District Court, Delta County, State of Colorado Court Address: 501 Palmer Street, #338 Delta, CO 81416	Filed in the Combined Courts Delta County, Colorado NOV 09 2018 ▲ *COURT USE ONLY* ▲
Plaintiff: **CUSTODIAN OF RECORDS FOR THE TOWN OF PAONIA** v. Defendant: **BILL BRUNNER**	Case: **2017 CV 30118** Division:1 Courtroom:1

DATE FILED: November 9, 2018
CASE NUMBER: 2017CV30118

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

This matter comes before the Court on the Plaintiff's complaint seeking declaratory judgment that certain records maintained by the Town of Paonia ("Paonia") are not subject to disclosure under the Colorado Open Records Act ("CORA"), C.R.S. 24-72-200.1 *et. seq.* In particular, the Plaintiff claims that it was unable to determine in good faith whether documents concerning a complaint filed by one of the Paonia's public work employees were exempt from disclosure because they contained medical records or data, or because it was in the public interest to withhold them. The Plaintiff therefore filed this action under CORA's safe harbor provision, C.R.S. §24-72-204(6)(a), to have the Court make that determination. The Defendant argues that neither exemption applies here, and maintains that the Town's lawsuit was brought in bad faith. Since the relevant documents have now been produced to the Defendant indirectly, the only remaining issue for the Court to resolve is whether the Plaintiff's refusal to disclose them was appropriate under the statute. If it was, then no fees are warranted. If it was not, then the Defendant is entitled to be reimbursed for both his legal costs and his attorney fees.

The Court held three days of hearings in this case. During the first day on November 21, 2017, the judge covering this matter halted the hearing to allow the Paonia employee to get access to his own records and to decide for himself whether he considered them personal or confidential. Two additional days of trial were subsequently held before the undersigned judge on May 11, 2018 and June 15, 2018. The Court took testimony from Charles Stewart, Paonia's Mayor, Bill Brunner, the Defendant, and Eric Pace, the employee who initially filed the complaint with the town. The Court also accepted into evidence exhibits 1-4 on behalf of the Plaintiff and exhibits A-J on behalf of the Defendant, respectively. After the close of evidence, both sides opted to submit written closing, which were filed simultaneously with the Court on August 1, 2018. The Court's findings, order and judgment are set forth below.

I. FINDINGS OF FACT

Based on the testimony and evidence submitted during the evidentiary hearings, the Court makes the following findings of fact:

1. Paonia is a statutory town located in Delta County, Colorado.

2. Charles Stewart is the Mayor. The town clerk, Corrine Ferguson, was the official custodian of records for Paonia when the issues in this case first arose.

3. Eric Pace was a town employee with the equivalent of Paonia's public works department. He reported to Jan Berry, who was the town manager at that time. Mr. Brunner was a member of the Paonia Board of Trustees. In that capacity, he was aware of and received many of the documents at issue in this case.

The Underlying Employment Complaint

4. On July 11, 2016, Mr. Pace forwarded an email to Mayor Stewart enclosing a twelve page written complaint about Ms. Berry's supervision. Distilled to its essence, the complaint charged two types of misconduct: (i) that Ms. Berry had improperly deprived him of overtime hours and pay and (ii) that she had retaliated against him for filing a workers compensation claim. Mr. Pace also accused Ms. Berry of defamation, harassment, and the use of threatening and intimidating tactics.

5. On July 14, 2016 Mr. Pace sent a second lengthy email to each member of the Paonia Board of Trustees, Mayor Stewart and Ms. Berry reiterating his complaints and requesting that the board members address his complaints directly rather than dealing with them through Ms. Berry.

6. Mayor Stewart sent an email back to Mr. Pace the next day, advising him that the Town was considering its response.

7. Five days later, Mayor Stewart notified Mr. Pace by letter that the Town had hired an outside consultant to investigate his claims and directed him to cooperate with that process. A similar letter went out to Ms. Berry as well.

