

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-02074-WYD-STV

MASTERPIECE CAKESHOP INCORPORATED, a Colorado corporation, *et al.*,

Plaintiffs,

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official and individual capacities, *et al.*,

Defendants.

**STATE OFFICIALS' MOTION FOR ORDER PROHIBITING PLAINTIFFS'
USE OF OPEN RECORDS LAWS TO CIRCUMVENT DISCOVERY**

Defendants Aubrey Elenis, Director of the Colorado Civil Rights Division, in her official and individual capacities (the “Division Director”), Anthony Aragon, Miguel “Michael” Rene Elias, Carol Fabrizio, Charles Garcia, Rita Lewis, and Jessica Pocock, in their official capacities as members of the Colorado Civil Rights Commission (collectively, “Commissioners” or the “Commission”), Cynthia H. Coffman, in her official capacity as Colorado Attorney General (the “Attorney General”), and John Hickenlooper, in his official capacity as Colorado Governor (the “Governor”) (collectively, “State Officials”), by and through the Attorney General’s Office and undersigned counsel, move for an order prohibiting Plaintiffs from using the Colorado Open Records Act (“CORA”) to circumvent the discovery process.

D.C. COLO. Civ. R. 7.1(a) CERTIFICATION

Undersigned counsel certifies that she conferred in good faith with counsel for Plaintiffs regarding the relief requested by this Motion and is authorized to represent that Plaintiffs oppose the same.

BACKGROUND

Plaintiff Masterpiece Cakeshop, Inc. (the “bakery”), which is owned by Plaintiff Jack Phillips, was the respondent to an earlier third-party charge of discrimination in a place of public accommodation filed with the Colorado Civil Rights Division (“Division”) in 2012. After the full adjudication of the 2012 charge, the United States Supreme Court issued a decision on June 4, 2018, holding that hostility on the part of *former* Commissioners was “inconsistent with the First Amendment’s guarantee that our laws be applied in a manner that is neutral towards religion.” *See Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), *rev’d sub nom. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1732 (2018). As a result, the Court did not reach the merits of the bakery and Mr. Phillips’ challenge to the former Commissioners’ decision holding that they violated the Colorado Anti-Discrimination Act, §§ 24-34-301 to –804, C.R.S. (2018). *Id.*, at 1728, 1723-24, 1732.

On June 28, 2018, the Division Director found probable cause for a *new* charge of discrimination filed against the bakery and Mr. Phillips by a *different* member of the public. Doc. 1, ¶¶ 175, 195-202. In June 2017, the bakery refused to make a birthday cake for Autumn Scardina because “the cake was ‘to celebrate a sex-change from male to female.’” Doc. 1, ¶¶ 179, 184; Doc. 1-1, p. 2-3. After being refused service, Ms. Scardina filed a charge of discrimination based on sex and transgender status with the Division in July 2017, which in turn notified the bakery and investigated the charge to determine whether probable cause exists. Doc. 1, ¶¶ 192-93.

After the Division Director’s probable cause finding but before the Commission filed a Notice of Hearing and Formal Complaint in *Scardina v. Masterpiece Cakeshop Inc., et al.*, Colorado Office of Administrative Courts Case No. CR 2018_____, on October 9, 2018,

Plaintiffs filed their Verified Complaint in this Court. *See* Doc. 1, p. 51. In it, they assert claims under 42 U.S.C. § 1983 against the State Officials for allegedly violating their First and Fourteenth Amendment constitutional rights based on several as-applied and facial theories. *Id.*, ¶¶ 280-335. The Verified Complaint requests preliminary injunctive relief [Doc. 1, p. 48-49] and, although Plaintiffs have not yet filed a motion seeking same, they have requested and received leave of Court to file a motion that exceeds the 15-page limit. *See* Doc. 19. As a result, the State Officials believe that the filing of such a motion is imminent and, in turn, will necessitate their defense of Plaintiffs' claims on short notice in a contested evidentiary hearing.

PENDING COLORADO OPEN RECORDS ACT REQUESTS

After initiating this civil action, Plaintiffs, through attorney Barry Arrington, submitted three separate CORA requests to the State Officials (attached as *Exhibit A*).¹ The Division and the Commission received their CORA requests on August 29, 2018, and the Governor received his CORA request on August 31, 2018. Because the requests are broadly worded, encompass all of a large category of records, and will yield a large volume of potentially responsive records, each State Official utilized the extension provided in § 24-72-203(3)(b)(I)-(III), C.R.S., to prepare cost estimates for the staff time it would take to gather, review, and produce the requested records.

Simultaneously, counsel of record for the parties were engaged in conferrals about the scope of this litigation, including limiting Plaintiffs' ability to circumvent or supplement the discovery process by submitting CORA requests to the State Officials for records related to

¹ Although not counsel of record, Mr. Arrington appears to be working in concert with Plaintiffs and/or their counsel of record as demonstrated by his act of copying two of their counsel of record on two of the CORA requests. *See* Exhibit A, p. 1, 6.

disputed claims and defenses. Because those discussions would affect the State Officials' responses to the CORA requests, their records counsel contacted Mr. Arrington by telephone on September 13, 2018, to request that the CORA requests be put on hold pending the outcome of those conferrals. Mr. Arrington agreed to a temporary hold of the three outstanding CORA requests by email on September 18, 2018 (attached as *Exhibit B*).

On October 12, 2018, Mr. Arrington renewed his CORA requests by email asking that the State Officials proceed with fulfilling the requests (attached as *Exhibit C*). In response, records counsel for the State Officials sent a letter notifying Mr. Arrington about their intent to file this Motion, and providing status updates and/or cost estimates for the three CORA requests (attached as *Exhibit D*).

ARGUMENT

I. Standard of review.

The Federal Rules of Civil Procedure (“Rules”) govern, *inter alia*, the timing and manner in which the parties to an action obtain information about disputed facts, claims, and defenses from each other and third-parties. *See e.g.*, Fed. R. Civ. P. 1, 16, 26, 30, 33-34, and 36. Coupled with any discovery orders specific to the civil action, the Rules and a court’s orders operate to control the exchange of information and documents between the parties. In many cases, they also operate to protect confidential or privileged information by limiting access to and the use of documents obtained in discovery, and to protect parties and third-parties from overly burdensome or harassing discovery requests. *See* Fed. R. Civ. P. 16, 26(c). By their own terms, the Rules must “be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1. “Generally, [c]ontrol of discovery is entrusted to the sound discretion of the trial courts,” and

a trial court's ruling on discovery motions "will not be disturbed absent abuse of discretion." *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1550 (10th Cir. 1995) (quoting *Martinez v. Schock Transfer and Warehouse Co.*, 789 F.2d 848, 850 (10th Cir. 1986)).

II. This Court should prohibit Plaintiffs from using open records laws to circumvent or supplement the discovery process.

In this case, Plaintiffs seek to bypass the Rules and use CORA as a discovery substitute. The three CORA requests seek records that are unquestionably related to the parties' disputed claims and defenses in this case, as illustrated by just one of their many subparts:

All e-mails (including attachments) sent or received by [respective State Official] from June 1, 2012², through the present that mention or relate to: (1) Masterpiece Cakeshop (a business located at 3355 South Wadsworth H-117, Lakewood, CO 80227); (2) Jack Phillips (the owner of Masterpiece Cakeshop); (3) Charlie Craig (an individual who filed a discrimination complaint against Masterpiece Cakeshop); (4) David Mullins (an individual who filed a discrimination complaint against Masterpiece Cakeshop); (5) Deborah Munn (the mother of Charlie Craig); (6) Autumn Scardina (an individual who filed a discrimination complaint against Masterpiece Cakeshop); (7) any current, past, or contemplated litigation or proceedings involving Masterpiece Cakeshop or Jack Phillips; (8) Azucar Bakery (a business located at 1886 S. Broadway, Denver, CO 80210); (9) Le Bakery Sensual, Inc. (a business located at 300 E. 6th Ave., Denver, CO 80203); (10) Gateaux, Ltd. (a business located at 1160 N. Speer Blvd., Denver, CO 80204); or (11) William Jack (an individual who filed discrimination complaints against Azucar Bakery, Le Bakery Sensual, and Gateaux).

See Exhibit A, p. 2, 8, 13. The requests seek numerous, broad categories of records that would otherwise be available through the discovery process subject to the Rules and any Orders of this Court. Indeed, the requests read like requests for production issued to parties under Rule 34. Records obtained through the requests doubtless will be offered as evidence against the State Officials throughout their defense of this case, including at the imminent preliminary injunction hearing.

² The timeframe in the request to the Attorney General is January 13, 2015, through the present.

This Court should prohibit Plaintiffs from using CORA to circumvent the Rules and court-supervised discovery process for three reasons. *First*, CORA itself imposes specific limitations on the right to access public records:

(1)(a) All public records shall be open for inspection by any person at reasonable times, *except as provided in this part 2 or as otherwise provided by law*....

...

