

DISTRICT COURT, BOULDER COUNTY,
COLORADO
1777th 6th Street
Boulder, Colorado 80302
303-441-3750

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**DANIEL LIBIT and SCRUTINY IS UNITY, LLC,
Plaintiffs,**

v.

**UNIVERSITY OF COLORADO at BOULDER,
Defendant.**

▲ COURT USE ONLY ▲

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Case No:

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 Daniel Libit and Scrutiny is Unity, LLC (“Scrutiny”), through undersigned counsel, for their Complaint and Application for an Order to Show Cause against the University of Colorado at Boulder (“UCB”), and allege as follows:

I. Introduction

1. This is an expedited civil action under the Colorado Open Records Act (“CORA”). On September 25 and October 5, 2020 Daniel Libit and Scrutiny served records requests on the Defendant UCB. The requests sought five categories of certain agreements, reports and notices of Buffalo Sports Properties, LLC (“BSP”) and work emails to or from specific employees of BSP that referenced, among other things, “gambling,” “PointsBet,” “Covid,” “agreement,” “negotiate,” “terms,” and/or “deal”. The requests were made consistent with UCB’s statutory obligation that “[a]ll public records shall be open for inspection by any person at reasonable times... .” § 24-6-403(1)(a), C.R.S.
2. In response to the CORA request UCB produced no records and maintained it does not make, maintain, or keep any of the requested agreements, notices, reports, or email records of individuals who are not employees of UCB. In accordance with § 24-72-204(5)(a), C.R.S., Mr. Libit and Scrutiny filed a written notice with UCB, and the parties attempted in good faith to resolve this matter without court involvement. Those efforts resulted in UCB’s production of six pages of fee reports, but otherwise the efforts to resolve the matter without court involvement did not succeed.
3. Through this action, Mr. Libit and Scrutiny seek an Order directing UCB to show cause why its custodian of records should not permit the inspection of the requested public records.
4. CORA requires a hearing on this Complaint and Application “at the earliest practical time,” § 24-72-204(5)(b), C.R.S., and Mr. Libit and Scrutiny therefore request that the Court issue a Show Cause Order requiring UCB to demonstrate the propriety of its closure of the requested records, 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. Mr. Libit and Scrutiny anticipate that no discovery is necessary or appropriate in this expedited action, and that the majority of operative facts will likely be stipulated.
5. The practice sought to be ended here by Mr. Libit and Scrutiny is UCB’s circumvention of CORA by attempting to contract away its CORA obligations.
6. UCB justifies its closure of the emails by one method. It asserts that it does not make, maintain, or keep the requested records, with the implication being that the records are not “public records”. UCB’s position on closure under this theory is not supported by CORA. As a result, the records have been wrongfully withheld from public disclosure.

7. Mr. Libit and Scrutiny request that the Court examine the records *in camera*. If the records 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”, Mr. Libit and Scrutiny request that the Court find that UCB has violated CORA and order the records to be released.

8. In addition to such relief, Mr. Libit and Scrutiny also seek recovery of their costs and reasonable attorney’s fees, under § 24-72-204(5)(b), C.R.S.

II. Parties, Jurisdiction and Venue

9. Daniel Libit is a “person” under § 24-72-202(3), C.R.S., and as such, has standing to bring a claim for access to records under CORA. Mr. Libit’s address is c/o Nathan Eisenberg, 666 Dundee Road, Building 600, Northbrook, IL 60062.

10. Scrutiny is Unity, LLC is a “person” under CORA, § 24-72-202(3), C.R.S., and as such, has standing to bring a claim for access to records under CORA. Scrutiny is organized under the laws of the state of Illinois and its address is c/o Nathan Eisenberg, 666 Dundee Road, Building 600, Northbrook, IL 60062.

11. Daniel Libit is a member of the press.

12. Defendant UCB is an “institution” under § 24-72-202(1.5), C.R.S. and its address is 914 Broadway, Boulder, CO 80309.

13. Scott Bocim is the official custodian of records of UCB.

14. All writings made, maintained, or kept by UCB 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 §§ 24-72-202(5)-(6)(a)(I), 24-72-203(1)(a), C.R.S. UCB is the custodian of the public records that are the subject of this action.

