may deny access to documents under its policy. Colorado law firmly holds that a policy cannot be used to deny documents that must otherwise be made public.

CFHC’s “subject matter” requirement is a substantive limitation on the types of documents that it will produce, not a “reasonably necessary” method governing the manner in which CFHC can produce documents. A “reasonably necessary” rule governing the inspection of documents includes:

- (1) Requiring a “nominal research and retrieval fee,”<sup>10</sup>
- (2) Prohibiting the removal of original records from the custodian’s office,<sup>11</sup>

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<sup>8</sup> *Tax Data Corp. v. Hutt*, 826 P.2d 353, 357 (Colo. App. 1991) (emphasis in original).

<sup>9</sup> *Citizens Progressive Alliance v. Southwestern Water Conservation Dist*, 97 P.3d 308, 312-313 (Colo. App. 2004).

<sup>10</sup> *Black v. Southwestern Water Conservation District*, 74 P.3d 462, 472 (Colo. App. 2003).

<sup>11</sup> *Citizens Progressive Alliance*, 97 P.3d at 312.

- (3) Limiting records inspection to work hours;<sup>12</sup>
- (4) Prioritizing “previously scheduled activities” over fulfillment of CORA requests.<sup>13</sup>
- (5) Providing information in a customary format;<sup>14</sup>
- (6) Requiring a deposit before records production.<sup>15</sup>

Thus, a custodian may regulate the manner of access to records and the form the records take.<sup>16</sup>

But CFHC’s “subject matter” policy is a wholly different type of regulation. It does not regulate the manner in which CFHC produces records, such as the time, place or procedures for record inspection. Nor does it regulate the form of production, such as paper, microfiche, or type of electronic file. Rather, the policy requires the person requesting the records to change the substance of the request itself, to include the “subject matter” of the records he seeks. This condition has nothing to do with “the inspection of . . . records,” and everything to do with the substance and content of the request itself. It is well

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Tax Data Corp. v. Hutt*, 826 P.2d 353, 356 (Colo. App. 1991).

<sup>15</sup> *Mountain Plains Investment Corporation v. Parker Jordan Metropolitan District*, 312 P.3d 260 (Colo. App. 2013).

<sup>16</sup> *Tax Data Corp.*, 826 P.2d at 357.

established that a custodian may not limit access to the “informational content” of the records,<sup>17</sup> but rather may only regulate access to records in the form they are normally kept or produced. Under the “subject matter” requirement, CFHC has denied public access to records unless the requester identifies a specific subject matter that he seeks. It does not regulate the mechanics of producing records, but rather creates a new exception to CORA: a custodian may deny records if the public does not identify a subject matter.

A CORA request must be specific enough to enable a custodian to identify the requested records, and a custodian may require “specificity in records requests.”<sup>18</sup> And there can be no dispute that Shepherd’s CORA requests contained the level of specificity necessary to enable CFHC to identify and retrieve the records. Unlike a request for ten years of documents relating to all communications with a sovereign nation, Shepherd did not submit an “impossibly broad” request.<sup>19</sup> And CFHC has, during the course of this litigation, identified and retrieved all emails identified in Shepherd’s requests.<sup>20</sup>

The “subject matter” requirement is not “reasonably necessary” to allow CFHC to identify documents. CFHC identified the documents in this case. And many other types of

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<sup>17</sup> *Id.* at 356.

<sup>18</sup> *Citizens Progressive Alliance*, 97 P.3d at 312.

<sup>19</sup> *Id.*

<sup>20</sup> *See* n. 1, *supra*.



requests that do not contain a subject matter nonetheless provide enough specificity to enable a records custodian to identify and retrieve documents.

Further, CFHC has admitted that the “subject matter” requirement is not designed to enable the custodian to have enough specificity to identify and make documents available for inspection. Instead, CFHC has enacted the “subject matter” requirement to restrict the volume of documents it has to make available, because it claims that too many documents create a burden that is too great. This is discussed below. It is important, however, to note that CFHC seeks “specificity” not so that it can find documents, but rather so it can reduce the number of documents it has to produce.

3. *The “subject matter” policy is not necessary to enable CFHC protect documents.*

CORA also requires that a governmental agency’s policy be “necessary for the protection of such records.”<sup>21</sup> Here, CFHC’s “subject matter” requirement is not necessary to protect documents from being damaged or from being altered. Limiting a member of the public’s request to documents identified by subject matter has no logical connection to protecting documents themselves.

