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| DISTRICT COURT, BOULDER COUNTY, COLORADO<br>1777th 6th Street<br>Boulder, Colorado 80302<br>303-441-3750 | |
| **BOULDER BEAT NEWS,**<br>**Plaintiff,**<br><br>**v.**<br><br>**CITY OF BOULDER,**<br>**Defendant.** | **▲COURT USE ONLY▲** |
| Attorney for Plaintiff:<br>Eric Maxfield, #29485<br>Maxfield Gunning, LLP<br>1738 Pearl Street, Suite 300<br>Boulder, Colorado 80302<br>720-925-4615<br>Eric@maxfieldgunning.com | Case No:<br><br>Division |

**COMPLAINT AND APPLICATION FOR AN ORDER TO SHOW CAUSE UNDER § 24-72-204(5), C.R.S. WITH EXPEDITED SETTING UNDER § 24-72-204(5)(b), C.R.S.**

COMES NOW Boulder Beat News ("Boulder Beat"), Plaintiff, through undersigned counsel, for its Complaint and Application for Order to Show Cause against the City of Boulder ("City"), Defendant, and alleges as follows:

## I. Introduction

1. The Colorado Open Records Act ("CORA") requires that governmental records be open to a person upon request unless the records fall outside the definition of "public records" or otherwise fall in an exception to CORA's transparency requirement. Whether requested records are "public records" under CORA is at issue here.

2. Reporter Shay Castle of Boulder Beat News requested specific records, the existence of which is not in dispute. The Records are between Boulder Mayor Pro Tem Bob Yates and two Boulder nonprofits (Emergency Family Assistance Association ("EFAA") and Attention Homes) and they express Mayor Pro Tem Yates' concerns with the so-called "Bedrooms are for People" Ballot initiative that may be on this year's ballot.[1] The ballot initiative was on the City Council's agenda, of which Mayor Pro Tem Yates is a member, and for which he did not recuse himself, on July 21, 2020. The City at first declined to provide Boulder Beat the requested records. Upon receipt of a notice of intent to file this application, the City then provided the email exchanges between Mayor Pro Tem Yates and EFAA. Ex. 1, 2. The emails were sent and received to and from Mayor Pro Tem Yates' personal email account, and were in the nature of political advocacy. In one of two emails Mayor Pro Tem Yates stated that he was writing in his personal capacity. The City asserts that, because these records are made, maintained, and kept on a personal email account, and because the political advocacy was, according to the Mayor Pro Tem, personal, the emails are not "public records" subject to disclosure. Boulder Beat alleges that, based on information not in dispute and based on fair inferences drawn from records disclosed by the City, the records contain a demonstrable connection to the exercise of functions required or authorized by law. An elected official's use of one's own private email account to conduct public business, and perhaps disclaiming one's official capacity, while nonetheless acting within that capacity, cannot circumvent the transparency requirements of CORA.

3. This civil action therefore seeks injunctive and declaratory relief to redress the failure of the City to fulfill the guarantee of public access enshrined in the Colorado Open Records Law.

[1] Following the City Council's decision not to authorize the matter for the November election at its July 23, 2020 meeting, the ballot initiative proponents sued the City in order to place the ballot measure on the ballot.

4. This action follows the City's unjustified closure to public inspection of emails between an elected official and a constituent with a demonstrable connection to the exercise of functions required or authorized by law. See §§ 24-72-202(6)(a)(I), (II)(b), C.R.S.

5. CORA requires a hearing on this Complaint and Application "at the earliest practical time," § 24-72-204(5)(b), C.R.S., and Boulder Beat therefore requests that the Court issue a Show Cause Order requiring the City to demonstrate the propriety of its closure of the requested records, and to provide the records to the Court for *in camera* inspection, and to order an expedited setting of a hearing to determine the propriety of the record closure. Boulder Beat anticipates that no discovery is necessary or appropriate in this expedited action, and that the majority of operative facts will likely be stipulated.

