From: [redacted]
To: Steven Ward
Subject: FW: CORA working group
Date: Friday, August 05, 2016 11:26:34 AM
Attachments: image002.png
State ex rel Athens Cty Property Owners Assn Inc v Athens.doc
Farrell v City of Detroit.doc

Hi Steven,

Below is a legal analysis from Steve Zansberg, president of the Colorado Freedom of Information Coalition, on whether requesters have the right to inspect "data" under the Colorado Open Records Act. Could you please share this with the CORA Working Group? Steve is an attorney who represents many news organizations in Colorado.

Thank you,

Jeff

Jeffrey A. Roberts
Executive Director | Colorado Freedom of Information Coalition
1120 Lincoln St., Suite 912
Denver, CO 80203
720-274-7177 (office)
303-748-2406 (cell)
www.coloradofoic.org
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From: Steven Zansberg [redacted]
Sent: Thursday, August 4, 2016 5:50 PM
To: 'David Blake' [redacted]; 'Jeff Roberts [redacted]' [redacted]; 'Peg Perl [redacted]
Cc: Stefanie Mann [redacted] Bolton - GovOffice, Mark [redacted] Suzanne Staiert [redacted]
Subject: RE: CORA working group

David, et al.

Thanks for inviting me to address this issue further. Below is my explanation for why, in my view, the CORA, as it presently exists, provides a records requester with the right to inspect and obtain a copy of the actual data, in digitized form, from any government agency that so makes and maintains it, "for use in

the functions authorized or required by law or administrative rule."

I. The Statutory Text

CORA defines "public records" -- that which the public is entitled to inspect and copy "*any portion*" thereof, § 24-72-204(1)), C.R.S. -- as the "writings" of government that are "made maintained or kept" for any the uses stated above. § 24-72-202(6)(a)(I), C.R.S. Even prior to the 1996 amendments, CORA defined those "writings" to include all "tapes, recordings or other documentary materials, regardless of physical form or characteristics." § 24-72-202(7), C.R.S. With the 1996 amendments, the General Assembly made express and unambiguous that the public has a right to access digital records in electronic format: "'Writings' includes digitally stored data." *Id.* The same provision also makes clear that while the digital "writings" – the electronic files generated by computer software programs – are to be made available as public records, the computer software that generates those electronic files are not public records. *Id.*

As for how the "writings" – the electronically or digitally stored information – are to be provided to a records requester, the General Assembly has also, in response to prior court rulings, specifically indicated that digitized records (those "kept only in miniaturized or digital form") are to be provided in a manner that does not impose "unreasonable delay or unreasonable cost." § 24-72-203(1)(b), C.R.S. Notably, this latter provision was added in 1996, and specifically in response to an earlier Court of Appeals ruling.

In *Tax Data Corp. v. Hutt*, 826 P.2d 353 (Colo. App. 1991), the Colorado Court of Appeals held the Open Records Act does not permit the public to dictate the format in which information will be transmitted; it only guarantees the public's right to access information that is a matter of public record "in a form which is reasonably accessible and which does not alter the contents of the information." Applying this standard, the court upheld the custodian's regulations denying public access to government-owned computer terminals or magnetic computer tapes but requiring that the information on those computers be transmitted to the requester in another "reasonably accessible" format. The court ruled that the government body's regulations providing that the information be provided orally, on microfiche, or on computer printouts did not improperly deny access to the electronically stored information but merely regulated the manner of access to that information – regulations that were within the discretion of the government body to enact at that time.

Five years later, however, the General Assembly enacted amendments to CORA to specifically address electronically maintained records, and effectively overturned Tax Data Corp. v. Hutt. As noted above, CORA now requires custodians of "records kept only in miniaturized or digital form" to "take such measures as are reasonably necessary to . . . to ensure public access to the records without unreasonable delay or unreasonable cost." § 24-72-203(1)(b), C.R.S. (emphasis added). Specifically included among the measures suggested by the new provision to accomplish this mandate is "the provision of portable disk copies of computer files or direct electronic access via on-line bulletin boards or other means." Id. Notably, even though this provision includes the word "may" in setting forth the non-exhaustive menu of alternative means of providing access, all three suggested alternatives involve providing electronic access – the use of computer terminals where the records are kept on microfiche, and the provision of "portable disk copies" or "direct electronic access" where the records are kept digitally. Thus, the General Assembly clearly intended that public records ("writings") that are maintained exclusively in digitized form must be made available, upon request, in electronic format provided that such files are available "without unreasonable delay or unreasonable cost." Printing out paper copies imposed unlawful "unreasonable cost" and providing PDFs that require the records requester to re-assemble the very "writings" to which she sought access, through scanning, sorting, and re-generating the government's database file, imposes "unreasonable delay" in providing access to the "writing" that was requested.

