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| DISTRICT COURT<br>CITY & COUNTY OF DENVER, COLORADO<br><br>1437 Bannock Street<br>Denver, Colorado 80202<br><br>DATE FILED: August 5, 2022 1:32 PM<br>CASE NUMBER: 2021CV32935 | |
| **Plaintiff: DENVER HEALTH WORKERS UNITED**<br><br>v.<br><br>**Defendants: DENVER HEALTH AND HOSPITAL AUTHORITY** | **COURT USE ONLY**<br><br>Case Number:<br>**2021CV32935**<br><br>Courtroom: 269 |
| **ORDER ON APPLICATION FOR AN ORDER TO SHOW CAUSE PURSUANT TO § 24-72-204(5)** | |

Before the Court is Denver Health Workers United's application for an order to show cause seeking the disclosure of documents under the Colorado Open Records Act (CORA) from the Denver Health and Hospital Authority (DHHA). DHHA opposes the application contending that the requested records are not public records, and if they are public records, that they are exempt from production because they are covered by the attorney-client privilege, the attorney work product doctrine, and the CORA exemption for confidential information. Because DHHA raised a new legal argument – that the records sought were not public records in the first instance, the Court requested a response brief from DHWU on that point. DHWU responded with its brief on the threshold issue of whether the records are public records. Having considered the briefing and all the authorities, the Court finds and orders as follows:

## I. RECORDS SOUGHT

DHWU sent a CORA request to DHHA requesting, "The Equity Project report about Denver Health, including but not limited to the summary, the findings, and any and all documentation provided by the Equity Project in association with the report."

DHHA initially responded that it would not permit inspection or produce the documents because they were subject to the attorney-client privilege, the attorney work product doctrine, and the deliberative process privilege. DHHA subsequently responded, amending the grounds for its denial of the request and asserting that the records contained confidential data and were covered by attorney-client privilege and the attorney work product doctrine.

DWHU filed its application seeking a judicial order compelling production of the records. The parties then negotiated for some period of time about the scope of the request, but do not appear to have reached any agreement as to the production of responsive documents.

In its response to the application, DHHA asserts that the report was commissioned by DHHA's General Counsel for the purpose of assisting him in providing legal advice. DHHA also asserts that the requested documents contain interviews with employees and that employees were assured that their interviews would be confidential and anonymous.

The Court has not been provided with any affidavits or other evidence describing the report, the circumstances under which it was created, or how it has been maintained. The Court also has not yet been provided with information about what records beyond the report itself that may fall within the request for "any and all documentation provided by the Equity Project in association with the report."

## II. LEGAL AUTHORITY

### A. CORA Procedures

CORA provides that when a public body denies a requester access to public records, the requestor "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. The district court may hold a hearing on the application and the hearing should be held "at the earliest practical time." § 24-72-204(5)(b).

### B. CORA and DHHA's Authorizing Statute

Under CORA, it is "the public policy of this state that all public records shall be open for inspection by any person" unless the records fall within certain exceptions. § 24-72-201, C.R.S.; *see also* § 24-72-203, C.R.S. ("All public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise provided by law…"). Indeed, courts have described a "strong general rule that public records should be disclosed." *Jefferson Cnty. Educ. Ass'n v. Jefferson Cnty. Sch. Dist. R-1*, 2016 COA 10, ¶ 25. Typically, "public records" are those maintained by any state or local authority. *See* § 24-72-202(6), C.R.S.

DHHA's enabling statute, however, specifies that only certain records of DHHA are "public records" subject to CORA. § 25-29-109, C.R.S. Here, Plaintiff concurs that the DHHA enabling statute describes which of DHHA's records are subject to disclosure. *See* Plt. Brief Regarding Equity Report as a Public Record, p. 3. DHHA public records are "resolutions and other proceedings of the board of directors, minutes of the board meetings, annual reports and financial statements, certificates, contracts and financial agreements, employee salaries, and bonds given by officers, employees, and any other agents of the authority, and any personnel reports, guidelines, manuals, or handbooks, other than individual personnel files" in addition to "[t]he account of all money received by and disbursed on behalf of the authority." § 25-29-109. DHHA's enabling statute also specifies which records are not public records, including individual medical records and other records concerning patient care and authority health-care programs or initiatives. *Id.* The statute specifying which DHHA records are public records was amended in 2018 to include a comprehensive list of records that are public records; prior to that time, the statute simply stated that all of DHHA's records were public records. § 25-29-109, C.R.S. (2017) (amended 2018; *see also Axios v. Denver Health & Hosp. Auth.*, 2019CV34834, Order Regarding Plaintiff's Amended Complaint and Application for Order to Show Cause, at *11 (Colo. Dist. Ct. Sept. 18, 2020) (finding that 2018 amendments clarified DHHA's enabling statute and specified which of DHHA's records are subject to CORA).

