District Court City and County of Denver, Colorado 1437 Bannock Street Denver, CO 80202	DATE FILED: July 12, 2016 10:32 AM CASE NUMBER: 2015CV31310
Plaintiff: THE INDEPENDENCE INSTITUTE, v. **Defendant:** THE COLORADO HEALTH BENEFIT EXCHANGE.	Case No. 15CV31310 Courtroom 376

ORDER

This matter comes before the Court on three motions:

(1) "Defendants' Motion for Summary Judgment and Brief in Support Thereof Pursuant to C.R.C.P. 56(a) and (b)," filed March 3, 2016. Plaintiff submitted a Response on April 11, 2016, and Defendant, a Reply on May 6, 2016.

(2) "Plaintiff's Motion for Summary Judgment" filed on May 23, 2016. Defendant submitted a Response on June 13, 2016 and Plaintiff, a Reply on June 27, 2016.

(3) "Defendant's Motion for Determination of Questions of Law Pursuant to C.R.C.P. 56(h)" on May 23, 2016. To this, Plaintiff submitted a Response on June 14, 2016, and Defendant, a Reply on June 27, 2016.

As the issues in these three motions are interrelated, the Court will address them in one Order. The Court, having reviewed the Motions, Responses and Replies, along with exhibits attached thereto and referenced therein, the case file, applicable law, and being otherwise fully advised, does hereby find and order as follows:

BACKGROUND

Connect for Health Colorado ("CFHC") is an official custodian of records for purposes of requests for records made under the Colorado Open Records Act ("CORA"), § 24-72-101, C.R.S. On January 28, 2015, Todd Shepherd, an employee of the Independence Institute ("Institute"), a Colorado non-profit, made a CORA request to CFHC seeking certain emails of the following people: Lindy Hinman, Brycen Baker, and Proteus Duxbury.

On February 2, 2015, CFHC replied to Mr. Shepherd's CORA request and asked that he narrow his request as to topic or subject matter due to the amount of work required to review each email for privileged information. On February 4, 2015, Mr. Shepherd replied to CFHC's email, disagreeing about a need to modify his request. The parties continued an email chain wherein CFHC repeatedly asked Mr. Shepherd to modify his CORA request and Mr. Shepherd refused to do so. Mr. Shepherd also expanded his request to include all of the writings and emails on certain dates for several other CFHC employees including Interim CEO Gary Drews. The CORA requests at issue are dated January 28, 2015, February 11, 2015, and February 23, 2015.

On April 13, 2015, the Institute brought this case against CFHC and several people who worked at CFHC. On May 5, 2016, the Court granted Plaintiff's motion to dismiss the individual Defendants.

In its Motion for Summary Judgment, CFHC argues that the Institute's employee's requests are too broad and unduly burdensome to produce and asks that Mr. Shepherd identify the subject matter of the emails he seeks to inspect pursuant to their internal policy. CFHC requests that the Court grant summary judgment on its counterclaim for declaratory relief and dismiss Plaintiff's claims. The Institute, in turn, requests summary judgment on its claims and requests that the Court order CFHC to provide the requested documents for review. In its Motion for Determination of Questions of Law, Defendant seeks a determination by this Court that its CORA policies are enforceable and that CFHC has shown cause why it is not permitting these requests.

STANDARD OF REVIEW

Summary Judgment

Under C.R.C.P. 56(c), summary judgment is proper only if the pleadings and supporting documents establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Civil Serv. Comm'n v. Pinder*, 812 P.2d 645, 649 (Colo. 1991). The moving party bears the burden of establishing the non-existence of a genuine issue of material fact. *Id.*

When a party moves for summary judgment, its initial burden is satisfied by demonstrating to the court that there is an absence of evidence in the record to support the nonmoving party's case. If the moving party meets this initial burden, the burden then shifts to the nonmoving party to establish that there is a triable issue of fact. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712-13 (Colo. 1987). If the nonmoving party fails to do so, a trial court is left with no alternative but to conclude that no genuine issue of material fact exists. *Pinder*, 812 P.2d at 649. All doubts as to the presence of disputed facts must be resolved in favor of the nonmoving party. *Southard v. Miles*, 714 P.2d 891, 895 (Colo. 1986). However, where, as here, there is no genuine issue of material fact, the Court may enter summary judgment as a matter of law.