II. The Colorado Supreme Court's Implementation of the Statutory Text

In 2006, the Chief Justice of the Colorado Supreme Court approved and adopted a "Public Access Policy" concerning records maintained by the judicial branch. *See* C.J.D. 05-01. In that policy,

the Court acknowledges that its records are subject to inspection in accordance with Colorado's public records statutes. Id. § 5.00(b). Notably, under a provision that permits members of the public to submit requests for access to "Compiled Data" from the state's online court records system, the policy adopted by the Supreme Court authorizes the provision of "an electronic list of matches" to the requestor, id. § 4.40(a) & (f), and the policy expressly provides that members of the public requesting access to electronic data shall bear the cost of the "Disks, CDs or other medium used for providing the data to the requestor," *id.* at Addendum C. Thus, the state's highest court, interpreting "Colorado's public records statutes" has adopted its own policy of providing digitized data sets maintained by the judicial branch in digitized dataset format.

III. Public Policy

Lastly, apart from the statutory text and the Supreme Court's implementation of it, there is the issue of appropriate public policy. As I've said previously, the public pays for the creation and maintenance of the databases that government entities hold and keep as the "custodians" of those records. Government is not the owner of the public's records; it is the *custodian* of those records. The People own the records that their government agents have created and maintained on their behalf, and at their expense. Great sums of public monies are spent every year (indeed every day) to keep these records and to update them to maintain their currency and accuracy. The same is true of the paper records that were formally maintained by government agencies in filing cabinets and huge document warehouses -- cataloged, indexed, and organized in particular manner by the public servants paid public salaries to do so. The government could no more empty those filing cabinets or warehouses of boxes into a huge pile of documents and make them available to the public in that way saying "go ahead – you can spend your time, now, re-creating the system of information organization, by date or topic, that we used to keep these files in" and thereby comply with spirit of letter of the law. This is not only my own personal view, it is what several other courts have said, as excerpted below (two such rulings are attached).

> [The City of] Athens [, Georgia] contends that the method of dissemination of public documents is solely at the discretion of the agency. We believe that Athens misinterprets R.C. 149.43 and that the correct interpretation may be found in *Margolius.*
>
> The basic tenet of *Margolius* is that **a person does not come—like a serf—hat in hand, seeking permission of the lord to have access to public records. Access to public records is a matter of right.** The question in this case is not so much whether the medium should be hard copy o[r] diskette. Rather, the question is: Can a government agency, which is obligated by law to supply public records, impede those who oppose its policies by denying the value-added benefit of computerization?
>
> The Ohio Supreme Court answered this question first in *State ex rel. Cincinnati Post v. Schweikert* (1988), 38 Ohio St.3d 170, 173–174, 527 N.E.2d 1230, 1233, when it held:
>
> > "The law does not require members of the public to exhaust their energy and ingenuity to gather information which is already compiled and organized in a document created by public officials at public expense."
>
> The *Margolius* court further stated, in following its holding in *Cincinnati Post:*

> "Similarly, **a public agency should not be permitted to require the public to exhaust massive amounts of time and resources in order to replicate the value added to the public records through the creation and storage on tape of a data base containing such records**." *Margolius, supra,* 62 Ohio St.3d at 460, 584 N.E.2d at 669.

> The record shows that **the records are normally stored on an electronic medium,** that **those records are compiled using taxpayer dollars, on equipment purchased with taxpayer dollars.** The record also shows that the requested information consists of over six hundred records and that **the ACPOA would have to go to needless expense to replicate these records from hard copy**. [Therefore, Athens is required to provide access to the public records in digitized form].

