DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED November 4, 2026 4:16 PM CASE NUMBER: 2026CV32943 ▲ COURT USE ONLY ▲
BRADLEY KLAFEHN, Petitioner, v. **COLORADO ENERGY AND CARBON MANAGEMENT COMMISSION; BIOLOGICAL WORKING GROUP,** Respondents.	Case No: 26CV30405 Division: 280

ORDER RE: APPLICATION FOR ORDER TO SHOW CAUSE RE: COLORADO OPEN RECORDS ACT

THIS MATTER is before the Court on Application for Show Cause Order,[1] filed by Petitioner Bradley Klafehn (Petitioner Klafehn) against Energy & Carbon Management Commission (Defendant ECMC) and Biological Resources Working Group (Working Group).[2] The Court conducted an evidentiary hearing on October 1, 2026. The Court, having reviewed the Application and Complaint, Answer, evidence presented at the hearing,[3] applicable legal authority and being advised on the premises, hereby finds and orders as follows:

I. BACKGROUND

By email dated February 2, 2026, Petitioner Klafehn submitted a Colorado Open Records Act ("CORA") request to the ECMC. The request sought:

> "Minutes of any meeting of a state public body shall be taken and promptly recorded, and such records shall be open to public inspection." I would like ECMC to provide me with the minutes of meetings of the Biological Resources Working Group which have already occurred.

Comp Ex. 3.

[1] At the October 1, 2026 hearing, the Court separated the CORA show cause application from the claims related to the Colorado Open Meetings Law.

[2] Plaintiff provided the Court with a Waiver of Service for both Defendants. The Court reviewed the Biological Resources Working Group as a group created by the Energy & Carbon Management Commission for the purposes of the CORA request only.

[3] At the October 1, 2026 hearing, the Court received evidence in the form of testimony from Petitioner Klafehn and Elias Thomas. The Court also admitted Exhibits 3, 4, 5, B, E, & F. The numbered exhibits are from the Petitioner's Application and the letters are from Defendant's Motion to Separate and Discharge and Petition to Restrict Disclosure of Documents.

On March 2, 2026, Petitioner Klafehn by email requested:

> All records provided by ECMC to the Biological Resources Working Group ("Working Group") established pursuant to the "Cumulative Impacts" rulemaking, docket number 240600145. Please include records provided to the Working Group concerning the reason for convening the Working Group, the procedures of the group including how and whether the meetings 4 are public meetings open to the public to attend, and anticipated public comment opportunities. I would also like to request any minutes of Working Group meetings which have been held to date.

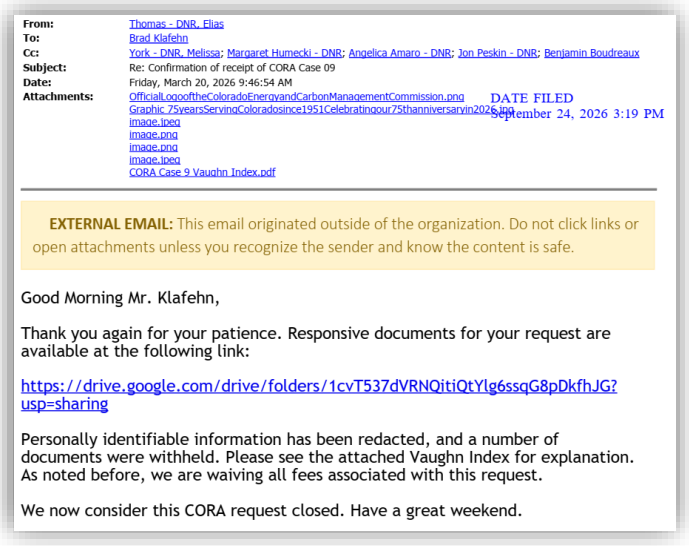
Comp. Ex. 5.

On March 2, 2026, Defendant ECMC acknowledged the request and also notified Petitioner Klafehn it would use an additional seven days to respond. Ex. A. On March 13, 2026, Defendant ECMC emailed Petitioner Klafehn as follows:

> I hope you're well. We've encountered some technical difficulties with our file conversion systems that we're working on getting fixed. As a result, we will not be able to get you your requested documents today. I apologize for the inconvenience and assure that we will produce everything as soon as we are able to do so. We will be waiving all fees for this matter.

Id.

On March 20, 2026, Defendant ECMC emailed its response to the CORA request, including a Vaugh index and a link to a google drive.



