District Court Boulder County, Colorado 1777 6th Street Boulder, CO 80302 (303) 441-3750	DATE FILED: February 23, 2021 1:03 PM CASE NUMBER: 2020CV30970
DANIEL LIBIT, and **SCRUTINY IS UNITY, LLC.** Plaintiffs, **v.** **UNIVERSITY OF COLORADO AT BOULDER** Defendant.	**▲ COURT USE ONLY ▲**
Attorney for Plaintiffs: Eric Maxfield *Attorney for Defendant:* Hermine Kallman	Case Number: 2020 CV 30970 Division: 3 Courtroom: K
ORDER RE: PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT	

THIS MATTER comes before the Court on the Motion for Summary Judgment ("Motion") filed January 12, 2021 by Plaintiffs. Defendant filed a Response to Plaintiffs' Motion for Summary Judgment ("Response") on February 1, 2021, and Plaintiffs filed a Reply on Motion for Summary Judgement ("Reply") on February 22, 2021. Having carefully considered the motions, responsive pleadings, record, and applicable law, the Court enters the following findings, rulings, and ORDER:

I. BACKGROUND

This action arises out of Plaintiffs' Complaint filed December 2, 2020 asserting Defendant had denied a valid request for inspection of public records under the Colorado Open Records Act ("CORA"). Plaintiffs filed Stipulated Facts and Exhibits on behalf of the parties on December 24, 2020.

In summary, Plaintiffs' CORA request deals with records related to Buffalo Sports Properties, LLC ("BSP"). BSP is a Missouri limited liability company operating in Colorado that was created by Learfield Communications, Inc. ("Learfield") solely to manage licensing and sponsorship agreements on behalf of Defendant. (Stip. Facts ¶¶ 9-10). BSP, Learfield, and Defendant are signatories to a multimedia rights agreement ("the Agreement"), where Defendant granted BSP the exclusive right and obligation to engage in marketing and promotion for Defendant's intercollegiate athletic teams. (*Id*. ¶¶ 11-12).

Plaintiffs made two records requests to Defendant pursuant to CORA on September 25, 2020 and October 5, 2020. (*Id*. ¶¶ 22-25). In Plaintiffs' September 25th records request,

Plaintiffs requested: (1) any agreements entered into by BSP since January 1, 2018; (2) annual reconciliation reports produced by BSP since January 1, 2018; (3) annual year-end reports produced by BSP since January 1, 2018; (4) inventory sales reports produced by BSP since January 1, 2018; and (5) written notices about ticket needs sent by BSP to the CU Athletic Department since January 1, 2018. (*Id.* ¶ 22).

Plaintiffs' October 5, 2020 request sought the following records:

(1) Any emails, inclusive of attachments, sent from the work email account of Buffalo Sports Properties General Manager Todd Wienke…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…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… since March 15, 2020, which include any of the following search terms: "gambling," "PointsBet," "COVID," "agreement," "negotiate," "terms," and/or "deal."

(Stip. Facts ¶ 24).

II. STANDARD OF REVIEW

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." C.R.C.P. Rule 56(c). The purpose of "summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial . . . ." *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). Summary judgment is a drastic remedy, and, therefore, it is only properly entered upon a clear showing that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Pueblo W. Metro. Dist. v. Se. Colorado Water Conservancy Dist.*, 689 P.2d 594, 600 (Colo. 1984). A material fact is a fact that "will affect the outcome of the case." *Peterson*, 829 P.2d at 375.

Determining whether summary judgment is proper, "the nonmoving party is entitled to the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts, and all doubts must be resolved against the moving party." *Casebolt v. Cowan*, 829 P.2d 352, 354 (Colo. 1992); *see also Jones v. Dressel*, 623 P.2d 370, 373 (Colo. 1981). Accordingly, the trial court must accept as true the material allegations of the nonmoving party unless affidavits, depositions, and admissions on file, clearly establish there is no genuine issue as to any material fact. *Churchey v. Adolph Coors Co*., 759 P.2d 1336, 1345 (Colo. 1988).

