DISTRICT COURT, EL PASO COUNTY STATE OF COLORADO 270 South Tejon Street Colorado Springs, CO 80903	DATE FILED January 15, 2025 2:07 PM CASE NUMBER: 2024CV31735
Applicant: **CITY OF COLORADO SPRINGS** v. Interested Parties: **HANNAH BECKLER**, and **BUSINESSINSIDER.COM**	▲ **COURT USE ONLY** ▲
	Case No.: 2024CV31735 Div. 3
ORDER	

This matter came before the Court in a hearing on December 19, 2024 as requested in the Application filed herein under the Colorado Open Records Act. The Court has reviewed the Court file, including said Application, the parties' respective hearing briefs and Exhibits 1-4 that were identified in Interested Parties' Exhibit List filed December 17, 2024. The Court also heard oral argument from counsel for both parties and took the matter under advisement. The Court hereby enters the following Conclusions of Law and Findings of Fact.

Colorado Revised Statute § 24-72- 204 is what guides the Court this morning. It is the portion of the Colorado Open Records Act that dictates the allowance or denial of inspection of public records. The subsections that are really at issue before the Court in this matter are § 24-72-204(3)(a)(IX) and § 24-72-204(6)(a). However, the Court also finds that subsections 24-72-204(5)(a) and (5)(b) are also applicable.

The Court has reviewed legal authorities cited by the parties in their briefs, specifically *Bodelson v. Denver Publishing Company,* 5 P.3d 373 (Colo. App. 2000), which offers guidance to the Court when determining these types of issues. Specifically, the Court should interpret statutory terms in accordance with their plain and ordinary meaning, as cited in that case. Furthermore, as stated therein, the public policy of the State of Colorado, with certain exceptions, is that "all public records shall be open for inspection by any person at reasonable times" pursuant to the Colorado Open Records Act ("CORA"). That case really dealt with the "substantial injury to the public interest" subsection or exception to the CORA, which is no longer on the table for purposes of today's hearing.

The Court also reviewed *Jefferson County Education Association v. Jefferson County School District*, 378 P.3d 835 (Colo. App. 2016), which states that CORA allows access to all public records not specifically exempted by law, and that CORA's clear language creates a strong presumption in favor of disclosing records, requiring courts to construe any exceptions to CORA's disclosure requirements narrowly.

With that guidance, I now turn my attention to the statutory exception that was raised by the City as justifying its non-disclosure of these records. Ms. Beckler's CORA request is detailed in Exhibit 1. It sought "records of total water consumption by month, if available at facilities at the following addresses," and two addresses in Colorado Springs were provided as part of that records request. And the CORA request states, "I am requesting records of total water use in gallons consumed by these facilities. If possible, I'm requesting records of total gallons of water use by month, or if available by year, from 2020 to the most recently available date."

The City's (hereinafter "Utilities") response was that those records were exempted from the CORA pursuant to subsection 24-72-204(3)(a)(IX) (hereinafter "Exception IX") and specifically that "personal financial information of past or present users of public utilities" is excepted. Utilities' argument is that if they were to disclose total water use in gallons, and if a person were to know what their rate was for water, they could essentially multiply the gallon use times rate and receive some sort of financial information.

The Court does not find that interpretation is what was intended by Exception IX. The price paid for the amount of water a utility user purchases is not personal financial information. It is simply the cost of water usage, not personal financial information. The Court does not find that the public records sought by Ms. Beckler meets that exception.

Utilities further argues that that information was accepted pursuant to Exception IX because this information may permit the identification of the "habits of individuals." Utilities argued that this request constituted a disclosure concerning "individuals" under the statute. The Court disagrees. Specifically, in reading Exception IX, the Court notes that the legislature excepted "personal identifying information" (such as name, address, telephone numbers and personal financial information) "of past or present users," but it did not repeat that formulation later in the same exception by stating "habits of past or present users;" instead, it simply said, habits "of *individuals.*"

The Court does not agree with Utilities' interpretation that the statutory term "individuals" is somehow to be interpreted as an adjective not as a noun, and that Utilities' proposed interpretation directly contradicts the general requirement that Courts interpret statutes according to the plain meaning of the words used.

Accordingly, the Court hereby FINDS that there is not an exception met and that the records are required to be disclosed as requested.

With that finding, the Court is required to determine whether or not attorney's fees are to be awarded to the records requesters (Interested Parties). To make this determination, the Court looks to subsections (6)(a) and (5)(a) and(b) of section 204 of CORA. In reviewing the records presented to the Court, specifically Exhibits 1, 2, 3, and 4, as well as the argument of counsel regarding those exhibits, the Court makes the following observations.

Exhibit 1 was the original open records request. On May 21, 2024 Utilities responded to the request by stating "the records you requested *cannot be released* because they contain confidential utility customer information. Utilities now considers your request closed."

Subsequently, the requester sent an email asking for clarification, and on June 10, 2024, Mr. Dalton (the Records Administrator for Utilities) responded stating "Utilities takes the position that under Colorado Revised Statutes, 24-72- 204(3)(a)(IX), the requested data about a customer of utilities is protected from disclosure under CORA." So it was clear that the response to the records requester was that *Utilities had determined definitively that the information could not be disclosed*, because it was protected under Exception IX.