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

16. With respect to the jurisdictional requirement for providing notice of intent to sue under § 24-72-204(5), C.R.S., Mr. Libit and Scrutiny provided notice to UCB on October 16, 2020. The parties were not able to resolve this issue within the 14-day period.

17. Venue is proper under C.R.C.P. 98(b)(2) and (c)(1) and § 24-72-204(5) C.R.S.

III. General Background and Allegations

18. For open records requests under CORA, UCB identifies its address as:
University of Colorado Boulder
Office of the Chancellor
Address: 914 Broadway, Boulder, CO 80309

19. Mr. Libit and Scrutiny believe that college sports deserves the kind of investigative and explanatory journalism and elevated analysis befitting any other multi-billion-dollar industry that touches every important part of our society and prevails over our public institutions of higher learning.

20. The press, including Mr. Libit and Scrutiny, has among its central purposes an interest in the openness of the process and decision-making of UCB. CORA requires that records concerning matters that are the business of the University of Colorado 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 for their decision-making.

21. Buffalo Sports Properties, LLC ("BSP") is a Missouri limited liability company operating in Colorado. BSP was created by Learfield Communications, LLC ("Learfield") solely to manage licensing and sponsorship agreements on behalf of UCB. In return, UCB receives payments from Learfield, through BSP, from revenues derived from these agreements.

22. BSP manages all broadcast operations and corporate partnerships for UCB as part of the overall multimedia rights relationship between the company and the athletic department.

23. BSP holds the exclusive marketing and sponsorship rights for UCB athletics and holds its address out as Buffalo Sports Properties c/o The University of Colorado Boulder, 372 UCB, Stadium Room 129, Boulder, CO 80309.

24. Learfield is a limited liability company with its principal place of business in Plano, Texas. Learfield is the sole owner and sole member of BSP, and the signatory to the licensing and sponsorship agreement between BSP and UCB.

25. BSP, Learfield, and UCB are signatories to a multimedia agreement.

26. The multimedia rights agreement requires BSP and Learfield to maintain records and to make records available to UCB.

27. As a result of BSP's purpose and conduct, it creates and maintains public records on behalf of UCB arising from its contracted role in the "marketing and selling of certain broadcasting, publication, distribution, promotion, and sponsorship rights." This includes the exclusive rights to sell sponsorships on university-produced television shows, radio broadcasts, athletic venue signage, the official UCB athletic department website, game-related announcements and printed materials, and football stadium sponsorships.

28. As part of its agreement, BSP agrees that it will not make any news releases "without the prior approval of the University" other than "standard postings on Parent Company's website..."

29. As part of its agreement, BSP grants UCB the "exclusive right to review, examine, copy, obtain copies, and/or transcribe at its expense any such records" that pertain to their relationship, so long as UCB gives ten days' prior notice.

30. The agreement grants UCB the right to audit Learfield's records once per athletic year, subject to 30 days' notice and certain conditions.

31. Mr. Libit and Scrutiny ask this Court to declare that records created, kept, or maintained by BSP, including certain agreements, reports and notices of BSP, as well as emails made in order to carry out its contractual obligations to UCB, are UCB's public records subject to disclosure under CORA, and to award Mr. Libit and Scrutiny their costs and reasonable attorney's fees.

Records Requests and Responses

32. Mr. Libit and Scrutiny made the following records request to UCB by email on September 25, 2020:

Pursuant to CORA, I am requesting the following materials:

1. Any agreements entered into by Buffalo Sports Properties since Jan. 1, 2018, excluding agreements between Buffalo Sports Properties and the universities (which I have requested under separate cover).
2. Annual reconciliation reports produced by Buffalo Sports Properties, since Jan. 1, 2018
3. Annual year-end reports produced by Buffalo Sports Properties, since Jan. 1 2018
4. Inventory sales reports produced by Buffalo Sports Properties since Jan. 1, 2018
5. Written notices about ticket needs sent by Buffalo Sports Properties to the CU athletic department since Jan. 1, 2018

33. On behalf of UCB, Mr. Bocim made the following email response on October 5, 2020:

Hi Daniel,

We are continuing to research your request below, so pursuant to C.R.S. §24-72-203(3)(b), CU Boulder requires an extension of up to seven working days to respond.