6. Critically, the Colorado Supreme Court has considered what constitutes a "public record". *Denver Post Corp. v. Ritter*, 255 P.3d 1083 (Colo. 2011); *Wick Communications v. Montrose Cnty. Bd. of Cnty. Com'rs*, 81 P.3d 360 (Colo. 2003); *Denver Publ'g. Co. v. Bd. of Cnty. Com'rs*, 121 P.3d 190 (Colo. 2005). These cases clarify the metes and bounds of CORA for government officials in their personal sphere through analysis of a phone bill for personal phone used for personal and work functions; a personal diary; texts concerning a sexual/personal relationship on work accounts. *Id*.

7. Notwithstanding that there is a personal sphere where records are not "public records", there are limits to the personal sphere when one is an elected official. This Court should determine that an elected official may not manufacture a safe harbor from the category of "public record" for emails that conduct public business by using a personal email address and disclaiming the official role.

8. In short, the practice sought to be ended here by Boulder Beat is circumvention of CORA by public officials conducting public business by using one's personal email account and disclaiming one's professional role. The question to be answered in this litigation is why Mayor Pro Tem Yates made the emails with Attention Homes. His reason will be apparent on the face of the emails and likewise may be apparent from the response of the party to whom he sent the correspondence.

9. The City justifies its closure of the emails by one method. It asserts that the records are not "public records".[2] The City's position on closure under this theory is not supported by CORA. As a result, the records have been wrongfully withheld from public disclosure.

[2] See City response dated 7/16/2020 referencing § 24-72-202(6)(a)(2)(B), C.R.S., attached as exhibit 3.

10. The records should be examined by the Court *in camera*, and if they reveal what is fairly and reasonably implied by the circumstances, that they were made, maintained, or kept for the function of conducting public business and are therefore "public records", they should be ordered released.

11. In addition to such equitable relief, Boulder Beat also seeks recovery of its costs and reasonable attorney's fees, under CORA at section 24-72-204(5), C.R.S.

## II. Parties Jurisdiction and Venue

12. Boulder Beat News, Plaintiff, is a limited liability company registered with the Secretary of State in Boulder, Colorado.

13. Boulder Beat is a "person" under CORA, section 24-72-202(3), C.R.S., and as such, has standing to bring a claim for access to records under CORA.

14. Boulder Beat is a member of the press.

15. The City of Boulder is the governing body of a political subdivision of the State of Colorado. § 24-72-202(5), C.R.S.

16. All writings made, maintained, or kept by the City for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds are "public records" and are open to a person who requests inspection unless an exemption applies, see sections 24-72-202(5)-(6)(a)(I), 24-72-203(1)(a), C.R.S. The City is the custodian of the public records that are the subject of this action.

17. This Court has jurisdiction under article VI, section 9(1) of the Colorado Constitution and under section 24-72-204(5), C.R.S. of CORA.

18. With respect to the jurisdictional requirement for providing notice of intent to sue under section 24-72-204(5), C.R.S. of CORA, Boulder Beat provided notice to the City of Boulder on July 19, 2020. See exhibit 1 (mis-dated as July 20, 2020 but emailed July 19, 2020).

19. Venue is proper in this district under Rules 98(b)(2) and (c)(1) of the Colorado Rules of Civil Procedure; and under section 24-72-204(5) C.R.S. of CORA.

## III. General Background and Allegations

20. Shay Castle is the agent and sole proprietor for Boulder Beat.

21. Bob Yates is on the Boulder City Council and is Mayor Pro Tem.

22. Boulder Beat is a press organization within the City of Boulder. The press, including Boulder Beat, has among its central purposes an interest in the openness of the process and decision-making of the City. CORA requires that records concerning matters that are the business of the City Council are public, unless they fall within an exception. This permits the public to be educated about its government's conduct, and to hold public officials accountable.

**Records Requests and Responses**

23. Mr. Mark Gelband, not a party to this litigation, inquired by a July 13, 2020 email to the City Council requesting emails between Boulder City Mayor Pro Tem Bob Yates and two nonprofits concerning a controversial ballot initiative, (which would change Boulder's limits on un-related persons living together). Ex. 4.

