District Court, Chaffee County, COLORADO Court Address: 142 Crestone P.O. Box 279 Salida, Colorado 81201 Phone Number: (719) 539-2561	DATE FILED: January 2, 2018 3:05 PM CASE NUMBER: 2016CV30028
Plaintiff(s): JAMES R. MILLER, an individual, TOM BOMER, an individual, v. **Defendant(s):** CITY OF SALIDA, a Colorado municipality; and BETTY SCHWITZER, as City Clerk for the City of Salida in her official capacity only.	**▲COURT USE ONLY▲** Case No.: 2016CV30028 Division: 2
Order on Plaintiffs' Motion for Summary Judgment and Defendants' Cross Motion for Summary Judgment	

This matter is before the Court on Plaintiffs' Motion for Summary Judgment. The Defendants, The City of Salida (The City) filed a Response and the Plaintiffs, a Reply. In addition, Defendants filed a Cross Motion for Summary Judgment. To this Motion Plaintiffs have filed a Response and Defendants a Reply. The Court has considered these filings and issues the following Order disposing of both Motions.

Background

This case concerns two requests filed by Plaintiffs under the Colorado Open Records Act (CORA); a request filed by Plaintiff James R. Miller (Miller Request) and one filed by Plaintiff Tom Bomer (Bomer Request). The documents responsive to both requests are in the possession of both plaintiffs according to a stipulation entered into by the parties on March 6, 2017. The Court has considered the disclosed documents as well as the parties' stipulation with respect to this Order.

Rule of Law

Pursuant to C.R.C.P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not

prevail." *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). The moving party has the burden of showing there are no issues of material fact. Once the moving party has met its initial burden, the burden then shifts to the nonmoving party to establish that there is a triable issue of material fact. *Mancuso v. United Bank*, 818 P.2d 732 (Colo. 1991).

Miller Request

The Miller Request was filed May 31, 2016 and requested "email or other correspondence between Ben Kahn and the City Auditor, Hinton Burdick, regarding potential legal liability on behalf of the City of Salida provided as part of the 2015 financial audit for the City of Salida". (Pls.' Mot. Summ. J. 3, ¶3.) On June 3 the City responded stating it needed seven working days. (*Id.* at 4, ¶5.) On June 14 the City stated it would not disclose the requested correspondence because it considered the documents privileged and therefore not subject to disclosure under "the Colorado Open Records Act '(CORA)', C.R.S. §24-72-201, *et seq."* (*Id.*, ¶6.) These facts do not appear to be contested by either party. (*See:* Def's Resp.to Pl.'s Mot. 3-4.)

Plaintiffs maintain the City failed to comply with procedures dictated by the CORA statute. In its Response, The City maintains it was never required to disclose the records because they were protected by both the attorney client privilege and the accountant client privilege. Plaintiffs disagree as to the application of these privileges.

As to its claim of attorney-client privilege, the Court, as well as Plaintiffs[1]', agree with Defendants that the proper test is laid out in *Alliance Const. Solutions, Inc. v. Department of Corrections*, 54 P.3d 861,(Colo. 2002). In order for the document to be privileged under the attorney client privilege it must be shown that the auditor qualifies as an independent contractor. Specifically, that the auditor had a significant relationship with the City as well as the transaction at hand, that the communication was made for the purpose of seeking or providing legal assistance, that the subject matter of the communication was within the scope of the duties provided to the City by its auditor and that the communication was treated as confidential and only disseminated to those persons with a specific need to know its contents. *Id.* at 862.

First, the auditor had a significant relationship with the City. The relationship, as the City points out, is statutorily mandated by C.R.S. §29-1-603. The auditor provided an audit of the City's financial statements, a venture that requires that the auditor examine, consider and become familiar with multiple facets of the City's operation. Plaintiffs argue the directional flow of information (going from the City Attorney to the Auditor) exempts it from the protection of the

[1] Because Plaintiffs argued the incorrect test in their Motion, they have failed to meet their burden of showing there does not exist a genuine issue of material fact on this issue. However, Defendants analyze the issue in their Response and the Plaintiffs addressed it in their reply. Therefore, the Court will rule on the issue based on the briefing currently before it in the interest of judicial economy and because the non-moving party will not be prejudiced by its ruling.

privilege. The Court is not convinced. The attorney client privilege protects communication made to the attorney for advice as well as any advice coming from the attorney. C.R.S. § 13-90-107(1)(b). The *Alliance* court implicitly recognized this when it found no need for a formal distinction between an employee and an independent contractor because either may have important information "needed by the attorney in order to provide effective representation." *Id.* at 869. Mr. Kahn provided the information in the audit response letter because doing so was necessary in order to provide effective representation to the City.

