DISTRICT COURT, DELTA COUNTY, COLORADO **501 Palmer St., #338** **Delta, Colorado 81416**	DATE FILED: April 17, 2023 1:42 PM CASE NUMBER: 2022CV30005
DELTA COUNTY CITIZEN REPORT, INC., et al., **Plaintiffs,** **v.** **DELTA COUNTY FINANCE DIRECTOR, in his or her official capacity as Finance Director for Delta County, Colorado, and/or CUSTODIAN OF FINANCIAL RECORDS FOR THE DELTA COUNTY ADMINISTRATOR, in his or her official capacity as the custodian of records for the County Administrator for Delta County, Colorado,** **Defendant**	**COURT USE ONLY**
	Case Number: 2022 CV 30005 **Division: 5**

ORDER ON SHOW CAUSE HEARING REGARDING COLORADO OPEN RECORDS ACT

This matter was before the Court on April 11, 2023 for a show cause hearing pursuant to provisions of the Colorado Open Records Act. Plaintiffs appeared with Attorney Mochulsky; Defendant appeared with Attorneys Behrmann and Baier. The Court heard testimony from Ms. Kalenak; Ms. Davey; Ms. Anderson; Ms. Place-Wise; and Ms. LeValley. The parties stipulated to the admission of all identified exhibits.

I. FACTS & HISTORY

Plaintiffs have moved for relief concerning four CORA requests made between September 2019 and November 2021. The requests called for the disclosure of

information for all Delta County credit card/debit card transactions and accounts associated with or used by Robbie LeValley in her capacity as the Delta County Administrator as well as certain current or former county commissioners. Plaintiff alleges that the responses from Delta County (hereafter "County") were either unresponsive, or that the disclosures were incomplete, thus effecting a denial of the right to inspect such records in violation of CORA.

Defendant argues that all records have been made available to Plaintiffs that are responsive to the CORA requests. The Court, having reviewed the record, the evidence from the hearing, and applicable authority now issues this order.

II. ANALYSIS

Plaintiffs made a total of four CORA requests beginning on September 6, 2019. Each request included similar language, requesting information related to credit card or debit card expenditures for accounts "associated with" or used by County Administrator Robbie LeValley or named Delta County Commissioners. The CORA requests were dated September 6, 2019 (Exhibit 1), September 12, 2019 (Exhibit 2), March 24, 2021 (Exhibit 4), and November 11, 2021 (Exhibit 6)[1]. The Court will refer to the CORA requests by numbers 1 to 4, respectively.

[1] The County filed a motion to dismiss asserting that the two-year statute of limitations for CORA requests 1 and 2 had expired prior to the initiation of this action on February 8, 2022. By order dated April 21, 2022, the Court denied the Motion as there were fact issues that needed to be resolved. As will be detailed in this Order, the Court does not find that the County denied the right to inspect the records and therefore the Court will not further address the issue of whether the statute of limitations had expired at the time of filing this action. The Court will note that the testimony of Ms. Kalenak was that she "knew" that there should be more records than were produced in response to CORA 1 and 2, thus suggesting that the statute of limitations commenced in September 2019 and had expired at the time of filing the complaint.

Documents were produced to Plaintiffs by the County in response to CORA requests 1, 2, and 4 (Exhibits A to AAF). With regard to CORA request 3, a response was provided to Plaintiffs explaining an estimate of the time and expense involved with producing the documents requested and advising that one-half of the cost would need to be paid by Plaintiffs in order for the County to begin to locate and copy documents. Plaintiffs did not respond or make a deposit for the requested documents.

Plaintiffs contend that there remain documents that have not been produced that would be responsive to CORA requests 1 and 2; that the cost estimate for documents responsive to CORA 3 was unreasonable; and that the documents produced in response to CORA 4 were not timely provided to Plaintiffs. The County contends that all documents responsive to the requests have been provided and there has not been a denial of inspection of records in violation of CORA.

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 inspection of such record." The parties agree that CORA applies and the records at issue are public records. In order to prevail, Plaintiffs must show that the County improperly withheld a public record. Wick Communications Co. v. Montrose County Bd. Of County Comm., 81 P.3d 360, 363 (Colo. 2003).

CORA 1 and 2.

