

<p>DISTRICT COURT, FREMONT COUNTY, COLORADO</p> <p>Court Address: 136 Justice Center Rd #103, Cañon City, CO 81212</p> <hr/> <p>Plaintiffs: Nexstar Media Group, Inc.; and Rob Low, reporter Nexstar Media Group, Inc.</p> <p>v.</p> <p>Defendant: Randy Keller, Fremont County coroner</p> <hr/> <p>Attorney for Plaintiffs: Rachael Johnson, #43597 Reporters Committee for Freedom of the Press c/o Colorado News Collaborative 2101 Arapahoe Street Denver, CO 80205 Telephone: (970) 486-1085 Facsimile: (202) 795-9310 rjohnson@rcfp.org</p>	<p>DATE FILED: June 8, 2021 9:16 AM FILING ID: 5268FAA7C9893 CASE NUMBER: 2021CV30042</p> <hr/> <p>COURT USE ONLY</p> <hr/> <p>Case Number: _____</p> <p>Division: _____</p>
<p align="center">COMPLAINT (And Request for Application for Order to Show Cause)</p>	

Plaintiff Rob Low, a reporter for KDVR-TV, and KDVR-TV’s owner, Plaintiff Nexstar Media Group, Inc. (collectively “Plaintiffs”), by and through their undersigned counsel, for this Complaint and Application for Order to Show Cause, hereby state as follows:

Introduction

1. In this civil action under the Colorado Open Records Act (“CORA”), §§ 24-72-201 *et seq.*, C.R.S., the Plaintiffs seek access to public records in the possession, custody, or control of the custodian Randy Keller, Fremont County coroner (“the Defendant”).

2. The Plaintiffs’ CORA request sought all autopsy photos of the tourniquet and plastic bedsheets (collectively the “Autopsy Photos”) involved in the alleged murder of LaMarcus Hillard, a former inmate at Supermax, the nation’s most secure prison located in Fremont County, Colorado, pursuant to § 24-72-203(1)(a) of CORA. The Autopsy Photos are

part of the Coroner's Autopsy Report #20-0929 for Mr. Hillard (the "Autopsy Report"). With the exception of the Autopsy Photos, a copy of the Autopsy Report has already been provided to Plaintiffs.

3. The Plaintiffs seek an order directing the Defendant to show cause as to why the public records that Plaintiffs have requested to inspect should not be made available.

4. As more fully set forth below, the Court should enter an order declaring that the Autopsy Photos are public records under CORA § 24-72-202(6)(a)(I) and § 24-72-202(7). Additionally, the Plaintiffs respectfully request that the Court waive any costs associated with retrieving the records, and order Defendant to pay Plaintiffs reasonable costs and attorney's fees associated with their efforts to inspect public records, pursuant to § 24-72-204(5), C.R.S. and/or § 24-72-203(3.5)(c), C.R.S.

Jurisdiction & Parties

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

6. KDVR-TV is a Fox-affiliated television station licensed to Denver, Colorado, and based in Denver County with its primary place of business at 100 E Speer Blvd, Denver, CO 80203. The station is owned by Plaintiff Nexstar Media Group, Inc., as part of a duopoly with CW affiliate KWGN-TV.

7. Plaintiff Rob Low is an investigative reporter with the KDVR-TV Fox31 Problem Solvers. He is an Emmy Winning Storyteller with his primary place of business at 100 E Speer Blvd, Denver, CO 80203.

8. Defendant Randy Keller is the coroner for Fremont County. Defendant Keller is a "custodian" under CORA, § 24-72-202, C.R.S., of the records requested by the Plaintiffs, as more fully described below. Defendant Keller is being sued in his official capacity as custodian of records.