8. On July 26th, the Mayor sent a second letter to Mr. Pace reiterating the requirement that he cooperate with the Town's investigator. The reason for the second letter was that Mr. Pace had refused to speak with the investigator, telling him that his complaint had laid out all of his concerns and claims. That same day, Mr. Pace responded in his own two page letter back to the mayor, noting that no one had spoken with him to schedule an interview with

the investigator, that he had no idea who the investigator was, and that he was not comfortable speaking with him further without counsel.

9. On August 9, 2016, Mr. Keough, the Town's outside consultant, issued his seven page report. Since the investigator had interviewed Ms. Berry, but never spoken with Mr. Pace, it was a very unbalanced document. The report accepted all of Ms. Berry's explanations as to the issues that had been raised in the employee's initial complaint, and made no independent effort to investigate any of the underlying allegations.

10. On August 16, 2016, Mayor Stewart sent Ms. Berry a cover letter and an attached memo advising her that the Town had found that she had not committed any violation of policy or other misconduct. While the Mayor noted that Mr. Pace had been owed pay ofr a few hours, he advised Ms. Berry that he intended to take no further action at that point.

11. The Mayor also sent a similar letter to Mr. Pace on that same day. In that letter the Mayor opined that Paonia had fully considered and addressed all of the complaints that Mr. Pace had raised. While the Mayor invited Mr. Pace to advise him if he had any future issues, he also cautioned him that "he should be prepared to cooperate in any investigation or analysis by the Town." Ironically, the letter concluded by warning that "[f[ailure to cooperate is not appropriate and would not be tolerated."

The CORA Request

12. Dissatisfied with the manner in which the Town had handled Mr. Pace's complaints, the Defendant in this action subsequently resigned his position with the Board of Trustees. Although he had already had access to the underlying materials, Mr. Brunner filed a

CORA request with Paonia on May 31, 2017 seeking nine categories of specific documents relating to Mr. Pace's complaints. Those requests included:

> 1) All e-mail's sent, received, or otherwise dated July 11, 2016 to, from between or cc'ing Eric Pace and Bill Brunner (BBrunner@townofpaonia.com)
>
> 2) All correspondence dated July 14, 2016 to, from, or between Eric Pace and any or all members of the Paonia Board of Trustees.
>
> 3) All communications, including emails or other correspondence, dated July 19, 2016 to, from or between Mayor Charles Stewart and Eric Pace.
>
> 4) All communications, including emails or other correspondence, dated July 19, 2016 to, from, or between Mayor Charles Stewart and former town administrator Jane Barry.
>
> 5) All communications, including emails or other correspondence, dated between July 11, 2016 and July 31, 2016, inclusively, to, from, or between Mayor Charles Stewart and Eric Pace.
>
> 6) All emails sent, received, or otherwise dated July 26, 2016 to, from, between, or cc'ing Eric Pace and Mayor Charles Stewart.
>
> 7) All correspondence, including any "undated" memos created or sent between September l and September 28, 2616, inclusive, to, from or between Mayor Charles Stewart and Eric Pace.
>
> 8) All correspondence, including any "undated" memos created or sent between September 1 and September 28, 2016, inclusive, to, from, or between Mayor Charles Stewart and former town administrator Jane Barry.
>
> 9) All documents, including, but not limited to, the investigative summary itself, related to a document titled "Town of Paonia Investigative Summary," labelled with an August 9, 20l6 date, and indicating it was "Prepared for Mayor Charles Stewart" by Dan Keough.

13. According to his testimony during the evidentiary hearing, Mr. Brunner intended to use the documents to highlight what he believed were the deliberate shortcomings in the Town's response to Mr. Pace's complaints, as well as what he believed was the Mayor's improper involvement in the resolution process. No party disputed that Mr. Brunner's motives

were to disclose this information to the citizens of the Town or to criticize how the Town had dealt with the entire affair.