(1) The custodian of any public records shall allow any person the right of inspection of such records or any portion thereof except on one or more of the following grounds or as provided in subsection (2) or (3) of this section:

...

(c) *Such inspection is prohibited* by rules promulgated by the supreme court or *by the order of any court*.

§§ 24-72-203(1)(a) and 24-72-204(1)(c), C.R.S. (emphasis added). Thus, the plain language of CORA establishes that the right to access public records can be limited by other laws, such as the Rules, or the order of *any* court, including *this* Court. *Id.*; *see Neiberger v. Hawkins*, 70 F. Supp. 2d 1177, 1184 (D. Colo. 1999) (“In construing statutory provisions, a court should give effect to the intent of the legislature. A court must look first to the statutory language itself, giving words and phrases their commonly accepted meaning. Where the language of a statute is plain and the meaning is clear, a court need not resort to interpretive rules of statutory construction, but must apply the statute as written.”).

Second, federal and state courts have long-recognized that nothing in CORA prohibits a court from entering and enforcing its own discovery limits. Indeed, the U.S. Supreme Court and a host of lower courts across the country have held that open records laws cannot be utilized as a substitute or supplement for traditional discovery procedures. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989) (stating Freedom of Information Act (FOIA) “was not intended to supplement” rules of discovery); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801 (1984) (explaining that permitting a party to “obtain through the FOIA material that is normally

privileged would create an anomaly in that the FOIA could be used to supplement civil discovery”); *see also Williams & Connolly v. SEC*, 662 F.3d 1240, 1245 (D.C. Cir. 2011) (“FOIA is ... [not] an appropriate means to vindicate discovery abuses”); *Columbia Packing Co., Inc. v. U.S. Dep’t of Agriculture*, 563 F.2d 495, 500 (1st Cir. 1977) (“FOIA was not enacted to provide litigants with an additional discovery tool.”); *Agility Pub. Warehousing Co. K.S.C. v. Nat’l Security Agency*, 113 F. Supp. 3d 313, 331 n.9 (D.D.C. 2015) (“FOIA is not the appropriate vehicle to vindicate discovery abuses or otherwise conduct discovery.”); *Johnson v. U.S. Dep’t of Justice*, 758 F. Supp. 2, 5 (D.D.C. 1991) (“FOIA is not a discovery statute.”).

Nearly forty years ago, the Colorado Supreme Court determined that the legislature did not intend for state open records laws to supplant discovery practice in civil litigation because such laws “are ‘directed toward regulation of the entirely different situation of the general exploration of public records by any citizen during general business hours.’” *Martinelli v. District Court in and for City and Cnty of Denver*, 612 P.2d 1083, 1093 (Colo. 1980), *quoting Tighe v. City and Cnty of Honolulu*, 520 P.2d 1345, 1348 (Haw. 1974). Over six years ago, a division of this Court relied on *Martinelli* in determining the same. *See Citizen Center v. Gessler*, No. 12-cv-00370-CMA-MJW, ¶ 11 (D. Colo. July 16, 2012) (Order regarding emergency motion to reconsider Scheduling Order provision prohibiting plaintiff’s use of CORA to circumvent discovery) (attached as *Exhibit E*). The clear thrust of this line of cases is that a party cannot accomplish through an open records request that which he “was unable to accomplish during civil discovery proceedings in the underlying action[.]” *Christmann & Welborn v. Dep’t of Energy*, 589 F. Supp. 584, 586 (N.D. Tex. 1984). Otherwise, discovery limits, privileges, and protections could be “easily circumvented.” *Weber Aircraft*, 465 U.S. at 802.

Third, allowing Plaintiffs to subvert the discovery process by using CORA as a means to obtain records gives them an unfair advantage over the State Officials, who lack the parallel ability to submit CORA requests to Plaintiffs. Specifically, Plaintiffs will be able to “obtain discovery in excess of the limitations set by this court in the Rule 16 Scheduling Order [Doc. 45],” that it will enter “after carefully considering the proffers by the parties as to the need and the amount of discovery that [is] reasonable and necessary in order to address the merits of this case at the Scheduling Conference in light of [Rule] 1 and 16 and the Civil Justice Reform Act.” Exhibit E, *Citizen Center Order*, p. ¶ 8. If required to respond to multiple, repeated CORA requests seeking unlimited records while simultaneously responding to properly issued discovery requests, the State Officials will be forced to devote significant extra resources and incur considerable “unnecessary expenses” while Plaintiffs avoid any added burden or expense beyond those associated with this Court’s future discovery limits.³ *Id.* To do so, the State Officials will have to redirect limited resources away from their defense of Plaintiffs’ claims, especially if required to respond to CORA requests *and* Plaintiffs’ imminent preliminary injunction motion at the same time.

And, unlike Plaintiffs, the State Officials will be forced to forgo the following procedural rights and protections available to parties when responding to properly issued discovery requests: (1) the right to have thirty days to respond to a Rule 34 request for production, as opposed to a minimum of three and maximum of ten business days to respond to a CORA request; (2) the right to object to a discovery request and withhold responsive information or documents because it is not reasonably calculated to lead to the discovery of admissible evidence; (3) the right to

³ CORA caps the hourly rate that State Officials may charge for the research and retrieval of public records taking longer than one hour at \$30, which is just a fraction of their actual costs to fulfill Plaintiffs’ CORA requests. *See* § 24-72-205(6)(a), C.R.S. (2018).

seek a protective order under Rule 26(c) to limit access to, use of, and the later return or destruction of records containing confidential or privileged information; and (4) the right to seek a protective order under Rule 26(c) if responding to a discovery request will expose the party to “annoyance, embarrassment, oppression, or undue burden or expense[.]” Such a result would be fundamentally unfair. It also would ignore the fact that “[t]he word “administered” was added to Rule 1 in 1993 to indicate the affirmative duty of courts to exercise the authority conferred upon them by the Rules in ensuring that civil litigation is resolved not only fairly, but also without undue cost or delay.” Exhibit E, *Citizen Center Order*, ¶ 8

Finally, even if this Court prohibits Plaintiffs and their counsel of record from using CORA to supplant or supplement the discovery process, that alone will not solve the problem. Any person acting in concert with or for the benefit of Plaintiffs will be free to issue CORA requests to the State Officials for records related to the facts, claims, and defenses disputed here, and then provide responsive records obtained to Plaintiffs for their use in this litigation. This would result in the same inequities discussed above, and fairness dictates that Plaintiffs not be permitted to rely on individuals who are not subject to this Court’s jurisdiction to do for them what this Court has prohibited them from doing. For this reason, the State Officials respectfully request that this Court also prohibit Plaintiffs from using any records obtained through any third-party open records request for any purpose in this litigation.

CONCLUSION

Nothing in CORA bars a federal court from establishing and enforcing discovery limits, and Plaintiffs voluntarily subjected themselves to this Court’s jurisdiction over and control of the discovery process by initiating this lawsuit. Records to support Plaintiffs’ claims or overcome the State Officials’ defenses must be obtained through discovery rather than through CORA requests

that this Court cannot monitor or control. The State Officials respectfully request that this Court issue an order prohibiting Plaintiffs from (1) using open records laws, including but not limited to CORA, to circumvent or supplement the discovery process, and (2) using any records obtained through any third-party open records request for any purpose in this litigation.

DATED: October 19, 2018.

CYNTHIA H. COFFMAN
Attorney General

s/ LeeAnn Morrill

LEEANN MORRILL*
First Assistant Attorney General
VINCENT MORSCHER*
Senior Assistant Attorney General
GRANT T. SULLIVAN*
Assistant Solicitor General
JACQUELYNN RICH FREDERICKS*
Assistant Attorney General
State Services Section
1300 Broadway, 6th Floor
Denver, Colorado 80203
Telephone: (720) 508-6000
*Counsel of Record
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2018, I served a true and complete copy of the foregoing **STATE OFFICIALS' MOTION FOR ORDER PROHIBITING PLAINTIFFS' USE OF OPEN RECORDS LAWS TO CIRCUMVENT DISCOVERY** upon all counsel of record and parties who have appeared in this matter through ECF or as otherwise indicated below:

Kristen K. Waggoner
James A. Campbell
Jonathan A. Scruggs
Jacob P. Warner
Katherine L. Anderson
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
kwaggoner@ADFlegal.org
jcampbell@ADFlegal.org
jscruggs@ADFlegal.org
jwarner@ADFlegal.org
kanderson@ADFlegal.org

David A. Cortman
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Road NE
Suite D-1100
Lawrenceville, GA 30043
dcortman@ADFlegal.org

Nicolle H. Martin
7175 W. Jefferson Avenue
Suite 4000
Lakewood, CO 80235
nicollem@comcast.net

s/ LeeAnn Morrill
LeeAnn Morrill

From: Barry Arrington
To: [CORA](#); [Annie Skinner](#)
Cc: "[Jake Warner](#)"; "[Jim Campbell](#)"
Subject: Open Records Request
Date: Wednesday, August 29, 2018 9:52:07 AM
Attachments: [AG CORA.pdf](#)

Dear Ms. Skinner,

Please see the attached CORA request.