4. *An agency cannot invoke a CORA policy to avoid the work necessary to produce documents.*

Finally, CFHC may not invoke the “subject matter” as “reasonably necessary for the prevention of unnecessary interference with the regular discharge of its duties.”<sup>22</sup> This

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<sup>21</sup> C.R.S. § 24-72-203(1)(a).

<sup>22</sup> *Id.*

“unnecessary interference” clause “strikes a balance between the statutory right of members of the public to inspect and copy public records and the administrative burdens that may be placed upon state agencies in responding to such requests.”<sup>23</sup> Relying upon this provision, CFHC has vigorously asserted that’s its “subject matter” requirement is necessary to prevent CFHC from facing unnecessary administrative burden. But upon inspection, the claimed administrative burden cannot justify the “subject matter” exception.

To be sure, *any* CORA request will create some burden on a government agency; CORA is a law that imposes obligations on governmental organization, and therefore governmental organizations must devote resources to meet their legal mandates. In that sense obligations imposed by CORA are just like obligations imposed by any other statute. And when it created the CFHC, the Colorado General Assembly specifically mandated that CFHC assume CORA obligations.<sup>24</sup> Furthermore, CORA requires less resources than many other laws, because CFHC, like any other governmental organization, can shift much of the cost of retrieval and copying to the public, by allowing public agencies to charge an hourly rate for the work its employees must to perform to meet CORA obligations.<sup>25</sup>

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<sup>23</sup> *Black v. Southwestern Water Conservation District*, 74 P.3d 462, 471 (Colo. App. 2003).

<sup>24</sup> C.R.S. § 10-22-105(3)(c).

<sup>25</sup> C.R.S. 24-72-205(6)(a).

Nonetheless, CFHC insists on arguing that Shepherd's request provides an undue administrative burden, specifically pointing to its necessity of reviewing documents to ensure there is no unauthorized release of information.<sup>26</sup> Although CFHC provides a lengthy list of state and federal laws for which it claims it must review the documents, it offers no evidence to support its contentions, and indeed firmly states that any evidence is irrelevant to determining whether it must produce responsive documents. Thus, CFHC has stated that the costs for fulfilling CORA requests are irrelevant,<sup>27</sup> that general costs and budgetary constraints affecting CORA requests are irrelevant,<sup>28</sup> that past CORA requests are

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<sup>26</sup> *Defendant's Reply Brief in Support of Motion for Summary Judgment Pursuant to C.R.C.P. 56(a)( and (b)*, pp. 10-11.

<sup>27</sup> Plaintiff's ***Interrogatory No. 5***. Detail all costs directly associated with fulfilling CORA requests from January 1, 2014, through and including December 31, 2014.

Defendant's *Response*: Objection. Interrogatory No. 5 is irrelevant to any claim or defense in this action [and] is overbroad, burdensome, and harassing.

<sup>28</sup> Plaintiff's *Interrogatory No. 9*. Identify and explain all budgetary constraints and costs imposed on CHFC by Open Records Act Requests.

Defendant's *Response*: Objection, Interrogatory No 9 is irrelevant to any claim or defense in this action. . . . [R]esponding to CORA requests requires the devotion of time and effort from its employees and the expenditure of physical and financial resources. . . ."

irrelevant,<sup>29</sup> and that all considerations that went into developing the “subject matter” policy requirement are irrelevant.<sup>30</sup>

A governmental entity cannot deny documents based on a bald claim of administrative inconvenience without any factual support. For example, the Colorado Board of Health established costs for copying and sending patient documents, as allowed by federal law. But the Colorado Court of Appeals rejected its attempt to obtain summary judgment without establishing a factual basis to support the reasonableness of its fee schedule.”<sup>31</sup> Just as the court prohibited the Colorado Board of Health from justifying its document fee schedule without evidence, CFHC cannot establish, through mere assertion, that its policy is

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<sup>29</sup> Plaintiff’s ***Request for Production No. 1***. Produce all CORA requests made to Connect for Health from January 1, 2014 to the present.

Defendant’s *Response*: Objection. Interrogatory No. 7 is irrelevant to any claim or defense in this action. . . . Notwithstanding this objection, and without prejudice to or waiver of it, documentation relating to CORA requests made by Mr. Shepherd has been identified in disclosures and are in the possession of the Plaintiff.

<sup>30</sup> Plaintiff’s ***Interrogatory No. 4***. Explain the process by which CHFC developed its CORA policy, including the personnel involved and evidence relied upon.