24. City Attorney Tom Carr responded to Mr. Gelband on July 14, 2020, in substantive part:

> Thanks for raising this. It's important that the community have faith in the ethics of their elected leaders. I asked Bob to send me the emails that he exchanged with EFFA and Attention Homes. They are in the nature of political advocacy. He makes it clear that he is expressing only his personal views. He never mentions city funding, either directly or indirectly. He does mention his personal donations to both organizations. All of this was done using his personal email account, which is consistent with city policy of not using official resources for political activity. Elected officials must walk a careful line between constraints that exist because of the nature of their position and their protected right to political speech.

See exhibit 4.

25. Shay Castle was copied on the email response from City Attorney Tom Carr and followed up with her own request on July 15, 2020, the response to which is the subject of this complaint: "Regarding my record request: I want the emails mentioned below, sent to Attention Homes and EFAA from Bob Yates' personal email. They have already been shared with Tom Carr, so therefore should be readily available." Ex. 5 (referring to the request in Ex.4).

26. The City responded on July 16, 2020 and declined to provide the requested records on the grounds that, according to the City, they "have no "demonstrable connection to the exercise of functions required or authorized by law or administrative rule and does not involve the receipt or expenditure of public funds." (See C.R.S. 24-72-202(6)(a)(2)(B)." Ex. 3.

27. On July 19, 2020 Boulder Beat sent the City its "Notice of Intent to file an application with the District Court by Shay Castle of Boulder Beat on Request for Records under the Colorado Open

Records Act, § 24-72-204, C.R.S. and Request for mandatory conference under § 24-72-204(5)(a), C.R.S.

28. On July 27, 2020 Mayor Pro Tem Bob Yates provided Boulder Beat with email exchanged between himself and Emergency Family Assistance Association ("EFAA") Executive Director Julie Van Domelen. Exhibit 2. The emails were dated June 27, July 10, and July 11, 2020 and were sent and received from and to Mayor Pro Tem Yate's personal email account. Ex. 2.

29. Mayor Pro Tem Yates did not provide the requested records that were identified as an email exchange with Attention Homes.

30. The June 27, 2020 email from Mayor Pro Tem Yates to Executive Director Domelen stated, in part: "I'm writing here in my personal capacity." Ex. 2.

31. The July 11, 2020 email from Mayor Pro Tem Yates to Executive Director Domelen stated, in part:

> "As you may have seen, it now appears that the city attorney and city clerk may not be in a position to certify the Bedrooms charter amendment initiative for the ballot. City council will be discussing this and possible alternatives at its meeting on July 21. I think this will be a good opportunity for EFAA to start working collaboratively with city council on the kind of occupancy changes that EFAA's clients need."

Ex. 2

32. On August 5, 2020, the City responded to the "Notice of Intent" that "Our position remains that the emails are not public records. It is the Councilman's decision whether to produce his private emails."

33. The City of Boulder has denied Boulder Beat the right to inspect the requested records.

34. The City of Boulder continues to withhold records without proper justification.

## IV. Colorado Open Record Act

35. The General Assembly has declared that it is the "public policy of the state that all public records shall be open for inspection by any person at reasonable times, except as provided herein or as otherwise specifically provided by law." See § 24-72-201, C.R.S.

36. CORA "recognize[s] the compelling public interest in access to information." *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1156 (Colo. App. 1998). In light of that "compelling

public interest," it is well settled that CORA establishes "a strong presumption in favor of public disclosure." *Id*.

37. Per § 24-72-202(6)(a), C.R.S.

(I) "Public records" means and includes all writings made, maintained, or kept by the state, any agency, institution, a nonprofit corporation incorporated pursuant to section 23-5-121(2), C.R.S., or political subdivision of the state, or that are described in section 29-1-902, C.R.S., and held by any local-government-financed entity for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.