Sincerely,

Barry K. Arrington
Arrington Law Firm
3801 East Florida Avenue
Suite 830
Denver, Colorado 80210
Voice: 303.205.7870
Fax: 303.463.0410

EXHIBIT A

August 29, 2018

Via U.S. Mail and Electronic Mail

Ms. Annie Skinner
Public Information Officer/Director of Communications
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, CO 80203
cora.request@coag.gov
annie.skinner@coag.gov

Re: Open Records Request

Dear Ms. Skinner:

Pursuant to the Colorado Open Records Act (C.R.S. § 24-72-201 *et seq.*), I write to request copies of all documents¹ (or portions thereof) that are not covered by a work-product or attorney-client privilege and that pertain to or include the following:

1. All e-mails (including attachments) sent or received by Attorney General Coffman from January 13, 2015, through the present that mention or relate to: (1) Masterpiece Cakeshop (a business located at 3355 South Wadsworth H-117, Lakewood, CO 80227); (2) Jack Phillips (the owner of Masterpiece Cakeshop); (3) Charlie Craig (an individual who filed a discrimination complaint against Masterpiece Cakeshop); (4) David Mullins (an individual who filed a discrimination complaint against Masterpiece Cakeshop); (5) Deborah Munn (the mother of Charlie Craig); (6) Autumn Scardina (an individual who filed a discrimination complaint against Masterpiece Cakeshop); (7) any current, past, or contemplated litigation or proceedings involving Masterpiece Cakeshop or Jack Phillips; (8) Azucar Bakery (a business located at 1886 S. Broadway, Denver, CO 80210); (9) Le Bakery Sensual, Inc. (a business located at 300 E. 6th Ave., Denver, CO 80203); (10) Gateaux, Ltd. (a business located at 1160 N. Speer Blvd., Denver, CO 80204); or (11) William Jack (an individual who filed discrimination complaints against Azucar Bakery, Le Bakery Sensual, and Gateaux).

¹ The word “documents” as used in this letter includes, but is not limited to, correspondence, notes, minutes, memoranda, statements, e-mails, text messages, instant messages, voicemail messages, social media communications, letters, calendar or diary logs, facsimile logs, telephone records, call sheets, video recordings, audio recordings, electronically stored information, non-identical copies of documents, and other written or recorded materials of any kind.

2. All e-mails (including attachments) sent or received by any agent, employee, or representative of Attorney General Coffman or the Office of the Attorney General from June 1, 2012, through the present that mention or relate to any of the eleven topics listed in Request No. 1.
3. All documents that reflect, mention, or relate to speeches, presentations, statements to the media, press releases, or public statements of Attorney General Coffman from January 13, 2015, through the present that mention or relate to any of the eleven topics listed in Request No. 1.
4. All documents that reflect, mention, or relate to speeches, presentations, statements to the media, press releases, or public statements of any agent, employee, or representative of Attorney General Coffman or the Office of the Attorney General from June 1, 2012, through the present that mention or relate to any of the eleven topics listed in Request No. 1.
5. All social media correspondence (whether in written, audio, video, image, or other form) transmitted by Attorney General Coffman, the Office of the Attorney General, or any of their agents, employees, or representatives from June 1, 2012, through the present that mentions or relates to any of the eleven topics listed in Request No. 1. The social media correspondence covered by this request includes, but is not limited to, posted messages, comments to posted messages, responses to comments, and “direct messages.”
6. All documents that reflect, mention, or relate to communications from June 1, 2012, through the present between Attorney General Coffman, the Office of the Attorney General, or any of their agents, employees, or representatives and Governor Hickenlooper, the Office of the Governor, or any of their agents, employees, or representatives that mention or relate to any of the eleven topics listed in Request No. 1.
7. All documents that reflect, mention, or relate to communications from June 1, 2012, through the present between Attorney General Coffman, the Office of the Attorney General, or any of their agents, employees, or representatives and any official, member, employee, agent, or representative of the Colorado Civil Rights Commission (Commission) or the Colorado Civil Rights Division (Division) that mention or relate to any of the eleven topics listed in Request No. 1. The members of the Commission referenced in this request include, but are not limited to, Anthony Aragon, Miguel “Michael” Rene Elias, Carol Fabrizio, Charles Garcia, Rita Lewis, Jessica Pocock, and Heidi Hess, and the officials of the Division referenced in this request include, but are not limited to, Aubrey Elenis, Jennifer McPherson, and Steven Chavez.
8. All documents that reflect, mention, or relate to communications from June 1, 2012, through the present between Attorney General Coffman, the Office of the Attorney General, or any of their agents, employees, or representatives and any other government actor, official, employee, agent, or representative that mention or relate to any of the eleven topics listed in Request No. 1.

9. All documents that reflect, mention, or relate to communications from June 1, 2012, through the present between Attorney General Coffman, the Office of the Attorney General, or any of their agents, employees, or representatives and any “outside organization or individual” (defined in the following sentence) or an official, employee, agent, or representative of such “outside organization or individual” that mention or relate to any of the eleven topics listed in Request No. 1. “Outside organization or individual,” as used here, refers to Americans United for Separation of Church and State; American Civil Liberties Union; Human Rights Campaign; Lambda Legal; National Center for Lesbian Rights; GLAAD (formerly known as the Gay & Lesbian Alliance Against Defamation); Anti-Defamation League; Transgender Law Center; Freedom from Religion Foundation; Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders; Daneya Esgar; Lucía Guzmán; Joel Judd; Dominick Moreno; Jennifer Veiga; Tim Gill; Colorado LGBT Bar Association; National LGBT Bar Association; American Bar Association; Colorado Bar Association; Gender Identity Center of Colorado; GLBT Community Center of Colorado; Interfaith Alliance of Colorado; Northern Colorado Equality; One Colorado; PFLAG Boulder County; PFLAG Greeley; Southern Colorado Equality Alliance; Trans* Youth Education and Support (TYES); Transformative Freedom Fund; Sikh American Legal Defense and Education Fund; Sikh Coalition; National LGBTQ Task Force; Denver Metro Chamber of Commerce; NAACP Legal Defense & Education Fund, Inc.; Transgender Legal Defense & Education Fund; People For the American Way Foundation; Microsoft Corporation; Amazon, Inc.; Google LLC; any state, municipal, local chapters, or other subgroups of any of the previously listed organizations.
10. All documents reflecting, mentioning, or relating to the statements, considerations, views, or thoughts of Attorney General Coffman, the Office of the Attorney General, or any of their agents, employees, or representatives from June 1, 2012 through the present regarding any of the eleven topics listed in Request No. 1.
11. All documents reflecting, mentioning, or relating to the statements, considerations, views, or thoughts of Attorney General Coffman from January 13, 2015, through the present regarding any of the following terms or topics: “religious liberty,” “religious freedom,” “free exercise,” “freedom of religion,” “religious beliefs,” “religious freedom restoration act,” “RFRA,” “sexual orientation,” “gender identity,” “transgender,” “lesbian,” “gay,” “bisexual,” “homosexual,” “homophobic,” “LGBT,” “GLBT,” “same-sex marriage,” “gay marriage,” “opposite-sex marriage,” “traditional marriage,” “gender transition,” “Civil Rights Commission,” “Civil Rights Division,” “CADA,” “Anti-Discrimination Act,” “public accommodation,” “discrimination,” or “bigot.”
12. All documents reflecting, mentioning, or relating to the statements, considerations, views, or thoughts of any agent, employee, or representative of Attorney General Coffman or the Office of the Attorney General from June 1, 2012, through the present regarding the terms or topics listed in Request No. 11.

13. All documents relating to any allegation of a discriminatory practice by a place of public accommodation that was considered, evaluated, rejected, or pursued by Attorney General Coffman, the Office of the Attorney General, or any of their agents, employees, or representatives from June 1, 2012, through the present.

Please note that I agree to pay any reasonable fees not exceeding \$400.00 that are permitted by law for responding to this request. If you anticipate that the fees will exceed \$400.00, please notify me by email before responding to this request. After completing the processing of this request, please provide a receipt itemizing the charges associated with this request.

If any of the requested documents are redacted or withheld, please specify the basis for the redaction or withholding and provide a log of documents that are withheld. The log need not include withheld documents that (1) were created by attorneys (who have litigation responsibilities) at the Attorney General's office or their co-counsel regarding litigation that was active or contemplated at the time the document was created, (2) were not shared with anyone other than such attorneys or their legal staff (e.g., paralegals and legal assistants) who assisted with editing of filing those documents, and (3) would receive protection under the work-product or attorney-client privilege in civil litigation. But the log should include all other documents that are withheld, including documents shared with non-litigation staff at the Attorney General's office, such as those responsible for public relations. Placing a document on the log will *not* be construed as an admission that the document does not fall within the circumstances stated above allowing for the omission of a document from the log.