Second, contrary to the argument laid out in Plaintiffs' Reply, the communication *was* made for the purpose of seeking or providing legal assistance. The audit response letter included an evaluation of the pending litigation facing the City including its financial exposure should it not prevail in this litigation. The *Alliance* court's new test broadened the prior term legal "advice" to legal "assistance" because they wanted to include activities that do not just entail advice given to the client. *Id.* Indeed, including "legal services" and activities that require "peculiarly legal skills" leads to the broader definition that the court had in mind. *A Post-Upjohn Consideration of the Corporate Attorney-Client Privlege*, 57 N.Y.U. L.Rev. 443, 490 (1982). While Mr. Kahn may not have been advising the auditor on these cases, he was informing them of the advice he had given to the City so that the City could comply with its statutorily mandated audit requirement. The information conveyed in the audit response letter was "peculiarly legal" because "generally, one who acts in…counseling, advising and assisting [the City] in connection with [its] rights and duties is engaged in the practice of law." *Denver Bar Ass'n v. Public Utilities Commission*, 391 P.2d 467, 471 (Colo. 1964).

Third, the communication must be within the scope of the duties provided to the client by the independent contractor, which is clear in this case. Here, the focus of the letter itself was the audit and its concern on the legal issues facing the City, which at the time were handled by Mr. Kahn.

Finally, the Court finds the letter was treated as confidential and only disseminated to those with a specific need to know its contents. The letter's confidentiality is stated clearly and it was only shared with the auditor, a person who needed to be advised of its contents pursuant to the audit.

The Defendants have shown that there exists a genuine issue of material fact so the Court denies the Plaintiffs' Motion for Summary Judgment that the attorney-client privilege did not apply to the document in question.

As to Defendants' assertion that the accountant-client privilege applied to the document, the Court finds that Defendants have met their burden on this issue as well and denies Plaintiffs' Motion for Summary Judgment.

"By protecting the confidentiality of communications between an accountant and a client, the legislature intended to encourage 'full and frank communication between certified public

accountants and their clients so that professional advice may be given on the basis of complete information, free from the consequences or the apprehension of disclosure.'" *Colorado State Board of Accountancy v. Raisch*, 960 P.2d 102, 106 (Colo. 1998). In their reply, Plaintiffs argue the privilege does not apply because the auditor was independent and their purpose was not to provide legal advice. However, C.R.S. §13-90-107(f)(I) does not protect merely the giving of professional advice, it protects "any communication…of books of account and financial records or his or her advice, reports, or working papers given or made thereon in the course of professional employment…." Further, the legislature requires municipalities to conduct an independent audit as opposed to having it done by their own accountant. C.R.S. §29-1-603(1). It is inconsistent to then strip this audit of a privilege that seeks to encourage an open flow of communication.

Plaintiffs also raise procedural defects in support of their Motion. They first argue the City was not entitled to take seven days before responding because the original request only sought one identifiable document. They also argue the City was required to provide an explanation of its findings regarding the extenuating circumstances it was relying on for this extension.

First, looking at the request it cannot be said that it sought only one identifiable document. The March 6, 2017 stipulation relied upon by the Plaintiffs for this argument had not been entered in to at the time the original request was made nor do its terms establish that the City was under the impression it was only one identifiable document at the time the request was made. Given the standard employed in deciding a Motion for Summary Judgment as well as the wording of the Miller Request, this Court finds the City was allowed to take advantage of the additional time in order to process the request. Plaintiffs have failed to meet their burden and their Motion for Summary Judgment on this issue is denied.

Second, the City argues the statute does not require that it provide detail on the extenuating circumstances to the requestor. It is hard for this Court to imagine the legislature would require a finding that extenuating circumstances exist as well as provide a discreet list of instances when they exist but then not require this information to be shared with the requestor. However, this is a Motion for Summary Judgment and so the Court will give the City's argument the appropriate amount of favorable light due and deny the Plaintiffs' Motion on this issue. Plaintiffs' argument that it is implied the custodian would have completed an initial review of the request and responsive documents is not persuasive. It is not obvious from the language in the statute that any portion of the review would have been completed in order to determine that extenuating circumstances existed. Indeed, in order to "prepare or gather the records" is the very reason the City can take seven days to make its response. C.R.S. 24-72-203(3)(b).

Plaintiffs also complain that the City failed to follow CORA with respect to their ultimate response given on June 14, 2016 that the document requested was "privileged" and not required to be disclosed under "CORA". Plaintiffs maintain the City should have given a more detailed

response under CORA as to why they were not disclosing the document. While the City is correct that Plaintiffs must specifically request this response, it seems the Plaintiffs did make several follow up requests on July 8, 2016 and July 19, 2016 for information on who was making the claim of privilege. (Def.'s Resp. to Mot. Summ. J. 4-5). However, these requests don't specifically ask for the grounds for non-disclosure. (*See:* C.R.S. §24-72-204(4), "[i]f the custodian denies access to any public record, the applicant may request a written statement of the grounds for the denial, which statement shall cite the law or regulation under which access is denied and shall be furnished forthwith to the applicant.") The City argues they satisfied this statutory provision by citing to the Colorado Open Records Act and stating the document was not disclosed because it is privileged. There are numerous privileges that could apply to any request made under CORA so it would seem the City should have stated which specific privilege it was relying on in order to be in compliance with CORA. However, the City's argument, again, receives the benefit of the standard employed on a Motion for Summary Judgment and the Court denies Plaintiffs' Motion.