(II) "Public records" includes the correspondence of elected officials, except to the extent that such correspondence is:

(A) Work product;

(B) Without a demonstrable connection to the exercise of functions required or authorized by law or administrative rule and does not involve the receipt or expenditure of public funds;

(C) A communication from a constituent to an elected official that clearly implies by its nature or content that the constituent expects that it is confidential or that is communicated for the purpose of requesting that the elected official render assistance or information relating to a personal and private matter that is not publicly known affecting the constituent or a communication from the elected official in response to such a communication from a constituent; or

(D) Subject to nondisclosure as required in section 24-72-204(1).

38. The Court should begin its analysis where all CORA analysis begins-determining if the records at issue are public records within the scope of CORA's mandatory disclosure provisions. In doing so, when construing the statutory language of CORA, the Court should look first to the plain language, striving to give effect to the General Assembly's intent and chosen legislative scheme. *Sooper Credit Union v. Sholar Group Architects, P.C.*, 113 P.3d 768, 771 (Colo. 2005). ("We interpret every word, rendering none superfluous; undefined words and phrases are read in context and construed literally according to common usage."). Statutory provisions must be read as a whole, based on their plain and ordinary meaning. *Department of Revenue v. Agilent Technologies, Inc.*, 441 P.3d 1012, 1016 (Colo. 2019).

39. The Court must determine whether the express provisions of CORA, namely the definition of "public records" set forth in section 24-72-202(6)(a), C.R.S., protect the privacy interests at issue in this case. The General Assembly has provided that the content of a public official's e-mail message must be examined to determine whether the e-mail addresses public functions or the receipt or expenditure of public funds to decide whether the email is a "public record." *Denver Publ'g. Co. v. Bd. of Cnty. Com'rs*, 121 P.3d at 195.

40. CORA specifically defines "public records" as "all writings made, maintained, or kept by the state, any agency, institution, ... or political subdivision of the state ... for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds." § 24-72-202, C.R.S.

41. Public records under CORA also "includes the correspondence of elected officials" insofar as the correspondence is "demonstrab[ly] connect[ed] to the exercise of functions required or authorized by law or administrative rule" or involves "the receipt or expenditure of public funds." See § 24-72-202(6)(a)(II)(B), C.R.S.

42. According to *Denver Publ'g. Co. v. Bd. of Cnty. Com'rs*, 121 P.3d at 195., when a party requests records under CORA, the initial burden is on the requesting party to demonstrate that the records at issue are likely "public records." *Id*. at 362. Under circumstances where the records are in the possession of a public official, rather than an agency, that burden may be met if it can be shown that the records are "made, maintained, or kept" in a public capacity. *Id*. at 366. Where the agency is the custodian of the records sought and the records are "made, maintained, or kept" in a public capacity, the burden to show that the records are likely public records has been met. *Id*. The burden then shifts to the public agency to show that the records are public or non-public. *Id.* To determine whether the records kept by the agency are public or non-public records, the agency must look to the content of the records to resolve whether they relate to the performance of public functions or involve the receipt or expenditure of public funds. *Id*.

43. Mayor Pro Tem Yates made, maintained, and kept the emails on his personal email account. The content of the records produced (emails with EFAA) and their categorization as both being political activity (by the City Attorney) result in the fair inference that the records remaining closed (emails with Attention Homes) are likely public records.

44. At the pleading stage, the question of whether the document is made, kept, or maintained in the individual's private or public capacity cannot be entirely separated from the question of the document's intended use. *Denver Post Corp. v Ritter*, 255 P.3d at 1092. A court analyzing in what capacity a public official made, maintained, or kept a requested record should consider factors that go to whether the record was "for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds." § 24-72-202(6)(a)(I); *Id.*, citing to see *Wick*, 81 P.3d at 366.

45. Plaintiff does not bear the burden at this stage to conclusively prove that the requested document exists " for use in the performance of public functions or the receipt and expenditure of public funds." *Denver Post Corp. v Ritter*, 255 P.3d at 1092 citing to see *Denver Publishing*, 121 P.3d at 199. Rather, the court's inquiry into the capacity in which the records are held should be influenced by the existence or absence of facts suggesting the requested record was made, maintained, or kept for official use. If the plaintiff makes an adequate showing that the requested record was made, maintained, or kept in an official capacity, then the burden shifts to the defendant to show that the requested document is not a public record. *Id., Wick*, 81 P.3d at 364; *Denver Publishing*, 121 P.3d at 199.

