

The DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way Castle Rock, Colorado 80109 (720) 437-6200	DATE FILED: May 5, 2022 12:16 PM CASE NUMBER: 2022CV30243
Plaintiff: TEGNA, INC. d/b/a KUSA-TV and KYLE CLARK, Plaintiffs, v.	▲ COURT USE ONLY ▲
Defendants: IOANA MARIN, in her official capacity as the Public Records Manager for the Douglas County School District.	Case Number: 2022CV30243 Division: 5
ORDER	

THIS MATTER came before the Court for a show cause hearing on April 29, 2022. At the conclusion of the hearing, the Court took its ruling under advisement. Now having considered the stipulated facts submitted by the parties, the court file and the applicable law, the Court finds and orders as follows:

STATEMENT OF THE CASE

On February 15, 2022, Plaintiff Kyle Clark, a reporter for Plaintiff KUSA-TV, submitted a request pursuant to § 24-72-204, C.R.S., of the Colorado Open Records Act (hereafter “CORA”), to the Douglas County School District (hereafter “DCSD”) for a copy of CORA requests that had been made for documents related to teacher and staff absences on February 3, 2022 (hereafter “Original Request”). On March 10, 2022, Defendant Ioana Marin advised Clark that the Original Request would not be provided to him as the original requester had withdrawn the request and, therefore, the District believed it did not constitute a “public record” under CORA. This action was then commenced pursuant to §24-72-204(5).

ANALYSIS

In the legislative declaration for CORA it was expressed to be the public policy of Colorado that all public records should be open for inspection by any person at reasonable times, except as provided in the act and as otherwise provided by law. §24-72-201, C.R.S. Exceptions to this broad general policy are to be narrowly construed. *City of Westminster v. Dogan Construction Co., Inc.*, 930 P.2d 585, 589 (Colo. 1997)(citing *Sargent School District v. Western Servs.*, 751 P.2d 56,60 (Colo. 1988)).

“The custodian of any public records shall allow any person the right of inspection of such records or any portion thereof except on one or more of the following grounds or as provided in subsection (2) or (3) of this section...” § 24-72-204(1), C.R.S.

“CORA specifically defines ‘public records’ as ‘all writings made, maintained, or kept by the state, any agency, institution...or political subdivision of the state...for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.’” *Denver Publishing Co. v. Board of County Com’rs of County of Arapahoe*, 121 P.3d 190, 195 (Colo. 2005)(quoting §24-72-202(6)(a)(I)).

The DCSD is a “political subdivision” of Colorado. §24-72-202(5).

“Except as provided in subsection (5.5) of this section, any person denied the right to inspect any record covered by this part 2 or who alleges a violation of section 24-72-203(3.5) 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...” § 24-72-204(5)(a), C.R.S.

“Hearing on the application described in section (5)(a) of this section must be held at the earliest practical time. Unless the court finds that the denial of the right of inspection was proper, it shall order the custodian to permit such inspection...” §24-72-204(5)(b).

A party requesting records under CORA, has the initial burden to demonstrate that the records at issue are likely “public records.” The burden then shifts to the public agency to show that the records are public or non-public. *Denver Publishing Co.*, 121 P.3d at 199. Where an agency is the custodian of the records and those records are “made, maintained, or kept” in a public capacity, the burden to show that the records are likely public records has been met. *Id.*

There is no disagreement that DCSD is the custodian of the record requested. Defendant does not contend that any of the exceptions to inspection of public records contained in CORA are applicable. Instead Defendant contends that the Original Request is not a “public record” because the record request was withdrawn.

The Original Request in this case was submitted prior to February 15, 2022 and was for all documents, including but not limited to, emails, absence request forms, paid time off requests and related correspondence from all District teachers and staff who submitted absence requests for February 3, 2022, and further requested a complete database and/or list of the names of District teachers and staff who submitted absence requests for February 3, 2022. *Stipulated Facts*, ¶ 1.

The Original Request was submitted on DCSD’s official CORA request form. *Stipulated Facts*, ¶ 2. On February 15, 2022, DCSD sent an email to employees who had requested an

absence on February 3, 2022, advising them of the request and notifying them that the district intended to respond to it. *Stipulated Facts*, ¶ 4. On the evening of February 16, 2022, the DCSD Board of Education held a special meeting. During that meeting it voted to conduct an executive session, described in the Special Meeting Minutes, to receive legal counsel regarding the release of names in response to a CORA request. After completion of the executive session and reconvening of the public meeting, the meeting minutes reflect that the board president made a statement regarding the CORA request that the names would not be released. *Stipulated Facts*, ¶¶ 6-7.

On March 10, 2022, Defendant Marin notified Clark that DCSD would not make available to him the Original Request explaining that, "...the person who made the request for the names of staff members who submitted an absence request for February 3, 2022 orally withdrew the request on February 16, 2022 after learning that multiple members of the District's community had raised concerns about the purpose of the request. Given that the request was withdrawn, the District does not believe that it constitutes a 'public record' under CORA and therefore declines to produce the information requested." *Stipulated Facts*, ¶13.