Thus, the Utilities' response to the requester was not that "after exercising reasonable diligence and after reasonable inquiry, Utilities is unable to determine if disclosure of the public records is prohibited pursuant to statute," but rather, that Utilities had determined, in their interpretation of the statute, that disclosure of the records requested was prohibited.

Exhibit 2 is the letter that Mr. Zansberg, as counsel for the records requesters, sent in which he let Utilities know that he believed that their interpretation of Exception IX was incorrect, and he asked Utilities to take a second look at that, essentially. The letter concluded that "This will obviate the need for us to ask a judge to review your denial decision," which the records requester is able to do pursuant to subsection (5)(a), by filing "an Application to the District Court of the District wherein the record is found from an order directing the custodian of such record to show cause why the custodian would not permit the inspection of such records." So, Mr. Zansberg did what was required by CORA; he put Utilities on notice that if it continued *to deny disclosure* of those records his clients would file such an Application with the Court.

On September 12, 2024, Utilities filed its own Application, pursuant to § 24-72-204(3)(a)(IX) and § 24-72-204(6)(a), in which Utilities stated, in paragraph 2, the requested information *could not be disclosed* because it contains confidential utility customer information. Utilities, again, did *not* state, as is required by subsection (6)(a), that Utilities, after a good faith investigation and after exercising due diligence, was "unable to determine" whether or not disclosure of the public records was prohibited by the statute. Utilities went on in their Application to the Court to state further – which does concern the Court – in paragraph 13, specifically, that given the nature of the information requested, "[i]t is the opinion of Utilities' records custodian that unauthorized disclosure of the records would do *substantial injury to the public interest*." (emphasis added).

It appears that what Utilities was attempting to do there was to meet the first prong of subsection 204(6)(a), which allows the Official Custodian to petition the Court. Utilities essentially withdrew that argument this morning, because there is no argument that disclosure of these records would cause a "substantial injury to the public interest." As noted above, Utilities putting that claim in its Application before the Court is concerning, and I'm not sure if that was an oversight or something that was disingenuous by Utilities when they filed that Application.

Additionally, in the City's/Utilities pre-hearing brief, they again state that the public records at issue *cannot be released because they contain confidential utility customer information*. Utilities never proffers or puts before the Court what is required by subsection 204(6)(2), which is evidence showing they have been unable to determine *whether or not* the records can be released. Instead, they have made it clear it was *their determination that they could not* do so.

Accordingly, the Court hereby FINDS that Utilities has not met their requirement pursuant subsection 204(6)(a)(1). There has been no argument put forth by Utilities that release of the requested public records would cause "substantial injury to the public interest," notwithstanding that they may otherwise be releasable. Nor has Utilities demonstrated that it made some sort of reasonable inquiry to determine *if* disclosure of the requested public records was prohibited and had determined that they needed further Court help to make that determination.

Section 24-72-204(6)(a) does allow, in certain limited circumstances, the Official Custodian to file an Application with the Court for resolution of questions concerning the rights of the parties with respect to a particular set of records that have been sought pursuant to CORA. There are two permissible circumstances in which Custodians of Records can petition the Court: (1) where they believe the records may be disclosable pursuant to CORA, but disclosure would cause substantial injury to the public interest, or (2) where upon receiving a records request, and despite having conducted reasonable inquiry and having exercised reasonable diligence into the facts and law, the Official Custodian is unable, in good faith, to determine if disclosure of the public records is prohibited.

There is no record in the court file or from counsel's arguments today that the custodian of the records here ever put forth that they were "unable to determine if disclosure of the records was prohibited." The message that Utilities provided the records requester was simply that disclosure of the requested records *was prohibited* by Exception IX. Accordingly, the requester needed to become the Applicant by filing an Application for an Order to Show Cause, to which the custodian could then file a response in which the custodian could raise any defenses, essentially, or raise the two grounds listed in subsection 204(6)(a). So, contrary to what Miss O'Boyle argued this morning, there was nothing that would have precluded the city from raising any argument that they believed that these records were protected by Exception IX, had the records requester petitioned the Court (by filing an Application) for resolution of this issue.

WHEREFORE, the Court hereby ORDERS Utilities to disclose the requested public records to the Interested Parties. The Court also finds that the City's Application contravenes the clear statutory framework for resolving these public access questions in cases where the records custodian is unable to determine if disclosure is prohibited and is required to notify the requester of that inability to make a determination.

The Court hereby ORDERS that attorney's fees be granted to the records requester, and the award of those fees shall be handled pursuant to C.R.C.P. 121(c) section 1-22. Fourteen days from the issuance of this Order, counsel for the Interested Parties shall forward to counsel for Utilities/the City a draft affidavit of the Interested Parties' attorney's fees, along with supporting documentation. Counsel for both parties shall confer and attempt to reach an agreement on that amount. No later than 21 days from the issuance of this Order, counsel for the Interested Parties shall file an affidavit of attorney's fees along with supporting billing records and a statement as to whether an agreement has been reached with the Court. If the amount is disputed, the City will have 21 days in which to respond, and the Interested Parties will have seven days thereafter

in which to file a Reply. Finally, the Court notes that the records requester is entitled to recover attorney's fees reasonably incurred and seeking to recover its fees.

DONE AND ENTERED this 15 day of January, 2025

BY THE COURT

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District Court Judge