Determination of Question of Law

The same principles governing summary judgments apply to motions brought pursuant to Rule 56(h). *See Coffman v. Williamson*, 348 P.3d 929, 934 (Colo. 2015). Rule 56(h) provides that at any time after the last required pleading, a party may move for a determination of a question of law.

DISCUSSION

Unless they are specifically exempt, all public records must be made available for public inspection. § 24-72-203, C.R.S. CORA defines "public records" as writings made, maintained, or kept by a state agency. § 24-72-202(6)(a)(I). "Electronic mail" ("email") sent or received as part of a CFHC's employee's work duties is considered a

public record. § 24-72-202(1.1), C.R.S. The person to whom those emails belong is the "custodian." *Id.*

Courts "narrowly construe exceptions from CORA's presumption in favor of public access to public records." *City of Fort Morgan v. E. Colo. Pub. Co.*, 240 P.3d 481, 487 (Colo. App. 2010). However, the Colorado Supreme Court has stated that "[a]lthough generally CORA favors broad disclosure, the General Assembly recognized that not all documents should be subject to public disclosure." *Wick Comm. Co. v. Montrose Cty. Bd. of Cty. Comm.*, 81 P.3d 360, 364 (Colo. 2003).

For parties whose requests are denied by a custodian, § 24-72-204(5) provides the appropriate remedy. It reads, in relevant part:

> [A]ny person denied the right to inspect any record covered by this part 2 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; except that, at least three business days prior to filing an application with the district court, the person who has been denied the right to inspect the record shall file a written notice with the custodian who has denied the right to inspect the record informing said custodian that the person intends to file an application with the district court.

CFHC argues that it has shown cause as to why Plaintiff's CORA request has not been honored. CFHC states that Plaintiff's request does not comply with CFHC's regulation regarding the form in which it receives CORA requests and that Plaintiff's request must be more specific.

Section 24-72-203(1)(a) allows a custodian of records to make rules governing the inspection of the records. Specifically, it states:

> 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.

CFHC claims that its actions with respect to this CORA request are consistent with Colorado law in requiring Mr. Shepherd to specify the records requested and spell out reasonable procedures. Further, CFHC stated that it would provide a time estimate after receiving a narrowed request. In support, CFHC cites *Pruitt v. Rockwell*. 886 P.2d 315 (Colo. App. 1994).The court in *Pruitt* held that the "Act [struck] 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." *Id.* at 317. To that end, the court held that the CORA statutes allowed for agencies to make rules and regulations that were reasonably necessary for the protection of the records and to prevent unnecessary interference with the custodian's regular duties. *Id.*

The Court finds that the limitation discussed by the *Pruitt* court is directed to the manner in which the public records are made available, and not to the nature of the public records themselves. CFHC has not provided any evidence that the records sought are not "public records" under CORA. Further, the Court finds that the statute, § 24-72-203(1)(a), speaks only to the protection of the records and the way in which they made accessible. It does not provide a custodian leeway to decide which documents can be made accessible to the public based on the documents' subject matter. *See Tax Data Corp. v. Hutt*, 826 P.2d 353, 356-57 (Colo. App. 1991) (holding that the purpose of the Open Records Act is to ensure the public's right to information but allows a custodian control over the form in which the information is provided, so long as the form is "reasonably accessible" and "does not alter the contents of the information").

The Court finds that the Plaintiff has sufficiently specified the records requested and CFHC can easily identify the records sought. CFHC may state that some of these emails fall under the enumerated exceptions to CORA and therefore do not need to be produced; however, to date, it has not done so.

CONCLUSION

The Court hereby **DENIES** CFHC's Motion for Summary Judgment and **GRANTS** Plaintiff's Motion for Summary Judgment. Plaintiff's three CORA requests are valid and appropriate. The Court **DENIES AS MOOT** Motion for Determination of Questions of Law.

The Court awards Plaintiff reasonable attorney fees pursuant to § 24-72-204(5), C.R.S.

Dated this 12th day of July 2016.

SO ORDERED.

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ELIZABETH A. STARRS
Denver District Court Judge