Please do not hesitate to contact me if you have any questions, need additional information regarding the scope of the records requested, or if there is anything I can do to expedite the processing of this request. You can reach me via e-mail at barry@arringtonpc.com. If possible, I ask that all records responsive to this request be sent to me via that e-mail address.

Sincerely,



Barry K. Arrington

Open Records Request

Inbox

Barry Arrington <barry@arringtonpc.com>

Aug 29, 2018,
9:57 AM

to me, dora_ccrd, Jake, Jim

Dear Ms. McPherson:

Please see the attached CORA request.

Sincerely,

Barry K. Arrington
Arrington Law Firm
3801 East Florida Avenue
Suite 830
Denver, Colorado 80210
Voice: 303.205.7870
Fax: 303.463.0410

Attachments area

EXHIBIT A

August 29, 2018

Via U.S. Mail and Electronic Mail

Ms. Jennifer McPherson
Department of Regulatory Agencies
Colorado Civil Rights Division
1560 Broadway, Suite 825
Denver, CO 80202
jennifer.mcpherson@state.co.us
dora_ccrd@state.co.us

Re: Open Records Request

Dear Ms. McPherson:

Pursuant to the Colorado Open Records Act (C.R.S. § 24-72-201 *et seq.*), I write to request copies of all documents¹ (or portions thereof) pertaining to or including the following:

1. All documents that mention or relate to complaints or investigations of alleged or confirmed discrimination in a place of public accommodation in violation of C.R.S. § 24-34-601 regarding which the Colorado Civil Rights Division (Division), the Colorado Civil Rights Commission (Commission), or any member, official, agent, employee, or representative of the Division or Commission rendered a decision (whether preliminary, such as a finding relating to probable cause, or a more final decision), or that was resolved (whether formally or informally), on or after June 1, 2018. The documents provided should include, but not be limited to, the following: the complaint; decisions and determinations of the Division; decisions of the Commission; decisions of an administrative law judge; statements of members, officials, agents, employees, or representatives of the Commission or Division; and correspondence with the party complaining of discrimination and the party accused of discrimination.
2. All documents that mention or relate to complaints or investigations of alleged or confirmed discrimination in a place of public accommodation in violation of C.R.S. § 24-34-601 regarding which the Division, the Commission, or any member, official, agent,

¹ The word “documents” as used in this letter includes, but is not limited to, correspondence, notes, minutes, memoranda, statements, e-mails, text messages, instant messages, voicemail messages, social media communications, letters, calendar or diary logs, facsimile logs, telephone records, call sheets, video recordings, audio recordings, electronically stored information, non-identical copies of documents, and other written or recorded materials of any kind.

employee, or representative of the Division or Commission rendered a decision (whether preliminary, such as a finding relating to probable cause, or a more final decision), or that was resolved (whether formally or informally), on or after June 1, 2012, but before June 1, 2018. The documents provided should include, but not be limited to, the following: the complaint; decisions and determinations of the Division; decisions of the Commission; decisions of an administrative law judge; statements of members, officials, agents, employees, or representatives of the Commission or Division; and correspondence with the party complaining of discrimination and the party accused of discrimination.

3. All documents that mention or relate to complaints or investigations of alleged or confirmed discrimination in a place of public accommodation based on sexual orientation (which includes gender identity) in violation of C.R.S. § 24-34-601 where those complaints or investigations originated on or after June 1, 2012. The documents provided should include, but not be limited to, the following: the complaint; decisions and determinations of the Division; decisions of the Commission; decisions of an administrative law judge; statements of members, officials, agents, employees, or representatives of the Commission or Division; and correspondence with the party complaining of discrimination and the party accused of discrimination.
4. All documents that mention or relate to complaints or investigations of alleged or confirmed discrimination in a place of public accommodation based on creed (which includes religion) in violation of C.R.S. § 24-34-601 where those complaints or investigations originated on or after June 1, 2012. The documents provided should include, but not be limited to, the following: the complaint; decisions and determinations of the Division; decisions of the Commission; decisions of an administrative law judge; statements of members, officials, agents, employees, or representatives of the Commission or Division; and correspondence with the party complaining of discrimination and the party accused of discrimination.
5. All documents that mention, discuss, list, or relate to penalties, training requirements, orders, or other remedial measures that have been imposed, issued, required, or agreed upon by the Commission or Division or any member, official, agent, employee, or representative of the Division or Commission since June 1, 2012, for violations or alleged violations of C.R.S. § 24-34-601.
6. All documents disclosing or demonstrating the total number of complaints of discrimination based on creed (which includes religion) in violation of C.R.S. § 24-34-601 received by the Commission or Division since June 1, 2012, and all documents disclosing or demonstrating how many of those complaints resulted in final Commission determinations that discrimination based on creed in violation of C.R.S. § 24-34-601 had indeed occurred.
7. All documents disclosing or demonstrating the total number of complaints of discrimination based on sexual orientation (which includes gender identity) in violation of C.R.S. § 24-34-601 received by the Commission or Division since June 1, 2012, and

all documents disclosing or demonstrating how many of those complaints resulted in final Commission determinations that discrimination based on sexual orientation in violation of C.R.S. § 24-34-601 had indeed occurred.

8. All e-mails (including attachments) sent or received by any current or former member of the Commission or current or former director (or interim director) of the Division from June 1, 2012, through the present that mention or relate to: (1) Masterpiece Cakeshop (a business located at 3355 South Wadsworth H-117, Lakewood, CO 80227); (2) Jack Phillips (the owner of Masterpiece Cakeshop); (3) Charlie Craig (an individual who filed a discrimination complaint against Masterpiece Cakeshop); (4) David Mullins (an individual who filed a discrimination complaint against Masterpiece Cakeshop); (5) Deborah Munn (the mother of Charlie Craig); (6) Autumn Scardina (an individual who filed a discrimination complaint against Masterpiece Cakeshop); (7) any current, past, or contemplated litigation or proceedings involving Masterpiece Cakeshop or Jack Phillips; (8) Azucar Bakery (a business located at 1886 S. Broadway, Denver, CO 80210); (9) Le Bakery Sensual, Inc. (a business located at 300 E. 6th Ave., Denver, CO 80203); (10) Gateaux, Ltd. (a business located at 1160 N. Speer Blvd., Denver, CO 80204); or (11) William Jack (an individual who filed discrimination complaints against Azucar Bakery, Le Bakery Sensual, and Gateaux).
9. All e-mails (including attachments) sent or received by the Division, the Commission, or any member, official, agent, employee, or representative of the Division or Commission from June 1, 2012, through the present that mention or relate to any of the eleven topics listed in Request No. 8.
10. All documents that reflect, mention, or relate to speeches, presentations, statements to the media, press releases, or public statements of any current or former member of the Commission or current or former director (or interim director) of the Division from June 1, 2012, through the present that mention or relate to any of the eleven topics listed in Request No. 8.
11. All documents that reflect, mention, or relate to speeches, presentations, statements to the media, press releases, or public statements of the Division, the Commission, or any member, official, agent, employee, or representative of the Division or Commission from June 1, 2012, through the present that mention or relate to any of the eleven topics listed in Request No. 8.
12. All social media correspondence (whether in written, audio, video, image, or other form) transmitted by the Division, the Commission, or any member, official, agent, employee, or representative of the Division or Commission from June 1, 2012, through the present that mentions or relates to any of the eleven topics listed in Request No. 8. The social media correspondence covered by this request includes, but is not limited to, posted messages, comments to posted messages, responses to comments, and “direct messages.”

13. All documents that reflect, mention, or relate to communications from June 1, 2012, through the present between the Division, the Commission, or any member, official, agent, employee, or representative of the Division or Commission and Governor Hickenlooper, the Office of the Governor, or any of their agents, employees, or representatives that mention or relate to any of the eleven topics listed in Request No. 8.
14. All documents that reflect, mention, or relate to communications from June 1, 2012, through the present between the Division, the Commission, or any member, official, agent, employee, or representative of the Division or Commission and Attorney General Coffman, the Office of the Attorney General, or any of their agents, employees, or representatives that mention or relate to any of the eleven topics listed in Request No. 8.
15. All documents that reflect, mention, or relate to communications from June 1, 2012, through the present between the Division, the Commission, or any member, official, agent, employee, or representative of the Division or Commission and any other government actor, official, employee, agent, or representative that mention or relate to any of the eleven topics listed in Request No. 8.
16. All documents that reflect, mention, or relate to communications from June 1, 2012, through the present between the Division, the Commission, or any member, official, agent, employee, or representative of the Division or Commission and any “outside organization or individual” (defined in the following sentence) or an official, employee, agent, or representative of such “outside organization or individual” that mention or relate to any of the eleven topics listed in Request No. 8. “Outside organization or individual,” as used here, refers to Americans United for Separation of Church and State; American Civil Liberties Union; Human Rights Campaign; Lambda Legal; National Center for Lesbian Rights; GLAAD (formerly known as the Gay & Lesbian Alliance Against Defamation); Anti-Defamation League; Transgender Law Center; Freedom from Religion Foundation; Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders; Daneya Esgar; Lucía Guzmán; Joel Judd; Dominick Moreno; Jennifer Veiga; Tim Gill; Colorado LGBT Bar Association; National LGBT Bar Association; American Bar Association; Colorado Bar Association; Gender Identity Center of Colorado; GLBT Community Center of Colorado; Interfaith Alliance of Colorado; Northern Colorado Equality; One Colorado; PFLAG Boulder County; PFLAG Greeley; Southern Colorado Equality Alliance; Trans* Youth Education and Support (TYES); Transformative Freedom Fund; Sikh American Legal Defense and Education Fund; Sikh Coalition; National LGBTQ Task Force; Denver Metro Chamber of Commerce; NAACP Legal Defense & Education Fund, Inc.; Transgender Legal Defense & Education Fund; People For the American Way Foundation; Microsoft Corporation; Amazon, Inc.; Google LLC; any state, municipal, local chapters, or other subgroups of any of the previously listed organizations.
17. All documents reflecting, mentioning, or relating to the statements, considerations, views, or thoughts of the Division, the Commission, or any member, official, agent, employee,

or representative of the Division or Commission from June 1, 2012, through the present regarding any of the eleven topics listed in Request No. 8.

