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| DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202 (303) 606-2300 | DATE FILED: July 7, 2022 12:33 PM FILING ID: CFACA3EBCB1F1 CASE NUMBER: 2022CV31898 |
| Plaintiff: CLAY BURLEW v. Defendants: ENID WADE , in her official capacity as General Counsel for Denver Health and Hospital Authority; JUDITH BENTON , in her official capacity as Senior Assistant General Counsel for Denver Health and Hospital Authority; and DENVER HEALTH AND HOSPITAL AUTHORITY | <p style="text-align: center;">▲ COURT USE ONLY ▲</p> |
| Attorneys for Plaintiff Clay Burlew Name: Adrienne C. Scheffey (#48668) Dana L. Eismeier (#14379) Address: BURNS, FIGA & WILL, P.C. 6400 South Fiddler's Green Circle Suite 1000 Greenwood Village, CO 80111 Telephone: (303) 796-2626 Facsimile: (303) 796-2777 Email: ascheffey@bfwlaw.com deismeier@bfwlaw.com | Case No. Div. |
| APPLICATION FOR AN ORDER TO SHOW CAUSE PURSUANT TO THE COLORADO OPEN RECORDS ACT | |

Plaintiff Clay Burlew, by and through her undersigned counsel, files the instant Complaint and Application for Order to Show Cause against Denver Health and Hospital Authority (“DHHA”); Enid Wade, in her official capacity as General Counsel for DHHA; and Judith Benton, in her official capacity as Senior Assistant General Counsel for DHHA.

INTRODUCTION AND RELEVANT BACKGROUND

1. This civil action is brought pursuant to the Colorado Open Records Act (“CORA”) C.R.S. § 24-72-201 *et seq.* seeking access to certain public records of DHHA’s surgical department involving its pay policies, pay band measures, personnel reports, salary data, and job postings.

2. Plaintiff Clay Burlew, a former employee of DHHA, seeks access to certain public records, which relate to personnel reports, salary data, pay band policies, and job postings.

3. On June 2, 2022, Dr. Burlew submitted her request under CORA to Enid Wade, General Counsel of DHHA, requesting the public records sought herein. The request is attached as **Exhibit A**.

4. On June 8, 2022, having received no correspondence in response to the CORA request, counsel for Dr. Burlew sent an email to Ms. Wade stating as follows:

Three working days have now come and gone since the below-referenced CORA request was submitted. As you know, the statute requires Denver Health to provide the responsive documents within three working days, which time would have elapsed yesterday June 7, 2022. See C.R.S. § 24-72-203(3)(b). We have not yet received any documents in response to our request. Please let us know if we can expect the documents by the close of business today, or if we will need to file a show cause order in Denver District Court.

This email provided notice to DHHA of Dr. Burlew’s intent to seek an order to show cause pursuant to C.R.S. § 24-72-204(5)(a).

5. On June 9, 2022, well beyond the reasonable time set forth in section 24-72-203(3)(b) (three working days or less)—and without stating good cause for delay—Judith Benton, Senior Assistant General Counsel of DHHA, responded to the CORA request. In connection with her response, Ms. Benton provided a single DHHA policy entitled “Annual Increases.” The document confirmed existence of a separate “pay band” policy, but no such policy was produced. DHHA’s response and produced policy are attached hereto as **Exhibit B**.

6. In DHHA’s June 9th response, DHHA did not claim that any category of documents requested was excluded from CORA under section 24-72-204. Instead, DHHA issued its wholesale denial on the basis that DHHA’s obligations under CORA are limited to only those categories expressly stated in C.R.S § 25-29-109. Through this argument,

DHHA asserted that its CORA obligations were limited by DHHA's enabling statute that addresses, with specificity, which records of the DHHA Board of Directors are public records. *See* **Exhibit B**.

7. On June 10, 2022, Dr. Burlew, by and through her undersigned counsel, responded to Denver Health's denial of inspection of records. In Dr. Burlew's June 10th correspondence, she detailed why section 25-29-109 did not limit the universe of documents subject to CORA, as DHHA is a political subdivision of the state under C.R.S. § 25-29-103(1) and is subject to the same definition of "public records" as any other political subdivision. Dr. Burlew further explained that, even if DHHA's interpretation of section 25-29-109 was correct, DHHA had still fallen short of its obligation to produce public records. That correspondence is attached hereto as **Exhibit C**. As noted therein, Dr. Burlew provided examples of the types of documents she expected to be responsive to each request and requested a time for an in-person conferral prior to June 22, 2022, pursuant to section C.R.S. § 24-72-204(5)(a).