Facts

Plaintiffs' CORA Request for—and the Defendant's Denial of—Access to the Autopsy Photos

9. On or around January 8, 2021, Plaintiff Low received a copy of portions of the Autopsy Report concerning the in-custody death of LaMarcus Hillard, then a prisoner in the Supermax facility in Fremont County, Colorado. The copy of the Autopsy Report received by Plaintiff Low did not include photos of the murder weapon, consisting of a tourniquet and plastic bed sheets, as described in the copy of the Autopsy Report received by Plaintiff Low. A true and correct copy of the Autopsy Report, dated December 7, 2020, without Autopsy Photos, as received by Plaintiff Low, is incorporated by reference and attached hereto as **Exhibit A**.

10. Under the “Final Diagnosis” section of the copy of the Autopsy Report attached as **Exhibit A**, the murder weapon is described in connection with stating the cause of death to be ligature strangulation:

“E. Ligature fashioned out of twisted bedsheet.

F. History the decedent was found bound at the hands and feet with plastic sheeting over his head while being strangled by an inmate in an adjacent room. The ligature was reportedly fed through the food slot.”

See Exhibit A at 1.

11. On or about January 11, 2021, Plaintiff Low phoned Sandy Wilson, an office administrator in the El Paso County Coroner’s Office to request copies of specific Autopsy Photos documented in the Autopsy Report.

12. Plaintiff Low did not request any autopsy photos from the Autopsy Report of Mr. Hillard’s body.

13. Later that same day, on January 11, 2021, Plaintiff Low submitted a formal CORA request to Ms. Wilson via email. A true and correct copy of that request is incorporated by reference and attached hereto as **Exhibit B**. It states:

“Per our phone Conversation I’d like to file a CORA for autopsy photos for LaMarcus Hillard /Autopsy Report #20-0929. Specifically, I’d like the 5-10 photos (however many exist) of the tourniquet and plastic bed sheets that were documented. I understand you plan to share my request with the El Paso County Attorney. I’m hoping you will forward any correspondence from the El Paso County Attorney with us.”

See Exhibit B.

14. Later that same day, January 11, 2021, Ms. Wilson denied the CORA request via email. A true and correct copy of that denial is incorporated by reference and attached hereto as **Exhibit C**. It states:

“As we discussed, photos do not fall under the open records act, only the autopsy report does. I will need a subpoena for the photos you are requesting. Please contact County Attorney Diana May with any further questions.”

See Exhibit C.

15. Also on January 11, 2021, Plaintiff Low submitted the same CORA request to Diana May, El Paso County attorney, who also denied it, stating that “the autopsy photos are not releasable under CORA” and that the “Coroner’s office does not release the photos without a court order or subpoena.” A true and correct copy of Plaintiff Low’s January 11, 2021 correspondence with Ms. May is incorporated by reference and attached hereto as **Exhibit D**.

16. On January 13, 2021, Ms. May told Plaintiff Low via email to refer his request to Brenda Jackson, the Fremont County attorney. *See Exhibit D.*

17. On January 13, 2021, per Ms. May's instruction, Plaintiff Low submitted the following CORA request to Jackson via email:

"Randy Keller was kind enough to send me the autopsy report and Sandy Wilson in El Paso County confirms the report includes 5-10 photos of the weapon used (bed sheets/tourniquet etc). I'm told Fremont County has the discretion to release the photos as part of the autopsy report (not asking for photos of the body) without a court order but may also demand a court order. I'm hoping for the former because obviously that would be quicker since I already waited a few months to get the autopsy report. I'd like to file a CORA/CCJRA public records request for autopsy photos for LaMarcus Hillard /Autopsy Report #20-0929. Specifically, I'd like the 5-10 photos (however many exist) of the tourniquet and plastic bed sheets that were documented. If for some reason, you deny my request please cite the state statute you're relying on [sic]"

A true and correct copy of this January 13, 2021, CORA request is incorporated by reference and attached hereto as **Exhibit E** (the "January 13 CORA Request").

18. On January 19, 2021, Jackson denied Plaintiff Low's January 13 CORA Request via email, stating "Mr. Keller has indicated your request for photographs is 'denied pursuant to CRS 24-72-204-3A1. Any other documents from my file will require a court order from a judge.'" A true and correct copy of Jackson's January 19, 2021 denial is incorporated by reference and attached hereto as **Exhibit F**.