18. All documents reflecting, mentioning, or relating to the statements, considerations, views, or thoughts of any current or former member of the Commission or current or former director (or interim director) of the Division from June 1, 2012, through the present regarding any of the following terms or topics: “religious liberty,” “religious freedom,” “free exercise,” “freedom of religion,” “religious beliefs,” “religious freedom restoration act,” “RFRA,” “sexual orientation,” “gender identity,” “transgender,” “lesbian,” “gay,” “bisexual,” “homosexual,” “homophobic,” “LGBT,” “GLBT,” “same-sex marriage,” “gay marriage,” “opposite-sex marriage,” “traditional marriage,” “gender transition,” or “bigot.”
19. All guidance, directives, instructions, comments, or other documents mentioning or relating to the U.S. Supreme Court’s June 4, 2018 decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* that were issued by, received by, or reflect the comments or views of the Division, the Commission, or any member, official, agent, employee, or representative of the Division or Commission.
20. All guidance, directives, instructions, comments, or other documents originating on or after June 4, 2018, that were issued by, received by, or reflect the comments or views of, the Division, the Commission, or any member, official, agent, employee, or representative of the Division or Commission, and mention or relate to when places of public accommodation can decline to provide a good or service because of an objection to a message or the offensiveness of a request.
21. All guidance, directives, instructions, comments, or other documents originating on or after June 1, 2012, but before June 4, 2018, that were issued by, received by, or reflect the comments or views of, the Division, the Commission, or any member, official, agent, employee, or representative of the Division or Commission, and mention or relate to when places of public accommodation can decline to provide a good or service because of an objection to a message or the offensiveness of a request.
22. All documents disclosing or demonstrating the total number of complaints or investigations of alleged or confirmed discrimination in a place of public accommodation in violation of C.R.S. § 24-34-601 that originated on or after June 1, 2012, that resulted in the Division issuing a determination of probable cause, and that the Commission declined to pursue following a failure of conciliation. The documents provided should include, but not be limited to, the following documents that mention or relate to the responsive complaints or investigations: the complaint; decisions and determinations of the Division; decisions of the Commission; decisions of an administrative law judge; right-to-sue letter; statements of members, officials, agents, employees, or representatives of the Commission or Division; and correspondence with the party complaining of discrimination and the party accused of discrimination.

23. All documents disclosing or demonstrating the total number of complaints or investigations of alleged or confirmed discrimination in a place of public accommodation in violation of C.R.S. § 24-34-601 that originated on or after June 1, 2012, that resulted in the Division issuing a determination of probable cause, that the Commission decided to pursue through administrative proceedings, and that resulted in a final Commission determination that no discrimination occurred. The documents provided should include, but not be limited to, the following documents that mention or relate to the responsive complaints or investigations: the complaint; decisions and determinations of the Division; decisions of the Commission; decisions of an administrative law judge; statements of members, officials, agents, employees, or representatives of the Commission or Division; and correspondence with the party complaining of discrimination and the party accused of discrimination.

Please note that I agree to pay any reasonable fees not exceeding \$400.00 that are permitted by law for responding to this request. If you anticipate that the fees will exceed \$400.00, please notify me by email before responding to this request. After completing the processing of this request, please provide a receipt itemizing the charges associated with this request.

If any of the requested documents are redacted or withheld, please specify the basis for the redaction or withholding and provide a log of documents that are withheld.

Please do not hesitate to contact me if you have any questions, need additional information regarding the scope of the records requested, or if there is anything I can do to expedite the processing of this request. You can reach me via e-mail at barry@arringtonpc.com. If possible, I ask that all records responsive to this request be sent to me via that e-mail address.

Sincerely,



Barry K. Arrington

ARRINGTON LAW FIRM
3801 East Florida Avenue, Suite 830
Denver, Colorado 80210
website: arringtonpc.com

August 29, 2018

Via U.S. Mail and Electronic Mail

Office of the Governor
136 State Capitol Building
Denver, CO 80203
gov_constituentservices@state.co.us

Re: Open Records Request

To Whom It May Concern:

Pursuant to the Colorado Open Records Act (C.R.S. § 24-72-201 *et seq.*), I write to request copies of all documents¹ (or portions thereof) pertaining to or including the following:

1. All e-mails (including attachments) sent or received by Governor Hickenlooper from June 1, 2012, through the present that mention or relate to: (1) Masterpiece Cakeshop (a business located at 3355 South Wadsworth H-117, Lakewood, CO 80227); (2) Jack Phillips (the owner of Masterpiece Cakeshop); (3) Charlie Craig (an individual who filed a discrimination complaint against Masterpiece Cakeshop); (4) David Mullins (an individual who filed a discrimination complaint against Masterpiece Cakeshop); (5) Deborah Munn (the mother of Charlie Craig); (6) Autumn Scardina (an individual who filed a discrimination complaint against Masterpiece Cakeshop); (7) any current, past, or contemplated litigation or proceedings involving Masterpiece Cakeshop or Jack Phillips; (8) Azucar Bakery (a business located at 1886 S. Broadway, Denver, CO 80210); (9) Le Bakery Sensual, Inc. (a business located at 300 E. 6th Ave., Denver, CO 80203); (10) Gateaux, Ltd. (a business located at 1160 N. Speer Blvd., Denver, CO 80204); or (11) William Jack (an individual who filed discrimination complaints against Azucar Bakery, Le Bakery Sensual, and Gateaux).
2. All e-mails (including attachments) sent or received by any agent, employee, or representative of Governor Hickenlooper or the Office of the Governor from June 1,

¹ The word “documents” as used in this letter includes, but is not limited to, correspondence, notes, minutes, memoranda, statements, e-mails, text messages, instant messages, voicemail messages, social media communications, letters, calendar or diary logs, facsimile logs, telephone records, call sheets, video recordings, audio recordings, electronically stored information, non-identical copies of documents, and other written or recorded materials of any kind.

Office of the Governor
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August 29, 2018

- 2012, through the present that mention or relate to any of the eleven topics listed in Request No. 1.
3. All documents that reflect, mention, or relate to speeches, presentations, statements to the media, press releases, or public statements of Governor Hickenlooper from June 1, 2012, through the present that mention or relate to any of the eleven topics listed in Request No. 1.
 4. All documents that reflect, mention, or relate to speeches, presentations, statements to the media, press releases, or public statements of any agent, employee, or representative of Governor Hickenlooper or the Office of the Governor from June 1, 2012, through the present that mention or relate to any of the eleven topics listed in Request No. 1.
 5. All social media correspondence (whether in written, audio, video, image, or other form) transmitted by Governor Hickenlooper, the Office of the Governor, or any of their agents, employees, or representatives from June 1, 2012, through the present that mentions or relates to any of the eleven topics listed in Request No. 1. The social media correspondence covered by this request includes, but is not limited to, posted messages, comments to posted messages, responses to comments, and "direct messages."
 6. All documents that reflect, mention, or relate to communications from June 1, 2012, through the present between Governor Hickenlooper, the Office of the Governor, or any of their agents, employees, or representatives and any official, employee, agent, or representative of the Colorado Attorney General's Office that mention or relate to any of the eleven topics listed in Request No. 1.
 7. All documents that reflect, mention, or relate to communications from June 1, 2012, through the present between Governor Hickenlooper, the Office of the Governor, or any of their agents, employees, or representatives and any official, member, employee, agent, or representative of the Colorado Civil Rights Commission (Commission) or the Colorado Civil Rights Division (Division) that mention or relate to any of the eleven topics listed in Request No. 1. The members of the Commission referenced in this request include, but are not limited to, Anthony Aragon, Miguel "Michael" Rene Elias, Carol Fabrizio, Charles Garcia, Rita Lewis, Jessica Pocock, and Heidi Hess, and the officials of the Division referenced in this request include, but are not limited to, Aubrey Elenis, Jennifer McPherson, and Steven Chavez.
 8. All documents that reflect, mention, or relate to communications from June 1, 2012, through the present between Governor Hickenlooper, the Office of the Governor, or any of their agents, employees, or representatives and any other government actor, official, employee, agent, or representative that mention or relate to any of the eleven topics listed in Request No. 1.
 9. All documents that reflect, mention, or relate to communications from June 1, 2012, through the present between Governor Hickenlooper, the Office of the Governor, or any