46. Here, the messages were made, maintained or kept by a public official, Mayor Pro Tem Yates. As such, a closer inquiry into the content of the message is required to determine if the messages were "for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds." The content of the messages must address the performance of public functions or the receipt and expenditure of public funds. Insofar as the messages do not, they remain non-public and outside the scope of CORA.

47. Through the content of his disclosed email, Mayor Pro Tem Yates provides substantial reason to conclude that the undisclosed email(s) includes public business similar to that described in his July 11, email to EFAA: “As you may have seen, it now appears that the city attorney and city clerk may not be in a position to certify the Bedrooms charter amendment initiative for the ballot. City council will be discussing this and possible alternatives at its meeting on July 21. I think this will be a good opportunity for EFAA to start working collaboratively with city council on the kind of occupancy changes that EFAA's clients need.” Ex. 2. This content reflects various and significant public business, including the Mayor Pro Tem’s reference to the City Council agenda and exhortation to EFAA to work with the City Council.

48. Moreover, City Attorney Carr has characterized the email records between Mayor Pro Tem Yates and EFAA and Attention Homes as “political advocacy” and grouped them together as such. Ex. 4.

49. The content-driven inquiry is not made inapplicable to the correspondence of elected officials by the requirement of section 24-72-202(6)(a)(II)(B) that elected officials' correspondence be "demonstrably connected" to an elected official's duties as an elected official or the receipt or expenditure of public funds. Rather, this requirement also mandates that one look to the content of the message to determine if it addresses the performance of public functions or the receipt or expenditure of public funds.

50. It is clear that section 24-72-202(6)(a)(II)(B) was not intended to create a backdoor to acquire personal or private communications sent to or from an elected official by demonstrating a tenuous or indistinct impact or effect on an elected official's performance (or nonperformance) of his official duties. *Denver Publishing*, 121 P.3d at 200.

51. The inclusion of an elected official's correspondence, namely the official's e-mail messages, into CORA was in furtherance of the concept that "public business is the public's business.". *Id*.

52. This inclusion did not eliminate the privacy protection inherent in the "public records" definition. *Id*. If the content of the communication pertains to the elected officials' role as an elected official, then it falls within the definition. If an elected official sends or receives a message that is in furtherance of, or pertaining to, her duties as an elected official, then it falls within the definition. If, however, the communication was sent to or from the elected official in furtherance of some other relationship, it does not fall within the definition. *Id*.

53. When CORA was amended in 1996, concerns were also raised that the amendment adding elected officials' correspondence might be too invasive. *Id*. At least one Representative expressed concern that he did not want to lose privacy as a result of the legislation. *Id.*, citing to see An Act Concerning Public Access to Governmental Processes, and, in Connection Therewith, Amending the Public Records and Open Meetings Laws to Address Issues Raised by the Use of Electronic Mail by Governmental Agencies: Hearing on S.B. 96-212 Before House Committee on State, Veteran, and Military Affairs, 60th Gen. Assemb., 2nd Sess. (April 9, 1996) (comments of Rep. Tupa).

54. It was clarified at this committee meeting that, like other records, the inquiry as to whether correspondence is a "public record" focuses on what the communication includes, rather than how it was produced. *Id*. That is, simply because an e-mail message was produced by an elected official or created "using state equipment" does not make it a public record. *Id*.

55. The converse is also true: simply because an email message was produced by an elected official on a personal email with a statement that it was sent in his personal capacity does not take it out of the ambit of "public record." Rather, it is critical to ask what the communication includes, rather than how it was produced.

## V. First Claim for Relief
### Violation of CORA

56. Boulder Beat incorporates by reference all preceding paragraphs as if stated fully herein.

57. CORA provides in pertinent part as follows: "[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… . Unless 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….” § 24-72-204(5), C.R.S.