Have a good day!

Scott

Scott Bocim
Custodian of Records / Assistant to the Chancellor
University of Colorado Boulder
17 UCB
303-492-8908
Scott.Bocim@Colorado.edu
coracuboulder@colorado.edu

34. Mr. Libit and Scrutiny made the following records request to UCB by email on October 5, 2020:

This request is made under the Colorado Open Records Act. I am seeking the following records:

1. Any emails, inclusive of attachments, sent from the work email account of Buffalo Sports Properties General Manager Todd Wienke (Todd.wienke@buffalosportsproperties.com) since March 15, 2020, which include any of the following search terms: "gambling," "PointsBet," "Covid," "agreement," "negotiate," "terms," and/or "deal."
2. Any emails, inclusive of attachments, sent or received by Todd Wienke since Jan. 1, 2020, from any senders or recipients with a "@pointsbet.com" email address. Please exclude any emails received by Mr. Wienke that are in duplicate of records responsive to #1. Please exclude any emails received by Mr. Wienke that are from subscription services or list-serve.
3. Any emails, inclusive of attachments, sent from the work email account of Buffalo Sports Properties Director of Business Development Brandon Flavey (bfalvey@buffalosportsproperties.com) since March 15, 2020, which include any of the following search terms: "gambling," "PointsBet," "Covid," "agreement," "negotiate," "terms," and/or "deal."
4. Any emails, inclusive of attachments, sent from the work email account of Buffalo Sports Properties Senior Manager Mike Pearl (mike.pearl@buffalosportsproperties.com) since March 15, 2020, which include any of the following search terms: "gambling," "PointsBet," "Covid," "agreement," "negotiate," "terms," and/or "deal."

35. On behalf of UCB, Mr. Bocim made the following email response on October 9, 2020:

From: "Scott E. Bocim" <Scott.Bocim@colorado.edu>

Subject: RE: CORA request

Date: October 9, 2020 at 6:02:41 PM CDT

To: Daniel Libit <dlibit@theintercollegiate.com>

Hi Daniel,

The University does not keep or maintain any email records of the accounts you have specified in your request below. Should you wish to obtain records of University employee emails, please specify accounts, search terms, and date ranges.

Take care,

Scott

Scott Bocim
Custodian of Records / Assistant to the Chancellor
University of Colorado Boulder
17 UCB
303-492-8908
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36. UCB denied Mr. Libit and Scrutiny the right to inspect the requested records.

37. On October 16, 2020 Mr. Libit and Scrutiny provided written statutory notice of intent to file an application with the District Court concerning UCB's denials of the right of inspection of public records in relation to the 9/25/2020 and 10/5/2020 records requests. See § 24-72-204(5)(a), C.R.S.

38. On October 23, 2020, Mr. Libit and undersigned counsel met with UCB counsel over video link to discuss Mr. Libit and Scrutiny's records requests and UCB's position. UCB declined to change its position. UCB indicated that it did not search email records, accounts, or servers of BSP or its employees. Following the meeting, UCB produced six pages of fee reports.

39. UCB continues to withhold the requested records without proper justification.

IV. Colorado Open Records Act

40. 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." § 24-72-201, C.R.S.

41. 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.

42. 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., lawfully shield the University from disclosing the records made, kept, and maintained physically by BSP wholly on the University's behalf.

43. CORA defines "custodian" as "the official custodian or any person having personal custody and control of the public records in question." § 24-72-202(1.1), C.R.S.

44. CORA defines "official custodian" as, "any officer or employee of the state, of any agency, institution, ...who is responsible for the maintenance, care, and keeping of public records, regardless of whether the records are in his or her actual personal custody or control." § 24-72-202(2), C.R.S.

45. UCB is an institution and therefore subject to CORA under § 24-72-202(1.5), C.R.S. and by contract BSP is the sole private entity that manages the University's day-to-day multimedia rights business.