## III. ANALYSIS

### A. Whether the Records at Issue Are Public Records

DHHA argues that the Equity Project report and related documents are not among the enumerated public records of DHHA. Plaintiff counters that they are personnel reports, which are among the DHHA documents identified as public records.

"Personnel reports" is not a defined term in CORA, DHHA's enabling statutes, or generally in the Colorado Revised Statutes. *See* § 24-72-201; § 25-29-102; § 2-4-401; *see also* § 23-21-502 (University of Colorado Hospital Authority enabling act, which employs language similar to the DHHA enabling act).

In considering what types of reports constitute "personnel reports," the Court will employ standard principles of statutory construction. In doing so, the Court must give effect to the legislature's intent by "look[ing] first to the statutory language itself, giving words and phrases their commonly accepted and understood meaning." *Spracklin v. Indus. Claim Appeals Office*, 66 P.3d 176, 177 (Colo. App. 2002); *see also Abu-Nantambu-El v. State*, 2018 COA 30, ¶ 10 ("The legislative choice of language may be concluded to be a deliberate one calculated to obtain the result dictated by the plain meaning of the words.").

"Personnel" means, "[c]ollectively, the people who work in a company, organization, or military force." PERSONNEL, Black's Law Dictionary (11th ed. 2019). The Court, therefore, concludes that the plain language of DHHA's statute contemplates the release of some information about DHHA's workforce. In addition, the Court observes that Colorado statutes use the terms "personnel reports" and "personnel files" in very different ways. DHHA's recently amended statute uses the term "personnel reports," which is distinct from CORA's exception for the contents of "personnel files." § 24-72-202(4.5) (defining "personnel files" as "home addresses, telephone numbers, financial information, a disclosure of an intimate relationship filed in accordance with the policies of the general assembly, other information maintained because of the employer-employee relationship…"). Material protected from disclosure in personnel files usually implicates documents in which "a

legitimate expectation of privacy" exists. *Jefferson Cnty. Educ. Ass'n*, 2016 COA 10, ¶ 47.

CORA provides some further guidance about what types of reports may be considered "personnel reports." For example, CORA specifically says that while records of sexual harassment investigations shall not be subject to disclosure, the law does not "preclude disclosure of all or part of the results of an investigation of the general employment policies and procedures of an agency, office, department, or division, to the extent that the disclosure can be made without permitting the identification, as a result of the disclosure, of any individual involved." § 24-72-204(3)(a)(X). Courts also have found that internal investigation reports may fall outside of the CORA exception for personnel files. *See Denver Post Corp. v. Univ. of Colorado*, 739 P.2d 874, 879 (Colo. App. 1987) (affirming order to produce internal investigation materials regarding whether employees received and did not report the receipt of foreign funds).

The collective import of this authority is that the DHHA statute covering "personnel reports" contemplates the release of some information about the collective DHHA workforce as opposed to information in which specific employees would have an expectation of privacy.

The Court does not, at present, have sufficient information in the abstract to determine whether the Equity Project report or any documentation provided in association with the report qualify as "personnel reports" subject to disclosure. Likewise, the Court cannot evaluate in the abstract whether information in these documents implicates personal privacy interests such that the materials are more akin to personnel file materials rather than personnel reports. The Court, therefore, directs Defendant to submit the documents for in camera review using the instructions at the end of this order.

The Court also considers and resolves DHHA's second contention – that the records are not discoverable because they are about "programs or initiatives" that "would give an unfair competitive or bargaining advantage to any person or entity." § 25-29-102. The Court rejects that argument. Not all DHHA documents about

programs and initiatives are exempt from disclosure as public records – those terms are qualified and cover only programs and initiatives about patient care and health care. The full text of DHHA's statute says, "all writings and other records concerning the modification, initiation, or cessation of patient care and authority health-care programs or initiatives shall not be deemed to be a public record if premature disclosure of information contained in such writings or other records would give an unfair competitive or bargaining advantage to any person or entity." *Id.* As a result, the phrase "programs or initiatives" is modified by the phrase "concerning … patient care and authority health-care." *Id.* Thus, only those records relating to patient care and authority health-care programs or initiatives fall within that exception. DHHA does not describe the Equity Project report and accompanying documents as being about patient care or health care, and therefore, the Court rejects that argument.

**B. Whether the Records Seek Confidential Commercial Data**

Even if the requested documents are public records subject to CORA, DHHA argues that they fall within CORA's exception for confidential commercial data. Section 24-72-204(3)(a)(IV) provides that a custodian of records "shall deny" a request for "[t]rade secrets, privileged information, and confidential commercial, financial, geological, or geophysical data furnished by or obtained from any person." CORA exemptions should be narrowly construed. *City of Westminster v. Dogan Const. Co.*, 930 P.2d 585, 589 (Colo. 1997). The burden of proving an exemption rests with the record custodian. *Zubeck v. El Paso Cnty. Ret. Plan*, 961 P.2d 597, 600 (Colo. App. 1998).