19. On February 15, 2021, Plaintiffs, through counsel, sent Defendant Keller a Notice of Intent under § 24-72-204(5)(a), C.R.S. challenging the denial of the January 13 CORA Request. A true and correct copy of that correspondence is incorporated by reference and attached hereto as **Exhibit G**.

20. On March 1, 2021, Jackson sent a response letter to Plaintiffs' counsel reiterating the denial of Plaintiff Low's January 13 CORA Request on the following grounds:

"The request for the photos is denied. . . . Many [records] are properly characterized as criminal justice records, pursuant to §24-72-302(4), C.R.S. and also as public records under CORA. In conjunction with this request, Coroner Keller's office is properly characterized as a "criminal justice agency," as it performs activities directly relating to the detection or investigation of crime. The records being requested are part of an ongoing criminal investigation. In accordance with §24-72-305, the custodian may deny access to records of investigations and investigatory files compiled for any other law enforcement purpose, on the ground that disclosure would be contrary to the public interest. . . . Inspection of criminal justice and public records . . . may also be denied pursuant to §24-72-305(8), §24-72-204(2)(a)(I), and §24-72-204(2)(a)(VIII), C.R.S. Additionally, this request has been denied under the medical and health records exception found at §24-72-204(3)(a)(I), C.R.S."

A true and correct copy of that correspondence is incorporated by reference and attached hereto as **Exhibit H**.

21. The denial did not state that the Autopsy Photos were not public records under CORA, nor did the denial state that the Autopsy Photos were not part of the Autopsy Report.

Applicable Law

22. The Colorado Open Records Act, §§ 24-72-201 *et seq.*, C.R.S., declares that it is the public policy of the State of Colorado that “all public records shall be open for inspection by any person at reasonable times,” unless specifically excepted by statute, and that there is a general presumption in favor of public access to records. *See Daniels v. City of Commerce City*, 988 P.2d 648, 650–51 (Colo. App. 1999); § 24-72-203(1)(a), C.R.S.

23. Under CORA, a public record “means and includes all writings made, maintained, or kept by the state, any agency, institution, a nonprofit corporation incorporated pursuant to § 23-5-121(2), C.R.S., or political subdivision of the state, or that are described in § 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.” *See* § 24-72-202(6)(a)(I), C.R.S.

24. Writings are defined under CORA to include “all books, papers, maps, **photographs**, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics.” *See* § 24-72-202(7), C.R.S. (emphasis added).

25. A person may request copies, printout, or photographs of any public record that the Act grants the right to inspect. § 24-72-205(1), C.R.S.

26. If the custodian of public records denies access, and the requesting entity seeks a court order directing the custodian to allow access, the custodian under CORA *must* pay the requesting party’s reasonable costs and attorney’s fees unless the court determines that denial of access was proper. *See* § 24-72-204(5), C.R.S.

27. Unless otherwise provided by law, a custodian shall deny the right of inspection of the following records: “Medical, mental health, sociological, and scholastic achievement data, and electronic health records, on individual persons, other than scholastic achievement data submitted as part of finalists’ records as set forth in subsection (3)(a)(XI) of this section and **exclusive of coroners’ autopsy reports** and group scholastic achievement data from which individuals cannot be identified; but either the custodian or the person in interest may request a professionally qualified person, who shall be furnished by the said custodian, to be present to interpret the records[.]” *See* § 24-72-204(3)(a)(I), C.R.S. (emphasis added).