8. On June 15, 2022, Judith Benton responded on behalf of DHHA. In the response, DHHA did not provide any further records, instead merely disagreeing that any such records were responsive. Ms. Benton ended her letter with the following:

"Denver Health has produced all responsive documents within its possession subject to CORA as described by § 25-29-109 and considers this matter closed."

That correspondence is attached hereto as **Exhibit D**. Ms. Benton did not provide a date and time for conferral.

9. Dr. Burlew, through counsel, once again followed-up with Ms. Benton seeking a time for conferral pursuant to § 24-72-204(5)(a). The Parties set a conferral for June 21, 2022.

10. In advance of the conferral, on June 17, 2022, Dr. Burlew sent additional correspondence, hoping to clarify the scope of documents requested and narrow the distance between the Parties. This correspondence is attached as **Exhibit E**. In the letter, Dr. Burlew specified various categories of documents that she believed fell within the scope of her request and asked that DHHA be prepared to explain what searches it had (or had not) conducted to locate such documents, and if it was DHHA's position the documents did not exist, or if it was simply refusing to produce the same. *Id.* DHHA had produced only a single document, yet was claiming it had produced "all responsive documents within its possession." Thus, additional information about each category of

records requested was necessary to determine whether Dr. Burlew would be required to submit the instant application to show cause.

11. Among other things, the June 17, 2022 letter explicitly requested the salaries/rate of pay, including the FTE¹ status, of “all physicians and AAPs in the Denver Health Surgery department from 2018 to present.” The letter indicated that if there were objections to privacy, the names of the individuals could be redacted.

12. Despite the fact that disclosure of pay policies and salaries (and the expenditure of public funds more generally) is central to the policy of transparency CORA seeks to enforce, to date, DHHA has not produced any of the requested salary or pay policy information.

13. During the Parties’ conferral on June 21, 2022, Ms. Benton, on behalf of DHHA, stated that she could not state whether the requested policies, salaries, or other information were in existence as she was “not the custodian.”² She stated that she needed to speak with others within DHHA to determine where the documents were stored, in what format, and who the relevant custodians were. Based upon these representations, the undersigned agreed to delay filing an application for an order to show cause until Ms. Benton could identify the location of the responsive documents and produce the same. That correspondence is attached hereto as **Exhibit F**. The Parties agreed to have a follow-up call on June 23, 2022, when Ms. Benton would have more information about the status of the documents. If documents were found in the meantime, Dr. Burlew understood that Ms. Benton agreed to produce any documents she was able to find. *Id.*

14. On June 23, 2022, Ms. Benton, on behalf of DHHA, stated that she had located only Dr. Burlew’s personnel file, but that she had sent requests for the remaining documents to the relevant personnel and had not received a response. To produce the personnel file, DHHA stated telephonically that it would provide only a paper copy and would charge \$1.25 per page to do so. DHHA stated that charging this amount was part

¹ In the context of DHHA employees, “FTE” or Full-Time Employee status indicates the expected clinical workload of an employee which provides necessary context for interpreting and assessing the individuals’ salary amount.

² The undersigned believes that this assertion was oddly timed, given that Ms. Benton had been responding as though she was the custodian of records for nearly three weeks and had been assigned by DHHA’s general counsel to respond to the request. Nevertheless, counsel was willing to learn who the custodian of records was and work with the appropriate person to obtain the requested records.

of a standard policy, but DHHA would not provide information about whether the document was maintained in an electronic file or in a paper record.³

15. During the June 23, 2022 call, the undersigned sought an update on the requested records. Ms. Benton stated she had no update as the requests had been sent to other individuals within DHHA and she had not received a response. The undersigned sought (i) a date certain for production of the documents, and (ii) the names of the custodians who were searching for the responsive documents. DHHA refused to provide the names of the the custodians of the records or a date for production.

16. Following the call, Dr. Burlew, through her counsel, once again followed up requesting information about the status of her CORA request. In the correspondence, the undersigned noted that DHHA bore an obligation under CORA to provide a date certain when the records could be inspected, as well as a list of custodians who were searching for the same. That correspondence is attached as **Exhibit G**.

17. Ms. Benton responded on Friday, June 24, 2022, stating that she was “working to determine the universe of responsive documents while managing available resources to avoid disruption of the delivery public healthcare services.” *See* **Exhibit H**. DHHA did not provide the list of custodians or a date certain for responding to the request.