Defendant’s *Response*: Objection. Interrogatory No. 4 is irrelevant to any claim or defense in this action. . . . [CFHC then identified 5 individuals, but provided no information about the process of developing its CORA policy.]

<sup>31</sup> *Colorado Consumer Health Initiative v. Colorado Bd. of Health*, 240 P.3d 525, 530 (Colo. App. 2010).

“reasonably necessary.” CFHC bears the burden of proving an exception to disclosure, and its refusal to provide any evidence shows that it has not met this burden.<sup>32</sup>

Just how heavy of a burden CFHC faces is truly unclear. Many, many government agencies deal in sensitive information. The range is enormous, including sensitive regulatory information, personal mental health information, trade secrets, confidential voter file information, and others. To be sure, CFHC is unique – but it is also just like other unique agencies that deal with many types of sensitive information.

And it is unclear whether any of the long list of asserted review filters meaningfully apply to CFHC and create much of a burden at all. CFHC is not an insurer. CFHC is not a medical provider. Rather, CFHC was established to “foster a competitive marketplace for [health] insurance,” and it may not “solicit bids or engage in the active purchasing of insurance.”<sup>33</sup> But CFHC would have this court accept that it faces incredibly enormous burdens just reviewing documents, without any evidence, without any proof, with nothing more than bare statement.

CFHC complains of a burden caused by reviewing documents. At its heart, CFHC’s “subject matter” requirement only reduces these burdens by limiting the actual number of documents made available. CFHC makes no claim that the “subject matter” requirement or a “specificity” requirement reduces the type of review CFHC must engage in. Those

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<sup>32</sup> *Zubeck*, 961 P.2d at 600; *Freedom Newspapers*, 961 P.2d at 1156; *Bodelson*, 5 P.3d at 377; *Shook*, 2015 WL 3776876 at \*2; *see also Marks*, 284 P.3d at 121.

<sup>33</sup> C.R.S. § 10-22-104.

requirements do not make the review go faster; they do not reduce the number of statutes that apply; they do not eliminate the need for attorney review. Instead, they simply choke off the number of documents so CFHC doesn't have to work as hard.

And the “subject matter” requirement or the “specificity” requirement does not even fulfill CFHC's claimed goal. A request that contains a broad subject matter can produce just as many documents – even more – than the number of documents that respond to the CORA Requests. Every single one of the administrative burdens CFHC complains of remains in place. The “subject matter” or “specificity” requirements do nothing to limit those burdens of reviewing documents.

Finally, even if CFHC were to prove the reasonableness of its policy, that doesn't justify CFHC's denial of Shepherd's requests. Even if a policy appears reasonable on its face, a governmental entity must still show that it hasn't improperly denied access to documents for any specific request. Thus, when the Court of Appeals allowed a custodian to delay the production of records according to its policy, the court explicitly stated that its “determination [did] not foreclose future challenges to [the custodian's] reliance on the policy in circumstances different from those present here.”<sup>34</sup> An agency cannot woodenly apply its policy to deny requests.

Here, CFHC can review and make documents available. It has identified the documents, it has retrieved and stored the documents, and it has counted the number of

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<sup>34</sup> *Citizens Progressive Alliance v. Southwestern Water Conservation Dist*, 97 P.3d 308, 313 (Colo. App. 2004).

pages in the documents. It can review the documents and make them available to Shepherd. The fact remains that Shepherd made three, very narrow, specific requests. Like other agencies, CFHC clearly has attorneys on staff who can review these documents, and a review is no different from document reviews that attorneys regularly engage in, such as other CORA requests, requests under federal open information laws, or discovery requests under the Colorado or Federal Rules of Civil Procedure.

At one point, CFHC argued that with respect to Shepherd's requests, the "breadth and depth of email correspondence to and from CHFC under these circumstances is literally limitless."<sup>35</sup> Diplomatically put, this has proven to be an overstatement. But it illustrates that CHFC has substituted melodramatic rhetoric instead of providing facts that demonstrate a burden.

CFHC is fully capable of making the documents available that Shepherd requested. It should do so immediately.

Respectfully submitted this 23rd day of May 2016,

ADROIT ADVOCATES, LLC

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<sup>35</sup> *Motion for Summary Judgment* at 13.

**CERTIFICATE OF SERVICE**

I certify that on this 23rd day of May 2016, the foregoing *Response to Defendants' Motion for Summary Judgment* was electronically filed and served via ICCES on the following:

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