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Page 3
August 29, 2018

of their agents, employees, or representatives and any “outside organization or individual” (defined in the following sentence) or an official, employee, agent, or representative of such “outside organization or individual” that mention or relate to any of the eleven topics listed in Request No. 1. “Outside organization or individual,” as used here, refers to Americans United for Separation of Church and State; American Civil Liberties Union; Human Rights Campaign; Lambda Legal; National Center for Lesbian Rights; GLAAD (formerly known as the Gay & Lesbian Alliance Against Defamation); Anti-Defamation League; Transgender Law Center; Freedom from Religion Foundation; Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders; Daneya Esgar; Lucía Guzmán; Joel Judd; Dominick Moreno; Jennifer Veiga; Tim Gill; Colorado LGBT Bar Association; National LGBT Bar Association; American Bar Association; Colorado Bar Association; Gender Identity Center of Colorado; GLBT Community Center of Colorado; Interfaith Alliance of Colorado; Northern Colorado Equality; One Colorado; PFLAG Boulder County; PFLAG Greeley; Southern Colorado Equality Alliance; Trans* Youth Education and Support (TYES); Transformative Freedom Fund; Sikh American Legal Defense and Education Fund; Sikh Coalition; National LGBTQ Task Force; Denver Metro Chamber of Commerce; NAACP Legal Defense & Education Fund, Inc.; Transgender Legal Defense & Education Fund; People For the American Way Foundation; Microsoft Corporation; Amazon, Inc.; Google LLC; any state, municipal, local chapters, or other subgroups of any of the previously listed organizations.

10. All documents reflecting, mentioning, or relating to the statements, considerations, views, or thoughts of Governor Hickenlooper, the Office of the Governor, or any of their agents, employees, or representatives from June 1, 2012, through the present regarding any of the eleven topics listed in Request No. 1.
11. All documents reflecting, mentioning, or relating to the statements, considerations, views, or thoughts of Governor Hickenlooper from June 1, 2012, through the present regarding any of the following terms or topics: “religious liberty,” “religious freedom,” “free exercise,” “freedom of religion,” “religious beliefs,” “religious freedom restoration act,” “RFRA,” “sexual orientation,” “gender identity,” “transgender,” “lesbian,” “gay,” “bisexual,” “homosexual,” “homophobic,” “LGBT,” “GLBT,” “same-sex marriage,” “gay marriage,” “opposite-sex marriage,” “traditional marriage,” “gender transition,” “Civil Rights Commission,” “Civil Rights Division,” “CADA,” “Anti-Discrimination Act,” “public accommodation,” “discrimination,” or “bigot.”
12. All documents reflecting, mentioning, or relating to the statements, considerations, views, or thoughts of any agent, employee, or representative of Governor Hickenlooper or the Office of the Governor from June 1, 2012, through the present regarding the terms or topics listed in Request No. 11.

Please note that I agree to pay any reasonable fees not exceeding \$400.00 that are permitted by law for responding to this request. If you anticipate that the fees will exceed \$400.00, please notify me by email before responding to this request. After completing the

EXHIBIT A

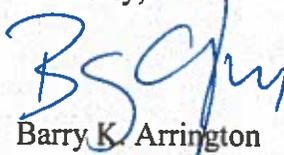
Office of the Governor
Page 4
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processing of this request, please provide a receipt itemizing the charges associated with this request.

If any of the requested documents are redacted or withheld, please specify the basis for the redaction or withholding and provide a log of documents that are withheld.

Please do not hesitate to contact me if you have any questions, need additional information regarding the scope of the records requested, or if there is anything I can do to expedite the processing of this request. You can reach me via e-mail at barry@arringtonpc.com. If possible, I ask that all records responsive to this request be sent to me via that e-mail address.

Sincerely,



Barry K. Arrington

From: Barry Arrington
To: [Stefanie Mann](#)
Cc: "[Hinojosa - GovOffice, Martina](#)"; "[Jacki Melmed - GovOffice](#)"
Subject: RE: CORA request
Date: Tuesday, September 18, 2018 11:14:28 AM

Dear Ms. Mann,

We agree to a temporary hold on the three outstanding CORA requests while your discussions proceed. We reserve the right to request the AG, the Governor and the Division to proceed with complying with the CORA requests at any time we deem the discussions to be at an impasse or otherwise unfruitful.

Sincerely,

Barry K. Arrington
Arrington Law Firm
3801 East Florida Avenue
Suite 830
Denver, Colorado 80210
Voice: 303.205.7870
Fax: 303.463.0410

From: Stefanie Mann <Stefanie.Mann@coag.gov>
Sent: Thursday, September 6, 2018 3:13 PM
To: barry@arringtonpc.com
Cc: Hinojosa - GovOffice, Martina <martina.hinojosa@state.co.us>; Jacki Melmed - GovOffice <jackic.melmed@state.co.us>
Subject: CORA request

Dear Mr. Arrington,
I represent the Governor's Office with respect to the attached Colorado Open Records Act request you submitted. The Governor's Office received your request on August 31, 2018, and are utilizing the extension provided in sections 24-72-203(3)(b)(I)-(III).
Sincerely,
Stefanie Mann

From: [Barry Arrington](#)
To: [Stefanie Mann](#); martina.hinojosa@state.co.us; jackic.melmed@state.co.us
Subject: RE: CORA request
Date: Friday, October 12, 2018 8:57:52 AM

Dear Ms. Mann, Ms. Hinoosa and Ms. Melmed,

As set forth below, we reserved the right to request the AG, the Governor and the Division to proceed with complying with the CORA requests. Please do so. Also, please provide your best estimate of the time you will require for compliance and the estimated cost.

Thank you.

Barry Arrington

From: Barry Arrington <barry@arringtonpc.com>
Sent: Tuesday, September 18, 2018 11:14 AM
To: 'Stefanie Mann' <Stefanie.Mann@coag.gov>
Cc: 'Hinojosa - GovOffice, Martina' <martina.hinojosa@state.co.us>; 'Jacki Melmed - GovOffice' <jackic.melmed@state.co.us>
Subject: RE: CORA request

Dear Ms. Mann,

We agree to a temporary hold on the three outstanding CORA requests while your discussions proceed. We reserve the right to request the AG, the Governor and the Division to proceed with complying with the CORA requests at any time we deem the discussions to be at an impasse or otherwise unfruitful.

Sincerely,

Barry K. Arrington
Arrington Law Firm
3801 East Florida Avenue
Suite 830
Denver, Colorado 80210
Voice: 303.205.7870
Fax: 303.463.0410

From: Stefanie Mann <Stefanie.Mann@coag.gov>
Sent: Thursday, September 6, 2018 3:13 PM
To: barry@arringtonpc.com

EXHIBIT C

Cc: Hinojosa - GovOffice, Martina <martina.hinojosa@state.co.us>; Jacki Melmed - GovOffice <jacki.melmed@state.co.us>

Subject: CORA request

Dear Mr. Arrington,

I represent the Governor's Office with respect to the attached Colorado Open Records Act request you submitted. The Governor's Office received your request on August 31, 2018, and are utilizing the extension provided in sections 24-72-203(3)(b)(I)-(III).

Sincerely,

Stefanie Mann

This e-mail message from Alliance Defending Freedom and any accompanying documents or embedded messages is intended for the named recipients only. Because Alliance Defending Freedom is a legal entity engaged in the practice of law, this communication contains information, which may include metadata, that is confidential, privileged, attorney work product, or otherwise protected from disclosure under applicable law. If you have received this message in error, are not a named recipient, or are not the employee or agent responsible for delivering this message to a named recipient, be advised that any review, disclosure, use, dissemination, distribution, or reproduction of this message or its contents is strictly prohibited. If you have received this message in error, please immediately notify the sender and permanently delete the message.
PRIVILEGED AND CONFIDENTIAL - ATTORNEY-CLIENT COMMUNICATION/ATTORNEY WORK PRODUCT.