18. The undersigned followed up on June 24, 2022, seeking, once again, the list of custodians and a date the documents would be provided. *See* **Exhibit I**. DHHA did not respond to this request.

19. On June 27, 2022, counsel for Dr. Burlew once again sent an email to DHHA seeking a response to its request. **Exhibit J**. DHHA did not respond.

20. As of the date of this filing, DHHA has not responded to the June 24th or 27th correspondence, has not produced all the public records in its possession at issue in this application, has not provided a date by which it will produce the relevant records (despite having had the request for over 30 days), and has not provided the list of custodians with whom it is working—necessitating the instant action. Furthermore, DHHA has provided only a single pay policy entitled “Annual Increases” as well as Dr. Burlew’s personnel file. DHHA has not provided any of the following public records:

- a. Pay band policies for DHHA, showing the policies for implementing and adjusting pay bands (the salary ranges a doctor or surgical staff member can

³ DHHA’s policy of charging \$1.25 per page appears to be based upon a 2007 version of § 24-72-205. The current version places a maximum charge per page copied of \$0.25 and requires documents that can be transmitted via-email to be so transmitted without charge. DHHA ultimately provided the file without charge.

expect to be compensated for various experience levels), as described in more detail in **Exhibit E**.

- b. Leadership stipend policies, as described in more detail in **Exhibit E**.
- c. Employee salaries and bonuses for the DHHA department of Surgery, as described in more detail in **Exhibit E**.
- d. Personnel reports completed by Employment Matters LLC, as described in more detail in **Exhibit E**.
- e. Personnel reports containing complaints of gender discrimination in the past six months, as described in more detail in **Exhibit E**.
- f. Internal job postings for the Interim Director of Services Position for the Surgery Department as well as the Interim Associate Director of Services Position for the Surgery Department from 2019 to present.
- g. Internal job posting for the Associate Director of Services for the Subspecialty Surgeons position from 2019 to present.

PARTIES, JURISDICTION, AND VENUE

- 21. Dr. Clay Burlew is an individual and a resident of Arapahoe County.
- 22. Defendant Enid Wade, in her official capacity as General Counsel of DHHA, is a custodian of public records for DHHA.
- 23. Defendant Judith Benton, in her official capacity as Senior Assistant General Counsel of DHHA, is a custodian of public records for DHHA.
- 24. Defendant Denver Health and Hospital Authority is a political subdivision of the State of Colorado pursuant to C.R.S. § 25-29-103(1).
- 25. Jurisdiction is proper under C.R.S. § 24-72-204(5).
- 26. Venue is proper because C.R.S. § 24-72-204(5)(a) permits an aggrieved party to bring an action in the district court of the district wherein the record is found. The records at issue are located within Denver County.
- 27. Venue is also proper pursuant to C.R.C.P 98(b)(2) insofar as the claims are made against DHHA and its agents, all of whom are employed by DHHA which is located within Denver County.

APPLICABLE LAW AND DISCUSSION

28. CORA establishes a fundamental presumption that all “writings” of government entities that relate in any way to the discharge of government authority shall be open for public review. *See* C.R.S. § 24-72-201.

29. Any person in this State may exercise her statutory right to inspect such records, without having any special “need” or particularized “reason” for doing so. *See Anderson v. Home Ins. Co.*, 924 P.2d 1123, 1126 (Colo. App. 1996); C.R.S. § 24-72-203(1)(a).

30. Where DHHA believes that records are not in the control of the responding party, it must “notify the applicant of this fact, in writing . . . [and] state in detail to the best of the person’s knowledge and belief the reason for the absence of the records for the person’s custody or control, the location of the records, and what person has custody or control of the records.” C.R.S. § 24-72-203(2)(a).

31. Dr. Burlew has requested information about which custodians have custody or control over the requested records at DHHA, and in violation of § 24-72-203(2)(a), Ms. Benton has refused to provide that information.

32. If the public records are “not readily available at the time an applicant asks to examine them, the custodian shall forthwith notify the applicant of this fact, in writing . . . [and] shall set a date and hour at which time the records will be available for inspection.” C.R.S. § 24-72-203(3)(a).

33. To date, DHHA has not provided a date and time for inspection of records.

34. The date and time in which DHHA must make records available must be “reasonable,” which CORA states is “three working days or less.” C.R.S. § 24-72-203(3)(b).