14. On or about June 8, 2017, the Town responded to Mr. Brunner's CORA request by producing the single cover email enclosing Mr. Pace's original complaint (without the attached document). The Town also provided a log of ten documents that it claimed were exempt from disclosure under CORA as documents containing medical records or data or personnel information:

NON – DISCLOSURE LOG

COLORADO OPEN RECORDS ACT

TOWN OF PAONIA – PUBLIC RECORDS REQUEST

May 31, 2017 - Town of Paonia Public Records Request from Trustee William "Bill" Brunner

July 11, 2016	Notice of Administrative Complaint by Mr. Eric Pace
July 14, 2016	Email from Mr. Eric Pace to Paonia Board of Trustees
July 15, 2016	Email from Mayor Charles Stewart to Mr. Eric Pace with a cc to Mr. David Marek
July 19, 2016	Email from Mayor Charles Stewart to Mr. Eric Pace with a cc: to Mr. David Marek
July 19, 2016	Letter from Mayor Charles Stewart to Mr. Eric Pace
July 19, 2016	Letter from Mayor Charles Stewart to Ms. Jane Berry
July 26, 2016	Email from Mayor Charles Stewart to Mr. Eric Pace
July 26, 2016	Letter from Mayor Charles Stewart to Mr. Eric Pace
July 26, 2016	Email from Mr. Eric Pace to Mayor Charles Stewart
August 9, 2016	Town of Paonia Investigative Summary

15. Initially, Mr. Brunner took no further immediate action on his request.

16. On October 11, 2017, some four months later, he hired an attorney to write a detailed letter to Paonia explaining why these materials were discoverable under CORA and encouraging the Town to reconsider its positon on non-disclosure. The letter also provided the

requisite 14 days of advanced notice of his intent to commence litigation under C.R.S. §24-72-204(5)(a) if his demands were not met.

17. Paonia's outside counsel contacted the Defendant's attorney and advised him that the Town was working on a response. No such response was forthcoming. Instead, the Town filed this action under CORA's safe harbor provision on October 24, 2017, arguing that it could not determine in good faith if it was obligated to turn over the disputed materials. The Town made no effort to confer with the Defendant's attorney prior to filing this action.

18. In its complaint, the Town argued that the materials sought by the Defendant were exempt from disclosure because they contained "medical data and other health records." See Plaintiff's Complaint and Request for Hearing, dated October 24, 2017 at ¶ 23. The Plaintiff also invoked the personnel exemption, again based on the alleged existence of "private medical information" *Id.* Finally, the Town asserted that withholding the materials was proper as their release would cause a substantial injury to a public interest. As part of that argument, the Town noted that the employee's workers compensation complaint was still pending, and that if the Court released the underlying documents in that case, it could dissuade other employees from using the Town reporting system for such issues. *Id.* at ¶¶ 34-35.

Procedural History

19. After the complaint was filed, an immediate hearing was set before the Court for November 21, 2017 with Judge Jin Ho Pack, the Delta County Judge presiding. Both Mayor Stewart and Mr. Brunner appeared with counsel. Mr. Pace, whose records were the subject of the parties' dispute, also appeared in person. Finally, Ms. Berry, who had been given notice of the proceedings, failed to appear.

20. During the initial questioning of Mayor Stewart, it was discovered that the Town had never spoken with Mr. Pace to determine if he objected to the release of any of his records to either Mr. Brunner or the public. The Town had also not asked him if he considered the information in his complaint or correspondence to be confidential medical data or records.

21. Faced with that situation, Judge Pack continued the hearing to allow the Town to provide the documents to Mr. Pace so that he could determine for himself if he was concerned about them being made public. Following his review of the materials, he did not object to their disclosure and turned over a complete copy to Mr. Brunner.

22. Even though the documents had been disclosed by Mr. Pace, this litigation was not resolved. The Defendant has challenged the Plaintiff's attempt to invoke CORA's safe harbor provision, arguing that Paonia had no good faith basis to seek to shield these records and that it had failed to exercise reasonable diligence and inquiry before instituting the case. Because the Defendant had obtained a copy of the underlying materials, the only remaining issue is whether the Town is responsible for paying his costs and legal fees.

