

DISTRICT COURT, CITY AND COUNTY OF
DENVER, STATE OF COLORADO
1437 Bannock Street, Room 256
Denver, Colorado 80202
(303) 606-2300

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CASE NUMBER: 2020CV34122

FLORENCE SEBERN

Plaintiff,

v.

**THE CITY AND COUNTY OF DENVER, a home rule
municipality; and MICHAEL B. HANCOCK, in his
official capacity as the Mayor of the City of Denver**

Defendants.

▲ COURT USE ONLY ▲

Attorneys for Plaintiff:

Robert R. Gunning, #26550
Eric Maxfield, #29485
Maxfield Gunning, LLP
3223 Arapahoe Avenue, Suite 300
Boulder, Colorado 80303
(720) 586-8567

Rob@maxfieldgunning.com

Eric@maxfieldgunning.com

Case No:

Division:

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

Plaintiff Florence Sebern, through the undersigned counsel, for her Complaint and Application for Order to Show Cause, alleges as follows:

I. Introduction

1. This is an expedited civil action under the Colorado Open Records Act (“CORA”). Plaintiff served records requests on the City and County of Denver, Denver Mayor’s Office. The requests sought materials regarding the authority for, and creation of the Group Living Advisory Committee from personnel in the Mayor’s Office.

2. In response to the CORA request, the Mayor’s Office maintained that the requested documents are all subject to the deliberative process privilege. The Mayor’s Office withheld the documents on this basis.

3. Through this action, Plaintiff seeks an Order directing the Defendants to show cause why the Mayor’s custodian of records should not permit the inspection of the requested public records. In addition to this equitable relief, Plaintiff also seeks recovery of her reasonable attorney fees and court costs under § 24-72-204(5)(b), C.R.S.

4. At its core, this litigation requests the Court to review the subject documents *in camera*, and to determine whether the Mayor’s Office properly invoked the deliberative process privilege in withholding the documents.

5. Under § 24-72-204(3)(a)(XIII), C.R.S., the Court “shall weigh, based on the circumstances presented in the particular case, the public interest in honest and frank discussion within government and the beneficial effects of public scrutiny upon the quality of governmental decision-making and public confidence therein.”

6. If the Court determines that the beneficial effects of public scrutiny upon the quality of governmental decision-making and the public confidence therein outweighs the public interest in honest and frank discussion within government, Plaintiff requests the Court to order the records be opened for inspection.

7. Plaintiff anticipates that no discovery is necessary or appropriate in this expedited action, and that the operative facts will likely be stipulated.

8. Further, CORA requires a hearing on this Complaint and Application “at the earliest practical time,” § 24-72-204(5)(b), C.R.S., and Plaintiff therefore requests an expedited setting.

II. Parties, Jurisdiction and Venue

9. Plaintiff is an individual and a resident of the City and County of Denver.

10. Plaintiff is a “person” under § 24-72-202(3), C.R.S. and has standing to bring a claim for access to public records under CORA.

11. Defendant City and County of Denver is a home rule municipality. Its principal office is located at 1437 N. Bannock Street, Denver, CO 80202.

12. Michael B. Hancock is the Mayor of Denver. Theresa Marchetta, Director of Strategic Communications for the Mayor's Office, is the custodian of the public records that are the subject of this action. The Mayor's Office and custodian of records is located at 1437 N. Bannock Street, Room 350, Denver, CO 80202.

13. Jurisdiction is proper in this Court under § 24-72-204(5)(a), C.R.S. Venue is proper under C.R.C.P. 98(b)(2) and (c)(1) and § 24-72-204(5)(a), C.R.S.

III. General Background and Allegations

14. In late 2017, the Mayor's Office spearheaded formation of the Group Living Advisory Committee. The Committee ultimately consisted of 48 people who were given the authority to craft and vote on a draft amendment to Denver's Group Living Zoning Code. Upon information and belief, many of the Committee members were planners, developers, providers of services, and representatives of organizations that stand to commercially gain from the proposed Zoning Code amendment. To date, the Mayor's Office has not responded to Plaintiff's request to identify legal authority supporting the creation of the Group Living Advisory Committee.

15. The Group Living Zoning Code Amendment is a 184-page zoning text amendment that will have a very substantial impact on Denver residents. It is currently in the Land, Use, Transportation and Infrastructure Committee. Upon information and belief, it will be scheduled for a public hearing before the Denver City Council in late January 2021.