35. Dr. Burlew’s initial request was made on June 2, 2022, and further detail was provided on June 10 and June 17, 2022. Not only has Dr. Burlew not received the requested documents within three working days, nearly two weeks have passed since her last clarification during which DHHA has provided no information as to when the documents will be made available, who the relevant custodians are, or any other information that would indicate DHHA is attempting in any meaningful way to comply with its requirements under CORA.

36. None of the requests made by Dr. Burlew are “contrary to any state statute” under section 24-72-204(1)(a).

37. “CORA’s clear language creates a strong presumption in favor of disclosing records.” *Jefferson Cnty. Educ. Ass’n v. Jefferson Cnty. Sch. Dist. R-1*, 2016 COA 10, ¶ 14, 378 P.3d 835, 838. “Exceptions to the broad, general policy of the Act are to be narrowly construed.” *Sargent Sch. Dist. No. RE-33J v. W. Servs., Inc.*, 751 P.2d 56, 60 (Colo. 1988); *Jefferson*, 2016 COA 10, ¶ 25. To that end, public records must be open to inspection unless access is “specifically” limited. *Denver Pub. Co. v. Dreyfus*, 184 Colo. 288, 293, 520 P.2d 104, 107 (1974). Thus, where there is a question concerning an interpretation of CORA, the statute should be interpreted in favor of liberal disclosure of records.

38. While DHHA has pointed to section 25-29-109, part of DHHA’s enabling statute entitled “Records of board of directors,” as a shield from its CORA responsibilities, the cited provision is reasonably construed as setting only two limits on the disclosure of DHHA records where CORA may otherwise require their production: (i) writings and records related to modification, initiation, or cessation of certain programs that would give an unfair or competitive advantage to a person or entity; and (ii) individual personnel files. *Id.* With the exception of her own personnel file,⁴ which is not at issue here, Dr. Burlew does not seek any documents that fall within those limitations.

39. Section 25-29-109 otherwise does not exempt or specifically limit the disclosure of all records of the Authority. Instead, when narrowly construed in favor of the “strong general rule that public records should be disclosed,” *Jefferson*, 2016 COA 10, ¶ 25, section 25-29-109 provides for only the two exceptions set forth above.

40. As for the remaining language in § 25-29-109, it describes specific records of the DHHA Board of Directors that are to be definitively construed as public records—without exception. It does not otherwise limit DHHA’s obligations under CORA. Thus, the production of public records under CORA is not in conflict with section 25-29-109.

41. Even if section 25-29-109 were to be construed as a limit on DHHA’s CORA obligations, each of the documents requested by Dr. Burlew fall within the scope of that section and, therefore, are public records subject to inspection under all applicable statutory provisions.

42. Indeed, DHHA employee salaries, employment contracts/terms, personnel reports, policies, and other information regarding amounts paid or benefits provided to employees are explicitly included as public records under sections 24-72-204(II)(B), 24-72-202(4.5), 24-72-202(6)(a)(IV), and 25-29-109.

⁴ Dr. Burlew is entitled to a copy of her own personnel file under sections 24-72-104(3)(II)(A); 24-72-202(4); and 8-2-129. As she has now received this file, she is not seeking further relief as to that request here.

43. The policies underlying how DHHA employees are paid are also public records as they demonstrate how public funds are to be allocated and spent. To be sure, one of the key aims of CORA is to “assure that, by providing access to public records, the workings of government are not unduly shielded from the public eye.” *Zubeck v. El Paso Cnty. Ret. Plan*, 961 P.2d 597, 600 (Colo. App. 1998).

44. Likewise, the remaining documents requested fall within the categories of “personnel reports, guidelines, manuals, or handbooks” subject to disclosure under section 25-29-109.

45. “[I]t has been recognized that public employees have a narrower expectation of privacy than other citizens.” *Denver Pub. Co. v. Univ. of Colorado*, 812 P.2d 682, 685 (Colo. App. 1990). To that end, records related to employees of governmental authorities repeatedly have been found to be subject to disclosure under CORA. *See e.g. Jefferson*, 2016 COA 10, ¶ 23, 378 P.3d 835, 839 (finding teachers’ sick leave records were required to be disclosed under CORA, despite their relationship to individual employees); *see also Daniels v. City of Com. City, Custodian of Recs.*, 988 P.2d 648, 651 (Colo. App. 1999) (finding that, to be withheld from disclosure under the personnel file exception to CORA, “information must be of the same general nature as an employee’s home address and telephone number or personal financial information.”).