23. The Court accordingly held a second and third day of hearings in this case on May 11, 2018 and June 15, 2018. Prior to those hearings, the Plaintiff argued that the case had been rendered moot because the Defendant had obtained the documents from another source. The Court rejected that argument on the record, finding that it was contrary to controlling statutes and the case law in Colorado. The Court also found that dismissing the case on mootness grounds would promote litigation by punishing the Defendant for resolving the access dispute outside the courtroom.

24. Because the Defendant had already obtained the records at issue here, the focus of the hearings on May 11th and June 15th turned on whether they were discoverable and whether the Town of Paonia had a good faith basis for seeking to withhold them in its lawsuit. Those issues are addressed below.

LEGAL ANALYSIS

This action is governed by the Colorado Open Records Act, C.R.S. 24-72-200.1 *et seq.* (CORA). Public records are records "made, maintained or kept" by a political subdivision of the State of Colorado "for use in the exercise of functions required or authorized by law or administrative rule. C.R.S. §24-72-202(6)(a)(I). CORA's legislative declaration provides, in relevant part, that "[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 provided in this part 2 or as otherwise specifically provided by law." C.R.S. §24-72-201. With that principle in mind, the custodian of public materials in Colorado can only deny inspection of that record if it falls within one of CORA's enumerated exceptions or if it is exempt under another law. All exceptions set forth in CORA are to be narrowly construed and it is the custodian's burden to prove that an exception applies. *Shook v. Pitkin County Bd. Of County Commissioners*, 411 P.3d 158, 160 (Colo. App. 2015). Under CORA, there is a strong presumption in favor of disclosure. *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1156 (Colo. App. 1998).

In this case, there is no dispute that the records at issue are public records and subject to CORA. Instead, Plaintiff has argued that the materials are exempt from disclosure under the medical data and public interest exceptions in the statute. The Plaintiff has also claimed that it

was unable to determine whether these materials should have been produced or withheld, and therefore sought Court direction on those issues. Each claim is addressed below.

POINT I
The Medical Exception Does Not Apply To the Public Records in this Case

Paonia first argues that the materials withheld from the Defendant included Mr. Pace's medical data or health records that are exempt from disclosure under C.R.S. §24-72-204(3)(a)(I). This argument, however, has no application to the overwhelming majority of the documents withheld by the Town. Indeed, of the ten specific documents listed on Paonia's Non-Disclosure log, *see* p. 6 *supra*, eight of them do not contain any information that could be considered medical data or health records. *See* documents 2, 3, 4, 5, 6, 7, 8 and 9. Paonia's attempt to rely on this exception as a basis to reject disclosure of all of the documents at issue in this case is therefore unavailing. It is also insufficient to defeat the Defendant's request for reimbursement of his costs and attorney fees under CORA. *See Colorado Republican Party v. Benefield*, 337 P.3d 1199, 1208 (Colo. App. 2011) (defining a prevailing applicant under the statute as any party that obtains disclosure of an improperly withheld document), *aff'd Benefield v. Colorado Republican Party*, 329 P. 3d 262 (Colo. 2014).[1]

Based upon the Court's review of the exhibits, the only two documents that could fall within the medical exception are Mr. Pace's original administrative complaint, dated July 11, 2016 and Mr. Keough's Investigative Summary, dated August 9, 2016. In his initial twelve page complaint, Mr. Pace included two pages that discussed his workers compensation claim and the

[1] The Court also finds that the Mayor's letters to Mrs. Berry and Mr. Pace, dated August 16, 2016, were responsive to the Defendant's CORA request under item number nine and should have been produced as well.

alleged issues that it caused with his supervisor. The actual discussion, however, was couched in vague terms that disclosed nothing about his medical condition. Other than stating that his doctor had recommended modified duties, that he was taking some unidentified medicine, and that he was in therapy, there is no medical data or information at all. The statements do not even identify the nature of his injury.

