

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: July 24, 2019 2:26 PM CASE NUMBER: 2019CV30927
PLAINTIFF: JANET MONSON, v. DEFENDANTS: COLORADO DEPARTMENT OF HUMAN SERVICES and SHANNON MULHALL, in her official capacity as Custodian of Records for Colorado Department of Human Services	Case No.19CV30927 COURTROOM 209
ORDER RE: DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT	

This matter comes before the Court on Defendants' Motion to Dismiss Plaintiff's Complaint, filed May 21, 2019, the response and reply. After reviewing the parties' filings and the applicable law, the Court finds and orders as follows:

BACKGROUND

Plaintiff brings this action under the Colorado Open Records Act ("CORA," §§ 24-72-201 et seq.) seeking to inspect the investigative file that Defendant DHS provided to Investigation Law Group ("ILG"), who conducted an investigation concerning Plaintiff's pay discrimination claim. Plaintiff made a CORA request on or about October 30, 2018. Compl. ¶ 35. The final correspondence from Defendants relative to the status of the CORA request was issued on January 10, 2019. Compl. Ex.5. In the January 10, 2019 letter, a cost to start the request was estimated at \$5,850.00. *Id.* Plaintiff argues in her complaint that Defendants have refused to produce records under CORA and she is entitled to bring this action before the Court.

STANDARD OF REVIEW

A complaint must state a plausible claim for relief to survive a motion to dismiss. *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016). However, motions to dismiss are disfavored, and may be granted only when, assuming all the allegations of the complaint are true, and drawing all reasonable inferences in favor of the plaintiff, the plaintiff would still not be entitled to any relief under any cognizable legal theory. *Colorado Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012). In deciding motions to dismiss for failure to state a claim, the particular theory of recovery proffered by the plaintiff is irrelevant; the question is whether the facts as pled state a claim under any theory. *Id.*; *Hinsey v. Jones*, 411 P.2d 242, 244 (Colo. 1966); *Hannon Law Firm, LLC v. Melat, Pressman & Higbie, LLP*, 293 P.3d 55, 62-3 (Colo. App. 2011). C.R.C.P. 12(b)



further provides that a court may not consider matters outside the allegations in the complaint when ruling upon a motion to dismiss for failure to state a claim. *Dunlap*, 829 P.2d at 1290. In assessing a C.R.C.P. 12(b)(5) motion to dismiss, courts liberally construe the pleadings and resolve all doubts in favor of the pleader. *Denny Constr., Inc. v. City & County of Denver*, 170 P.3d 733, 736 (Colo. App. 2007)(*cert. granted* Nov. 26, 2007).

Under C.R.C.P. 8(a) a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief,” to give the defendant fair notice of what the claim is and the grounds upon which it rests. Although a court must accept as true all the allegations in a complaint, this requirement does not apply to legal conclusions. To determine if a complaint states a plausible claim for relief, a court must engage in a “context-specific” analysis drawing on “judicial experience and common sense.” *Id.* at 679.

LEGAL AUTHORITY AND ANALYSIS

To show that CORA applies, a plaintiff must show that the public entity in question (1) improperly (2) withheld (3) a public record. All three prongs must be shown, or the act will not apply.” *Wick Commc'ns Co. v. Montrose County Bd. of County Comm'rs*, 81 P.3d 360, 363 (Colo. 2003).

Here, the crux of the issue is whether the records were withheld from Plaintiff. Plaintiff relies, *inter alia*, upon the January 10, 2019 letter as culminating in a withholding of records.

Our Court of Appeals has found that an agency can require payment of a deposit before producing the documents. *Mt. Plains Inv. Corp. v. Parker Jordan Metro. Dist.*, 312 P.3d 260, 268 (Colo. App. 2013) As that opinion held, the imposition of an advance deposit was reasonable, and given the potential volume of the documents requested, an advance deposit in a reasonable amount was not a violation of CORA. *Cf.* 5 U.S.C. § 552(a)(4)(A)(v) (2009) (under federal Freedom of Information Act, agency can require advance payment of a fee to produce public records if the agency determines that the fee will exceed \$ 250). *Id.* at 268.

Here, there were three letters from the Department of Human Services discussing the costs. The first letter dated November 2, 2018 required a \$60 deposit, based upon an estimate of “a minimum of three hours to complete.” Compl. Ex.3 The second letter dated November 16, 2018, advised Plaintiff’s counsel that the “Department has withheld documents and emails related to this investigation a they are privileged attorney-client communications and work product.” Compl. Ex. 4. The January 10, 2019 letter outlined “a minimum of 196 hours to complete, due to the volume of records that must be processed.” Compl. Ex. 5.

The Court notes that each letter advises Plaintiff’s counsel of the status of the CORA request, starting with a letter approximately three days after the request was received, then 14 days later, and finally about two and one-half months after the request was received. Each letter attached to the complaint and incorporated therein by reference, provides additional detail to Plaintiff’s counsel about the CORA request. No correspondence, however, contains a refusal to produce (a/k/a withholding of) the records.

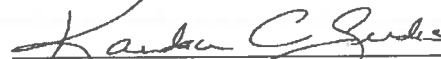
Accordingly, because the law allows an agency, here the Department of Human Services, to collect a deposit prior to producing the records, the Court rejects Plaintiff's contention that Defendants violated CORA by withholding records.

CONCLUSION

Defendants' Motion to Dismiss Plaintiff's Complaint is GRANTED. Plaintiff's complaint is HEREBY DISMISSED WITH PREJUDICE and a show cause hearing is not necessary.

SO ORDERED this 24th day of July, 2019.

BY THE COURT:



Kandace C. Gerdes
District Court Judge