

LA PLATA COUNTY DISTRICT COURT STATE OF COLORADO 1060 East 2 nd Avenue, Room 106 Durango, CO 81301 (970) 247-2304	
Plaintiff: JOHN SIMPSON; v. Defendants: CITY OF DURANGO, a Colorado Home Rule Municipality; FAYE A. HARMER in Her Official Capacity as City Clerk for the City of Durango; MARK MORGAN in His Official Capacity as City Attorney for the City of Durango; and JOSÉ R. MADRIGAL in His Official Capacity as City Manager for the City of Durango.	▲ COURT USE ONLY ▲
Counsel for Plaintiff: Matt Roane (Atty. Reg. No. 41018) Matt Roane Law P.O. Box 957 Pagosa Springs, CO 81147 Tel: (970)507-7117 E-Mail: mhroane@gmail.com	Case No: Div:
COMPLAINT	

COMES NOW Plaintiff John Simpson and files this Complaint against Defendants City of Durango, Faye A. Harmer, Mark Morgan, and José R. Madrigal, with the latter three defendants sued in their respective official capacities. In this case, Mr. Simpson seeks an order from the Court requiring Defendants to appear and show cause why they should not permit Mr. Simpson to inspect certain requested emails. In support of his claim for relief, Mr. Simpson presents the following averments for the Court's consideration and Defendants' response.

PARTIES AND VENUE

1. Plaintiff John Simpson is a natural person residing in La Plata County, Colorado.
2. Defendant City of Durango is a Colorado home rule municipality ("the City").
3. The City is a body politic and corporate, organized under the laws of Colorado.
4. Defendant Faye A. Harmer serves as the clerk for the City.
5. In her official capacity as City Clerk, Ms. Harmer is as an official custodian of emails made, maintained, or kept by the City Council, as well as those made, maintained, and kept by the City that are not specifically entrusted to any other office.
6. Ms. Harmer is a custodian of, at least, some of the emails sought in this lawsuit.
7. Defendant Mark Morgan serves as the City's city attorney.
8. In his official capacity as City Attorney, Mr. Morgan is a custodian of emails made, maintained, or kept by the City Attorney's office.
9. Mr. Morgan is a custodian of, at least, some of the emails sought in this lawsuit.
10. Defendant José R. Madrigal serves as the City's city manager.
11. In his official capacity as City Manager, Mr. Madrigal is a custodian of emails made, maintained, or kept by the City Manager's office.
12. Mr. Madrigal is a custodian of, at least, some of the emails sought in this lawsuit.

13. Hereafter, Ms. Harmer, Mr. Morgan, and Mr. Madrigal may be referred to jointly and severally as “Custodians”.
14. The emails at issue in this lawsuit are presently kept in La Plata County, Colorado.

STATEMENT OF FACTS

15. Colorado’s Open Records Act (CORA) declares it to be the public policy of this state that all public records shall be open for inspection by any person at reasonable times except as provided in C.R.S. § 24-72-201 et seq., or as otherwise specifically provided by law. See C.R.S. § 24-72-201.
16. On September 1, 2023, Mr. Simpson submitted a request to the City seeking “all back and forth email communications between the city attorney, city manager, and city councilors used to develop the Financial Advisory Board governance document. This is the document the FAB discussed at length at the 8/30 meeting.” (A true and correct copy of “the Request” is attached as Plaintiff’s Exhibit No. 1.)
17. On the same day, the City and Custodians responded to Mr. Simpson. (A true and correct copy of “the Response” is included in Plaintiff’s Exhibit No. 1.)
18. In the Response, the City and Custodians acknowledged emails exist that are responsive to the Request. (See Plaintiff’s Exhibit No. 1.)
19. Nonetheless, the City and Custodians explained that it was withholding the emails because each one constituted an attorney-client communication and was therefore excepted from the general production requirement set forth in CORA. (See Plaintiff’s Exhibit No. 1.)
20. On September 25, 2023, Mr. Simpson informed the City and Custodians that he respectfully disagreed with its Response and that he intended to file suit seeking judicial review of the matter.
21. On October 2, 2023, and again on October 12, 2023, the parties’ legal counsel conferred by telephone in hopes of settling their differences of opinion by voluntary agreement.
22. On October 17, 2023, the City and Custodians produced a set of heavily redacted email correspondences dated August 30, 2023, to Mr. Simpson in response to the Request. (A true and correct copy of “the Record Production” is attached as Plaintiff’s Exhibit No. 2.)
23. After a thorough review of the Record Production, Mr. Simpson still disputes the City’s and Custodians’ grounds for refusing to produce the redacted portions of the August 30,

2023, emails in response to the Request. (Hereafter, the redacted portions of the August 30, 2023, emails shall be collectively referred to simply as “the Emails”.)