In its brief in support of the complaint, Paonia argues that the Court should interpret the term "medical data" broadly so as to include such generic language. The Court rejects that suggestion. First, it makes no sense to find that an individual has a privacy interest in such generalized information. Under Plaintiff's approach, the fact that an individual was "sick" would constitute protected medical data, which is contrary to Colorado law. *See Jefferson County Education Assoc. v. Jefferson County School Dist.*, 378 P.3d 835, 840 (Colo. App. 2016) (holding that teacher's sick leave records that do not contain descriptions of specific medical conditions are discoverable under CORA). Second, the Plaintiff ignores one of the primary tenets in interpreting CORA exceptions – that they must be construed narrowly, rather than broadly. *Marks v. Koch*, 284 P.3d 118, 121 (Colo. App. 2011). Applying that principle here, the Court concludes that the general references to Mr. Pace's unidentified injury in his complaint were insufficient to constitute either medical data or a health record. The document was therefore discoverable under CORA. [2]

[2] In its closing brief, the Plaintiff posits that an employee could be compelled to turn over medical related documents maintained by its employer under CORA that would disclose specific medical conditions or treatments – such as a person undergoing in vitro fertilization. Of course, this case does not involve any such specific medical information. Moreover, Paonia' s own policies required that medical records for an employee be segregated in a separate confidential file within his employee file. None of the documents at issue in this case were maintained in that manner.

The final document that the Plaintiff withheld under the medical exemption was Mr. Keough's seven page investigative report. Like Mr. Pace's initial complaint, it contains vague references to his workers compensation claim. Again, that information is not sufficient to constitute medical data. The only reference to any specific medical information is three brief mentions of the fact that Mr. Pace had been prescribed "opiate narcotic painkillers" or "narcotic painkillers" at some time during his treatment for his workers compensation injury. Again, there is a dearth of details. There is no information as to what medicine he was taking, how long it was prescribed for, or even if he was still on it. The Court struggles to understand how such vague references to a class of medicine could be viewed as protected medical data.

Even if the Court found that the reference to painkillers met that standard, however, it did not justify the Town withholding all of Mr. Keough's report. The Court agrees with Mr. Brunner that the Town could have easily redacted the limited references to painkillers and released the remaining public document. This is not a case, as Plaintiffs suggest, where the Town is being asked to modify exempt information to make it discoverable. *See e.g. Sargent v. Western Svcs, Inc.*, 751 P.2d 56 (Colo. 1988). The Keough report is seven pages. Redacting the references to painkillers would have required editing out seven words in a single paragraph. That task is neither onerous, nor unreasonable, and courts have repeatedly approved such minor redactions in similar cases. *Denver Publishing Co. v. Board of County Com'rs of County of Arapahoe*, 121 P.3d 190, 205 (Colo. 2005) ("We see no problem, however, requiring that such messages be redacted by the district court to exclude from disclosure those communications within the messages that do not address the performance of public functions. CORA does not mandate that e-mail records be disclosed in complete form or not at all."); *Colorado Republican Party v.*

Benefield, 337 P.3d at 1203 (directing district court to redact constituent surveys on remand to remove non-public information from public record); *Land Owners United LLC v. Waters*, 293 P.3d 86, 99 (Colo. App. 2011) (Allowing district court to redact investigative files to remove confidential financial information).

Significantly, even if the Town adopted a broad approach to interpreting CORA's medical exemption, it could have easily addressed its concerns by striking the paragraph that referred to Mr. Pace's medication or even by withholding the entire page. What it could not do was withhold the entire public document. Allowing Paonia to interpret CORA's medical data exemption so as to exempt the entire Keough report would limit access to public business, and deprive the citizens of that Town of the very information that the Colorado General Assembly has deemed necessary to our democratic government. It would also directly encourage public employees and officials to include brief references to private information in public documents simply to shield them from disclosure under CORA. Because Paonia could have easily excised the relevant language from the Keough report and still produced the remainder of that document, the Court rejects its attempt to justify its actions under CORA's medical data exemption.

POINT II
The Public Interest Exception
Does Not Apply Here

As an alternate basis for withholding the documents, the Plaintiff also claims that its action was justified under CORA's public interest exception as set forth in C.R.S. §24-72-204(6)(a). While that provision is contained in the safe harbor clause, it constitutes a separate ground for a public entity or official to withhold otherwise discoverable public documents.

