LAW OFFICE OF
STEVEN D. ZANSBERG, L.L.C.

July 10, 2023

via email

Ms. Pamela Lintern
Business Operations Administrator
Arts & Venues
City and County of Denver

Re: 9News' CORA Request

Dear Ms. Lintern:

This law firm represents KUSA-TV/9News. Reporter Stephen Staeger has shared with me his exchange of communications with your regarding his request, under Colorado's Open Records Act (CORA), to inspect and copy certain public records in your office's possession, custody or control (by virtue of those records being in the possession, custody or control of its employees, and generated/kept in their conduct of official city business). Specifically, Mr. Staeger requested

- Any text messages you [Ms. Ginger White Brunetti] sent and received regarding city business on 6/21/23 and 6/22/23.
  - If you used a private phone to conduct city business, your text messages are still subject to public disclosure.

In response, you stated "Arts & Venus [sic] has consulted the City Attorney's Office on this matter. Text messages are not records made, maintained, or kept by the City and are not subject to disclosure under Colo. Rev. Stat. Secs. 24-72-101 to 24-72-402 et. seq. Therefore, nothing will be produced in response to your request." When Mr. Staeger subsequently asked to have the City Attorney's office explain how it distinguishes the holding of *Denver Publishing Company v. Board of County Commissioners for Arapahoe County*, 121 P.3d 190 (2005) (hereinafter "the Tracy Baker Text Message Case") you stated, simply, "Mr. Staeger, the City disagrees with your interpretation of the facts and holding of the cited case. We have provided the City's position and have no further comment at this time."

I write to respectfully ask you to forward this letter to the Assistant City Attorney who has been advising your office and ask her or him to please confer with the City Attorney before making a final decision. It is my hope that by having this conversation between the attorneys for the two parties that we can avoid bringing this matter to a court for resolution.

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Here is my understanding of what the above case, as well as the plain text of the CORA, say: text messages sent or received by any government official or employee – regardless of whether the device or communications system they employ is paid for by the public – in which public business is discussed (i.e., the content of those messages) are "public records" under CORA. Thus, unless some statutory exemption applies to them, they must be disclosed in response to a request for inspection under CORA.

Here is why I fully believe this to be true and correct. First, the text of CORA declares that *all* "writings"– regardless of physical form or characteristics," and specifically including "digitally stored data" that are "made, maintained, or kept" by any governmental entity (including all of its employees), "for use in the exercise of functions required or authorized by law or administrative rule" are public records, available for inspection. *See* §§ 24-72-202(6)(1)(a) & 202(7), C.R.S. Moreover, CORA specifically requires all government offices to adopt a specific policy regarding their employees' use of electronic mail. § 24-72-204.5, C.R.S.

While the writings that Mr. Staeger requested are text messages, not emails, that distinction is irrelevant. Why? Because in the Tracy Baker Text Message Case, Colorado's Supreme Court specifically used the word "email" interchangeably to refer to the *text messages* at issue. *See* Tracy Baker Text Message Case, 121 P.3d at 192, n.1. Ultimately, the Court determined that any portion of the text messages that Mr. Baker and his mistress, Ms. Sale, had exchanged that bore "a demonstrable connection to the performance of public functions" were public records that must be made available for inspection. Only those text messages whose entire contents bore absolutely no "demonstrable connection" to their official duties as public employees (i.e., purely sexually explicit content) were deemed to be *not* public records.

Here, of course, all of the electronic "writings" that Mr. Staeger has requested – which discuss what was to be done, and what was done, at the Red Rocks Amphitheater when the hail storm began, including steps taken to maintain public safety, and what corrective steps might be taken thereafter to avoid future recurrences of such unfortunate events, are unquestionably directly related to public employees' official governmental functions. Those writings were both "made" and "kept" by Ms. White Brunetti for "use in the exercise of" her official functions. Thus, under the Tracy Baker Text Message Case they are all "public records."

And, of course, it matters not whether Ms. White Brunetti's cell phone and/or the text messaging accounts on which those writings were "made" and "kept" were paid for by public funds. When the Mayor writes a letter to his subordinates discussing public business on his own private stationery and using his own pen/ink, that writing is nevertheless, unquestionably, a "public record" under CORA.

Not only does Section 3(a)(1) of the General Assembly's own Legislative Policy Related to Public Records and Email make this unmistakably clear (and that is the body

that drafted the CORA), but even in the case of *Denver Post Corp. v. Ritter*, 255 P.3d 1083 (2011) in which the former Governor successfully argued to the Supreme Court that the *billing records* for his cell phone were not "public records" because he paid for that phone personally and he had not used *those records* in conducting his office, he – upon advice from the State's Attorney General – provided the *Denver Post* with copies of the *text messages* he had received on that *privately paid-for phone*. He did so, pursuant to a CORA request, precisely because he and the Attorney General understood that under the Tracy Baker Text Message Case the sole question is whether *the content of the communication relates to public business*, not whether the means of communicating that content is public funded.

Accordingly, I invite the City Attorney to please review this situation and respond with an explanation for how, possibly, text messages "made" and "kept" by a city employee, in the course of performing her official functions and in which *she discussed her and other public employees' official duties* (in the midst of a serious, acute threat to the public's health and safety) do not fit within the statutory definition of public records.

Let me be absolutely clear: unless your office, upon review and reconsideration by the City Attorney's Office, notifies me within three business days of today that it will make the text messages Mr. Staeger has requested available to him, this letter constitutes the written notice required by § 24-72-204(5), C.R.S., that my clients intend to file an Application in the Denver District Court asking that you be ordered to appear and show cause why inspection of those public records should not be made. Furthermore, because my clients are engaged in covering news events on a timely, not historical, basis, they have an immediate need for these records and therefore they need not wait 14 days hereafter before filing said Application.

I look forward to hearing from either the City Attorney, or you, promptly.

Sincerely,

Steven D. Zansberg

cc: Tim Ryan, News Director, KUSA-TV/9News
Jeffrey Roberts, Executive Director, Colorado Freedom of Information Coalition