The Ohio Supreme Court's ruling in *Margolis,* cited above, provides an excellent explanation of its reasoning:

> a public agency should not be permitted to require the public to exhaust massive amounts of time and resources in order to replicate the value added to the public records through the creation and storage on tape of a data base containing such records.
>
> . . . Here, the added value is not only the organization of the data, but also the compression of the data into a form that allows greater ease of public access. Thus, in keeping with the expressed intent of the General Assembly to provide broad access to public records, we hold that a governmental agency must allow the copying of the portions of computer tapes to which the public is entitled . . . if the person requesting the information has presented a legitimate reason why a paper copy of the records would be insufficient or impracticable, and if such person assumes the expense of copying.

Ohio ex rel. Margolius v. Cleveland, 584 N.E.2d 665, 669 (Ohio 1992).

That is why I believe the statute, on its face, the case law applying it, the Colorado Supreme Court's own implementation of it, and sound public policy all command that the public is entitled to obtain digitized data set "writings" in the same form and format in which the government has organized and maintained them, with confidential data fields withheld from public inspection.

I would be glad to review any views to the contrary and to respond thereto.

Best,
Steve

Steven D. Zansberg

LSKS LEVINE SULLIVAN KOCH & SCHULZ, LLP

(303) 376-2409

From: David Blake [redacted]
Sent: Thursday, August 04, 2016 9:23 AM
To: Steven Zansberg; 'Jeff Roberts [redacted]; 'Peg Perl [redacted]
Cc: Stefanie Mann; Bolton - GovOffice, Mark [redacted]; Suzanne Staiert [redacted]
Subject: RE: CORA working group

Hi Steve – As I prep for tomorrow, what is the legal rationale for why you think a requester is entitled to an entire data set. We have obviously disagreed on this in the past but I see no reason not to bring that debate to the larger group outside of the specific facts that we have dealt with this issue in the past. Thanks, Dave

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From: Steven Zansberg [redacted]
Sent: Friday, July 22, 2016 10:34 AM
To: David Blake; 'Jeff Roberts [redacted]; 'Peg Perl [redacted]
Subject: RE: CORA working group
Importance: High

I completely agree with Stephanie's comment: The public is not entitled to request particular customized reports. **It IS entitled, as she said, to obtain the ENTIRE DATA set**, with the confidential information (fields) – as the government determines it – withheld. The public records requester is then able to generate whatever particular reports (s)he wishes from that complete data set.

Please see if there is consensus among the government attorneys on this point. If so, we have a very good starting point for further discussion.

Thanks,

Steven D. Zansberg

LSKS LEVINE SULLIVAN KOCH & SCHULZ, LLP

(303) 376-2409

From: Steven Zansberg
Sent: Friday, July 22, 2016 10:22 AM
To: David Blake
Cc: Jeff Roberts [redacted] Peg Perl [redacted]
Subject: CORA working group
Importance: High

David:

I am listening in on today's meeting, but do not know how to phone in to voice comments.

Here are my thoughts in response to your comment, earlier, about the public has no right to access information in any manner other than the particular "business needs" format in which the government

uses the data (feel free to share this with the group):

> I strongly disagree with Mr. Blake's comment earlier about the CORA guaranteeing only a right for the public to see the actual reports and forms the government uses according to its "business needs."
>
> CORA provides the public a right to inspect ALL "writings" made, maintained or kept by the government, for whatever purpose the public wishes to see, inspect and copy that information. It does NOT limit the public to viewing only the information in the manner, means, or "business needs" format in which the government uses it. The public paid for the creation of the database, and it pays for the maintenance of those databases, so the fact the government only wants to use a small subset of that data, in a particular "business needs" way is completely irrelevant to what CORA provides – the UNDERLING DATA BELONGS TO THE PUBLIC, not to the government agency that is declared to be the CUSTODIAN of that public data set.
>
> Once again – the UNDERLYING DATA belongs to the public, not the government. It is that data to which the CORA provides a right of access.

Best,
Steve

Steven D. Zansberg

LSKS LEVINE SULLIVAN KOCH & SCHULZ, LLP

1888 Sherman Street
Suite 370
Denver, CO 80203
(303) 376-2409 | Phone
(303) 376-2401 | Fax
www.lskslaw.com