From: Thomas - DNR, Elias
To: Brad Klafehn
Cc: York - DNR, Melissa; Margaret Humecki - DNR; Angelica Amaro - DNR; Jon Peskin - DNR; Benjamin Boudreaux
Subject: Re: Confirmation of receipt of CORA Case 09
Date: Friday, March 20, 2026 9:46:54 AM
Attachments: OfficialLogooftheColoradoEnergyandCarbonManagementCommission.png
Graphic_75yearsServingColoradosince1951CelebratingOur75thanniversaryin2026.jpg
image.jpeg
image.png
image.png
image.jpeg
CORA Case 9 Vaughn Index.pdf

DATE FILED
September 24, 2026 3:19 PM

EXTERNAL EMAIL: This email originated outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Good Morning Mr. Klafehn,

Thank you again for your patience. Responsive documents for your request are available at the following link:

https://drive.google.com/drive/folders/1cvT537dVRNQitiQtYlg6ssqG8pDkfhJG?usp=sharing

Personally identifiable information has been redacted, and a number of documents were withheld. Please see the attached Vaughn Index for explanation. As noted before, we are waiving all fees associated with this request.

We now consider this CORA request closed. Have a great weekend.

Id.

After reviewing the response, Petitioner Klafehn, through counsel, sent Defendant ECMC a 14-day notice pursuant to C.R.S. § 24-72-204(5)(a) detailing asserted deficiencies in the March 20, 2026 response. The asserted deficiencies included 1) no minutes and no notations regarding withholding of the minutes were provided; 2) withholding the Draft Biological Working Group 2.0 White Paper (White Paper) without affidavit while citing deliberative process; and 3) raising why records were withheld as predecisional when the working group makes no decisions. Comp. Ex. 5.

On May 5, 2026, Defendant ECMC, through their counsel, responded as follows:

1. ECMC is producing all documents listed in the initial *Vaughn* Index from March 20, 2026, except for the Draft Biological Working Group 2.0 White Paper for which ECMC asserts deliberative process privilege.
2. ECMC is providing an updated *Vaughn* Index related to the Draft Biological Working Group 2.0 White Paper. Regarding your question as to whether a final version of the Draft Biological Working Group 2.0 White Paper exists, it does not. The draft was not finalized and therefore was not shared outside of ECMC and their attorney.
3. ECMC is providing an affidavit from Elias Thomas, ECMC's Hearings Manager and custodian of records. In the affidavit, Mr. Thomas provides more detail on why he is asserting deliberative process privilege for the Draft Biological Working Group 2.0 White Paper and indicates that other documents were withheld as privileged attorney-client communications.

Hrg. Ex. D. The May 5, 2026 letter also addressed the meeting minutes as follows:

> Regarding your request for meeting minutes from the Biological Resources Working Group meetings, there are no minutes. The meetings of the Biological Resources Working Group are not subject to Colorado's Open Meetings Law.

Id.

The only remaining record withheld pursuant to deliberative process is the White Paper.

On August 13, 2026, this case was filed. Defendant ECMC filed its answer on September 8, 2026. The Court held a hearing only on the Show Cause Application for the CORA request on October 1, 2026. The parties submitted supplemental briefing as requested by the Court on October 13, 2026. The Court took possession of the White Paper for in camera review. On October 13, 2026, the Court received a flash drive with the requested metadata and placed it in the same envelope with the White Paper for in camera review.

II. LEGAL AUTHORITY AND ANALYSIS

A. COLORADO OPEN RECORDS ACT

The Show Cause Order portion is governed by the Colorado Open Records Act, C.R.S. § 24-72-200.1 *et seq*. ("CORA"). To show that CORA applies, a plaintiff must show that the public

entity in question (1) improperly (2) withheld (3) a public record. *Sierra Club v. Billingsley*, 166 P.3d 309, 316 (Colo. App. 2007). All three prongs must be shown, or the act will not apply. *Wick Commc'ns Co. v. Montrose County Bd. of County Comm'rs,* 81 P.3d 360, 363 (Colo. 2003).

Public records are records "made, maintained, or kept" by a political subdivision of the State of Colorado "for use in the exercise of functions required or authorized by law or administrative rule." C.R.S. § 24-72-202(6)(a)(I); *Freedom Newspapers, Inc. v. Denver & Rio Grande W. R.R. Co.*, 731 P.2d 740, 742 (Colo. App. 1986). CORA's legislative declaration provides, "It is declared to be the public policy of this state that all public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise specifically provided by law." C.R.S. § 24-72-201; *Colorado Republican Party v. Benefield*, 337 P.3d 1199, 1205 (Colo. App. 2011) *cert granted* (Colo. 2012); *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1153-54 (Colo. App. 1998). Thus, the custodian of any public record may deny the right of inspection of a record only if the requested record falls within one of CORA's enumerated exceptions or is excepted by another statute or law. *Benefield*, 337 P.3d at 1205.

