

DISTRICT COURT, WELD COUNTY
Court Address: 901 9th Ave
Greely, CO 80631

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CASE NUMBER: 2019CV30115

Plaintiff: COLLEGE INSIDER, INC. ("CI")

vs.

Defendants: UNIVERSITY OF NORTHERN COLORADO ("UNC"), and DAVID SABOLCIK, in his capacity as Senior Associate Athletic Director of UNC.

▲ COURT USE ONLY ▲

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Case Number:

Div.: Ctrm.:

COMPLAINT AND APPLICATION FOR ORDER TO SHOW CAUSE

COMES NOW the Plaintiff, by and through its undersigned counsel, and for its Complaint and Application for Order to Show Cause, states as follows:

INTRODUCTION

Plaintiff brings this action under the Colorado Open Records Act ("CORA"), §§ 24-72-201, *et seq.*, C.R.S., to compel access to public records in the custody of the University of Northern Colorado ("UNC") and the Senior Associate Athletic Director of UNC, David Sabolicik ("Sabolicik"). This action further seeks the release of emails, text messages and any other written correspondence between Sabolicik, in his official capacity as Sr. Athletic Director of UNC, and employees, officers, officials or other agents acting on behalf of any college or university, from January 1, 2018 through May 31, 2018 and relating in any manner to the college basketball post-season tournament known as College Insider.com Postseason Tournament (CIT), operated by either Gazelle Group of Princeton NJ, or by College Insider, Inc. . Specifically, the plaintiff seeks access to cellular telephone billing statements, text messages and call logs containing records of

calls and text messages to and from the cellular telephone that is used by Sabolicik to conduct UNC business.

As more fully set forth below, these public records have been withheld by UNC on the grounds that they are not “public records” subject to CORA because *electronic written communications sent from or received by a device not University of Northern Colorado property [...] are not maintained by the “custodian”*. The defendant’s assertion of these grounds for denial of access to the records in issue is not supported in fact or law, and as a result, the documents should not have been withheld from public access. Thus, the records should be ordered released, and reasonable attorney’s fees awarded, to CI pursuant to § 24-72-204(5), C.R.S.

Jurisdiction & Parties

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff College Insider, Inc. (CI) is a Massachusetts Corporation. CI operates a men’s college basketball post-season tournament known College Insider.com Postseason Tournament (CIT). The tournament is geared toward mid-major and small schools, and it featured 20 teams in 2018, including UNC.

2. Defendant University of Northern Colorado (UNC) is a Colorado public university located in Greeley, Colorado. Defendant UNC is the custodian of the public records to which Plaintiff seeks access.

3. Defendant David Sabolicik is the Senior Associate Athletic Director at UNC and is responsible for the overall management of the athletic operations at UNC. Defendant Sabolicik is being sued in his official capacity as custodian of the public records to which Plaintiff seeks access. *See* § 24-72-302(5) & (8), C.R.S. (2009).

4. Plaintiff is a “person” as defined in CORA. C.R.S. § 24-72-202(3).

5. Defendant David Sabolicik, is an official custodian of UNC records at issue in this case. *See* C.R.S § 24-72-202(1.1) and (2).

6. This Court has jurisdiction over Defendants and the subject matter of this action pursuant to § 24-72-204(5), C.R.S.

7. Venue is proper in the County of Weld pursuant to C.R.C.P. 98(b)(2).

GENERAL ALLEGATIONS AND GROUNDS FOR MOTION TO SHOW CAUSE

8. Plaintiff, CI operates a college basketball post-season tournament College Insider.com Postseason Tournament (CIT), devoted exclusively to mid-major programs.

9. On or at about March 14, 2018 UNC and CI executed a contract for UNC pledging to participate in the CIT tournament.

10. Based on information and belief, after UNC pledged to participate in the CIT, its Sr. Associate Athletic Director Sabolicik deliberately interfered with the process of other schools pledging to the tournament by contacting athletic directors from other schools planning to commit to the tournament and soliciting them to forgo the rates preset by CIT or to make lesser payments for the tournament than the rates preset by CIT.

11. Upon information and belief, Sabolcik used his personal cell phone, in his official capacity to make phone calls, and send text messages to other athletic directors in order to convince the other schools' athletic directors to forfeit or pay lower rates in the CIT tournament.

12. The use of Sabolcik's personal cell phone is evidenced by a series of emails sent by Sabolicik in his official capacity and in which Sabolicik is including his personal cell phone number on the signature block of his official UNC email. A true and correct copy of Sabolicik's emails showing his cell phone on the official UNC email correspondence is attached and incorporated herein as Exhibit 1.

