

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Wiley Y. Daniel

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

MASTERPIECE CAKESHOP INCORPORATED, a Colorado corporation; and
JACK PHILLIPS,

Plaintiffs,

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official and individual capacities;
ANTHONY ARAGON, as member of the Colorado Civil Rights Commission, in his official capacity;
MIGUEL "MICHAEL" RENE ELIAS, as member of the Colorado Civil Rights Commission, in his official capacity;
CAROL FABRIZIO, as member of the Colorado Civil Rights Commission, in her official capacity;
CHARLES GARCIA, as member of the Colorado Civil Rights Commission, in his official capacity;
RITA LEWIS, as member of the Colorado Civil Rights Commission, in her official capacity;
JESSICA POCOCK, as member of the Colorado Civil Rights Commission, in her official capacity;
AJAY MENON, as member of the Colorado Civil Rights Commission, in his official capacity; and
PHILIP WEISER, Colorado Attorney General, in his official capacity,

Defendants.

ORDER OVERRULING OBJECTION

THIS MATTER is before the Court on Defendants' Fed. R. Civ. P. 72(a) Objection (ECF No. 85) to the Magistrate Judge's order denying Defendants' Motion for Order Prohibiting Plaintiffs' Use of Open Records Laws to Circumvent Discovery (ECF No. 79). For the reasons stated below, Defendants' Objection is overruled and Magistrate Judge Scott T. Varholak's order is affirmed.

Since Defendants' Objection to Magistrate Judge Varholak's nondispositive order is timely, I review the order to determine whether it is "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a). "An order is clearly erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Cook v. Rockwell Int'l Corp.*, 147 F.R.D. 237, 243 (D. Colo. 1993). "The clearly erroneous standard . . . requires that the reviewing court affirm unless it 'on the entire evidence is left with the firm and definite conviction that a mistake has been committed.'" *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1996) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). Review under the "clearly erroneous" standard is "significantly deferential." *United States v. Gallegos*, 314 F.3d 456, 462 n.3 (10th Cir. 2002) (quotation marks omitted).

Defendants' motion sought to prevent Plaintiffs from using the Colorado Open Records Act ("CORA") "to circumvent or supplement the discovery process" and from "using any records obtained through any third-party open records request for any purpose in this litigation." (ECF No. 46 at 10). Magistrate Judge Varholak denied the motion. Specifically, he stated

. . . And I think that the clear intent of the legislature to allow both discovery requests in a case and CORA requests in a case is illustrated in Colorado Revised Statute section 24-72-204(5)(b).

Because there, again, in discussing the attorneys' fees and costs, the legislature created an exception, such that a requester cannot get fees and costs if the requester could have obtained the requested documents through the discovery procedure in a case.

Well, that would be -- there's no point of having that in there if the legislature intended CORA to essentially be blocked as soon as a State case is -- as soon as any litigation is filed because there would be no ability to obtain the documents through litigation if there's no pending litigation. And so I think that that evidence is a clear intent [on] behalf of the Colorado legislature to not simply, on a regular basis, block CORA requests because there is pending litigation.

There is no dispute that plaintiff could have obtained all of these documents through a CORA request, had they done so prior to the litigation, and I see no reason to block it now that there is federal litigation.

I want to be clear that my ruling in no way reflects, or is intended to reflect, any intent of what in a parallel state proceedings a state court judge can do.

If the plaintiffs are using somehow CORA requests improperly to effect those state court proceedings and a state court judge deems it necessary to block that improper use of CORA, then a state court judge is obviously free to do so. And I am in no way commenting on the ability of a state court judge in the parallel proceeding to exercise his discretion interpreting -- his or her discretion interpreting Colorado law as he or she deems fit to address those CORA requests.

(ECF No. 84 at 36:14-37:22).