Therefore, it is ordered:

Plaintiffs' Motion for Summary Judgment is DENIED as to their claim that Defendants violated CORA's procedures with respect to the Miller Response.

Plaintiffs' Motion for Summary Judgment is DENIED as to their claim that the document responsive to the Miller Request was not protected by the attorney-client privilege.

Plaintiffs' Motion for Summary Judgment is DENIED as to their claim that the document responsive to the Miller Request was not protected by the accountant-client privilege.

Bomer Request

The Bomer request sought copies of "all letters from Mayor LiVecchi to City Finance Director Jan Schmidt from 2/1/16 through 4/30/16." (Pls.' Mot. Summ. J. 4, ¶8.) Plaintiffs maintain the City responded with a flash drive containing the requested records in compliance with CORA and that Mr. Bomer emailed the Deputy City Clerk when he determined that one email from the requested time period had been left out. (*Id.* ¶9). Mr. Bomer requested a citation of the statutory authority for withholding such information and asked for a response delineating what information was withheld. (*Id.* ¶10). Plaintiffs maintain the City's response failed to provide a legal citation and instead advised them a privilege log would need to be created. (*Id.* ¶11). Mr. Bomer requested again that the City provide the specific statutory citation and, this time, provided the date of the email in question. (*Id.* ¶12.) The City responded that the email was not subject to disclosure because it was privileged pursuant to C.R.S. §24-72-204(3)(a)(IV). (*Id.* ¶13). Reviewing Defendants' Response, it does not appear this version of events is in dispute. (6-8, and *See*: 9, "[d]efendants dispute the facts recited in numbered paragraphs 5 and 7", which are not relevant to the Bomer request.)

Plaintiffs argue The City violated CORA both when they failed to provide the document and failed to provide the grounds for why. The City argues that Mr. Bomer failed to follow up on the privilege log he requested and that the record itself is subject to various privileges.

First, as to Plaintiffs' argument that the City violated the procedural requirements of CORA, the Court finds Plaintiffs have met their burden. CORA states "[i]f the *custodian denies access* to any public record, the applicant may request a written statement of the grounds for the denial, which statement shall cite the law or regulation under which access is denied…" C.R.S. 24-72-204(4). (Emphasis added). The language requires the City to first deny access to the record, which carries the implication that they must first *inform* Mr. Bomer that there exists a record of which they denied access. Without this advisement, the rights Mr. Bomer has under subsection (4) would be meaningful only when he is able to determine, as he did here, that something has not been disclosed. When Mr. Bomer made this determination and submitted a request pursuant to subsection (4) the City treated the request as one for a privilege log and advised him of the need to pay money. The proper response was to advise Mr. Bomer in the first place that they denied his request and then advise him of the grounds for this denial when he requested that information. Defendants suggest it was only after Mr. Bomer made a pinpoint request citing the date of the email that they were able to properly handle his request but, there is no requirement in the statute that Mr. Bomer make such a pinpoint request.

Accordingly, Plaintiffs' Motion for Summary Judgment is GRANTED as to the claim the City violated CORA when they failed to properly respond to Mr. Bomer's request and when they failed to provide the legal grounds for this denial.

With respect to Plaintiffs' argument that the document did not fall under the protection provided by §24-72-204(3)(a)(IV), Defendants respond that the email was protected as privileged attorney client and work product "in any format given the sensitive attachments and related transmission communications". (Defs.' Resp. 24.) The City argues the portion of the email authored by the City Attorney includes legal advisement in and of itself, that it was prefaced as privileged and confidential and that in addition to including information privileged as attorney-client communications it also qualifies as work product given the materials were prepared in anticipation of litigation or claims activity.

With respect to Defendants' assertion the information is privileged as work product, this relates to C.R.C.P. 26 and is protection afforded to a party resisting disclosure who makes a showing that the document in question was prepared or obtained in order to defend the specific claim which already had arisen and that when the document was prepared or obtained, there was a substantial probability of imminent litigation over the claim or a lawsuit had already been filed. *Hawkins v. District Court*, 638 P.2d 1372 (Colo. 1982). Defendants have made no showing that they are entitled to this protection beyond merely claiming it in name. Specifically, they have not shown that there exists a material issue of fact because they have not shown that there was a substantial probability of imminent litigation. (*See: Hawkins* at 1379: "The general standard to be applied is whether, in light of the nature of the document and the factual situation in the

particular case, the party resisting discovery demonstrates that the document was prepared or obtained in contemplation of specific litigation.").