13. On August 16, 2018, Plaintiff sent a CORA request to Defendants seeking access to the following public records:

All written communication, including letters, emails, text messages, and any and all other forms of electronic communication (by means of personal or University-affiliated accounts) between David Sabolcik, the University's Senior Associate Athletic Director of External Affairs and employees, officers, officials or other agents acting on behalf of any college or university and relating in any manner to the college basketball tournaments operated by either the Gazelle Group, of Princeton, NJ, or by College Insider, Inc., during the time period of January 1, 2018 through May 31, 2018.

A true and correct copy of Plaintiff's CORA request is attached and incorporated herein as Exhibit 2.

14. On October 5, 2018 Plaintiff and Defendants' representative had a telephone discussion regarding the document request. The telephone call also served as a notice of intent to file an application under CORA. During the call Defendants contended that some of the records requested, specifically the cell phone records, were not public records. Plaintiff's letter to the Defendants memorializing the telephone discussion is attached and incorporated herein as Exhibit 3.

15. By email correspondence dated October 12, 2018 Defendants informed Plaintiff the disclosure of electronic written communications sent from or received from a device not considered to be the property of UNC was prohibited from disclosure under the Colorado Open Records Act and refused to provide access to the requested records. Defendants produced, however, electronic communications originated from devices that were property of UNC in response to Plaintiff's request. The produced records demonstrated that Sabolicik conducted official business through the use of the cellular phone billed to Sabolcik's private account. A true and correct copy of Defendants' October 12, 2018 email is attached and incorporated herein as Exhibit 3.

16. On October 9, 2018 the Plaintiff, through their attorneys Gelerman and Cabral, LLC, wrote the Defendants advising of their intent to file this Complaint and Application for an Order to Show Cause, pursuant to CORA based upon both August 16 requests. A true and correct copy of the letter by counsel is attached as and incorporated herein as Exhibit 4. This letter provided the required statutory notice pursuant to § 24-72-204(5), C.R.S., that absent production of the requested records, Plaintiff intended to seek judicial relief in this Court.

17. Defendants did not provide the requested documents within the timeframe.

18. As of the date of this complaint and application, Defendants continue to deny Plaintiff full access to the requested public records.

19. As will be fully explained in further briefing and/or argument to this Court, Defendants' willful and blatant disregard for the laws of Colorado as to Open Records are systemic of an attitude within the organization that its practices and actions are above judicial scrutiny and public examination. Any reason to withhold the documents requested and not received are legally inadequate. Moreover, by initially not acknowledging the requests and/or then indeterminably delaying the release of the requested public records as provided by law, any objections at this point in time should be deemed waived and barred.

APPLICABLE STATUTORY PROVISIONS

20. Under CORA, any person may request access to inspect and obtain copies of any public record. *See* § 24-72-203(1)(a), C.R.S.

21. “CORA should be construed ‘in favor of public access to public records.’” *Reno v. Marks*, 353 P.3d 866, 869 (Colo. App. 2014) (citing *City of Fort Morgan v. E. Colo. Pub. Co.*, 240 P.3d 481, 486 (Colo. App. 2010)) [*20] (additional citations omitted).

22. Public records that must be disclosed according to CORA includes “[w]ritings.” “‘Writings’ means and includes digitally stored data, without limitation electronic mail messages, but does not include computer software.” C.R.S. § 24-72-202(7).

23. All records “made, maintained, or kept” by the Defendants for use in the exercise of official functions are “public records” as defined by C.R.S. § 24-72-202(6)(a).

24. Unless specifically exempt, all public records should be made available for public inspection pursuant to C.R.S § 24-72-203.

25. Exceptions to the presumption of disclosure in Colorado’s open records laws are to be construed narrowly. *See Bodelson v. Denver Pub. Co.*, 5 P.3d 373, 377 (Colo. App. 2000) and *Sargent Sch. Dist. No. RE-33J v. Western Servs. Inc.*, 751 P.2d 56, 60 (Colo. 1988).

26. Upon application to the District Court for the district in which the public records can be found, the Court is to enter an order to show cause requiring the custodian of records to demonstrate “at the earliest practical time” why the denial of inspection was not an abuse of discretion. *See* C.R.S. § 24-72-204(5).

