District Court, Larimer County, State of Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 494-3500	DATE FILED: March 28, 2022 3:21 PM CASE NUMBER: 2021CV183
Plaintiff: Michele Dipietro v. **Defendants**: Delynn Coldiron, et. al.	▲ COURT USE ONLY ▲ Case Number: 2021CV183 Courtroom: 5B

ORDER REGARDING IN CAMERA REVIEW

This matter is before the Court because of Defendant's request for an in-camera review in their opening brief, filed on January 24, 2022. Plaintiff responded to that opening brief on February 7, 2022. Having conducted an in-camera review of the documents that Defendant asserts are protected from public disclosure, and all applicable law, the Court finds and orders as follows:

The Court orders the materials produced for an in-camera review to be made available for inspection by Plaintiff.

I. Background

This matter concerns a series of document requests after Plaintiff's employment ended with the City of Loveland. Plaintiff requests emails that issue.

The Defendants in this matter are the City, Moses Garcia, and Delynn Coldiron. Delynn Coldiron is a document custodian for the City.[1] Moses Garcia is the Loveland City Attorney.

Defendants assert that Plaintiff has made roughly forty document requests since leaving the city. Defendants also assert that they have produced many of the documents that Plaintiff has requested. Defendants filed sixteen emails with the Court,

[1] Ms. Coldiron is sued in her official capacity only.

under seal, for the Court to conduct an in-camera review. Defendants assert that those emails are not disclosable under the open records laws.

II. Applicable Law

The Colorado Open Records Act ("CORA") provides the process where individuals may request government documents. See C.R.S. § 24-72-200 *et. seq.* "CORA allows access to all public records not specifically exempted by law." *Land Owners United, LLC v. Waters*, 293 P.3d 86, 91 (Colo. App. 2011) (citing *Denver Publ'g Co. v. Univ. of Colorado*, 812 P.2d 682, 683–84 (Colo. App. 1990)). "As stated in section 24–72–201, "it is declared to be the public policy of this state that all public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise specifically provided by law." *Id*. (cleaned up).

CORA recognizes the common-law deliberative process privilege as serving partial grounds for disclosure. A custodian must deny an individual a right of inspection if the responsive document is "protected under the. . .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." C.R.S. § 24-72-204(3)(a)(XIII) (cleaned up).

III. Application of Law

Defendants assert that the seventeen emails are exempt from disclosure because they are covered by the deliberative process privilege. Plaintiff disagrees, and argues that the deliberative process privilege does not exempt documents from open records act disclosures when the "person of interest" is requesting the document.

The Court first analyzes whether the deliberative process privilege applies before determining whether Plaintiff's status as a person in interest requires disclosure of those documents.

A. Application of the Deliberative Process Privilege

The Court has conducted an in-camera review to determine whether the materials that Plaintiff wishes to discover are privileged under the deliberative process privilege. The Court finds that they are.

Defendants produced sixteen emails between various City officials for an in-camera review. The Court finds that, when considered together, those sixteen emails are sufficiently candid so that public disclosure is likely to stifle honest and frank discussion within the government. See C.R.S. § 24-72-204(3)(a)(XIII).

The emails contain discussions of personnel matters that are, in fact, pre-decisional and deliberative in nature. The emails frequently represent communications between

city employees who are in the process of planning communications with Plaintiff. Taken as a whole, these discussions are frank discussions that, if disclosed to the public writ large, would chill open discussion of these matters over regular channels of communication. See *Id.*; *City of Colorado Springs v. White*, 967 P.2d 1042, 1052 (Colo. 1998).

Accordingly, the Court finds that the Deliberative Process Privilege applies.

B. Person In Interest

Plaintiff asserts that, because she is the subject of the records she desires to have disclosed, the deliberative process privilege does not prevent disclosure to herself, the "person in interest." Plaintiff's argument is grounded in the text of C.R.S. § 24-72-204, which specifies when disclosure of public records may be denied. See, e.g., § 24-72-204(3)(a) (exempting the disclosure of various public records, except when requested by the person in interest).

