

DATE FILED: May 3, 2021 12:55 PM
FILING ID: B442A393A1E94
CASE NUMBER: 2021CV31379

DISTRICT COURT, CITY AND COUNTY OF
DENVER, STATE OF COLORADO

Court Address: 1437 Bannock St., Room 256
Denver, CO 80202

Plaintiffs:
**TEGNA, INC. d/b/a/ KUSA- TV, and
THE COLORADO SUN**

Defendant:
AMANDA BRUBAKER, in her official capacity the
Records Custodian for the Colorado Department of
Human Services

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Case Number:

Division:

**COMPLAINT AND APPLICATION FOR AN ORDER TO SHOW CAUSE
PURSUANT TO § 24-72-204(5), C.R.S.**

Plaintiffs TEGNA, Inc. d/b/a/ KUSA-TV and The Colorado Sun, by and through their undersigned counsel, for their Complaint and Application for Order to Show Cause, hereby states as follows:

INTRODUCTION

This is a civil action under the Colorado Open Records Act (“CORA”). The Plaintiffs, KUSA-TV/9News and The Colorado Sun are joint Applicants seeking an Order to Show Cause directed to the custodian of public records for the Colorado Department of Human Services, as state agency, to appear and to show cause why public records that the Applicants have requested to inspect should not be made available for inspection.

JURISDICTION AND PARTIES

1. This Court has jurisdiction over the claims herein under §§ 24-72-204(5) and - 204(5.5) of CORA, § 24-72-201, *et seq.*, C.R.S (2020). On information and belief, the public records that are at the center of this action can be found in this judicial district.

2. Plaintiffs TEGNA, Inc. (owner and operator of television station KUSA-TV) (hereinafter “KUSA-TV/9News) and The Colorado Sun are both “person(s)” as defined by § 24-72-202(3), C.R.S..

3. Defendant Amanda Brubaker is the CORA Manager for the Colorado Department of Human Services (“CDHS”) and is a custodian of the public records that are the subject of the Plaintiffs’ CORA request.

4. Venue for this civil action is proper in this District under Rules 98(b)(2) and (c)(1) of the Colorado Rules of Civil Procedure and under § 24-72-204(5), C.R.S.

APPLICABLE LAW

5. Under the CORA, any person may request to inspect and/or obtain a copy of a public record. *See* § 24-72-203(1)(a), C.R.S. CORA guarantees access to records of public business so that “the workings of government are not unduly shielded from the public eye.” *Int’l Bhd. of Elec. Workers Local Union 68 v. Denver Metro. Major League Baseball Stadium Dist.*, 880 P.2d 160, 165 (Colo. App. 1994).

6. 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” *See* § 24-72-202(6)(a)(I), C.R.S. (emphasis added).

7. Under the CORA, a custodian is required to provide access to a public record unless “[s]uch inspection would be contrary to any state statute” or is otherwise exempted from disclosure by one of the narrow exemptions in Section 204(3)(a) of the CORA. *See* § 24-72-204(1)(a), C.R.S.

8. If no such exemption applies, the custodian may nevertheless establish to the Court that, because of unique and extraordinary circumstances the General Assembly could not have foreseen, disclosure of a public record in these circumstances would cause “substantial injury to the public interest.” § 24-72-204(6)(a), C.R.S.

9. Any person whose request for access to a public record is denied may apply to the District Court, in the District in which such record can be found, for an “Order to Show Cause” directing the custodian of the public record to show cause why the record should not be made available for public inspection. *See* § 24-72-204(5), C.R.S. Prior to

filing such suit, the applicant must provide the records custodian with advance written notice (either fourteen days or three days, if the need for speedy resolution is justified through a factual recitation) in order to be eligible to recover attorneys' fees. *Id.*

10. Under the CORA, upon the filing of such an Application, the Court must schedule the hearing on an Order to Show Cause at the "earliest time practical." *See id.*

11. In a CORA show cause proceeding, once the requester establishes a *prima facie* basis for concluding that the requested record is a "public record," the burden shifts to the custodian of the record to demonstrate why the refusal to provide access to the requested record is not "improper." *See Denver Publ'g Co. v. Bd. of Cty. Comm'rs*, 121 P.3d 190, 199 (Colo. 2005).

12. Under the CORA, following a Show Cause Hearing, if the Court finds that the requested public record and/or recordings should be made available for public inspection, it *shall* order that those records be made available for public inspection; moreover, in such circumstances, the Court *must* award the applicant his or her reasonable attorneys' fees in connection with the effort to obtain access to the public record. *See Denver Publ'g Co.*, 121 P.3d at 199.