The custodian bears the burden of proving that the records fit within one of the specific exemptions from the requirement of disclosure. C.R.S. § 24-72-204; *Denver Publishing Co. v. Univ. of Colo.*, 812 P.2d 682, 685 (Colo. App. 1990). Of note, exceptions to CORA are to be narrowly construed. *Marks v. Koch*, 284 P.3d 118, 121 (Colo. App. 2011) *cert, granted* (Colo. 2012); *Tollefson*, 961 P.2d at 1154.

Here, there is no dispute that the documents are public records. Further, it is not disputed that venue and jurisdiction are proper in this Court. The dispute arises as to whether the White Paper was properly withheld under the deliberative process privilege and whether minutes existed for the Working Group Meetings.

B. DELIBERATIVE PROCESS PRIVILEGE

The deliberative process privilege is recognized in Colorado. *City of Colorado Springs v. White,* 967 P.2d 1042, 1045 (Colo. 1998). Materials falling within its ambit are not subject to disclosure under the Colorado open records laws. C.R.S. §§24-72-201 to -309; *White,* 967 P.2d at 1045.

As stated by the Colorado Supreme Court in *White*:

> [t]he deliberative process privilege is unique to the government. It is a widely recognized confidentiality privilege asserted by government officials. The privilege rests on the ground that public disclosure of certain communications would deter the open exchange of opinions and recommendations between government officials, and it is intended to protect the government's decision-making process, its consultative functions, and the quality of its decisions.

White, 967 P.2d at 1046–47 (internal citations omitted).

Therefore, the deliberative process privilege is a qualified privilege, the primary purpose of which is "to protect the frank exchange of ideas and opinions critical to the government's decision-making process where disclosure would discourage such discussion in the future." *White,* 967 P.2d at 1051. "In light of the purposes of the privilege, it protects only material that is both pre-decisional (*i.e.*, generated before the adoption of an agency policy or decision) and deliberative (*i.e.*, reflective of the give and take of the consultative process)." *Id.*

Pre-decisional material normally retains its protection even after the decision is made, and purely factual investigative material is not protected. *White,* 967 P.2d at 1052. The privilege typically covers recommendations, advisory opinions, draft documents, proposals, suggestions and other subjective documents that reflect the personal opinions of the writer rather than the policy of the agency. *Id.* at 1053.

In 1999, the Colorado General Assembly adopted how the "deliberative process" privilege may be claimed:

> In determining whether disclosure of the records would cause substantial injury to the public interest, the court shall weigh, based on the circumstances presented in the particular case, the public interest in honest and frank discussion within government and the beneficial effects of public scrutiny upon the quality of governmental decision-making and public confidence therein.

C.R.S. §24-72-204(3)(a)(XIII). This statutory formulation requires a court to determine and balance, based on the circumstances in the particular case, "whether the public interest in honest and frank discussion within government is outweighed by the beneficial effects of public scrutiny upon the quality of governmental decision-making and public confidence therein." *Land Owners United, LLC v. Waters*, 293 P.3d 86, 96 (Colo. App. 2011), *as modified on denial of reh'g* (Sept. 29, 2011).

In *City of Ft. Morgan v. E. Colorado Pub. Co.*, the court of appeals addressed the meaning of "deliberative" as:

> of, relating to, or marked by deliberation: proceeding or acting by discussion and examination: engaged in or devoted to deliberation. To deliberate means 'to ponder or think about with measured careful consideration and often with formal discussion before reaching a decision or conclusion.' Again, we perceive nothing in CORA's text indicating that 'deliberative' carries a meaning different from its commonly understood, unambiguous meaning.

City of Ft. Morgan v. E. Colorado Pub. Co., 240 P.3d 481, 487 (Colo. App. 2010).

Under Colorado law, "it . . . has been recognized that public employees have a narrower right and expectation of privacy than other citizens." *Denver Post Corp. v. Univ. of Colorado,* 739 P.2d 874, 879 (Colo. App. 1987), *cert. denied,* (Colo. 1987); *Freedom Newspapers, Inc., v. Tollefson,* 961 P.2d 1150, 1156 (Colo. App. 1998). Further, the Colorado constitution provides:

> (a) The conduct of public officers, members of the general assembly, local government officials, and government employees must hold the respect and confidence of the people; (b) They shall carry out their duties for the benefit of the people of the state …

Colo. Const. art. XXIX, § 1.