Defendants claim Magistrate Judge Varholak's ruling is incorrect for two reasons. First, Defendants argue "CORA expressly provides that the public's statutory right to access public records is *not* unlimited and, instead, may be limited or proscribed by other laws or the order of any court" and Magistrate Judge Varholak "erred as a matter of law in concluding that CORA does not expressly authorize the [Federal Rules of Civil Procedure] and orders of this Court to trump its provisions authorizing access to public records." (ECF No. 85 at 4). As a subset of this argument, Defendants claim Magistrate Judge Varholak misconstrued the legislative intent behind C.R.S. § 24-72-204(5)(b) contrary to Colorado law. (*Id.* at 5-7). I find that Defendants' first argument mischaracterizes Magistrate Judge Varholak's ruling and the subset argument is without merit.

Magistrate Judge Varholak never said he lacked authority to prohibit Plaintiffs from requesting documents through CORA. Instead, he found that Plaintiffs' CORA requests were not "an end-around around the discovery limitations . . . because what is being requested through CORA, one, are simply documents. And we're not talking about

interrogatories, we're not talking about depositions obviously, we're solely talking about documents. And it's [sic] documents that, by definition in Colorado, are open records; in other words, they're public documents." (ECF No. 84 at 35:2-11). He also noted that a state court judge in the parallel court proceeding could determine "that it's appropriate to prohibit a CORA request," which is a recognition that judges have authority to limit CORA requests. (*Id.* at 19:10-11).

This interpretation is consistent with CORA, because while C.R.S. § 24-72-204(1)(c) contemplates limitations on access to public documents by court order, nothing in CORA "expressly limit[s] access to any records merely because a person is engaged in litigation with the public agency from which access to records is requested," *People in Interest of A.A.T.*, 759 P.2d 853, 854 (Colo. App. 1988). Magistrate Judge Varholak properly exercised his discretion to determine Plaintiffs' CORA requests were appropriate because the requests were "a supplement" to discovery. (ECF No. 84 at 35:25-36:1).

Magistrate Judge Varholak's conclusion is supported by C.R.S. § 24-72-204(5)(b)'s acknowledgement that CORA requests may proceed alongside discovery procedures, as well as the legislative declaration of CORA which states "all public records shall be open for inspection *by any person at reasonable times*," without defining "any person" as only those not involved in litigation against a state agency. C.R.S. § 24-72-201. This conclusion is also consistent with *Martinelli v. District Court*, 612 P.2d 1083 (Colo. 1980), a case Defendants rely on, because Magistrate Judge Varholak found, in this case, that Plaintiffs' CORA request was not an "end-around around the discovery limitations" and were intended to "supplement" discovery. (ECF No. 84 at 35:3, 35:25-36:1).

Second, Defendants argue Magistrate Judge Varholak's "denial of the CORA Motion also was contrary to the [Federal Rules of Civil Procedure] because allowing Plaintiffs to subvert the discovery process by using the 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." (ECF No. 85 at 11). Magistrate Judge Varholak implicitly addressed this argument when he observed that many of the burdens Defendants highlighted in fulfilling CORA requests were a function of the statute. (ECF No. 84 at 17:11-20, 36:2-11). I agree with Magistrate Judge Varholak that Defendants' complaints about CORA is "a fix for the legislature and not for this Court[.]" (ECF No. 84 at 4:10-11). I also note that CORA already contains an internal scale that "balances the public's interest in access to information about how its government operates against the privacy interests of public officials and employees," *Denver Post Corp. v. Ritter*, 230 P.3d 1238, 1240 (Colo. App. 2009), in myriad ways and provides cost-shifting mechanisms to lighten the costs of state employees fulfilling CORA requests, C.R.S. § 24-72-205(6)(a).

In summary, I find that Magistrate Judge Varholak's conclusions are neither clearly erroneous nor contrary to law. Further, based upon my review of the record and case law, I do not have a definite and firm conviction that a mistake has been made and there is controlling law to support Magistrate Judge Varholak's legal conclusions.

Based on the foregoing, it is

ORDERED that Defendants' Fed. R. Civ. P. 72(a) Objection to the United States Magistrate Judge's Disposition of Their CORA Motion (ECF No. 85) is **OVERRULED**. Accordingly, Magistrate Judge Varholak's Order (ECF No. 79), entered on November 20, 2018, is **AFFIRMED**.

Dated: January 29, 2019.

BY THE COURT:

s/ Wiley Y. Daniel
WILEY Y. DANIEL,
SENIOR UNITED STATES DISTRICT JUDGE