46. Insofar as any of the requested documents are considered personnel files under section 24-72-104(3)(II)(A), Dr. Burlew is a “Person in interest” as defined in section 24-72-202(4). This status of Dr. Burlew provides further justification for compelling disclosure of the requested records.

47. The undersigned has set forth the reasons justifying disclosure of the documents, in the instant application, as well as in **Exhibits C & E**. In response to a request for a written statement for the grounds of denial, as required under section 24-72-204(4), DHHA has made only a general reference to section 25-29-109. As set forth above, DHHA’s enabling statute does not provide grounds for withholding the requested records.

48. Accordingly, DHHA has fallen short of its obligations under CORA.

49. When a public entity falls short of its CORA obligations, as here, the requesting party may apply to the district court for “an order directing the custodian of such record to show cause why the custodian should not permit the inspection of such record.” C.R.S. § 24-72-204(5)(a). Dr. Burlew herein is availing herself of this remedy.

50. DHHA was given notice that Dr. Burlew intended to seek an order to show cause on June 8, 2022 and again on June 23, 2022. DHHA has not provided the requested

public records, the requested custodian names, a date certain for production, or any other required disclosure.

FIRST CLAIM FOR RELIEF (VIOLATION OF CORA,
C.R.S. § 24-72-204 et. seq.)

51. Dr. Burlew hereby incorporates by reference paragraphs 1 through 50 of the above application.

52. The records requested by Dr. Burlew, and described in detail in **Exhibit E**, are “public records” as defined by CORA. C.R.S. § 24-72-204.

53. Salary, employee contract information, and other information regarding amounts paid or benefits provided to employee are considered public records under sections 24-72-204(II)(B), 24-72-202(4.5), 24-72-202(6)(a)(IV), and 25-29-109.

54. There is no basis for withholding the other requested categories of records as they are all public records (writings of DHHA) not subject to any exception under CORA.

55. Under CORA, as a political subdivision of the State, DHHA must make records available for review and inspection within a “reasonable time,” defined by CORA as three working days. C.R.S. § 24-72-203(3)(b).

56. Where public records are “not readily available at the time an applicant asks to examine them” the custodian must provide, in writing, a date and time when such records will be available for inspection. C.R.S. § 24-72-203(3)(a).

57. Section 24-72-203(3)(a) makes clear that if the public records are not in the custody or control of the person responding to the CORA request, DHHA shall provide, the location of the records and “what person has custody or control of the records.” C.R.S. § 24-72-203(3)(a).

58. Defendants violated CORA by wrongfully withholding public records, by withholding information about the relevant custodians, and by failing to provide a date by which documents could be inspected.

59. Accordingly, Dr. Burlew requests that the Court find, by way of the correspondence attached hereto, that DHHA has violated CORA. If the Court is unable to make such a finding on the face of this application, she requests a hearing “at the earliest practical time.” § 24-72-204(5)(b).

60. Because the withholding of records, custodian names, and availability of records was in violation of CORA, this Court should enter an Order awarding Dr. Burlew her reasonable attorneys' fees and costs. § 24-72-204(5)(b). Such an award is appropriate regardless of whether the violation is intentional or knowing. *See Zubeck v. El Paso Cnty. Ret. Plan*, 961 P.2d 597, 602 (Colo. App. 1998).

RELIEF REQUESTED

WHEREFORE, Plaintiff Dr. Burlew requests the following relief:

1. That this Court enter an order, at the soonest possible time, directing Defendants to show cause why this Court should not issue an order requiring DHHA to make the requested records available to Plaintiff at the earliest possible date;
2. That, to the extent the violation is not clear from the face of the complaint, this Court hold a hearing at the "earliest practical time" to show cause why DHHA should not make the requested records available to Dr. Burlew at the earliest possible date. § 24-72-204(5)(b).
3. That this Court enter an order requiring Defendants to pay Plaintiff's reasonable attorneys' fees as provided for by C.R.S. § 24-72-204(5)(b).
4. That this Court award any other further relief that it deems just and proper.

Respectfully submitted this 7th day of July, 2022.

BURNS, FIGA & WILL, P.C.

***Original signature at the offices of
Burns, Figa & Will, P.C.***

By: S/ Adrienne C. Scheffey
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Attorneys for Plaintiff Clay Burlew