After the Original Request was submitted, that request was made public and shared by DCSD at least with those individuals who had requested to be absent from work on February 3, 2022. *Stipulated Facts*, ¶ 4; *Ex. 1 to Stip. Facts*. Defendant acknowledged at the show cause hearing in this matter, that the contents of the Original Request, with the exception of the identifying information of the requester, was made public after the requester submitted it. The DCSD webpage that included the CORA request form notified all potential requesters, in all caps with red font, as follows:

Please be advised that as of January 1, 2022, we will no longer redact names of the persons that submit CORA requests, we will redact only personal information, such as phone numbers, address or email address. *Stipulated Fact*, ¶ 3.

The scope of what is included in "public records" is very broad. It includes "**all writings** made, maintained or kept" by a school district for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds. § 24-72-202(6)(a)(1). (Emphasis supplied).

A statute, CORA, makes all public records open for inspection by any person at reasonable times. It also permits the custodian of those records to make rules with reference to the inspection of such records as are reasonably necessary for the record's protection or to prevent unnecessary interference with the discharge of the duties of the custodian or his/her office. §24-72-203(1)(a). Here, a function imposed on the school district by law is making its public records available for inspection. A request for such records must be made on a form created by DCSD. That form is then maintained by DCSD for the purpose of processing the request, and presumable to determine whether the particular records should be made available, or

if they fall within an exception to the requirement of disclosure. There was no indication that the request for inspection is not kept by DCSD, but is disposed of or destroyed. The request itself, therefore, becomes a public record.

There is no authority of which this court is aware, that permits a requester to remove a CORA request from its status as a public record by simply asking that it be withdrawn. This is especially true when, as here, a CORA request is made for an Original Request prior to any effort at withdrawal and the Original Request clearly remained a public document seeking and triggering government action.

Clearly the Original Request was maintained at the time of Clark's request.¹ School employees had been advised of both its contents and of DCSD's intention to respond to it. The Original Request was also the subject of a school board meeting. After the Original Request was submitted, with the exception of the requester's identity, DCSD shared the contents of that request as public information. DCSD made clear by the advisement on its website that the identity of persons submitting requests would not be redacted from the CORA request form and consequently the requester had no expectation that his/her identity would be confidential.

In enacting CORA, the legislature clearly demonstrated that it understood how to carve out an exception to the broad category of public records to provide confidentiality for an applicant's identifying information, if it was appropriate to do so. Section 24-72-204(2)(a)(VI) provides that a custodian of records may deny the right of inspection to, "Records and information relating to the identification of persons **filed with**, maintained by, or prepared by the department of revenue pursuant to section 42-2-121, C.R.S." (Emphasis supplied). There is no similar exception, however, for the identifying information of those making CORA requests.

In certain circumstances, CORA also permits an individual to request that his/her address on a public record not be disclosed, but the court is unaware of any similar authority that permits

¹ The statutory procedure for production of public records suggests that the relevant time for determining whether something is a public record is when the request is made. The Act contemplates that a public record that is not "in active use, in storage, or otherwise not readily available at the time an applicant asks to examine them" will be produced immediately. If it is not readily available at the time of the request it is to be made available for inspection within three working days or less. If there are extenuating circumstances the period can be extended for a period not to exceed seven days. §24-72-203(3)(b). In no event, however, can extenuating circumstances apply to a request that relates to a single specifically identified document.

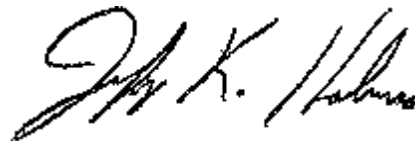
It should be noted that Defendant Marin did not respond to Clark's request until February 18, 2022 and merely acknowledged receipt of the CORA request and that a response would be provided "within the statutory deadline." On February 22, 2022, Marin sent a communication purporting to invoke the extenuating circumstances provision of CORA. Nine days later on March 3, 2022, Marin sent a response to the CORA request directing Clark to the District's CORA page and seven days after that, on March 10, 2022, she sent a response indicating the request to examine the public record was being denied because the Original Request had been withdrawn. *Stipulated Facts, Ex. 2-5, & 7.*

a person to request that their name on a public record be kept confidential. See §24-72-204(3.5)(a). Once again, the legislature could have provided for the non-disclosure of names, in addition to addresses, if it determined it was appropriate to do so. The court finds that the Original Request, including the requester's name is a public record.

CONCLUSION

The Court finds that the Defendant has failed to show good cause why the Plaintiffs' request for record inspection should not be permitted. Ioana Marin, as DCSD's records custodian, is ordered to allow Kyle Clark to inspect the withdrawn CORA request addressed in her communication to Clark of March 10, 2022, including the name of the requester.

DONE AND SIGNED this 5th day of May, 2022.



Jeffrey K. Holmes, District Court Judge