In a motion for summary judgment, "the moving party bears the initial responsibility of informing the court of the basis for his motion and identifying those portions of the record and of the affidavits, if any, which he believes demonstrate the absence of a genuine issue of material fact." *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987); *see also* C.R.C.P. Rule 56(e). Once the moving party makes a convincing showing that genuine issues of fact are lacking, "the burden shifts to the nonmoving party to establish that there is a triable issue of fact." *Mancuso v. United Bank of Pueblo*, 818 P.2d 732, 736 (Colo. 1991).

III. ANALYSIS

CORA requires public records be open for inspection and defines a "public record" as "all writings made, maintained, or kept by the state…for use in the exercise of functions required or authorized by law…or involving…public funds." C.R.S. § 24-72-202(6)(a)(I). To determine whether a writing is a public record subject to disclosure under CORA, the court should ascertain: (1) who made, maintained, or kept the requested record, and (2) why he, she, or it did so. *Mountain-Plains Inv. Corp. v. Parker Jordan Metro. Dist.*, 312 P.3d 260, 265 (Colo. App. 2013).

A. Defendant's Response to the September 25, 2020 Records Request

Defendant's Response asserts it has "chosen to invoke its rights under Section 13.2 of [the Agreement]…and has requested that BSP produce the records in its possession responsive to Plaintiffs' September 25 request." (Response at 2).

It is undisputed under Section 13.2 of the Agreement between Defendant and BSP, Defendant has 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. (Stip. Fact ¶ 17).

Plaintiffs assert this agreement to produce these documents is an admission by Defendant that it has "custody and control of the documents and is a concession that its closure was not justified and therefore violated CORA." (Reply at 4). Plaintiffs assert the disclosure of the records under the September 25, 2020 request is not moot because there are outstanding issues regarding whether UCB will provide the requested documents, whether redactions it may make are beyond that allowed under CORA, and whether Plaintiffs are entitled to their costs and reasonable attorney fees.

In *Denver Post Corp. v. Stapleton Dev. Corp.*, Stapleton argued it was not subject to CORA, but agreed as a matter of policy to allow access to its books and records, and redacted confidential, commercial and financial data from such records. 19 P.3d 36, 37 (Colo. App. 2000). Stapleton further argued its disclosure of these redacted documents would render Plaintiffs' action moot. *Id*. Plaintiffs objected, arguing the issue of costs and attorney fees needed to be resolved as the redactions went far beyond what was allowed, and so Stapleton had not complied with the requirements of CORA. *Id*. The Court of Appeals held there were outstanding issues regarding whether Stapleton had complied with CORA by providing redacted documents, whether redactions made were beyond CORA, and whether the plaintiffs were entitled to costs and attorney fees; therefore, the action was not moot. *Id*. The Court of Appeals further held voluntary compliance does not necessarily moot an action, as there is a risk that the defendant will resume the challenged practice once the action is dismissed. *Id*.

Defendant has voluntarily complied with the September 25, 2020 records request, but unlike Stapleton, it has not asserted that it is not subject to CORA. Rather, Defendant asserts it will exercise its rights under the Agreement with BSP for BSP to produce the records relevant to the September 25, 2020 records request. Further there is no evidence provided indicating that Defendant has redacted any portions of the records. Defendant indicated it will produce these records, with redaction if appropriate, upon receiving them from BSP. (Response at 2). Therefore, the Court cannot determine at this time whether any redactions are proper and whether any attorney's fees and costs should be awarded at this time. *See* C.R.S. 24-72-204(5)(b) (the award of costs and attorney fees is mandatory to the prevailing applicant "unless the court finds that the denial of the right of inspection was proper").

B. Plaintiffs' October 5, 2020 Records Request

The parties dispute whether the email communications listed in the October 5, 2020 records request are "public records" as defined by CORA.