46. All records transmitted to or by BSP in conducting business for the University are imputed to the University, and therefore are public records subject to CORA.

47. E-mails transmitted to or by BSP are records that are kept by the University because they are in its "care, custody, or control."

48. Under the University's multimedia agreement with BSP, BSP and its parent company Learfield have an obligation to maintain complete business and accounting records, in accordance with applicable state laws.

49. Under the University's multimedia agreement with BSP the University has a right to access any such records, "but not of any records that pertain in whole to matters outside this Agreement."

50. All business conducted by BSP is conducted for the University, that being its sole reason for existing.

V. First Claim for Relief

Violation of CORA

51. Mr. Libit and Scrutiny incorporate by reference all preceding paragraphs as if stated fully herein.

52. 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.

53. Mr. Libit and Scrutiny are applying to this Court for an Order directing the UCB custodian of records to show cause why the custodian should not permit inspection of the requested records.

54. UCB has denied Mr. Libit and Scrutiny the right to inspect public records with no demonstrated basis in fact or law. UCB is unable to establish that the public records sought by Mr. Libit and Scrutiny are exempt from its right of inspection established by § 24-72-205(1), C.R.S.

55. Mr. Libit and Scrutiny gave UCB at least fourteen days' notice, pursuant to § 24-72-204(5), C.R.S., of their intent to file this Complaint seeking documents subject to Mr. Libit and Scrutiny's CORA requests.

56. Upon conferral between the parties following UCB's receipt of Mr. Libit and Scrutiny's notice of intent to file an application with the District Court, UCB continued to maintain that it did not keep or maintain the requested records and, aside from producing six pages of fee reports, would not produce them.

57. Because UCB has denied a valid request for inspection of emails with a demonstrable connection to the exercise of functions required or authorized by law, Mr. Libit and Scrutiny are entitled to, and request this Court to enter, an Order directing UCB to turn over the requested documents to allow Mr. Libit and Scrutiny to inspect the public records subject to the requests. See §§ 24-72-202(6)(a)(I), 24-72-204(5), C.R.S.

58. Alternatively, UCB's unjustified closure to public inspection of emails with a demonstrable connection to the exercise of functions required or authorized by law (see § 24-72-202(6)(a)(I), C.R.S.) requires a hearing on this Complaint and Application "at the earliest practical time," § 24-72-204(5)(b), C.R.S. Mr. Libit and Scrutiny therefore request that the Court issue a Show Cause Order requiring UCB 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.

59. Mr. Libit and Scrutiny are entitled to an award of their costs and reasonable attorney's fees to enforce the right of public access to these records.

VI. Prayer for Relief

WHEREFORE, Plaintiffs Mr. Libit and Scrutiny respectfully pray for the following relief and judgment:

A. Order to Show Cause

Mr. Libit and Scrutiny respectfully request that the Court:

1. Enter an Order directing UCB to show cause why UCB 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 UCB 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 earliest practical time, at which time the Court may make the Order to Show Cause absolute;
4. Enter an Order directing UCB to provide to Mr. Libit and Scrutiny access to and/or copies of withheld public records requested by Mr. Libit and Scrutiny;
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 Mr. Libit and Scrutiny's valid requests under CORA.

B. Attorney's fees and costs

Mr. Libit and Scrutiny request their costs and reasonable attorney fees in bringing, filing, serving and litigating this civil action pursuant to § 24-72-204(5), C.R.S.

C. Other orders

Mr. Libit and Scrutiny request the entry of such other and further relief as the Court deems proper and just.

Respectfully submitted this 2nd day of December, 2020.

/s/Eric Maxfield _____

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Telephone: (720) 925-4615

Plaintiffs' Address
c/o Nathan Eisenberg,
666 Dundee Road, Building 600,
Northbrook, IL 60062

This Complaint and Application for an Order to Show Cause was filed with the Court through the electronic filing procedures under C.R.C.P. 121(c), § 1-26.

As required by these rules, the original signed copy of this pleading is on file with Maxfield Gunning, LLP