CYNTHIA H. COFFMAN
Attorney General
MELANIE J. SNYDER
Chief Deputy Attorney General
LEORA JOSEPH
Chief of Staff
FREDERICK R. YARGER
Solicitor General

STATE OF COLORADO
DEPARTMENT OF LAW

RALPH L. CARR
COLORADO JUDICIAL CENTER
1300 Broadway, 10th Floor
Denver, Colorado 80203
Phone (720) 508-6000

Office of the Attorney General

October 17, 2018

Barry K. Arrington
Arrington Law Firm
3801 East Florida Avenue, Suite 830
Denver, CO 80210

Via e-mail only to: barry@arringtonpc.com

RE: Colorado Open Records Act Requests

Dear Mr. Arrington:

I received your October 12, 2018, e-mail renewing your Colorado Open Records Act (“CORA”) requests to the Office of the Governor, the Attorney General’s Office, and the Colorado Civil Rights Division (the “Division”) (collectively, the “State Officials”). As you know, each request was made after the Verified Complaint was filed on August 14, 2018 in U.S.D.C. Case No. 1:18-cv-02074-WYD-STV, *Masterpiece Cakeshop Inc., et al. v. Aubrey Elenis, et. al.* (hereinafter referred to as the “pending litigation”). In our view, it is not appropriate for Plaintiffs, Masterpiece Cakeshop Incorporated and Jack Phillips, to circumvent the discovery process by issuing CORA requests to the State Officials for records related to the facts, claims, and defenses at-issue in the pending litigation. Accordingly, we intend to file a motion asking the U.S. District Court to exercise its authority, both inherent and under the Federal Rules of Civil Procedure, to control the exchange of information between the parties by prohibiting Plaintiffs’ use of CORA to supplant or supplement the discovery process. Subject to the U.S. District Court’s ruling on that motion and without waiving their objections to your CORA requests, below is the status of each request and each State Official’s preliminary response to same.

Office of the Governor: Under section 24-72-205(6)(a), C.R.S., the Office of the Governor may impose a fee in response to a request for the research and retrieval of public records, exclusive of the first free hour of time. Per its CORA policy, which is publicly available here: <https://www.colorado.gov/governor/CORA>, the Office may charge an hourly rate not to exceed \$30 an hour (after the first hour) when specialized document production or specialized skills are required to research, retrieve, review, locate, compile or produce records pursuant to a records request, including the use of third-party contractors. Based on its preliminary search for

EXHIBIT D

records responsive to your request, the Governor's Office estimates it will cost \$11,302 to fulfill the request. Please note that we will notify you if the actual cost is lower or higher and, as applicable, will make arrangements to refund any overpayment or obtain your agreement to pay any higher cost. It is also important to note that the cost estimate is simply for the specialized staff time necessary to review the records and does not guarantee that any records reviewed ultimately will be produced.

The Office of the Governor will not begin processing your request until you approve the total cost estimate and provide an upfront deposit of one-half, equaling \$5,651. Additionally, the statutory timeline for responding is tolled until it has received the deposit.

The Colorado Civil Rights Division: Under section 24-72-205(6)(a), C.R.S., the Colorado Civil Rights Division may impose a fee in response to a request for the research and retrieval of public records, exclusive of the first free hour of time. In accordance with its CORA policy, which is publicly available here: <https://drive.google.com/file/d/0B8bNvcf083ydWkxkMUFRU09rZ2c/view>, when searching, retrieving, and redacting the records consumes more than one hour of staff time, the Division charges \$25 an hour for all staff time. Because the Division uses several methods to store its records, including but not limited to, microfiche, microfilm, electronic data, and archived records housed in off premises storage facilities, the Division estimates it will cost \$41,100 to fulfill the request. Please note that we will notify you if the actual cost is lower or higher and, as applicable, will make arrangements to refund any overpayment or obtain your agreement to pay any higher cost. It is also important to note that the cost estimate is simply for the staff time necessary to search for and review the records and does not guarantee that any records reviewed ultimately will be produced.

The Colorado Civil Rights Division will not begin processing your request until you approve the total cost estimate and provide full payment of \$41,100. Additionally, the statutory timeline for responding is tolled until it has received the payment.

Attorney General's Office: After receiving your initial request on August 29, 2018, I contacted you on September 4, 2018, to discuss your request. At that time we discussed the two search options available: (1) have every employee in the office, which is close to 600 people, conduct a manual search to determine if they have responsive records, or (2) have the office conduct an electronic search of the office e-mail and office file servers using any search terms you provided. You informed us that you would think about the options and get back to us on how you would like to proceed. To date, you have not communicated your preferred search option. Once you do so, the Attorney General's Office will work to prepare a cost estimate in accordance with section 24-72-205(6)(a), C.R.S. and its CORA policy, which is publicly available here: <https://coag.gov/node/1774>.

If the U.S. District Court denies the motion to prohibit Plaintiffs' use of CORA to circumvent discovery in the pending litigation, then the State Officials will proceed with fulfilling your CORA requests subject to the cost estimates and request for search instructions set forth above.

Sincerely,

/s/

STEFANIE MANN
Assistant Attorney General

CITIZEN CENTER, a Colorado nonprofit corporation, Plaintiff(s),

v.

SCOTT GESSLER, in his official capacity as Colorado Secretary of State; SHEILA REINER, in her official capacity as Mesa County Clerk & Recorder; SCOTT DOYLE, in his official capacity as Larimer County Clerk & Recorder; PAM ANDERSON, in her official capacity as Jefferson County Clerk & Recorder; HILLARY HALL, in her official capacity as Boulder County Clerk & Recorder; JOYCE RENO, in her official capacity as Chaffee County Clerk & Recorder; and, TEAK SIMONTON, in her official capacity as Eagle County Clerk & Recorder, Defendant(s)

Civil Action No. 12-cv-00370-CMA-MJW

United States District Court, D. Colorado.

July 16, 2012

ORDER REGARDING EMERGENCY MOTION OF CITIZEN CENTER FOR MAGISTRATE'S RECONSIDERATION AND STAY PENDING RECONSIDERATION OF PART OF THE COURT'S JUNE 4 SCHEDULING ORDER (DOCKET NO. 46)

MICHAEL J. WATANABE, Magistrate Judge.

This matter was before the court on July 13, 2012, for hearing on the Emergency Motion of Citizen Center for Magistrate's Reconsideration and Stay Pending Reconsideration of Part of the Court's June 4 Scheduling Order (docket no. 46). The court has considered the subject motion (docket no. 46), the joint response by County Clerk's (docket no. 57), the response by Scott Gessler, in his official capacity as Colorado Secretary of State (docket no. 58), and the reply (docket no. 66). In addition, the court has taken judicial notice of the court's file and has considered applicable Federal Rules of Civil Procedure and case law. Furthermore, the court has reviewed and carefully considered the Colorado Open Records Act ("CORA"). Lastly, the court has considered oral argument presented by the parties through counsel, Defendants' Exhibit A, and Plaintiff's Exhibits 1, 2, and 3. The court now being fully informed makes the following finding of fact, conclusions of law, and order.

In the subject motion (docket no. 46), Plaintiff argues that this court has misapprehended controlling law by granting what amounts to injunctive relief in excess of the magistrate's authority and without requiring satisfaction by the Defendants of any of the legal prerequisites for obtaining an injunction. [docket no. 46

at p. 4].

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court finds:

1. That I have jurisdiction over the subject matter and over the parties to this lawsuit. See Order of Reference dated July 20, 2011 (docket no. 6) by District Judge Arguello giving authority to Magistrate Judge Watanabe pursuant to 28 U.S.C. § 636(b)(1)(A)-(C) and Fed. R. Civ. P. 72 and D.C.COLO.LCivR 72.1C.
2. That venue is proper in the state and District of Colorado.
3. That each party has been given a fair and adequate opportunity to be heard.
4. That "[t]he Federal Rules of Civil Procedure recognize no motion for reconsideration." *Hawkins v. Evans*, 64 F.3d 543, 546 (10th Cir. 1995) (quotation and internal quotation marks omitted). "The court's treatment of the motion for reconsideration depends on whether the order is a final order that disposes of all claims and all parties or is an interlocutory order." *Gagliardi v. Duran*, 2009 WL 5220679, *1 (D. Colo. Dec. 31, 2009). "[A]ny order... however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is an interlocutory order which is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." *Id.* (quoting *Raytheon Constructors, Inc. v. Asarco Inc.*, 368 F.3d 1214, 1217 (10th Cir. 2003); *National Bus. Brokers, Ltd. v. Jim Williamson Productions, Inc.*, 115 F.Supp.2d 1250, 1255 (D. Colo. 2000)). "Notwithstanding the court's broad discretion to alter its interlocutory orders, the motion to reconsider is not at the disposal of parties who want to rehash old arguments." *National Bus. Brokers*, 115 F.Supp.2d at 1256 (quotation and internal quotation marks omitted). "Rather, as a practical matter, [t]o succeed in a motion to reconsider, a party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Id.* (quotation omitted). "A motion to reconsider... should be denied unless it clearly demonstrates manifest error of law or fact or presents newly discovered evidence." *Id.*
5. That on June 4, 2012, this court conducted a Rule 16 Scheduling Conference (see Docket No. 43, Courtroom Minutes/Minute Order) and entered a Rule 16 Scheduling Order dated June 13, 2012, *nunc pro tunc* June 4, 2012 (docket no. 53). During the Scheduling Conference, this court carefully considered the proffers made by the parties through their counsel concerning discovery and limitations on discovery, and this court entered a

Scheduling Order (docket no. 53) consistent with the needs of this case for discovery and consistent with Fed. R. Civ. P. 1 and the Civil Justice Reform Act.