Colorado courts employ a three part test in determining if the public interest exception applies in a particular case:

> In the public records context, this inquiry requires consideration of (1) whether the individual has a legitimate expectation of nondisclosure; (2) whether there is a compelling public interest in access to the information; and (3), where the public interest compels disclosure of otherwise protected information, how disclosure may occur in a manner least intrusive with respect to the individual's right of privacy.

Denver Post Corp. V. University of Colorado, 739 P.3d 874, 879 (Colo. App. 1987). If there is no legitimate expectation of privacy in the underlying information, the inquiry ends and the document must be disclosed. *Todd v. Hause*, 371 P.3d 705, 713 (Colo. App. 2015). Alternately, if there is a privacy interest, the Court must balance that concern against the public's need to access that information and whether it can be produced in an manner that does not unduly intrude on the individual's privacy interests. *Id.*

In arguing that the public interest exception applies here, the Town again seeks to rely on Mr. Pace's privacy interest in his "medical information." The Court has rejected that argument on multiple grounds, including the fact that it does not apply to the majority of documents at issue, and that the few references to medical type information do not implicate any protectable privacy interest. With respect to the latter conclusion, the Court would note that Mr. Pace confirmed during his trial testimony that he did not consider the general information in those documents to be confidential. Just the fact that he turned them over to Mr. Brunner is ample evidence of that fact. The Court also does not consider the existence of a workers compensation claim to raise any protected privacy interest where the employer is a public entity. *See Daniels v. City of Commerce City*, 988 P.3d 648 (Colo. App. 1999) (affirming order directing production

under CORA of city records regarding sexual harassment, gender discrimination and retaliation claims).

In contrast, the Court finds that there is a public interest in how the Town handled the investigation and resolution of Mr. Pace's complaint. As part of this case, the Court has reviewed Mr. Pace's initial paperwork, the correspondence among the parties, and Mr. Keough's report. The Court is aware that the Town concluded that there had been no misconduct by Ms. Berry and that no further action was warranted. Despite that outcome, the Court still finds that there is a compelling interest for the public to see for itself whether the Town conducted its internal review of this matter efficiently, fairly and effectively. Indeed, the public interest in the process underlying these type of investigations has been repeatedly recognized by the Colorado courts under CORA. *See e.g. Daniels v. City of Commerce City*, 988 P.3d 648 (investigation of sex harassment and gender discrimination); *Land Owners United, LLC v. Waters*, 293 P.3d 86 (Colo. App. 2011) (investigation of state licensed appraisers); (*City of Boulder v. Avery*, 01 CV 1741, 2002 WL 31954865 (Dist. Ct. Colo. 2002) (investigation of municipal chief judge).

Finally, the third factor under the public interest analysis also favors the disclosure of the records here. Since there is no protectable privacy interest in the first nine documents on the Town's log, those could have been produced without any offsetting concerns. As for the Keough report, the Town could have simply redacted the references to Mr. Pace's medication, which would have taken a matter of minutes, or omitted the pages containing that language altogether. Either option would have protected Mr. Pace's privacy concerns while preserving public access to records that should have been disclosed under CORA. Ultimately, the Court's finds that the

public interest exception is inapplicable in this case and that all of the documents at issue should have been turned over to the Defendant under CORA.

POINT III
The Defendant is Entitled to Reimbursement for His Costs and Fees and the Prevailing Applicant

The remaining question in this case is whether the Defendant is entitled to costs and fees as the prevailing applicant. As previously noted, Mr. Brunner has obtained a complete copy of the disputed records directly from Mr. Pace. The Court has also found that the documents were not subject to either the medical data or public interest exceptions under CORA and therefore should have been disclosed. Typically, that conclusion would mandate that the Court award the Defendant his fees and costs as the prevailing applicant. In this case, however, Paonia brought its own action under CORA's safe harbor provision, C.R.S. §24-72-204(6)(a), alleging that it was unable to determine in good faith after exercising reasonable diligence and reasonable inquiry whether the requested materials should be disclosed. Just because the Court ultimately held that the materials were discoverable under CORA does not resolve that fee question. The Court must also analyze if the Town met the requirements to avoid an award of costs and fees under CORA's safe harbor clause.