The rationale behind the exemption for confidential commercial information "is twofold: to encourage cooperation on the part of those people who are not required to provide information to a governmental agency, as well as to protect the rights of those who are required to provide such information." *Id.* at 600. "The purpose of the exemption is to protect information originating from a private individual or business, not information generated by the government itself." *Id.* (rejecting application of the exemption to documents that were in possession of a

public entity retirement plan that were not obtained from any person). "[I]f disclosure of financial information would be likely either to impair the government's future ability to gain necessary information or to cause substantial harm to the competitive position of the person providing the information, the financial information is considered to be confidential for purposes of th[is] statutory exemption." *Id.*

Without the report and the benefit of any testimony that may shed light on the confidential nature of information that may exist in the report, the Court cannot determine whether DHHA has met its burden to demonstrate this exemption. As detailed below, the Court will review the documents in camera and subsequently hold an evidentiary hearing to determine facts relating to the nature of the information in the documents. DHHA contends that the confidential nature of the information in the report is confirmed by the agreement between the Equity Project and DHHA. The Court does not have the benefit of this agreement, and DHHA may submit it for in camera review with the report.

### C. Whether the Records Seek Information Covered by the Attorney-Client Privilege or the Attorney Work Product Doctrine

Even if the requested documents clear the hurdles identified above and are otherwise discoverable under CORA, DHHA argues that the documents are nonetheless shielded from disclosure because they are subject to the attorney-client privilege and the attorney work product doctrine. In support of this argument, DHHA claims that that report was commissioned by the DHHA General Counsel to facilitate legal advice.

#### 1. Attorney-Client Privilege

The attorney-client privilege protects both the communications between attorney and client and the attorney's advice. *See* § 13-90-107(1)(b), C.R.S. (2021). The privilege extends to "confidential matters communicated by or to the client in the course of gaining counsel, advice, or direction with respect to the client's rights or obligations. It does not protect any underlying and otherwise unprivileged facts that are incorporated into a client's communication to or with his attorney." *Guy v.*

*Whitsitt*, 2020 COA 93, ¶ 20 (internal citations omitted). "[T]he privilege applies only to statements made in circumstances giving rise to a reasonable expectation that the statements will be treated as confidential." *Lanari v. People,* 827 P.2d 495, 499 (Colo. 1992). The privilege is for the benefit of the client and it exists "to secure the orderly administration of justice by insuring [*sic*] candid and open discussion by the client to the attorney without fear of disclosure." *Losavio v. Dist. Ct. In & For Tenth Jud. Dist.*, 533 P.2d 32, 34 (Colo. 1975). The party asserting the privilege bears the burden to demonstrate the applicability of the privilege. *People v. Dist. Ct. In & For City & Cnty. of Denver,* 743 P.2d 432, 435 (Colo. 1987). In assessing privilege assertions, a trial court must examine each specific communication. *Oldham v. Pedrie*, 411 P.3d 933, 941-42 (Colo. App. 2015).

DHHA is correct as a general matter that the attorney-client privilege may extend not only to communications by/from counsel, but also to communications with professionals hired by legal counsel to assist in the lawyer's provision of legal advice. This is common in many contexts, such as when an attorney hires an investigator or expert to act as a litigation consultant; communications that occur in the context of this relationship remain privileged. *See* Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 336 (6th ed. 2017) ("Permissive presence of third parties will also be extended to communications of a more technical nature where the third party may help either the lawyer or the client or both in evaluating an issue on which legal advice is sought.").

The Restatement of the Law Governing Lawyers, which Colorado courts follow,[1] speaks directly to this issue.

> To qualify as privileged, a communication must originate from a person who may make privileged communications and be addressed to persons who may receive them. Those persons are referred to in this Restatement as privileged persons . . . Other privileged persons are those who serve to facilitate communication between client and lawyer and persons who aid the lawyer in representing the client.

[1] *See, e.g., Mercantile Adjustment Bureau, LLC v. Flood*, 278 P.3d 348, 355-56 (Colo. 2012).

Restatement (Third) of the Law Governing Laws. § 70 cmt. b (Am. Law Inst. 2000). Applying the privilege to those assisting in the legal representation "protect[s] the ability of attorneys to garner needed information to provide sound legal advice." *All. Const. Sols., Inc. v. Dep't of Corr.*, 54 P.3d 861, 863, 866, 871 (Colo. 2002) (finding that communications between the client's counsel and client's independent contractor were protected by the attorney-client privilege).