FACTS THAT PROMPTED PLAINTIFFS' CORA REQUESTS

13. CDHS is responsible for regulating private operators of Residential Child Care Facilities ("RCCFs"), which provide housing and care to troubled children who are awaiting foster care placement. Under the Child Care Licensing Act, the CDHS is responsible for ensuring that all licensed RCCFs comply with the standards prescribed in state law. When RCCFs fail to maintain these standards, the CDHS has the sole authority to initiate appropriate sanctions up to and including closure.

14. Operators of RCCFs are statutorily required (mandated) to phone the child abuse hotline whenever there is any complaint or alleged abuse of a child at the facility.

15. In 2019, The Office of Colorado's Child Protection Ombudsman released a report detailing the failure of the child welfare protection system, including CDHS, that resulted in the closure of the El Pueblo RCCF.¹ *See* CPO Investigative Report 2017-2736: El Pueblo Boys and Girls Ranch (Aug. 12, 2019), <https://coloradocpo.org/wp-content/uploads/2020/06/CPO-Investigative-Report-2017-2736-FINAL-Aug-9-2019.pdf>. In that report, the Colorado Child Abuse Ombudsman disclosed that

In total, seven county departments received 243 reports of suspected

¹ By preparing and publishing that report, the Office of Colorado's Child Protection Ombudsman was fulfilling its statutory charge as set forth in §19-3.3-103(2)(c) – (e), C.R.S.

intuitional abuse or neglect at El Pueblo during the year prior to the residential child care facility's closure. . . . The majority of the reports were screened out by PCDSS because the department did not find they contained allegations of abuse or neglect as defined in law.

Id. at 10; see also Jennifer Brown, “A Pueblo Center for Troubled Kids Had 243 Abuse Allegations in the Year Before it Closed,” Colorado Sun (Aug. 13, 2019), <https://coloradosun.com/2019/08/13/el-pueblo-residential-treatment-center-investigation/> (“The ombudsman’s investigation also hammered the state for not allowing parents, caseworkers or the public in general to find out whether a residential treatment center is safe. The lack of transparency ‘stands in stark contrast’ to other facilities licensed by the state human services department, the report said. Parents can look up daycare centers on a public website that lists licensing violations and corrective action plans, for example.”)

16. In March of this year, CDHS announced the closure of a second RCCF, the Tennyson Center. Once again, the Office of Colorado Child Protection Ombudsman disclosed that “Denver County child welfare officials had received 113 complaints about Tennyson Center in 2020, yet the county had assigned just eight of those for further investigation.” Jennifer Brown, “Denver’s Tennyson Center to Close its Residential Program After Runaways, Overdoses and Child’s Death” Colorado Sun (Mar. 13, 2021),

17. Even though the physical street *address* of both the El Pueblo and Tennyson RCCF was well-known and publicly available, no one has ever suggested that the above disclosure of the number of calls placed to the child abuse hotline, or the number of those calls that were “screened in” (investigated) or “screened out” (not investigated) were in violation of the provision in Colorado Children’s Code that declares:

Identifying information - confidential. Except as otherwise provided in this section and section 19-1-303, reports of child abuse or neglect and the name and address of any child, family, or informant or any other identifying information contained in such reports shall be confidential and shall not be public information.

§ 19-1-307(1) (a), C.R.S. (2020) (emphasis added); see also § 19-3.3-103(3), C.R.S. (requiring the Office of Child Protection Ombudsman to “comply with all state . . . confidentiality laws . . . with respect to the treatment of confidential information or records and the disclosure of such information and records.”).

PLAINTIFFS’ RECORDS REQUESTS AND DEFENDANT’S DENIALS

18. On March 26, 2021, Plaintiff KUSA-TV/9News, acting through its staff reporter Jeremy Jojola, requested, under CORA, to inspect certain public records in the possession, custody, or control of CDHS. Specifically, Mr. Jojola requested to inspect (*inter alia*):

any documents that show how many calls have been made to the child abuse hotline from Mount Saint Vincent (RCCF) and Cleo Wallace (RCCF) from 1/1/2018 to 3/26/2021.

Attached hereto as **Exhibit 1**, and incorporated herein by reference, is a true and correct copy of KUSA-TV/9News' records request dated March 26, 2021.

19. By letter dated April 1, 2021, the Defendant, acting on behalf of CDHS, denied Mr. Jojola's CORA request set forth above, stating "This request is denied pursuant to CRS 19-1-307(1)(a)." Attached hereto as **Exhibit 2**, and incorporated herein by reference, is a true and correct copy of the letter dated April 1, 2021 from Ms. Brubaker to Mr. Jojola.