16. On August 1, 2020, Plaintiff submitted a CORA request to the Mayor's office. In relevant part, this request asked for "all materials (emails, attachments, lists, documents, memos) regarding the authority for, and creation and appointment of the Group Living Advisory Committee from any personnel in the Mayor's Office, to include but not limited to January 2018 guidance and input from Skye Stewart per Andrew Webb's statement 'The project team sought her input back in January on how the committee should be appointed.'"

17. On August 6, 2020, the Mayor's custodian of records denied the request. Responding on behalf of Ms. Marchetta, Bailey Richter correctly interpreted the request to cover records related to potential work to be done to address issues in the zoning code related to group living. The response then stated that all records responsive to the request "are subject to the deliberative process privilege pursuant to Colorado Revised Statutes Section 24-72-204(3)(a)(XIII) and therefore not available for public inspection." A copy of the request and response are attached as Exhibit 1.

18. In conjunction with the August 6 response, the Mayor's Office also provided a deliberative process privilege certification statement. The statement, which was initially not notarized, identified the five emails and attached documents that were responsive to the request but being withheld on account of the deliberative process privilege. This statement did not provide any detailed information, by document, identifying why the records custodian believed each document was subject to the privilege. Upon request, a notarized statement was provided to Plaintiff on December 2, 2020. A copy of both statements is attached as Exhibit 2.

19. On November 11, 2020, through undersigned counsel, Plaintiff submitted a 14-day written notice to the Mayor's custodian of records. This notice was submitted in accordance with § 24-72-204(5)(a), C.R.S., and provided written notice of Plaintiff's intent to file this Application for an Order to Show Cause. The notice outlined Plaintiff's legal position that the Mayor's Office was unlawfully withholding the requested documents. This notice also requested a meeting to discuss potential resolution of this matter without court involvement. A copy of this notice is attached as Exhibit 3.

20. Denver's counsel agreed to meet, and counsel for both parties met in an online platform on November 18, 2020 to discuss potential resolution of the CORA dispute. At this meeting, Denver's counsel stated that they had prepared a "Vaughn index." A Vaughn index is required when documents are withheld on account of the deliberative process privilege. This index was provided to Plaintiff's counsel immediately after the meeting. The index is attached as Exhibit 4.

21. At the meeting, Denver's representatives indicated that Denver was unwilling to change its position as to the deliberative process privilege.

22. Following review of the Vaughn index, on November 23, 2020, through counsel, Plaintiff requested additional information about the identity of the individuals copied on one of the emails. Defendants responded with additional information on November 30, 2020.

IV. Claim for Relief (Application for Order to Show Cause - Violation of CORA)

23. Plaintiff incorporates by reference all preceding paragraphs as if fully stated herein.

24. The public policy of Colorado is that all public records shall be open for inspection by any person at reasonable times. § 24-72-201, C.R.S.

25. A public record is any "writing" that is "made, maintained or kept by . . . any . . . political subdivision of the state . . . for use in the exercise of functions required or authorized by law or administrative rule. . ." § 24-72-202(6)(a)(I), C.R.S. The records sought by Plaintiff through the CORA requests are public records.

26. Under CORA, any person may request to inspect and/or obtain a copy of a public record. § 24-72-203(1)(a), C.R.S.

27. Under CORA, a custodian is required to provide access to a public record unless the inspection is contrary to any state statute or is otherwise exempted from disclosure by one of the narrow exemptions in section 204(3)(a) of CORA. § 24-72-204(1)(a), C.R.S.

28. CORA provides in pertinent part: “[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.

29. Upon information and belief, the records sought by Plaintiff are located at the Mayor’s Office in Denver, Colorado.

30. In accordance with § 24-72-204(5)(a), C.R.S., Plaintiff is applying to this Court for an Order directing Defendants to show cause why the Mayor’s custodian of records should not permit inspection of the records.

31. Defendants have denied Plaintiff the right to inspect the requested public records. The Mayor’s August 6, 2020 withholding of the records was based solely on the deliberative process privilege under § 24-72-204(3)(a)(XIII), C.R.S.

32. Unlike other privileges, the deliberative process privilege is a qualified privilege. Section 24-72-204(3)(a)(XIII), C.R.S. exempts from disclosure “[r]ecords protected under the common law governmental or ‘deliberative process’ privilege, if the material is so candid or personal that public disclosure is likely to stifle honest and frank discussion within the government, unless the privilege has been waived.”

