

DISTRICT COURT, DENVER COUNTY, COLORADO Address: 1437 Bannock Street, Denver, Colorado 80202	
Applicant: CITY AND COUNTY OF DENVER ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS, v. Interested Parties: HANNAH BECKLER, and BUSINESSINSIDER.COM.	DATE FILED January 15, 2025 5:29 PM CASE NUMBER: 2024CV32747 ▲ COURT USE ONLY ▲
	Case No.: 2024CV32747 Div.: 275
ORDER RE: APPLICATION PURSUANT TO C.R.S. § 24-72-204	

This matter is before the Court on Application pursuant to C.R.S. § 24-72-204, filed by Denver Water Board (hereinafter “Applicant” or “Plaintiff”) on September 10, 2024, which was amended on October 24, 2024. After briefing was completed, a hearing was conducted on November 20, 2024. Thereafter, once the Court was advised that the El Paso District Court had rendered an opinion in that matter, this Court sought confirmation that the parties still wished this Court to proceed. By filing on January 9, 2025, Defendants requested that this Court issue a written ruling in this case. By filing on January 13, 2025, Denver Water confirmed that it, too, seeks a written ruling from this Court.

The Court, having reviewed the briefing, conducted the November 20, 2024 hearing, reviewed applicable legal authority, and being fully advised in the premises, hereby FINDS and ORDERS as follows:

PROCEDURAL BACKGROUND

The case arises from a CORA request on May 20, 2024, by Hannah Beckler, on behalf of Businessinsider.com (hereinafter “Defendants”), to obtain Denver Water records relative to four (4) licenses, for the time period of 2020 through May 2024. Specifically, the CORA request related to 2 locations operated by Oracle, 1 location operated by Raymond James, and 1 location at the Denver Federal Center.¹ By correspondence dated May 21, 2024, Denver Water Board custodian

¹ The Federal Records Center does not receive water from Denver Water, so the parties agree that this address is no longer at issue

Kathleen Legg denied the request for records. This denial was clarified on May 22, 2024, with an explanation that due to Denver Water bills being determined on rate x consumption/1,000 gallons, a person could calculate the water bill for a Denver Water customer, which was determined to fall within “customer financial information.” Ms. Legg offered an alternative of showing water usage by block or zip code.

On August 27, 2024, Businessinsider.com’s counsel requested reconsideration of the May 20, 2024 CORA request and added nine (9) additional locations. Denver Water and Defendants’ counsel considered this to be an expanded CORA request. The reconsideration was denied.

Applicant Denver Water now seeks a determination from this Court as to whether the records withheld is “personal financial data” of an individual customer. In response, Defendants argue that Applicant has failed to demonstrate (1) substantial injury to public interest and (2) an existing statutory exemption. Defendants also counterclaim for an order granting inspection of the original locations plus the nine additional locations and an award of attorney fees and costs pursuant to C.R.S. § 24-72-204(5)(b). Finally, Defendants rely upon other Colorado trial court decisions where the agency was required to disclose CORA records such as those requested by Businessinsider.com in the instant matter.²

STANDARD OF REVIEW/BURDEN

The parties agree that the burden of proof related to the non-disclosure of records in a CORA request falls to the applicant. *Denver Publishing v. Dreyfus*, 520 P.2d 104, 108 (Colo. 1974). In this case, Denver Water Board bears the burden of proof.

LEGAL AUTHORITY AND ANALYSIS

The Colorado Open Records Act (“Act”) contains a broad legislative declaration that all public records shall be open for inspection unless excepted by the statute itself or specifically by other law. *Denver Publishing Co. v. Dreyfus*, 520 P.2d 104 (Colo. 1974). Under the Act, “[i]t is the public policy of this state, with certain exceptions, that all public records shall be open for inspection by any person at reasonable times. See, C.R.S. §24-72-201; *Freedom Newspapers, Inc., v. Denver and Rio Grande Western Railroad Co.*, 731 P.2d 740, 743 (Colo. App. 1986). This declaration has eliminated any requirement that a person seeking access to public records show a special interest in those records in order to be permitted access to them.” *Bodelson v. Denver Pub. Co.*, 5 P.3d 373, 376 (Colo. App. 2000); .” *Daniels v. City of Commerce City*, 988 P.2d 648, 650 (Colo. App. 1999), *cert. denied*, (Colo. 1999). “The purpose of open records statutes is to assure that the workings of government are not unduly shielded from the public eye.” *International Brotherhood of Electrical Workers v. Denver Metropolitan Major League Baseball Stadium Dist.*, 880 P.2d 160, 165 (Colo. App. 1994). “... [I]n the absence of a specific statute permitting the withholding of information, a public official has no authority to deny any person access to public records.” *Denver Publishing Co.*, 520 P.2d at 109 .