20. On April 5, 2021, Plaintiff the Colorado Sun, acting through its staff reporter Jennifer Brown, submitted a CORA request to CDHS in which she sought to inspect, inter alia, public records that memorize or document "[t]he number of hotline calls/abuse and neglect reports/runaways reports from Tennyson Center, Mount St. Vincent and Cleo Wallace to local child welfare authorities in the last three years, and how many were screened in." Attached hereto as **Exhibit 3**, and incorporated herein by reference, is a true and correct copy of Ms. Brown's CORA request submitted to CDHS on April 5, 2021

21. By letter dated April 8, 2021, the Defendant, on behalf of CDHS, denied Ms. Brown's CORA request above, stating "This portion of your request is denied pursuant to §19-1-307." Attached hereto as **Exhibit 4**, and incorporated herein by reference, is a true and correct copy of the Defendant's letter to Ms. Brown dated April 8, 2021.

22. On April 15, 2021 the undersigned counsel, on behalf KUSA-TV/9News and Colorado Sun, wrote to Defendant and asked her to reconsider CDHS' denial of Mr. Jojola's CORA request. Attached hereto as **Exhibit 5**, and incorporated herein by reference, is a true and correct copy of a letter from Steven Zansberg to Ms. Brubaker dated April 15, 2021.

23. On April 22, 2021, CDHS, through its attorney, sent an email message to undersigned counsel, which stated:

After careful review, the Department respectfully stands by its previous response denying the request under section 19-1-307. While the request did not specifically ask for the address of either facility, the name of a RCCF facility is sufficient to identify its location. In the context of this request seeking information about child abuse hotline calls made from those facilities within a discreet timeframe, it is the Department's position that the requested information *is likely to identify the address of the child or informant associated with the hotline calls.* (emphasis added)

Attached hereto as **Exhibit 6**, and incorporated herein by reference, is a true and correct copy of Anne Pogue’s to Steven Zansberg dated April 22, 2021.

24. Of course, Plaintiffs are aware of the street addresses of the RCCFs at issue, as the public was previously aware of the street addresses for the El Pueblo and Tennyson Center facilities. Accordingly CDHS’ disclosure merely of *the number of phone calls received* from those facilities by the child abuse hotline cannot, in any way, lead to the *identification* of any *child* who was subject to alleged to abuse or neglect, nor to *the identification of any “informant”* who placed such a call. To construe the statute as prohibiting (and criminalizing) the disclosure of the address of a group child care facility, as CDHS has done, would render the statute unconstitutional, as one federal court has so found it. *See* Exhibit 5.

25. On April 26, 2021, undersigned counsel provided written notice to CDHS of the Plaintiffs’ intent to file this Application for an Order to Show Cause pursuant to § 24-72-204(5), C.R.S. Attached hereto as **Exhibit 7**, and incorporated herein by reference, is a true and correct copy of Mr. Zansberg’s email message to Assistant Attorney General Ann Pogue, dated April 26, 2021.

FIRST CLAIM FOR RELIEF
(Application for Order to Show Cause)

26. Plaintiffs incorporate by reference all of the allegations and statements in the foregoing Paragraphs.

27. Pursuant to § 24-72-204(5), C.R.S., the Plaintiffs are entitled to – and hereby formally apply for – the entry of an Order to Show Cause, directing that the Defendant to appear and show cause why the public records that were sought by the Plaintiffs under the CORA should not be disclosed to them.

28. As required by the CORA, the Court should set the date of the show cause hearing at “the earliest time practical.”

29. Upon completion of the hearing on the Order to Show Cause, the Court should enter and order directing the Defendant to provide the Plaintiffs with the public records they requested to inspect.

30. The proposed form of an Order to Show Cause is attached hereto.

Prayer For Relief

WHEREFORE, pursuant to § 24-72-204(5), C.R.S., Plaintiff prays that:

- A. The Court enter an Order directing the Defendant to show cause why CDHS should not permit inspection and copying of the requested Public Records as described in this Complaint and Application for Order to Show Cause;

- B. The Court conduct a hearing pursuant to such Order “at the earliest practical time” at which the Court may make the Order to Show Cause absolute;
- C. At the conclusion of the hearing on the Order to Show Cause, the Court enter an order directing the Defendant to disclose some or all of the Public Records to Plaintiffs;
- D. At the conclusion of the hearing on the Order to Show Cause, the Court enter an order directing the Defendant to pay Plaintiffs their reasonable attorneys’ fees and costs, pursuant to § 24-72-204(5), C.R.S.;
- E. Enter such further and additional relief as the Court deems just and proper.

Dated: May 3, 2021

By _____ /s/ Steven D. Zansberg
Steven D. Zansberg
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THIS COMPLAINT AND APPLICATION FOR AN ORDER TO SHOW
CAUSE WAS FILED WITH THE COURT THROUGH THE ICCES
ELECTRONIC FILING PROCEDURES, UNDER C.R.C.P. 121(c), §
1-26.

AS REQUIRED BY THOSE RULES, THE ORIGINAL SIGNED COPY OF
THIS PLEADING IS ON FILE WITH THE
LAW OFFICE OF STEVEN D. ZANSBERG, LLC.