As an initial matter, Plaintiff is clearly a person in interest with regard to these emails. She is the subject of each email. See C.R.S. § 24-72-202(4).

Defendants assert that the plain text of the statute does not dictate the result in this matter. Specifically, the Defendants argue that although Ms. Dipietro is a person in interest, she is not entitled to those records because the deliberative process privilege still applies. Defendants argue that: 1) that the legislature's intent was not to exempt persons in interest; and 2) that statutory canons of construction compel a finding that the privilege is not waived.

The Court finds that the legislature's intent, evidenced by legislative history and the text of the statute, clearly cuts against Defendants' arguments. At the outset, a reviewing Court must "look first to the plain language employed by the General Assembly." *See, e.g., Farmers Group, Inc. v. Williams*, 805 P.2d 419, 422 (Colo. 1991). "Words and phrases should be given effect according to their plain and ordinary meaning, and we must choose a construction that serves the purpose of the legislative scheme, and must not strain to give language other than its plain meaning, unless the result is absurd. " *Id.* (quoting *Colorado Dep't of Social Servs. v. Board of County Comm'rs*, 697 P.2d 1, 18 (Colo. 1985)) (cleaned up).

The text of the statute is unambiguous. See C.R.S. § 24-72-204(3)(a) ("The custodian shall deny the right of inspection of the following records. . .except that the custodian shall make any of the following records, other than letters of reference concerning employment, licensing, or issuance of permits, available to the person in interest in accordance with this subsection.") The exception to public disclosure is limited by subsection (3)(a)'s over-arching requirement of disclosure to a person in interest.

The Court addresses Defendants' arguments grounded in the § 24-72-204(3)(a) before turning to their other arguments.

1. Other Statutory References to the Person in Interest

Defendants argue that this §24-72-204(3)(a) is ambiguous and cite to several subsections within § 24-72-204(3)(a). Specifically, Defendants point to §24-72-204(3)(a)(II)(A) (exempting personnel files from disclosure); (X)(A) (exempting sexual harassment complaints); (XIV) (veterinary records); and (XIX)(A) (marriage licenses). Defendants argue that the fact that these subsections specifically reference the person in interest means that § 24-72-204(3)(a)'s carve out for the "person in interest" is limited to those sections that specifically mention a person in interest.

The Court disagrees. The specific references to persons in interest do not nullify § 24-72-204(3)(a)'s clear, unambiguous language. § 24-72-204(3)(a)(II)(A) reads: "Personnel files; but such files shall be available to the person in interest and to the duly elected and appointed public officials who supervise such person's work." The reference to the person in interest is made to ensure clarity, as omitting the reference to the person in interest may create confusion as to whether only elected officials may access personnel files.

The same is true of § 24-72-204(3)(a)(X)(A), which reads: "Any records of sexual harassment complaints and investigations. . .[d]isclosure of all or a part of any records of sexual harassment complaints and investigations to the person in interest is permissible to the extent that the disclosure can be made without permitting the identification, as a result of the disclosure, of any individual involved." The reference to the person in interest in this section exists to *modify* the general rule of disclosure to the person in interest of records. In this context, the legislature referenced the person in interest to narrow the disclosure available to them. This decision by the legislature reflects a policy judgment to protect those who report sexual harassment. Logically, by modifying how the general rule for disclosure in this context, the legislature recognized the general rule of disclosure to the person in interest.

§ 24-72-204(3)(a)(XIV) reads in relevant part: "Veterinary medical data. . . [f]or purposes of this subsection [ ], person in interest means the owner of an animal undergoing veterinary medical treatment or such owner's designated representative." (cleaned up.) Here, there is no probative value to this reference to the person in interest. With regard to this section, the reference only clarifies who the person in interest is when the subject of the records is an animal.