27. “Unless the court finds that denial of inspection was proper, it shall order the custodian to permit such inspection.” *Id.*

28. Upon a finding that the custodian’s denial of access was arbitrary or capricious, the Court may order the custodian to pay the applicant’s court costs and attorneys’ fees in an amount to be determined by the Court. *Id.*

29. The UNC’s position that the subject telephone records are not public records because they are “not maintained by the custodian” is not well taken. Sabolcik’s cell phone is used to conduct UNC business, and the records of its use are likewise generated as a by-product and contemporaneous records of the conduct of public business. The records are regularly furnished to Sabolick by his cell phone provider and maintained or kept by him for a period of time, and in any event remain available to him upon request from the carrier. Some or all of the records requested are in Sabolick’s possession, custody, and control. It is obvious that if individuals acting in an official capacity would be able to “privatize” their conduct of public business by establishing a private account or dealing with private providers of communications technologies, it would allow government officials to unilaterally create a vast and unacceptable “loophole” in the requirements of CORA.

30. UNC’s response dated October 12, 2018 recite that UNC’s principal concern for resisting disclosure of the subject cell phone records is concern over the fact that “*electronic written communications sent from or received by a device not University of Northern Colorado property [...] are not maintained by the “custodian”.* *See* Exhibit 4. Under CORA, a governmental employee that conducts official business through electronic means is the custodian of the information contained in the electronic record.

31. Under CORA, “any person denied the right to inspect any record . . . 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.” § 24-72-204(5), C.R.S.

32. Under CORA, “[u]nless the court finds that the denial of the right of inspection was proper, it shall order the custodian to permit such inspection and shall award court costs and reasonable attorney fees to the prevailing applicant in an amount to be determined by the court.” C.R.S. § 24-72-204(5).

33. In *Denver Publishing Co. v. Board of Cty Commissioners of Cty of Arapahoe*, 121 P.3d 190 (Colo. 2005), the Colorado Supreme Court made it clear that it is the content of the communication, and not its location that determines the status of being a “public record.” Sabolcik’s communications utilizing his cell phone with participating universities were conducted in his official capacity in the conduct of the UNC’s public business.

CLAIM FOR RELIEF
(Violation of CORA; § 24-72-204(5), C.R.S.)

34. Plaintiff re-alleges paragraphs 1-33 as if fully stated herein.

35. The records requested by Plaintiff in its September 12, 2017 CORA request are “public records” within the meaning of § 24-72-202(6)(a)(I), C.R.S.

36. Defendants have failed to adequately respond to Plaintiff’s August 16, 2018 CORA request. Consequently, Defendants have unlawfully denied Plaintiff full access to the requested public records.

37. Because Defendants have unlawfully denied Plaintiff full access to the requested public records, Plaintiff is entitled to an order compelling Defendants to allow Plaintiff access to all responsive public records in Defendants’ possession, custody, or control.

38. Plaintiff also is entitled to an award of its reasonable attorney’s fees and costs in enforcing its right of public access to these public records, pursuant to § 24-72-204(5), C.R.S.

APPLICATION FOR ORDER TO SHOW CAUSE

A. Pursuant to § 24-72-204(5), C.R.S., Plaintiff is entitled to, and hereby applies for, an Order to Show Cause directing Defendants to show cause why Plaintiff should not be allowed access to the requested public records. As required by CORA, the Court should set a date for a show cause hearing at “the earliest time practicable.”

B. A proposed Order to this effect is attached for the Court’s convenience.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court:

A. enter forthwith an Order directing Defendants to show cause why Plaintiff should not be allowed access to the public records described in Plaintiff’s August 16, 2018 CORA request;

B. conduct a hearing pursuant to such Order “at the earliest practicable time,” at which time the Court may make the Order to Show Cause absolute;

C. enter an Order requiring Defendants to allow Plaintiff access to all responsive public records in Defendants’ possession, custody, or control;

D. award Plaintiff its reasonable attorneys’ fees and costs associated with the preparation, initiation, and prosecution of this action, as mandated by § 24-72-204(5); and

E. grant such other and further relief as the Court deems proper and just.

DATED this 22nd day of January, 2019.

Anastasia Fainberg

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CERTIFICATE OF MAILING

I, the undersigned Attorney for Plaintiff, certify that on January 22, 2019, I mailed a copy of the Summons/, a copy of the Complaint, and Answer form by postage prepaid, first class mail, to the Defendants at the following address:

The University of Northern Colorado
501 20th St
Greeley, CO 80639

Anastasia Fainberg, Esq.
Attorney for Plaintiff