First Claim for Relief **Unlawful Denial of Access to Public Records Under CORA**

A. The Autopsy Report, Including the Autopsy Photos, Is a Public Record Under CORA and Must Be Disclosed to Plaintiffs.

28. Section 24-72-202(6)(a)(I), C.R.S. defines “public records” as “all writings made, maintained, or kept by the state, any agency, institution . . . or political subdivision of the state... and held by any local-government-financed entity for use in the exercise of functions required or authorized by law.” The records in this matter, the Autopsy Report, including the Autopsy Photos, were compiled by the Fremont County coroner’s office. *See Exhibit E.*

29. “Writings” are further defined in CORA as including “all books, papers, maps, *photographs*, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics.” § 24-72-202(7), C.R.S. (emphasis added). Plaintiffs seek photographs that are part of the Autopsy Report. As part of the Autopsy Report, the Autopsy Photos are public records subject to inspection under CORA.

30. The Autopsy Report is a public record subject to inspection under CORA—a fact that Defendant does not dispute. And a copy of the written portion of the Autopsy Report was provided to Plaintiffs in response to a separate CORA request. *See Exhibit A.*

31. Thus, as the Autopsy Report, including the Autopsy Photos, is a writing made, maintained, and kept under CORA, it is a public record and must be produced to Plaintiff Low in response to his request under CORA.

B. The Medical and Health Records Exception Under § 24-72-204(3)(a)(I), C.R.S. Is Explicitly Inapplicable to Autopsy Reports.

32. Autopsy reports are explicitly excluded from the definition of medical and health records under § 24-72-204(3)(a)(I), C.R.S. As part of the coroner’s Autopsy Report, the Autopsy Photos do not fall under the medical and health records exception under CORA.

33. Defendant contends that the Autopsy Photos included as part of the Autopsy Report are exempt from disclosure under § 24-72-204(3)(a)(I), C.R.S., which permits an agency to withhold “medical, mental health, sociological, and scholastic achievement data, and electronic health records, on individual persons, other than scholastic achievement data submitted as part of finalists’ records . . . and **exclusive of coroners’ autopsy reports.**” (emphasis added). But as the plain language of § 24-72-204(3)(a)(I), C.R.S. makes clear, autopsy reports are excluded from the category of exempt medical or health records under the statute. And, as part of the Autopsy Report, the Autopsy Photos do not fall within the “medical records” exception.

34. Further, under *Denver Publishing Co. v. Dreyfus*, 520 P.2d 104, 108 (Colo. 1974) (hereinafter “*Denver Publishing*”), the Court found “convincing evidence of legislative intent to classify autopsy reports as public records open to inspection, rather than directing the denial of a right of inspection by any person as is the case with other medical, psychological, sociological, and scholastic data.”

35. Nor are there any provisions under CORA that permit Defendant to withhold from Plaintiffs the Autopsy Photos made as part of the Autopsy Report on the grounds that the Autopsy Photos are medical or health records.

36. Thus, the Defendant has wrongly withheld the Autopsy Photos from the Plaintiffs and must make them available for inspection under the law.

C. An Autopsy Report Is a Public Record Under CORA, Not a Criminal Justice Record.

37. The Defendant claims that the coroner's office is a criminal justice agency, and thus, the Autopsy Report is a criminal justice record. The Colorado Supreme Court, however, has held that it is the clear intent of the legislature to classify autopsy reports and coroner's reports as public records open to inspection. *Denver Publishing*, 520 P.2d at 108. The Autopsy Report, including the accompanying Autopsy Photos are, accordingly, public records under CORA, not criminal justice records governed by the CCJRA.

38. Separately, under § 24-72-202(7), C.R.S., the Autopsy Report, including the accompanying Autopsy Photos, are "writings" and "all writings made, maintained, or kept by the state" are public records that must be disclosed to Plaintiffs. *See* § 24-72-202(6)(a)(I), C.R.S.

39. Having already released the written portions of the Autopsy Report to Plaintiffs, *see Exhibit A*, Defendant now contends that the coroner's office is a "criminal justice agency," and attempt to classify portions of the Autopsy Report as criminal justice records. But "autopsy reports" are "public records" and not "criminal justice records" under the Criminal Justice Records Act, so that "an autopsy report on a homicide victim may be withheld from public inspection by the custodian thereof only pursuant to the procedure provided under [CORA]," requiring establishment that disclosure would do "substantial injury to the public interest." *See Freedom Newspapers, Inc. v. Bowerman*, 739 P.2d 881, 883 (Colo. App. 1987); *see also Bodelson v. Denver Publ'g Co.*, 5 P.3d 373 (Colo. App. 2000) (the court held that the unique public grieving in the immediate aftermath of the Columbine High School massacre justifies non-disclosure of victims' autopsies as a substantial injury to the public interest).