Under Colorado law, because the Act is based upon “a broad legislative declaration that all public records shall be open for inspection unless excepted by the statute itself or specifically by other law,” ... “[e]xceptions to the Act should be narrowly construed.” *Daniels*, 988 P.2d at 650; *Zubeck*

² At the hearing, Defendants’ counsel referenced the Pueblo District Court opinion issued by Judge O’Shea in June 2024 relative to a CORA request to CDHS. Defendant also referenced the December 2024 hearing in El Paso County involving the same Defendants and the application by the City of Colorado Springs.

v. El Paso County Retirement Plan, 961 P.2d 597, 600 (Colo. App. 1998); *Freedom Newspapers, Inc., v. Tollefson*, 961 P.2d 1150, 1154 (Colo. App. 1998).

“The burden of proving an exemption rests with the record custodian.” *Zubeck*, 961 P.2d at 600; *Denver Post Corp. v. University of Colorado*, 739 P.2d 874, 878 (Colo. App. 1987). In every public records case under the CORA, the party seeking access to a record bears the ultimate burden of persuasion to show that “the public entity in question: (1) improperly; (2) withheld; (3) a public record.” *Wick Commc'ns Co. v. Montrose County Bd. of County Comm'rs*, 81 P.3d 360, 363 (Colo. 2003) (adopting the federal FOIA's similar standard, as enunciated in *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980)).

Personal Financial Information Exception

Under the Act, the confidential financial information exemption provides:

(3) (a) The custodian shall deny the right of inspection of the following records, unless otherwise provided by law; except that any of the following records, other than letters of reference concerning employment, licensing, or issuance of permits, shall be available to the person in interest under this subsection (3):

...

(IV) Trade secrets, privileged information, and *confidential* commercial, *financial*, geological, or geophysical *data*, including a social security number unless disclosure of the number is required, permitted, or authorized by state or federal law, furnished by or obtained from any person...

C.R.S. §24-72-204(3)(a)(IV)(emphasis added).

Under the Act, a “person” specifically includes a “corporation” and a “limited liability company.” C.R.S. §24-72-202(3); *DiPietro v. Coldiron*, 2022 COA 121.

The statutory exception for confidential financial information is narrowly construed. *Freedom Newspapers, Inc. v. Denver and Rio Grande Western R. Co.*, 731 P.2d 740, 743 (Colo. App. 1986); *Zubeck*, 961 P.2d at 600. “This right [to confidentiality] is by no means absolute, and the courts must engage in a balancing process when applying the right in specific cases.” *American Civil Liberties Union v. Whitman*, 159 P.3d 707, 710 (Colo. App. 2006), *cert. denied*, (Colo. 2007). “The rationale for this exception is dual in nature. Not only does it encourage cooperation on the part of those who may not be required to provide information to a governmental agency, but it also protects the rights of those who are required to provide such information.” *Freedom Newspapers, Inc.*, 731 P.2d at 743; *Zubeck*, 961 P.2d at 600.

When confidential financial information is obtained from a person by a state agency, the information is confidential when disclosure under the Act would (1) impair the government's future ability to gain necessary information; or (2) cause substantial harm to the competitive position of the person providing the information. *International Brotherhood of Electrical Workers*, 880 P.2d at 166; *Freedom Newspapers, Inc.*, 731 P.2d at 743; *Zubeck*, 961 P.2d at 600.

Section 24–72–204(6) allows a court to restrict access to public records where substantial injury to the public interest would result “notwithstanding the fact that said record might otherwise be available for public inspection.” As stated in *Zubeck*,

A plain reading of the language of the exception indicates an intent to protect public records against disclosure where harm to the public interest would result, although the records might be accessible under other provisions of the act. But, *this catch-all exemption is to be used only in those extraordinary situations which the General Assembly could not have identified in advance*. The custodian of the records has the burden to prove an extraordinary situation and that the information revealed would do substantial injury to the public interest.

Zubeck, 961 P.2d at 601 (Colo. App. 1998)(internal citations omitted)(emphasis added)

Here, the Applicant has not demonstrated that this is an extraordinary situation, or that substantial injury to the public would result. Here, like *Zubeck*, public entities rarely can establish harm to the public interest in revealing who is paying for utility services.

Moreover, Colorado authority allows that even if persons believe they have a subjective expectation of privacy in public utility (electricity) records, “this expectation is not one that society would recognize as reasonable or legitimate and is therefore not protected by the Fourth Amendment” *People v. Dunkin*, 888 P.2d 305, 307 (Colo. App. 1994), citing to *U.S. v. Porco*, 842 F. Supp. 1393, 1398 (D. Wyo. 1994); see also *Booker v. Dominion Virginia Power*, 2010WL1848474 *5 (E.D. Va. 2010).³

In declining to provide the records under Section 24-72-204(3)(a)(IX), Applicant stated that the “records requested contain customer information and cannot be released.” Ex. A1. Upon request for further explanation, Applicant stated that “... by releasing an individual customer’s monthly or annual consumption, it is possible to calculate the amount of their bill, which is customer financial information as described in the statute below [citing to 204(3)(a)(IX)].” Defendants contend that the confidential financial information exemption has not been properly claimed.

