

DISTRICT COURT, DENVER COUNTY, COLORADO Second Judicial District Denver City & County Bldg 1437 Bannock Street Denver, CO 80202	DATE FILED: May 7, 2018 11:25 AM FILING ID: B545ABB96C816 CASE NUMBER: 2018CV31668
DOLCEFINO COMMUNICATIONS, LLC DBA DOLCEFINO CONSULTING, <i>Plaintiff,</i> v. GERALD ROME, in his official capacity as the Securities Commissioner for the Colorado Division of Securities, <i>Defendant.</i>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
(attorney signature bloc)	Case Number: Div.: Ctrm.:
<p style="text-align: center;">COMPLAINT AND APPLICATION FOR ORDER TO SHOW CAUSE</p>	

COMES NOW Dolcefino Communications, LLC dba Dolcefino Consulting, Plaintiff herein, and files this its Complaint and Application for Order to Show Cause against Gerald Rome, Securities Commissioner for the Colorado Division of Securities, Defendant herein, and in support thereof, would respectfully show the Court the following:

I. INTRODUCTION

1. The legislative declaration to the Colorado Open Records Act (“CORA”) is crystal clear: “[i]t is declared 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 . . . otherwise specifically provided by

law.” This lawsuit seeks to enforce the public’s right to obtain, inspect and examine public data as Colorado’s legislature has required.

2. The Defendant, the Securities Commissioner for the Colorado Division of Securities, Gerald Rome (the “Commissioner”), has ignored the legislature’s mandate, refusing to answer Plaintiff’s valid, written CORA requests. Accordingly, Plaintiff has been left with no choice but to ask for the Court to intervene in this matter and require the Commissioner to comply with his statutory obligations.

II. PARTIES & SERVICE

3. Plaintiff Dolcefino Communications, LLC DBA Dolcefino Consulting (“Dolcefino” or “Plaintiff”), is a limited liability company formed under the laws of the State of Texas with its principal place of business in Harris County, Texas. Plaintiff is a “person” as defined under C.R.S. § 24-72-202(3).

4. Defendant Gerald Rome is the custodian for the Colorado Division of Securities. Rome is the legal custodian of the data at issue in this lawsuit. Further, Mr. Rome is designated as a responsible authority to receive and respond on behalf of the Colorado Division of Securities to requests for public data made pursuant to the Colorado Open Records Act. He is sued in his official capacity only. Pursuant to Colorado Rule of Civil Procedure 4(e)(10), Defendant may be served with process at 1560 Broadway, Suite 900, Denver, CO 80202, or wherever he may be found. Also pursuant to Rule 4(e)(10), a copy of this lawsuit shall be served on Cynthia H. Coffman, Attorney General for the State of Colorado, at 1300 Broadway, 10th Floor, Denver, CO 80203, or wherever she may be found.

III. JURISDICTION & VENUE

5. This action arises under the authority vested in this Court by virtue of C.R.S. § 24-72-204(5). Venue is proper in this Court pursuant to C.R.S. § 24-72-204(5).

IV. FACTS

A. Dolcefino’s Requests.

6. Wayne Dolcefino is one of the nation's most decorated journalists, having won more than 30 Emmy Awards from the National Academy of Television Arts and Sciences, Five Charles Green Awards, an Edward R. Murrow award, a Jack Howard Award for investigative reporting, numerous honors from the Associated Press and Texas Association of Broadcasters, and three medals from the international journalism organization Investigative Reporters and Editors. He is currently the owner and principal of Dolcefino Communications, LLC d/b/a Dolcefino Consulting, a firm that consults on crisis management, ethics reviews, informational marketing, investigative services and media relations.

7. The Commissioner has advertised that in “the fiscal year 2015-2016, the division brought 71 enforcement actions that resulted in criminal and civil sanctions against bad actors,

including over \$33 million ordered in damages and restitution back to harmed investors.” Dolcefino Consulting is investigating the veracity of this statement.

8. On March 10, 2017 Dolcefino submitted a valid, written CORA request to the Commissioner, seeking the disclosure of three categories of public data, including:

- Record of all restitution, fines, or any other monetary collections levied, regardless of current collection status, in relation to enforcement actions conducted by the Securities Division of the Department of Regulatory Agencies between Jan 1st, 2014 and the date this request is received.
- A document detailing the amounts actually received, by case, in relation to the above request.
- Any documents detailing the budget of the Securities division of the Department of Regulatory agencies for 2014 onward.