Further, the communications don't constitute attorney-client communications. "The attorney-client privilege extends only to confidential matters communicated by or to the client in the course of gaining counsel, advice, or direction with respect to the client's rights or obligations." *People v. Tippett*, 733 P.2d 1183,1192 (Colo. 1987). The email from Mr. Kahn merely discusses billing and the nature of his agreement with the City. There is no legal advice given nor discussion had on any particular legal matter in the email. With respect to the communication between Mayor LiVecchi and Ms. Schmidt, there is also no content that would constitute legal advice. Mayor LiVecchi simply expresses his displeasure at Ms. Schmidt's expressed opinion regarding billing procedures and scope of work agreements with Mr. Kahn. At most there is reference made to complaints filed against the City Administrator but, again, no legal advice is sought or received within that reference. The City's reliance on *Shriver v. Baskin-Robbins Ice Cream Co*., 145 F.R.D. 112, 114 (D. Colo. 1992) is premature because, regardless of whether communications occur between corporate counsel and company personnel, Defendants must still show that the communication itself is entitled to protection from the attorney-client privilege. Defendants have not met their burden.

The City attempts to argue that the attachments and other "metadata" included in this email provides them a basis for privilege under C.R.S. §24-72-204(3)(a)(IV). The Court is not convinced. Mr. Bomer's request was for "all letters". If the City was concerned about attachments and metadata, they could have taken advantage of manipulating the data pursuant to C.R.S. §24-72-205(3) so that this information either would not be deemed part of the public record or it would have been the subject of a privilege log. (See: *Mountain-Plains Investment Corporation v. Parker Jordan Metropolitan District*, 312 P.3d 260, 269 (Colo. App. 2013), "[u]nder a plain reading of the statute…compilation of a privilege log equates to 'generating a record in a form not used by the [political subdivision]'. Further, the compilation of a privilege log falls within the plain meaning of 'manipulation of data,' because it involves managing the privileged documents."). Perhaps this is the privilege log the Defendants advised Mr. Bomer of the need to create. If so, the advisement was late because Mr. Bomer was only advised of the need to create a privilege log after he requested the statutory grounds the City was relying on for its nondisclosure of a record the City never advised Mr. Bomer they weren't disclosing in the first place. Further, Defendants fail to argue this point in their Response, instead maintaining the presence of this metadata simply exempts the entire record from having to be disclosed under CORA.

Plaintiffs have met their burden of showing there is not a material issue of triable fact as to their claim that the document was not subject to the attorney-client privilege nor have Defendants shown any such material issue. The Court GRANTS Plaintiffs' Motion on this issue.

Therefore, it is ordered:

Plaintiffs' Motion for Summary Judgment is GRANTED as to the claim the City violated CORA when they failed to properly respond to Mr. Bomer's request and when they failed to provide the legal grounds for their denial of disclosure.

Plaintiffs' Motion for Summary Judgment is GRANTED as to the claim the document responsive to the Miller request was not protected by the attorney-client privilege.

Defendants' Cross Motion for Summary Judgment

Defendants have filed a Cross Motion for Summary Judgment in which they argue the claims asserted by Plaintiffs are moot because the two documents in question have already been disclosed to the Plaintiffs.

A case becomes moot when relief, if granted, would have no practical legal effect upon the existing controversy. *Van Schaack Holdings, Ltd. v. Fulenwider*, 798 P.2d 424 (Colo.1990).

First, the Defendants fail to meet their burden. Plaintiffs' Complaint ¶54(c), and their Sixth Claim for Relief, seeks fees. Further, regardless of the fact Plaintiffs now have these documents, "a defendant's voluntary cessation of a challenged practice does not deprive a court of its power to determine the legality of the practice. This is so because there is no certainty that the defendant will not resume the challenged practice once the action is dismissed, thereby effectively defeating the court's intervention in the dispute." *United Air Lines, Inc., v. City and County of Denver*, 973 P.2d 647, 652 (Colo. App. 1998). Defendants cite to *Cabinet for Health and Family Services v. Courier-Journal, Inc.*, 493 S.W.3d 375 (Ky. App. 2016) but this case is not binding authority, nor is it persuasive because the language cited by the City speaks to the records violation. Regardless of the court's finding of mootness on that issue, it still awarded attorney fees. *Id.* at 387.

Therefore it is ordered:

Defendants' Cross Motion for Summary Judgment is DENIED.

By the court, this 2st day of January, 2018,

/s/ *Amanda Hunter*, District Court Magistrate

Consent of the parties was necessary for this order. C.R.M. 6(c)(2). Appeal must be taken in the same manner as an order or judgment of a district court. C.R.M. 7(b).