33. Plaintiff has not been provided with the requested documents. However, based on the nature of the documents requested and from the limited information provided by Defendants, Plaintiff contests that the material contained is so candid or personal that public disclosure is likely to stifle honest and frank discussion within the government.

34. According to the General Assembly, in some circumstances, public disclosure of documents covered by the privilege may cause substantial injury to the public interest. In accordance with § 24-72-204(3)(a)(XIII), C.R.S., in “determining whether disclosure of records would cause substantial injury to the public interest, the court shall weigh, based on the circumstances presented in the particular case, the public interest in honest and frank discussion

within government and the beneficial effects of public scrutiny upon the quality of government decision-making and public confidence therein.”

35. Disclosure of the requested documents will greatly enhance public scrutiny of the quality of government decision-making and public confidence therein. In particular, the Group Living Zoning Code Amendment is likely to be presented to the Denver City Council in late January 2021. This Amendment seeks to increase density in single family neighborhoods, including but not limited to significantly increasing the number of unrelated adults that may reside in single family homes. Upon information and belief, the requested documents will shed considerable light on the formation of the Group Living Advisory Committee, including the criteria used to select the 48 members. The disclosure of this information before the City Council hearing(s) on the Amendment will foster transparency, accountability, and improve the decision-making process.

36. Upon information and belief, many of the Group Living Advisory Committee members were selected because they were likely to follow the direction of the Mayor’s Office in relation to the Group Living Zoning Code Amendment.

37. Upon information and belief, the Group Living Advisory Committee members did not include members representing diverse viewpoints that could enhance the quality of decision-making.

38. The Group Living Advisory Committee completed its work as of August 2020. The passage of time from the subject communications, and the completion of the Committee’s work, lessens the likelihood that disclosure will cause substantial injury to the public interest by stifling frank and honest discussion.

39. Section 24-72-204(3)(a)(XIII), C.R.S. requires that when a document is withheld on account of this qualified privilege, “the custodian shall provide the applicant with a sworn statement specifically describing each document withheld, explaining why such document is privileged, and why disclosure would cause substantial injury to the public interest.”

40. The initial response, served on August 6, 2020, did not offer an explanation as to why each document was privileged, or why disclosure would cause substantial injury to the public interest. The Vaughn index, produced on November 18, 2020, also fails to substantially comply with the statute’s requirements. Like the original statement, the index employs boilerplate provisions that fail to establish why each document’s disclosure would substantially impair the public interest.

41. Plaintiff has met all conditions precedent to filing this CORA action, including the 14-day notice requirements of § 24-72-204(5)(a), C.R.S.

42. Plaintiff has established a *prima facie* basis to believe that the requested documents are “public records” under CORA, and that Plaintiff has been denied access to public records by Defendants.

43. Because the Mayor’s Office has denied a valid request for inspection of public records, Plaintiff is entitled to, and this Court should enter, an Order directing Defendants to produce the requested documents. § 24-72-204(5), C.R.S.

44. Plaintiff is entitled to an award of her reasonable attorney fees and costs to enforce its right of public access to these public records. § 24-72-204(5)(a), C.R.S.

45. Under § 24-72-204(5)(b), C.R.S., upon the filing of an Application, the Court must schedule a hearing on the Order to Show Cause at the “earliest time practical.”

46. The proposed form of an Order calling for a show cause hearing is filed herewith.

V. Prayer for Relief

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

1. An Order directing Defendants 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. An Order directing the Mayor’s Office to provide to the Court, for *in camera* review, the closed records, including the five emails and all attachments, 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 a hearing pursuant to such Order at the earliest practical time, at which time the Court may make the Order to Show cause absolute;
4. An Order directing the Mayor’s Office to provide access to and/or copies of the withheld public records requested;
5. A declaratory judgment finding that the requested public records are subject to disclosure and not exempt under CORA, and that they are subject to public access pursuant to Plaintiff’s valid requests under CORA;
6. An Order awarding Plaintiff recovery of her reasonable attorney fees and costs under § 24-72-204(5)(a), C.R.S.; and
7. Any other and further relief as the Court deems proper and just.

Respectfully submitted this 4th day of December, 2020.

/s/Robert R. Gunning
Robert R. Gunning, #26550
Eric Maxfield, #29485
MAXFIELD GUNNING, LLP
Attorneys for Plaintiff

Plaintiff's Address

1140 S. Forest Street
Denver, CO 80246

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