COUNT ONE
(Violation of Colorado’s Open Records Act)

24. Mr. Simpson incorporates the preceding paragraphs, numbers 1 – 23, herein as if restated in their entirety.
25. C.R.S. § 24-72-204(5)(a) provides that “any person denied the right to inspect any record covered by this part 2 ... may apply to the district court of the district wherein the record is found for an order directing the custodian of such record to show cause why the custodian should not permit the inspection of such record.”
26. Part two of CORA covers “public records” as the term is defined in the statute. See C.R.S. § 24-72-202(6).
27. The Emails are public records, to wit:
 - A. The Emails exist as paper and/or other documentary material;
 - B. The Emails exist as digitally stored data;
 - C. The City of Durango Financial Advisory Board (FAB) is an advisory board to the City Council on specifically designated financial matters, city services, maintenance of city assets, fiscal responsibility, capital improvements, and growth management.
 - D. The Emails memorialize communications between members of the City Council concerning operation of the FAB, generally;
 - E. The Emails memorialize communications between members of the City Council concerning creation of bylaws for the FAB, specifically;
 - F. The Emails memorialize communications between members of the City Council and the City Attorney concerning the FAB;
 - G. The Emails memorialize communications between members of the City Council on matters involving the expenditure of public money.
 - H. The Emails were kept by the City and Custodians in accordance with the City’s public record retention policy.

28. To date, the City and Custodians continue to deny Mr. Simpson access to the Emails.
29. The Emails contain information that is not subject to withholding under CORA pursuant to the attorney-client privilege, to wit:
- A. Some of the Emails constitute communications between members of the City Council, only. These communications *do not* concern confidential matters communicated by or to the City Council, by or to the City Attorney, in the course of gaining counsel, advice, or direction about rights or obligations to the FAB.
 - B. Some of the Emails constitute communications between the City Council and the City Attorney. These communications *might* concern confidential matters communicated by or to the City Council, by or to the City Attorney, in the course of gaining counsel, advice, or direction about rights or obligations to the FAB.
 - C. The Emails referenced in subparagraph B above, however, also constitute “meetings” held in violation of Colorado’s Open Meetings Law (COML), C.R.S. § 24-6-401, *et seq.*, to wit:
 - i. The Emails memorialize a meeting of three or more members of the City Council;
 - ii. The Emails memorialize the City Council’s evolving creation of bylaws for the FAB;
 - iii. The Emails concern the subject matter of forthcoming legislation establishing bylaws for the FAB;
 - iv. The Emails memorialize the City Council’s discussion with the City Attorney about incorporating desired organizational elements into the bylaws for the FAB;
 - v. The City Council did not serve full and timely notice of the meetings memorialized in the Emails to the public at least 24 hours in advance of the meetings;
 - vi. The City Council did not afford the public access to the meetings memorialized in the Emails at all times;
 - D. The state of Colorado does not attach the attorney-client privilege to communications conducted between a local public body and its attorney during meetings conducted in violation of COML.

30. As a result of the withholding of the Emails, Mr. Simpson has been denied access to public information guaranteed him by CORA.

PRAYER FOR RELIEF

WHEREFORE PREMISES CONSIDERED, Mr. Simpson requests the following relief:

- An order issued pursuant to C.R.S. § 24-72-204(5)(a) requiring the Custodians to appear at the earliest practical time and show cause why the Emails should not be made available for public inspection;
- An order commanding an in-camera inspection of the Emails;
- A judgment issued pursuant to C.R.C.P. 57 declaring that the Emails constitute meetings conducted by the City Council in violation of COML;
- A judgment issued pursuant to C.R.C.P. 57 declaring that the Emails are not protected from disclosure under CORA as privileged attorney-client communications;
- An order issued pursuant to C.R.S. § 24-72-204(5)(b) requiring the Custodians to make the Emails available for public inspection;
- An award of costs, expenses, and attorney fees to Mr. Simpson; and
- Such other and further relief as the Court deems just and equitable.

Respectfully submitted this ____ day of November, 2023.

MATT ROANE LAW

Matt Roane
Legal Counsel for John Simpson