However, not every communication between legal counsel and an engaged professional may shelter under the umbrella of the attorney-client privilege, and communications that occur in the context of legal representation are not always privileged. *See Fox v. Alfini*, 2018 CO 94, ¶¶ 6-8, 29 (finding that attorney-client privilege did not apply to consultation with client and counsel where client's parents were also present).

The Court finds that the characteristic that protects the communications is the professional's involvement for the purpose of, or their assistance in, providing legal advice. *See All. Const. Sols.,* 54 P.3d at 869, 871 (finding that communications with independent contractor of client were protected when the communications were made for the purpose of seeking or providing legal assistance). The person asserting the privilege bears the burden to demonstrate that involving the professional "was for the purpose of obtaining or providing legal services." Restatement (Third) of the Law Governing Laws. § 70 Rep.'s Note cmt. g.

Here, the Court cannot determine on the present record the nature of the relationship between DHHA's General Counsel and the firm producing the Equity Project report. DHHA contends that the privileged nature of the report is confirmed by the agreement for the report. Again, the Court does not have the benefit of this agreement, and DHHA may submit it for in camera review with the report. The Court also will require testimony about the purpose of the report, the context, how the report is relevant to DHHA's legal concerns, and whether the report has been maintained as confidential such that DHHA has not waived the privilege. The Court will resolve the privilege assertion based on this information following the forthcoming hearing.

### 2. Attorney Work Product Doctrine

DHHA makes an additional assertion that the documents are further protected by the attorney work product doctrine.

The work product doctrine safeguards "the mental impressions, conclusions, opinions, or legal theories of an attorney" concerning litigation. *Gall ex rel. Gall v. Jamison*, 44 P.3d 233, 235 (Colo. 2002) (internal quotations omitted). The doctrine "generally applies to documents and tangible things . . . prepared in anticipation of litigation or for trial . . . and its goal is to insure [*sic*] the privacy of the attorney from opposing parties and counsel." *A v. Dist. Ct. of Second Jud. Dist.*, 550 P.2d 315, 327 (Colo. 1976) (internal quotations omitted). "Documents prepared in anticipation of litigation or for trial are discoverable 'only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.'" *Nat'l Farmers Union Prop. & Cas. Co. v. Dist. Ct. For City & Cnty. of Denver*, 718 P.2d 1044, 1047 (Colo. 1986) (quoting C.R.C.P. 26(b)(3)).

To be covered by the attorney work product doctrine, the materials at issue must be created in anticipation of litigation. *See, e.g., Hawkins v. Dist. Ct. In & For Fourth Jud. Dist.*, 638 P.2d 1372, 1377 (Colo. 1982). Whether materials are created in anticipation of litigation is not a bright line triggered by commencement of litigation, rather, it depends on the nature of materials and particular factual circumstances. *Id.* at 1378-79. However, the documents must have been prepared or obtained in contemplation of specific litigation." *Id.* at 1379. For materials to be protected, there must be a "substantial probability of imminent litigation over the claim." *Id.* It is not sufficient that litigation is merely possible. *See Compton v. Safeway, Inc.*, 169 P.3d 135, 138 (Colo. 2007).

Again, no evidence is currently before the Court demonstrating that the report was prepared in anticipation of particular litigation. DHHA must present evidence to the Court at the forthcoming hearing to establish that the attorney work product doctrine would apply in these circumstances.

## IV. CONCLUSION

First, the Court acknowledges the undue length of time that this matter has been pending. In order to fully resolve this application, however, the Court requires an in camera review of the Equity Project report, the agreement for the report, and any other documents that would fall within the parameters of Plaintiff's request. DHHA should submit the documents for the Court's review within 14 days of this order by filing them as "SEALED" documents. DHHA should e-file the documents with a note in the comments to the filing that "The exhibits should be sealed pursuant to the August 5, 2022 Order on Application for an Order to Show Cause Pursuant to § 24-72-204(5). Please ensure the comment is included, because if the file is only "protected," it will be accessible to the public after redaction. If there are any issues with adding the comment, please contact the Clerk's Office before filing at (303) 606-2330. The Court notes DHWU's request that the materials also be provided to DHWU for review, but finds that the materials are more properly submitted to the Court for in camera review.

The Court does not anticipate that an in camera review will be fully sufficient for the Court to make the factual findings necessary to resolve the objections to production raised by DHHA, including as to the attorney-client privilege and the attorney work product doctrine. Accordingly, the Court directs the parties to contact the Division Clerk for Courtroom 269 within 14 days of this order to set a half-day hearing. The Court will set this hearing as soon as possible.

**SO ORDERED** this 5th day of August, 2022.

**BY THE COURT**

STEPHANIE L. SCOVILLE
Denver District Court Judge