9. The Commissioner’s Office responded by providing Dolcefino with the two separate documents. The first was a document detailing the amount of money in restitution and judgments won by the Division of Securities from years 2010 through 2015. The document contains incomplete data about the amount of restitution and judgments ordered and the amounts recovered in the cases listed. Multiple entries in the document do not list the date the orders to pay were issued. The entry labeled 2014-2015 is the only year that lists case number associated with the orders. However, the case numbers provided by the Division of Securities cannot be matched to an existing case when searching through the www.cocourts.com website or the courts.state.co/dockets website, which appear to be the two platforms by which to search for court record information in the state of Colorado. The second document detailed the amount of money in restitution and judgments won by the Division of Securities from years 2014 through March of 2017 as well as the amounts recovered in those cases, a heading entitled “Pynt Date” and case numbers. Again, several of the entries detailing the amount of funds recovered are blank. Also, none of the case numbers provided can be matched to an existing case when searching through the www.cocourts.com website or the courts.state.co/dockets website. In sum, the information provided by the Division of Securities was wholly unusable.

10. Dolcefino is investigating allegations that the Securities Division has exaggerated their success in winning and collecting judgments in enforcement actions under Securities Commissioner Jerry Rome. Dolcefino’s firm has already determined that since Rome became the head of the Securities Division, the agency has spent three times more money prosecuting cases than the agency has collected for Coloradans. When Dolcefino and his firm began to inquire further in to the Securities Division’s case load, the Commissioner’s office became uncooperative.

11. On August 22, 2017, Dolcefino submitted a valid, written CORA request to the Commissioner, seeking the disclosure of three categories of public data. (Exhibit “A”). The requested documents were not only clear and unequivocal, but nearly identical to the March 10, 2017 request:

- Record of all restitution, fines, or any other monetary collections levied, regardless of current collection status, in relation to enforcement actions conducted by the Securities Division of the Department of Regulatory Agencies between March 1, 2017 and the date this request is received.”
- A document detailing the amounts actually received, by case, in relation to the above request.
- A document detailing the amounts actually received between March 1st, 2017 and the present, by case, for all enforcement actions conducted by the Securities Division of the Department of Regulatory Agencies between January 1st, 2014 and March 1st, 2017.

12. Plaintiff further asked the Commissioner to set a date and hour, within three working days following receipt of the request, at which time the records would be made available for inspection. If the Commissioner were to deny access to the requested documents, Plaintiff asked the Commissioner to provide an explanation for any denial, and to specifically cite each statutory exemption justifying the denial.

13. Despite his statutory obligation to respond to Dolcefino’s request, the Commissioner and his office remained silent.

B. Defendant refuses to answer Plaintiff’s request for access to records.

14. Instead, more than ten days after Dolcefino submitted his request, Eric Maxfield, Colorado’s First Assistant Attorney General, evidently speaking on behalf of the Commissioner, responded to Dolcefino’s office via email. The contents of the response can only be described as deliberate obfuscation. Maxfield refused to produce the requested documents unless and until Dolcefino identified his client:

The Colorado agency must make its own determination about its legal obligations, and therefore has requested that you identify your client. For instance, as already stated, the HIE Resources *et al* litigation has a discovery master assigned to the case. The matter is in litigation before a Colorado state district court. Please provide the identity of your client so the Commissioner can be advised whether a “person” has requested records, thereby triggering certain obligations under Colorado law. Specifically, please respond and inform me if your client is any of these litigants, and if so, which party: HEI Resources, Inc., Heartland Energy, Inc., Charles Reed Cagle, Brandon Davis, Heartland Energy Development Corporation, Bedrock Energy Development, Inc., John Schiffner, James Pollak, or Swann Energy. In the absence of a direct and clear response the Division cannot discern its obligations. Until such direct and clear response is made the Division will therefore not take

further action on your unnamed client's request for records. ("Exhibit B").

15. Nothing in this response complies with CORA. It did not inform Dolcefino whether the requested documents were or were not in his custody and control, whether the request was accepted or denied, let alone any legitimate basis in the law for the refusal to produce the requested records and comply with CORA.

16. Indeed, the proffered rationale is wholly spurious. Plaintiff's request specifically asked for "[a] listing of all cases filed by the Securities Division which were *found or dismissed* in favor of the defendant," not pending litigation as Maxfield response appears to indicate.

17. But most importantly, Maxfield's response violated the spirit, intent and design of CORA: the statute does not require the requestor to discuss his or her identity or affiliation, explain the reasons for the request, nor does it oblige the requester to explain what he or she will do with such records. It is the government's obligation to explain its justifications for refusing a CORA request, *not* the requestor's burden to explain him or herself.

18. Further exposing the baseless nature of the refusal, in 2001, the Colorado Attorney General issued a formal opinion providing answers to "Nineteen Frequently Asked Questions" relative to CORA, one of which *directly* contradicts the contents of the state's response:

8. What are common problems faced by people who seek public records, and how do I respond if they happen to me?

c) When you ask for a public record, you are asked questions about your affiliations, why you want the public record, and what you will use the record for.

A. You are not obligated to explain the reason you want any record. You do not have to discuss who you are or what you will do with the record. All you have to do is ask, and the government is obligated to make its public records available to you, as long as they are not confidential

19. Hiding behind this smokescreen, the Commissioner has refused and continues to refuse production of any documents requested, necessitating this Complaint.