Plaintiffs argue BSP operates solely to handle Defendant's multimedia rights, and as a result BSP makes, keeps, and maintains records involving the receipt or expenditure of public funds. Plaintiffs argue these emails should be imputed to Defendant as public records under CORA. Additionally, Plaintiffs argue the Agreement provides Defendant the right to access and inspect records made by BSP in furtherance of multimedia rights agreements involving the receipt of public funds, which should include the emails requested on October 5.

Defendant argues BSP is an independent entity that manages its own records, and that BSP's emails that have not been sent to or received by Defendant are not made, maintained, or kept by Defendant. Defendant argues the Agreement does not provide them access to BSP's email servers, but rather allows Defendant access to BSP's business and accounting records that reflect all receipts and income. Defendant further asserts Plaintiff has failed to provide evidence that BSP's emails involve the receipt or expenditure of public funds.

The Colorado Court of Appeals held that documents in possession of a contractor were "public records" as defined by CORA because they were maintained in such a manner as to give the public entity full access to them, and the documents had been referred to by at least one employee of the public entity when awarding contracts. *Int'l. Bhd. of Elec. Workers Local 68 v. Denver Metro. Major League Baseball Stadium Dist.*, 880 P.2d 160, 164 (Colo.

App. 1994) (*IBEW*). The Colorado Court of Appeals also held that communications sent to or received by the public entity – through a contractor – were public records under CORA. *Mountain-Plains,* 312 P.3d at 267.

The Court notes emails may be deemed public records if they were made, maintained, or kept by the government for use in the exercise of functions required or authorized by law or involving the receipt or expenditure of public funds. *Id*. at 266 (internal citations omitted). This means the email correspondence should address the performance of public functions or the receipt and expenditure of public funds. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1090 (Colo. 2011).

The Court finds it is undisputed that the Agreement requires BSP and Learfield to maintain "separate, accurate, and complete business and accounting records reflecting all receipts and income associated with their activities and operations undertaken pursuant to the Agreement, including, but not limited to, records of all sales revenues." (Stip. Fact ¶ 17; Ex. 1 at 21). The Court finds it is undisputed Defendant has the right to "review, examine, copy, obtain copies, and/or transcribe at its expense any such records but not of any records that pertain in whole to matters outside of this Agreement." (*Id*. at ¶ 18; Ex. 1 at 22).

Defendant asserts the provisions of the Agreement provide it access solely to the business and accounting records of Learfield and BSP – not BSP's emails. The Court finds it is undisputed that BSP and Defendant are separate entities. The Court also finds it is undisputed that Defendant notified Plaintiffs that BSP emails are not saved on Defendant's email servers, and that Defendant did not search email records, accounts, or servers of BSP or its employees. (*Id*. at ¶ 29). Unlike the situation in *IBEW*, the Court cannot find based on the facts provided that BSP's emails are maintained in such a way as to provide Defendant full access to them. And unlike the situation in *Mountain-Plains* where the public entity's daily affairs were managed solely by the contractor, BSP has separate email servers from Defendant's email servers and it does not act as custodian of Defendant's records.

If BSP's emails do fall under the defined "business and accounting records reflecting all receipts and income associated with their activities and operations undertaken pursuant to the Agreement, including, but not limited to, records of all sales revenues," the Court finds Defendant has a right to access them. If the emails are maintained in such a manner as to give Defendant access to them, and the emails concern the institution's authorized activity or the use and expenditure of public funds, then Defendant shall produce these emails to Plaintiffs under CORA. If not, the Court cannot find these email communications are public records as defined by CORA.

IV. CONCLUSION

In accordance with the foregoing analysis, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiffs' Motion for Summary Judgment. In short, if Defendant had a right to obtain the documents under the terms of the Agreement between Defendant and BSP, they must turn those records over to Plaintiffs.

Therefore, Defendant shall produce the records relevant to the September 25, 2020 records request to Plaintiffs within 21 days of receipt from BSP. Defendant shall produce BSP email communications under the October 5, 2020 request which meet the definition of records that Defendant has access to under Section 13.1 of the agreement within 60 days of this Order.

SO ORDERED: February 23, 2021

BY THE COURT

P. Butler

Patrick Butler
District Court Judge