After examining the testimony and the documentary evidence in this case, the Court concludes that Paonia's attempt to invoke that provision is ineffective. In particular, the Court finds that the Town was unable to demonstrate either good faith or that it exercised reasonable diligence and reasonable inquiry before commencing this lawsuit. Initially, the Court questions the Town's failure to provide any plausible explanation for its decision to withhold eight of the ten documents listed on its non-disclosure log. While the Town has argued that all of the records

are laced with medical information, that claim does not apply to those eight items. For example, there is no mention of any medical conditions or treatment in Mr. Pace's July 14th email to the Town Trustees. There are similarly no medical references in the Mayor's emails to Mr. Pace on July 15th or July 19th, or the Mayor's letters to Mr. Pace and Ms. Berry dated July 19, 2016. All three emails and letters, dated July 26, 2016, are also devoid of any medical information. Given that the Town failed to address eighty percent of the documents that it withheld, there is a significant question whether the filing of this action under CORA's safe harbor clause was pursued in good faith.

Moreover, the Court also finds that Paonia has failed to demonstrate that it exercised reasonable diligence before resorting to litigation. It was undisputed that Paonia did not confer with Mr. Brunner prior to commencing this action, even though such a conferral is mandatory under other parts of CORA. *See* C.R.S. §24-72-204(5)(a) ("During the fourteen-day period . . . the custodian who has denied the right to inspect the record shall either meet in person or communicate on the telephone with the person who has been denied access to the record to determine if the dispute may be resolved without filing an application with the district court."). Paonia argues that it was not bound by that provision because it filed this case under subsection 6(a), which allows the custodian to apply to the Court whenever it is unsure of whether a particular record should be produced. That argument makes little sense. If Paonia was truly unsure of whether disclosure was required, it could have taken advantage of the fourteen day cooling off period to confer with the Defendant to see if legal action could be avoided or some other compromise worked out. The fact that Paonia did not even try to speak with Mr. Brunner's attorney during that period is compelling evidence that it failed to exercise reasonable diligence.

Significantly, Paonia also failed to make any reasonable inquiries before instituting litigation. As the record shows, the Tow did not attempt to confer with the employee whose records it was purportedly protecting before file this aciton. While the Town now claims that it tried to contact Mr. Pace early on in the process that only occurred after it had commenced this lawsuit. Given that Mr. Pace ultimately had no concerns with the disclosure of his records and voluntarily gave them to the Defendant, Paonia's failure to confer with him is fatal to its attempt to invoke CORA's safe harbor clause. This is not a case where the Town could not locate Mr. Pace. It had contact information for him. It just failed to make the requisite effort to inquire as to his position. The Court believes that if the Town had contacted Mr. Pace, it would likely have obviated the need for this proceeding altogether and avoided the litigation expenses that have now been incurred by both parties. Ultimately, because Paonia took no affirmative steps to determine if this suit was necessary before it was filed, it failed to exercise reasonable diligence or reasonable inquiry as required by the safe harbor clause. C.R.S. 24-72-204(6)(a) is therefore inapplicable and Mr. Brunner is entitled to recover his legal costs and attorney fees as the prevailing applicant.

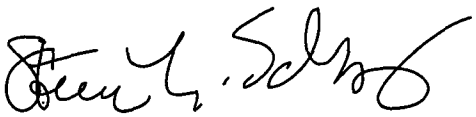
Conclusion

For the foregoing reasons, the Court concludes that the documents at issue in this case should have been produced under CORA and that the safe harbor clause does not excuse the Town's non-compliance with that obligation. The Defendant is accordingly entitled to reimbursement of his fees and costs. He will have 30 days from the date of this order to submit an affidavit and any exhibits establishing his costs and fees. The Plaintiff will then have twenty

one days to file any objection to those amounts. Either party may request an evidentiary hearing on those issues.

SO ORDERED THIS 9th day of November, 2018.

By The Court:



Steven L. Schultz
District Court Judge

xc: Parties of Record