The government entity asserting the deliberative process privilege has the burden of establishing that it applies; this burden is not met by conclusory and generalized allegations of privilege. *White,* 967 P.2d at 1052. The requirements for assertion of the privilege are technical. Specifically, the agency must produce a "*Vaughn* index" (or, as referred to here, a "privilege log") which provides specific information concerning each document claimed to be privileged (author, recipient, subject matter and explanation of why the privilege applies to that document). The "*Vaughn* index" is required to aid a reviewing court. *Id.* at 1053-1054.

Here, ECMC bears the burden of establishing that it was proper to withhold documents under the deliberative process privilege. *See*, *Denver Post Corp. v. University of Colo*., 739 P.2d 874, 881 (Colo. App. 1987), *cert. denied.* Although ECMC asserts it bears the burden only when the CORA application is made pursuant to C.R.S. § 24-72-204(6), the Court respectfully disagrees. When ECMC asserts deliberative process for its withholding, it must bear the burden to demonstrate why the document should be withheld. C.R.S. § 24-72-204(6) is permissive and states "the official custodian may apply to the district court of the district in which such record is located for an order permitting him or her to restrict such disclosure or for the court to determine if disclosure is prohibited." However, ECMC's argument is moot since on September 24, 2026, ECMC requested this Court proceed to address this matter pursuant to C.R.S. § 24-72-204(6), thereby accepting the burden. Therefore, even though ECMC did not apply to the Court to restrict disclosure, it still bears the burden to demonstrate why the White Paper should be restricted from disclosure.

Although ECMC asserts it strictly complied with the requirements for restricting the White Paper, the facts demonstrate differently. The response on March 20, 2026 was more than forty-six days from the February 2, 2026 request and eighteen days after the March 2, 2026 request. However, the March 20, 2026 response did not mention the requested Working Group minutes and did not provide the required affidavit. ECMC did not provide the affidavit and address the minutes until its May 5, 2026 response. ECMC did not fully comply until eighty-nine (89) days after the February 2, 2026 request and sixty-one (61) days after the March 2, 2026 request and only after Petitioner Klafehn notified ECMC of the deficiencies.

The final Vaughn Index provided on May 2, 2026, consists of a chart identifying only the White Paper as withheld and the following information:

- June 3, 2025 as the date,
- The individuals' names within the communications,
- The Title of the document, and
- Citations in support of redaction:
    - C.R.S. § 24-72-204(3)(a)(XIII)
    - City of Colorado Springs v. White, 967 P.2d 1042 (Colo. 1998)
- Reason for being withheld

> The draft was not circulated or released, and communications are pre-decisional and reflect the opinions of ECMC Commissioner Ackerman, ECMC staff, and ECMC attorney. The communications are candid such that their public disclosure is likely to stifle honest and frank communication within and among the ECMC. The document discusses legislative and regulatory background and history regarding protection of invertebrates and rare plants from the impacts of oil and gas operations.
> The document also discusses pre-decisional options related to the composition of the Biological Resources Working Group and predecisional and tentative plans for the working group, including logistics and possible stakeholder engagement.
> The information in the document was not incorporated by reference or expressly adopted in any final decision. A final version of the document does not exist. The only people who have had access to the document are an ECMC commissioner, members of ECMC Staff, and ECMC's attorney. The document was not shared with other members of the Biological Resources Working Group.

Hrg. Ex. E.

The Court next looks to whether the deliberative process privilege applies by conducting an *in camera* inspection of the four responsive pages that make up the White Paper.

C. IN CAMERA REVIEW [4]

Once submitted for *in camera* review, the Court must determine whether a document is subject to a CORA exception. *See* § 24–72–204(5). In this case, the Court's focus is on the "deliberative process privilege."

The Court has reviewed the items *in camera* in an unredacted format. First, while the White Paper is identified as a "draft," the label of draft does not automatically make the document deliberative. *See e.g. Simpson v. Harmer*, 551 P.3d 669 (2024) (reviewing whether draft financial

[4] By agreement of the parties, the Court was asked to review a printed four page document and a flash drive containing metadata related to the White Paper withheld based upon assertion of the deliberative process privilege. This exhibit is separately labelled Court Ex. 1 and has been filed into the case as a sealed document.

reports were work product subject to disclosure pursuant to CORA); *Bjornsen v. Bd. Of County Comm. Of Boulder Cty*, 487 P.3d 1015 (2019) (reviewing whether draft emails were work product subject to disclosure pursuant to CORA). At the hearing, Elias Thomas testified the Working Group has commenced meeting. The Court reviewed the White Paper to determine whether it is so candid or personal that public disclosure would stifle the work of the Working Group and whether it was part of the process by which a decision is made. *See White*, 967 P.2d 1042; *Ft. Morgan*, 240 P.3d 481; C.R.S. § 24-72-204(3)(a)(XIII). The Court must "distinguish[ ] between 'advisory materials which truly reflect[ ] the deliberative or policymaking processes of an agency' and 'purely factual, investigative material' which is not protected. *White*, 967 P.2d. at 1052.