§ 24-72-204(3)(a)(XIX)(A) reads: "applications for a marriage license. . . [a] person in interest under this subsection (3)(a)(XIX) includes an immediate family member of either party to the marriage application." Here, the reference to the person in interest

expands the definition to permit disclosure to more individuals than those just getting married. As before, the legislature's modification to who is a person in interest reflects an understanding that, without modification, subsection (3)(a)'s general rule of disclosure to the person in interest would otherwise apply.

Accordingly, the Court rejects Defendants argument that other references to person in interest in the relevant subsection confines the application to that part of the statute.

While the records are not subject to public inspection because of the deliberative process privilege, they are subject to disclosure to Plaintiff as she is the person in interest.

2. Defendant's Other Objections

Defendants argue several other points in the briefing in this matter. Namely, Defendants argue that legislative intent, evidenced through the canons of construction, supreme court interpretation of legislative history, and policy interests behind the common law deliberative process privilege shows that a person in interest should not be able to inspect items otherwise protected by the deliberative process privilege.

The Court is not convinced that the canons of statutory construction provide much utility where the statute's language is so clear. See *People v. Market,* 475 P.3d 607, 611 (Colo. App. 2020) (Holding that "[i]f a statute is clear and unambiguous, we need look no further than the plain language to determine the statute's meaning.")

With regard to the legislative history, the Court finds that the legislative history does not support Defendant's contentions. Defendants cite to *City of Westminster v. Dogan*, 856 P.2d, 585, 590-592 (Colo. 1997), a case which utilized the legislative history of the open records act to ascertain the legislature's intent.[2] In *Dogan*, the supreme court held that handwritten interview notes from a contractor's references qualified as "letters of reference" under C.R.S. 28-72-204(3)(a). The supreme court held that literally applying that exclusion to person of interest non-disclosure would harm the object of that textual carve-out.

As the supreme court found, the purpose of the letters of reference carve out is to ensure candid evaluations of prospective job candidates and contractors. Further, the supreme court held that the hand-written interview notes and letters of reference produced the same exact content- the difference was only the form presented.

However, on the facts before the Court there is not a vague or ambiguous term like "letter of reference concerning employment" nor is there an explicit carve-out to the

[2] The supreme court's analysis of the relevant legislative history in *Dogan* was confined to analysis of the term "letters of reference concerning employment." See *Id*. at 591.

general rule of person in interest disclosure like there are with letters of reference. Accordingly, the weak factual similarity to *Dogan* and the relevant legislative history are not persuasive where the language of the statute is clear.

Defendants arguments that analogize to the common-law deliberative process privilege are unconvincing. *Land Owners United, LLC. v. Waters*, 293 P.3d 86, 95-96 (Colo. App. 2011) did hold that Court could look to the common-law deliberative process privilege to interpret the statutory language. However, that court used the common-law privilege as an interpretive aid where there was no conflict between the statute and the common law. Here, because the statute requires inspection by a person in interest, there is a conflict between the common law and the statute. Accordingly, the common law and its purposes outside of the open records act are unpersuasive considering that conflict.

The Court's holding in this matter is informed by several considerations. First, the clarity and lack of ambiguity in the statute. Second, the strong presumption that CORA's exceptions are to be construed narrowly. *See Id.* at 94. Finally, the structure of § 24-72-204(3)(a)'s approach to modifying the general rule of person in interest disclosure.

C. Attorney Client Privilege

Defendants argue that Plaintiff has requested emails covered by the attorney client privilege. Defendants suggest that an in-camera review of those documents could also be conducted. Defendants should file the necessary documents with the Court within fourteen days.

IV. Order

The Court grants Plaintiff's request to inspect the documents that Defendants submitted to the Court for an in-camera review under the deliberative process privilege.

Any motion for a protective order covering the documents to be disclosed to Plaintiff as the person in interest should be filed within fourteen days.

The Court orders an in-camera review of the documents Defendants have identified as covered by the attorney-client privilege.

Dated: March 28, 2022.

BY THE COURT:

Gregory M. Lammons
District Court Judge