6. That paragraph 8(d)(2) - Discovery Limitations - in the Rule 16 Scheduling Order (docket no. 53), states:

Plaintiff Citizen Center and its individual members shall refrain during discovery in this case from submitting Colorado Open Records Act ("CORA") requests to each of the Defendants for inspection and copying of public records that are otherwise obtainable using discovery in order to prevent Plaintiff from using CORA as a means to exceed the discovery limits included in this Order.

Plaintiff objects to the order set out in Paragraph 8.d.2. as burdensome to and violative of Citizen Center's and its members' First Amendment constitutional rights to freedom of speech and association and to petition the government and as injunctive relief that is beyond the scope of the Magistrate's authority to order.

7. That the plain language of paragraph 8(d)(2) in the Scheduling Order (docket no. 53) does not prohibit Plaintiff or its members from submitting any CORA requests to non-defendant County Clerks and Recorders.

8. That the plain language of paragraph 8(d)(2) in the Scheduling Order (docket no. 53) does not prohibit Plaintiff or its members from submitting any CORA requests to Defendants, but instead it prohibits them from using CORA as a means to circumvent this court's Scheduling Order (docket no. 53) and to abuse the discovery process to obtain discovery in excess of the limitations set by this court in the Rule 16 Scheduling Order (docket no. 53), thereby gaining an unfair advantage over Defendants, who do not have the parallel ability to submit CORA requests to Plaintiff. The Rule 16 Scheduling Order (docket no. 53) was entered by this court after carefully considering the proffers by the parties as to the need and the amount of discovery that was reasonable and necessary in order to address the merits of this case at the Scheduling Conference in light of Fed. R. Civ. P. 1 and 16 and the Civil Justice Reform Act.

Rule 1 of the Federal Rules of Civil Procedure states: Scope and Purpose:

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

Fed. R. Civ. P. 1 (emphasis added).

The word "administered" was added to Rule 1 in 1993 to indicate the affirmative duty of courts to exercise the authority conferred upon them by the Rules in ensuring that civil litigation is resolved not only fairly, but also

without undue cost or delay. Accordingly, allowing Plaintiff to ignore this court's reasonable discovery limits by submitting CORA requests, or soliciting members of Plaintiff to make such CORA requests, thwarts Rule 1 by allowing Plaintiff to impose unnecessary expenses on Defendants while itself avoiding any expense beyond that contemplated under the limitations of the Scheduling Order (docket no. 53). This court has previously ordered, in open court, that Plaintiff and Plaintiff's counsel shall share all information obtained during the discovery process to Plaintiff's members in order to avoid duplicative, unnecessary, and costly CORA requests by individual members to Defendants.

9. That Plaintiff's argument that paragraph 8(d)(2) - Discovery Limitations - in the Rule 16 Scheduling Order (docket no. 53) is a violation of the First Amendment is without merit. The Tenth Circuit has stated that no general First Amendment right to access government records exists. See *Smith v. Plati*, 258 F.3d 1167, 1178 (10th Cir. 2001) ("It is well-settled that there is no general First Amendment right of access to all sources of information within government control.") (citations omitted). See also *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) ("Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."); *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1511 (10th Cir. 1994) ("[T]here is no constitutional right, and specifically no First Amendment right, of access to government records.").

10. That public record access in Colorado under CORA is a creature of state statute, and such statute creates such a right to public record access but also imposes specific limitations on such right. In particular, CORA provides at § 24-72-204, C.R.S.:

(1) The custodian of any public records shall allow any person the right of inspection of such records or any portion thereof except on one or more of the following grounds or as provided in subsection (2) or (3) of this section:

...

(c) Such inspection is prohibited by rules promulgated by the supreme court or by the order of any court....

§ 27-72-204, C.R.S. (emphasis added).

11. That Plaintiff's argument that CORA only allows a court to issue an order prohibiting access to specific public records upon a request from a records custodian under § 24-72-204(6) [docket no. 46 at p. 5] is misplaced. The plain language in CORA, as stated above in paragraph 10, contains no such limitation, and neither § 24-72-204(6) nor § 24-72-204(1)(c), C.R.S., reference the other. Accordingly, the provision in CORA that allows access to public records to be limited by the order of any court should be viewed giving commonly-accepted

meaning to such language. Where the statutory language used is clear, there is no need for this court to use interpretive rules of statutory construction but should apply the statute as written. See *Neiberger v. Hawkins*, 70 F.Supp.2d 1177, 1184 (D. Colo. 1999). Further, the order of any court controls a party's access to public records in civil litigation regardless of whether CORA allows or prohibits access to the same records. See *Martinelli v. District Court In & For City & County of Denver*, 612 P.2d 1083, 1093 (Colo. 1980); *Morrison v. City & County of Denver*, 80 F.R.D. 289, 291-92 (D. Colo. 1978). Nothing in CORA prohibits a federal district court from entering and enforcing its own discovery limits in a case filed in the federal district court.

12. That Plaintiff's argument that paragraph 8(d)(2) - Discovery Limitations - in the Rule 16 Scheduling Order (docket no. 53) prohibits Plaintiff or its members from meeting with the Colorado Secretary of State is without merit. Nowhere in paragraph 8(d)(2) are the Plaintiff or Plaintiff's members prohibited from meeting with the Colorado Secretary of State.

13. That the court does not agree with the Plaintiff's argument that paragraph 8(d)(2) - Discovery Limitations - in the Rule 16 Scheduling Order (docket no. 53) is a "defacto injunction." Instead, inclusion of paragraph 8(d)(2) is an exercise of the court's inherent authority to control and limit the discovery process. Plaintiff's legal support of its argument in the form of *MAI Basic Four, Inc. v. Basis, Inc.*, 962 F.2d 978, 981 (10th Cir. 1992), and *United States v. McVeigh*, 157 F.3d 809, 813 (10th Cir. 1998), is inapposite to this case. See subject motion (docket 46) at p. 6. This court is well aware of its authority per the Order of Reference (docket no. 6) and the requirements for injunction relief under Fed. R. Civ. P. 65, see, e.g., *Salt Lake Tribune Pub. Co., LLC v. AT & T Corp.*, 320 F.3d 1081, 1099 (10th Cir. 2003).

In this case, paragraph 8(d)(2) is an Order on limitation on discovery and not a "defacto injunction" as suggested by Plaintiff, which is well within my legal authority as the Magistrate Judge per the Order of Reference (docket no. 6) to enter.

14. That the court, however, finds some merit to the Plaintiff's argument that paragraph 8(d)(2) - Discovery Limitations - in the Rule 16 Scheduling Order (docket no. 53) is overbroad because it reaches members who are not parties to this action. See *Sherwin-Williams Co. v. Spitzer*, 2005 WL 2128938 (N.D.N.Y. Aug. 24, 2005) (treating association individual members as non-parties for purposes of discovery); *New Hampshire Motor Transport Ass'n v. Rowe*, 324 F.Supp.2d 231 (D. Maine 2004) (same). Consequently, the language of paragraph 8(d)(2) will be slightly modified to delete mention of the association members.

That the court, however, cautions the Plaintiff and its members that discovery in this case must be conducted in

an orderly fashion, that this court will not tolerate discovery abuses, and that this court will not allow the Plaintiff and its members to use discovery and/or CORA requests as a sword and a shield. See *Sherwin Williams Co.*, 2005 WL 2128938, at *10. See also *New Hampshire Motor Transport Ass'n*, 324 F.Supp.2d at 237 (court indicated it would reconsider its ruling as to the third prong of the associational standing test if it turned out that the defendant's discovery was excessively inefficient or hampered by virtue of the associations' conduct). Plaintiff and Plaintiff's counsel shall make available to Plaintiff's members all information obtained during the discovery process in order to avoid duplicative and unnecessary CORA requests to the Defendants by individual members. If during the discovery process any party believes there has been an abuse of the CORA process with respect to requests related to this case, i.e., by members of the Plaintiff's association, an appropriate motion may be filed, and today's ruling removing mention of the members in paragraph 8(d)(2) in the Scheduling Order may very well be reconsidered.

ORDER

WHEREFORE, based upon these findings of fact and conclusions of law this court ORDERS:

1. That the Emergency Motion of Citizen Center for Magistrate's Reconsideration and Stay Pending Reconsideration of Part of the Court's June 4 Scheduling Order (docket no. 46) is GRANTED to the extent that the language of paragraph 8(d)(2) - Discovery Limitations - in the Rule 16 Scheduling Order (docket no. 53) shall now read:

Plaintiff Citizen Center shall refrain during discovery in this case from submitting Colorado Open Records Act ("CORA") requests to any of the Defendants for inspection and copying of public records that are related to this case and otherwise obtainable using discovery in order to prevent Plaintiff from using CORA as a means to exceed the discovery limits included in this Order; and

2. That each party shall pay their own attorney fees and costs for this motion.