

| | |
|---|---|
| DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, CO 80202 | DATE FILED: June 30, 2023 2:51 PM FILING ID: AF8867AF1A12D CASE NUMBER: 2023CV31854 |
| Petitioner: SHERRIE PEIF v. Respondent(s): COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING, and KATHY SNOW, in her official capacity | ▲ COURT USE ONLY ▲ |
| <i>Attorneys for Petitioner</i> John S. Zakhem, #30089 Andrew C. Nickel, #45235 Jackson Kelly PLLC 1099 18th Street, Suite 2150 Denver, CO 80202 Telephone: (303) 390-0003 Facsimile: (303) 390-0177 jszakhem@jacksonkelly.com andrew.nickel@jacksonkelly.com | Case No.: 2023CV031854 Div: |
| AMENDED PETITION TO SHOW CAUSE | |

COMES NOW Petitioner, Sherrie Peif, by and through her legal counsel, Jackson Kelly, PLLC, hereby submits the following Amended Petition to this Honorable Court to order Respondents to show cause for not complying with requests pursuant to C.R.S. § 24-72-204(5). In support thereof, Petitioner states as follows:

CERTIFICATE OF CONFERRAL

Pursuant to C.R.S. § 24-72-204(5)(a), on May 8, 2023, undersigned counsel sent Respondents written notice of Petitioner’s intent to file a petition to show cause. On May 15, 2023, undersigned counsel conferred with counsel for Respondents via a Zoom teleconference

meeting. Thereafter, the Department produced additional documents responsive to the underlying Request, and an amended Vaughn index. Despite this supplemental response, Respondents herein have failed to produce at least one responsive record in violation of C.R.S. § 24-72-201, et seq. This certification of conferral is made pursuant to C.R.S. § 24-72-204(5)(a).

PARTIES

1. Petitioner is Sherrie Peif is a citizen of Colorado, residing in Weld County, and is employed as a journalist at CompleteColorado.com. Through her role at CompleteColorado.com, Petitioner regularly covers matters of public concern for readers throughout Colorado and beyond.

2. Respondent Colorado Department of Health Care Policy and Financing (the “Department” or “HCPF”) is a principal department of the government of the State of Colorado. C.R.S. § 24-1-110(1)(x); C.R.S. § 24-1-119.5.

3. Respondent Kathy Snow is the CORA Officer and custodian for HCPF and the custodian of records for HCPF.

4. At all times relevant herein, Respondents held their offices at 1570 Grant Street, Denver, CO 80203-1818.

JURISDICTION AND VENUE

5. Jurisdiction is proper in the State of Colorado.

6. Venue is proper in the City and County of Denver pursuant to C.R.S. § 24-72-204(5) because the records in question are located within the City and County of Denver.

FACTUAL ALLEGATIONS

7. On March 7, 2023, Petitioner delivered a Request for Information Pursuant to the Colorado Open Records Act (the “Request”) to Respondents. See attached **Exhibit 1**.

8. The Request sought the production of the following documents pursuant to C.R.S. § 24-72-101 to 24-72-402:

All hard-copy memoranda, letters or other correspondence, including Slack, Teams or Zoom chats, text messages, WhatsApp, Signal messages and/or email sent or received at any time from January 1, 2023 through March 1, 2023, inclusive, by one or more of the following twelve (12) employees, which include any of the stated terms:

Employees: Kim Bimestefer, Tom Massey, Rachel Reiter, Alec Garnett, Conor Cahill, Melissa Dworkin, Iris Hentze, Ciara O'Neill, Bettina Schneider, Marc Williams, Ralph Choate, Nancy Dolson

Terms: “Hospital Expenditure Report”, “Hospital Community Benefit Annual Report”, and “Colorado Healthcare Affordability and Sustainability Enterprise (CHASE) Annual Report”, “Annual Report”, “Hospital Insights”, “State of the State”, “CHASE Report”, “community benefits”, “hospital reserves”, and/or “hospital profits”.

9. On March 10, 2023, Respondent Snow sent Petitioner an email stating that there were “almost two thousand records that fit within the search parameters in email alone.” See attached **Exhibit 2**.

10. On March 21, 2023, Respondent Snow sent Petitioner an email lowering her estimate without explanation and stating that there were now “1,550 emails that are potentially responsive to your request.” See attached **Exhibit 3**.

11. On April 13, 2023, Respondents produced to Ms. Peif only 318 documents.

12. Respondents also produced to Ms. Peif an affidavit from Ms. Snow, together with a Vaughn Index, purportedly listing each document that was being withheld “as attorney-client privilege...and deliberative process privilege.” See attached **Exhibit 4**.

13. The Vaughn Index (**Exhibit 5**) that was incorporated in Ms. Snow’s affidavit identified only 283 records that were withheld. Together with the 318 documents that were produced, Respondents accounted for only 601 of the initially estimated 1,500 – 2,000 documents.

14. Thus, based on Ms. Snow’s initial estimate, there were additional responsive documents

that were not produced with Respondent's initial response.

15. On June 9, 2023, Respondents produced a supplemental response. See attached **Exhibit 6**. The supplemental response included an amended Vaughn Index (attached as **Exhibit 7**), along with six additional documents.

16. Respondents' supplemental response and amended Vaughn Index remains deficient.

17. The 6 additional documents produced in Respondents' supplemental response bring the total number of documents produced to 324. The amended Vaughn Index contains an identification of 272 documents over which the deliberative process privilege is claimed. The total number of documents accounted for, therefore, is 596, woefully short of Respondents' initial estimate of 1,550 – 2,000.

APPLICATION FOR AN ORDER TO SHOW CAUSE

18. The Respondents' response to Petitioner's March 7, 2023 Request is insufficient.

19. Respondents wrongfully withheld responsive documents.

20. Respondents' claim of the deliberative process over 272 responsive documents is overbroad. Respondents failed to meet their burden with respect to the 272 documents over which a claim of the deliberative process privilege was made.

21. Respondents' Vaughn Index is insufficient. Respondents' Vaughn Index does not contain an explanation as to the deliberative process to which each document relates, nor is there an explanation as to why disclosure of each document would be harmful.

22. For these reasons, the Court should order Respondents to show cause for failing to comply with the Colorado Open Records Act.

WHEREFORE, for the reasons above, Petitioner respectfully requests that this Honorable

Court order Respondents to show cause for failing to appropriately respond to Petitioner's March 7, 2023 Colorado Open Records Act request.

Respectfully submitted this 30th day of June 2023.

JACKSON KELLY PLLC

/s/ Andrew C. Nickel

John S. Zakhem, # 30089

Andrew C. Nickel, #45235

1099 18th Street, Suite 2150

Denver, CO 80202

Telephone: (303) 390-0003

Facsimile: (303) 390-0177

jzakhem@jacksonkelly.com

andrew.nickel@jacksonkelly.com

Attorneys for Petitioner Sherrie Peif