20. On February 26, 2018, Dolcefino Consulting sent a CORA request to the Division of Securities asking for the following:

1. Any documents detailing the process and procedures employed by the Securities Division to collect monetary judgments or awards secured through civil, criminal or administrative proceedings.

2. Any documents showing the use of these efforts since January 1st, 2014. These documents include demand letters, emails, mailed notices, receipts for payment, or any other form of communication employed to collect on these judgments. (Exhibit “C”).

21. The request was delivered via email at 3:27 PM CST. The following day, at 12:33 PM, Dolcefino Consulting received an unusually prompt response from Brett Radetsky, Securities Examiner. It took Mr. Radetsky five business hours to inform Dolcefino Consulting that the Colorado Division of Securities had no documents that were responsive to our requests. Mr. Radetsky’s response indicates that there were no responsive documents detailing any efforts by the Colorado Securities division to recover funds from any of the persons against whom a judgment or restitution award had been granted. (Exhibit “D”). The notion that in five hours, the Colorado Securities Division conducted a good faith review of possible records responsive to our request is laughable.

22. Finally, on April 12, 2018, Dolcefino Consulting submitted a CORA request for “any documents that details any efforts to identify and collect e-mails responsive to previous CORA requests by Dolcefino Consulting, including any efforts or communications involved in attempting to identify email communications between the Securities Division and or Mr. Rome specifically, and the Collections Division of the State of Colorado relating to any collection or pursuit of judgments and or restitution since January 1, 2014.” (Exhibit “E”).

23. The Division of Securities responded on April 13, 2018 stating that they had reviewed Dolcefino Consulting’s “request that the Division of Securities ‘identify who review [sic] the e-mails in Securities for communications on collecting judgments [sic] and restitution.’” The Division of Securities then went on to stated that the request:

“Does not appear to seek inspection of a public records as defined in the Colorado Open Records Act. Section 24-72-202-(6)(a)(I) defines “public records” as all writings made by an agency for the use in the exercise of functions required or authorized by law. Applying this definition to your request, there are no responsive documents for production or inspection.” (Exhibit “F”).

24. Dolcefino Consulting sought any documents detailing the efforts to identify and collect emails responsive to previous CORA requests by Dolcefino Consulting. Dolcefino Consulting did not simply request that the Division of Securities “identify who review[sic] the emails in Securities,” for requested information.

25. The failure by the Division of Securities to produce documents detailing the efforts to identify and collect emails responsive to previous CORA requests submitted by Dolcefino Consulting is a startling indicator that Division of Securities is either failing to comply with the CORA with respect to this request or that they have failed to comply with the CORA with respect to all other requests by failing to search for the requested records.

V. VIOLATION OF CORA

26. Plaintiff re-alleges and incorporates by reference all preceding paragraphs as though fully set forth herein.

27. C.R.S. § 24-72-204(5)(a) provides that “any person denied the right to inspect any record covered by this part 2 or who alleges a violation of section 24-72-203...may apply to the district court of the district wherein the record is found for an order directing the custodian of such records to show cause why the custodian should not permit the inspection of such record....”

28. C.R.S. § 24-72-204(5)(b) provides that “[u]nless the court finds that the denial of the right of inspection was proper, it shall order the custodian to permit such inspection....”

29. Here, Plaintiff has requested access to records which are “public records” as defined by C.R.S. § 24-72-202(6). However, Plaintiff was denied the right to inspect those records covered by part 2 of CORA, and upon information and belief, Defendant has otherwise violated section 24-72-203.

30. Upon information and belief, no statutory or common law exceptions under CORA warrants Defendant’s decision to deny access to the public records requested by Plaintiff.

31. At least fourteen (14) days prior to filing this lawsuit, Plaintiff served Defendant with written notice of its intent to file this lawsuit. Plaintiff and Defendant were not able to resolve this dispute thereby necessitating this action.

VI. ATTORNEY’S FEES

32. Pursuant to C.R.S. § 24-72-204(5)(b), Plaintiff hereby requests an award of its costs and reasonable attorney fees incurred in bringing this lawsuit.

VII. PRAYER

33. WHEREFORE, Plaintiff asks this Court to enter judgment in its favor and award the following relief:

- a. Enter an order directing Defendant to show cause why they should not permit inspection and copying of the requested records as described herein. An Order to Show Cause has been filed separately from this Complaint.
- b. Conduct a hearing pursuant to such Order “at the earliest practical time,” at which time the Court should make the Order to Show Cause absolute and order production of the requested documents
- c. Enter an order directing Defendant to pay Plaintiff’s court costs and reasonable attorney fees; and

d. Order such additional relief as the Court may deem just and proper.

DATED: May 7, 2018

Respectfully submitted,

/s/ Ben A. Barnes

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