Here, Applicant did not carry its burden to show harm to the agency or a substantial injury to the public interest in disclosing the consumption of water by the addresses requested in the CORA requests.

³ See *United States v. Hamilton*, 434 F.Supp.2d 974, 979–80 (D. Or. 2006) (finding no legitimate expectation of privacy in power records); *Samson v. State*, 919 P.2d 171, 173 (Alaska App. 1996) (finding no reasonable expectation of privacy in power consumption utility records); *People v. Dunkin*, 888 P.2d 305, 308 (Colo. App. 1994) (same); *State v. Kluss*, 867 P.2d 247, 254 (Idaho App. 1993) (noting that the records were maintained by the utility company in the ordinary course of business, that they do not identify any activities of the defendant, and finding no reasonable expectation of privacy in power consumption records); *State v. Chryst*, 793 P.2d 538, 542 (Alaska App. 1990) (stating that an electric utility customer does not have a reasonable expectation of privacy in his address information given to a company for the purpose of obtaining service and noting that the information “was available because Chryst was a consumer of a public utility [and][f]ew people would regard the fact that they are consumers of the services of a public utility to be private information.”). *Booker v. Dominion Virginia Power*, 2010 WL 1848474, at *5 (E.D. Va. May 7, 2010).

Accordingly, the Court finds that the records requested by Defendant are not exempt from disclosure.

REQUEST FOR ATTORNEY FEES AND COSTS

Businessinsider.com requests attorney fees pursuant to C.R.S. § 24-72-204(5), which requires a court to award costs and attorney fees to a prevailing applicant who seeks disclosure of a public record unless the court finds that the denial of the right of inspection was proper.

This case presents unique facts. In May 2024 there was the initial request for 4 licensees' information. In August 2024, there was an "expanded" request for 9 more licensees' information. Thereafter, during ongoing discussions between Applicant and Defendants' counsel about the appropriateness of disclosing records, Defendants' counsel provided Applicant with communications that listed other utilities that provided records pursuant to CORA requests. Hrg. Ex. 4.

Within days of receiving the September 3, 2024, communication from Defendants' counsel, an application was filed by Plaintiff with this Court seeking a determination by this Court as to whether the records requested should be withheld as "personal financial data" of an individual customer. Am. Appl. ¶ 22.

As stated in *Reno*,

Subsection (6)(a) provides a "safe harbor" from subsection (5)'s attorney fees provision to a custodian who was unable, in good faith, to determine whether disclosure of a particular record was prohibited without a court ruling:

The attorney fees provision of subsection (5) of this section shall not apply in cases brought pursuant to this paragraph (a) by an official custodian who is unable to determine if disclosure of a public record is prohibited under this part 2 if the official custodian proves and the court finds that the custodian, in good faith, after exercising reasonable diligence, and after making reasonable inquiry, was unable to determine if disclosure of the public record was prohibited without a ruling by the court.

Reno v. Marks, 349 P.3d 248, 251 (Colo. 2015).

The Colorado supreme court analyzed the effect of fee-shifting under CORA and whether the requestor is entitled to attorney fees when they are not the applicant. *Id.* As explained in *Reno*, subsection (5) has a non-reciprocal fee-shifting provision, which mandates attorney fees to a prevailing applicant. *Id.* at p. 254. Subsection (6)(a) provides a limited safe harbor from an attorney fee award if the records custodian can establish that they, "in good faith, after exercising reasonable diligence and making reasonable inquiry, was unable to determine if disclosure of the record was prohibited without a ruling by the court." *Id.*

It is undisputed that Plaintiff made application to this Court to determine the appropriateness of disclosing the water records in the CORA requests. At the hearing, the Court did not receive

evidence as to the custodian's reasonable diligence and inquiry in good faith, to determine if disclosure was prohibited prior to seeking judicial intervention.

Accordingly, Defendants are entitled to attorney fees and the safe harbor provisions of subsection 204(6) are unavailing to Plaintiff.

CONCLUSION

Applicant Denver Water is required to disclose or make available for inspection information related to the May 2024 CORA request and August 2024 expanded CORA request within 21 days of this order.

Defendants' request for attorney fees is GRANTED.

JUDGMENT is hereby entered in favor of Defendants and against Applicant, for Defendants' attorney fees and costs pursuant to C.R.S. § 24-72-204(5) and (6).

Defendants shall submit a bill of costs, and all supporting items described in C.R.C.P. Rule 121, 1-22, not later than twenty-eight (28) days from the date of this Order and the matter shall thereafter be addressed in accordance with C.R.C.P. Rule 121, 1-22(b) and (c).

The parties ORDERED to confer with respect to the amount of attorney fees and costs requested by Defendants to determine whether a hearing will be necessary. If a hearing is required, Applicant shall contact the Courtroom to obtain dates for said hearing.

SO ORDERED this 15th day of January, 2025.

BY THE COURT:



Kandace C. Gerdes
District Court Judge

cc: all parties