Here, the White Paper broadly contains the following:

- Background section containing factual legislative history related to the Colorado Oil and Gase Conservation Act and a summary of the recommendations from the previous working group. The Background continues with factual developments related to new legislation and subsequent rulemaking.
- Working Group Charge section contains quotations from ECMC "Cumulative Impacts and Enhanced Systems and Practices Statement of Basis and Purpose" dated October 15, 2024.
- Working Group Composition section consists of a list of potential members with area of affiliation and emails. Only one name on the list is not on the Working Group public webpage. Pet. Ex. 9 to the Supplemental Brief. The Court notes there are no comments or evaluation of the listed potential members.
- Working Group Logistics section describes how often the Working Group should meet and information related to use of a facilitator and budget impacts.
- Stakeholder Updates/Outreach section describes to whom and how updates and outreach may occur.
- Web Page section describes starting a website and content of the website.

Court Ex. 1. The metadata provided by ECMC demonstrates the White Paper has not been changed or altered since October 2025. Nothing in the White Paper indicates opinions, recommendations between government officials (no give and take), or that a decision would result from the White Paper.

The Court finds the White Paper does relate to pre-decisional materials and is not deliberative in nature. Further, the Court finds disclosure would not chill honest and frank communications in the future.

The Court concludes that ECMC has not met the required burden of proving the White Paper was properly withheld under the deliberative process privilege.

D. MEETING MINUTES

Petitioner Klafehn also requested minutes from the Working Group meetings. In Defendant ECMC's March 2, 2026 response, Defendant ECMC did not address Petitioner Klafehn's request for the Working Groups meeting minutes. On May 5, 2026, Defendant ECMC responded to the request stating no minutes were taken and thus, no records exist. Mr. Elias Thomas testified he

did not clarify the request with Petitioner Klafehn. Mr. Thomas further stated that he knew what Petitioner Klafehn wanted was formal minutes as required by Colorado Open Meetings Law.

C.R.S. § 24-72-203(2)(a) states:

> If the public records requested are not in the custody or control of the person to whom application is made, such person shall forthwith notify the applicant of this fact, in writing if requested by the applicant. In such notification, the person shall state in detail to the best of the person's knowledge and belief the reason for the absence of the records from the person's custody or control, the location of the records, and what person then has custody or control of the records.

While Defendant ECMC did not comply with C.R.S. § 24-72-203(2)(a) with its March 2, 2026 response, the Court finds the May 5, 2026 response demonstrates meeting minutes for the Working Group were not within the custody or control of Defendant ECMC. Petitioner Klafehn did not raise any concerns regarding the interpretation of the meeting minute request. Further, Defendant ECMC is not required by CORA to create documents that do not exist in response to a CORA request.

E. AVAILABLE REMEDIES

A court's review of a CORA claim does not end when parties have stipulated to an *in camera* review of the disputed documents. *Sierra Club*, 166 P.3d at 316. "Remedies for wrongful withholding of documents under CORA are limited to an order to produce the documents for inspection and an award of costs and attorney fees." *Sierra Club*, 166 P.3d at 317; s*ee also People in Interest of A.A.T.,* 759 P.2d 853, 855 (Colo. App. 1988).

The four pages of the White Paper were improperly withheld. Accordingly, the Court finds that the appropriate remedy is to order Defendant ECMC to produce the White Paper for inspection in accordance with CORA. However, prior to production, Defendant ECMC may redact personal contact information not disclosed on the Working Group website for any non-employee individuals on the list and the name and personal contact information of the one individual that ultimately is not part of the Working Group.

III. CONCLUSION

Within 21 days of this Order, ECMC is ORDERED to produce the White Paper consistent with this ORDER.

The White Paper unredacted will be retained in the Court file in a sealed envelope, marked as Court Exhibit 1 (with the flash drive).

If ECMC anticipates appealing this matter after the conclusion of the Colorado Open Meeting Law portion is completed, they shall apply to the Court for a stay of this order pending resolution of the entire matter within 14 days of this Order.

SO ORDERED this 4th day of November, 2026.

BY THE COURT:

Heidi L. Kutcher

Judge Heidi L. Kutcher
Denver District Judge