58. Plaintiff is applying to this district court for an order directing the custodian of such records to show cause why the custodian should not permit inspection of such records.

59. The City of Boulder has denied Boulder Beat the right to inspect public records with no demonstrated basis in fact or law. The City of Boulder is unable to establish that the public records sought by Boulder Beat are exempt from its right of inspection established by § 24-72-205(1), C.R.S.

60. Boulder Beat gave the City of Boulder at least fourteen days’ notice, pursuant to § 24-72-204(5), C.R.S., of its intent to file this Complaint seeking documents subject to Boulder Beat’s CORA requests.

61. The City declined to change its position following receipt of the notice of intent to file an application with the District Court, and rather repeated that the records were closed because, in the City’s view, the records are not “public records”.[3]

62. Because the City has denied a valid request for inspection of emails between an elected official and a constituent with a demonstrable connection to the exercise of functions required or authorized by law, Plaintiff is entitled to, and this Court should enter, an order directing the City to turn over the aforementioned documents to allow Boulder Beat to inspect public records subject to its requests. See §§ 24-72-202(6)(a)(I), 24-72-204(5), C.R.S.

63. Alternatively, the City’s unjustified closure to public inspection of emails between an elected official and a constituent with a demonstrable connection to the exercise of functions required or authorized by law (see §§ 24-72-202(6)(a)(I), (II)(b), C.R.S.) requires a hearing on this Complaint and Application “at the earliest practical time,” § 24-72-204(5)(b), C.R.S., and Boulder Beat therefore requests that the Court issue a Show Cause Order requiring the City to demonstrate the propriety of its closure of the requested records, and to provide the records to the Court for *in camera* inspection, and to order an expedited setting of a hearing to determine the propriety of the record closure.

[3] Prior to issuing the “notice of intent”, Counsel for the City and Counsel for Boulder Beat engaged in a phone call. The phone call did not resolve the conflict.

64. Boulder Beat is entitled to an award of its costs of filing and serving this Complaint and to its reasonable attorney's fees to enforce its right of public access to these records.

## VI. Prayer for Relief

**WHEREFORE,** Plaintiff Boulder Beat respectfully prays for the following relief and judgment:

### A. Order to Show Cause

The Court should:

1. Enter an order directing the City of Boulder to show cause why they should not allow inspection of the requested records as described in this Complaint and Application for an Order to Show Cause;
2. Enter an order directing the City to provide to the Court, for *in camera* review, the closed records so that the Court may determine if the documents were appropriately withheld or if they are public records required to be opened for public inspection;
3. Conduct an expedited hearing pursuant to such Order at the earlies practical time, at which time the Court may make the Order to Show Cause absolute;
4. Enter an Order directing the City to provide to Boulder Beat access to and/or copies of withheld public records requested by Boulder Beat;
5. Enter a declaratory judgment finding that the requested records are "public records" subject to disclosure and not exempt under CORA, and that they are subject to public access pursuant to Plaintiff Boulder Beat's valid requests under CORA .

### B. Attorney's fees and costs

The Court should award Plaintiff its reasonable costs and attorney fees in bringing, filing, serving and litigating this civil action pursuant to § 24-72-204(5), C.R.S.

### C. Other orders

The Court should enter such other and further relief as the Court deems proper and just.

Respectfully submitted this 21st day of August, 2020.

*/s/ Eric Maxfield*
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**CERTIFICATE OF SERVICE**

This is to certify that I have duly served this **COMPLAINT AND APPLICATION FOR AN ORDER TO SHOW CAUSE UNDER § 24-72-204(5), C.R.S. WITH EXPEDITED SETTING UNDER § 24-72-204(5)(**b**), C.R.S.,** upon all parties herein by E-Service through ICCES at Boulder, Colorado, this 21st day of August, 2020, addressed as follows:

Luis Toro, Senior Assistant City Attorney
City of Boulder
720-795-8502

Attorneys for Defendant City of Boulder

*/s/* Eric Maxfield