40. In this case, there is no risk of a substantial injury to the public interest. Plaintiffs have already received a copy of the written portions of the Autopsy Report from the Defendant; Defendant cannot now claim that release of the requested Autopsy Photos will cause substantial injury to the public interest. Further, Plaintiffs are not seeking any photos of the victim's body, but have, instead, requested all photos of the tourniquet and plastic bedsheets included in Defendant Keller's Autopsy Report.

41. The Plaintiffs do not seek any investigative information that may be contained in the coroner's files but is not recorded in the Autopsy Report itself. The Autopsy Photos included in the Autopsy Report are not investigative information and are disclosable to Plaintiffs. *See Denver Publishing*, 520 P.2d at 107 ("[T]he autopsy reports sought contain only medical information relevant to a determination of the cause of death. Additional investigative information, including reports by the coroner's investigators, may be contained in the coroner's files but is not recorded in the autopsy report itself. Thus, the autopsy reports do not contain the kind of investigative information contained in the police reports")

Second Claim for Relief
Unlawful Denial of Access to Public Records Under CORA

A. Photographs Are Public Records Under CORA and Must Be Disclosed to Plaintiffs.

42. Paragraph Nos. 1 through 41 above are incorporated herein by reference and made a part hereof with the same force and effect as if fully set forth herein.

43. Section 24-72-202(6)(a)(I), C.R.S. defines “public records” as “all writings made, maintained, or kept by the state, any agency, institution . . . or political subdivision of the state... and held by any local-government-financed entity for use in the exercise of functions required or authorized by law.” As discussed, the records in this matter, the Autopsy Photos, were compiled by the Fremont County coroner. *See Exhibit E.*

44. “Writings” are further defined in CORA as including “all books, papers, maps, *photographs*, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics.” § 24-72-202(7), C.R.S. (emphasis added). Plaintiffs seek Autopsy Photos, and photographs are considered writings subject to inspection under CORA.

45. Therefore, even if not part of the Autopsy Report, the requested Autopsy Photos are public records subject to inspection and copying under CORA.

* * *

46. For the reasons set forth above, the Plaintiffs respectfully request that the Court find that the Defendant improperly denied Plaintiffs’ CORA request. Plaintiffs must be allowed to inspect and copy the Autopsy Photos of the tourniquet and plastic bed sheets that are part of Autopsy Report #20-0929, and Plaintiffs should be awarded attorney’s fees and costs in connection with bringing this action.

Prayer for Relief

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

- a. The Court forthwith enter an Order directing Defendant to show cause as to why they should not allow inspection of the requested public records as described in this Complaint and Application for Order to Show Cause;
- b. The Court enter an Order that the Autopsy Report, including the Autopsy Photos, are public records under CORA and that Plaintiffs are entitled to copy and inspect the requested Autopsy Photos under § 24-72-202(6)(a)(I), C.R.S. and § 24-72-202(7), C.R.S.;
- c. The Court enter an Order awarding the Plaintiffs costs and reasonable attorney’s fees associated with the preparation, initiation, and maintenance of this action, as mandated by § 24-72-204(5), C.R.S.; and
- d. The Court award such other and further relief as the Court deems proper and just.

Respectfully submitted this 8th day of June, 2021.

By 

Rachael Johnson
Reporters Committee for Freedom of the Press
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 2021, a true and correct copy of the foregoing **COMPLAINT (AND APPLICATION FOR ORDER TO SHOW CAUSE)** was served on the following counsel through the Colorado Courts E-File Serve electronic court filing system, pursuant to C.R.C.P. 121(c), § 1-26:

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