The Court has reviewed the records produced in response to CORA 1 and CORA 2 and does not find that there has been a denial of the right to inspect records responsive to such requests. Other than asserting that she "knows" that more records exist, Ms. Kalenak was unable to identify a specific document that has not been produced. Thus, regarding CORA 1 and 2, the Court cannot conclude that the County improperly withheld any public record under the CORA requests.

Records were produced for CORA 1 for the credit card in Ms. LeValley's name after November 2018, which is when the account was opened; no evidence was introduced that Ms. LeValley ever actually used another credit card prior to that date and the meaning of "associated with" is vague and subject to interpretation. Ms. Davey testified that all records that were responsive to CORA 1 were provided to Plaintiffs.

The CORA 2 request expands the timeframe for production of records and adds a request for records related to credit cards for certain county commissioners. The language further adds that the records should be produced for accounts or cards "associated and/or used by" the individuals named. The records pertaining to Ms. LeValley had already been produced in response to CORA 1. The records provided in response to CORA 2 included credit card statements for the named commissioners; the testimony at the hearing was that no generic county credit cards existed and that cards had to have a name associated with them. As noted above, the testimony did not reflect that Ms.

LeValley *used* anyone else's credit card, although at times charges were placed on credit cards for her benefit. Ms. Davey testified that all records that were responsive to CORA 2 were provided to Plaintiffs. Again, Ms. Kalenak has been unable to identify a specific record that has been withheld and the Court cannot conclude that the County withheld any records from Plaintiffs in response to CORA 2.

CORA 3.

Plaintiff asserts that the cost estimate given to Plaintiffs in response to CORA 3 was not reasonable and therefore constitutes a denial of the right to inspect records. Ms. Anderson testified about how she arrived at the cost estimate, including her belief that there would be extensive investigation and research that would have to be done to locate the records. After review of the evidence, the Court concludes that the estimate was made in good faith based on the scope of the records request and information available to Ms. Anderson at the time.

Further, the Court does not find that requesting one-half of the estimate in advance of what was expected to be significant effort on the County's part was unreasonable. "[T]he imposition of an advance deposit was reasonable to avoid a situation where the [County] would need to pursue collection of any accrued fees." Mountain-Plains Investment Corporation v. Parker Jordan Metropolitan District, 312 P.3d 260, 268 (Colo. App. 2013). Ms. Kalenak did not inquire further about the deposit or advise the County that she was unable to make the

deposit. The fact that the actual cost associated with CORA 4 was only $99.00[2] does not make the estimate for CORA 3 or the request for the advance deposit unreasonable.

For the reasons stated, the Court does not find that the County denied the right to inspect records by providing the estimate of up to $4620 and requesting one-half of such amount up front.

CORA 4.

Plaintiffs assert that the County violated CORA regarding CORA 4 as the records were not provided within the time set forth at CRS § 24-72-203(3)(b). The request was made on November 11, 2021, and the records were produced on or about December 7, 2021. As noted in Exhibit 8, during the intervening period of time, counsel for the parties were regularly communicating about efforts to comply with the expansive request, including possibly refining the scope of the request. It is unclear to the Court whether communication was made during the initial three-day period required by the statute or within a seven-day period for "extenuating circumstances." Ultimately, the County produced approximately 750 records in response to CORA 4.

Extenuating circumstances that existed related to CORA 4 included a broadly stated records request encompassing six years; required locating the records in paper archives and scanning the documents; the responsible department was one person and there was a need to devote resources to an

[2] The estimate for CORA 4 was $750.00 and it was requested that fifty percent of such amount be paid in advance. Ultimately, the County produced the records to Plaintiffs without receiving the advance payment.

impending deadline that required the resources of the department; the volume of records requested could not reasonably be gathered within a three-day period without interfering with the custodian's other duties. As noted, counsel for the parties were communicating about the efforts being made to comply with the request.

Under the circumstances, the Court cannot find that there was a denial of the right to inspect records for CORA 4. It is clear from Exhibit 8 that efforts to produce the records were ongoing from the time of receipt of the request to the date the records were produced. While the December 2, 2021 letter is outside of the timelines set forth at CRS §24-72-203(3)(b), the County was communicating with Plaintiffs' counsel regarding the request and the extenuating circumstances that prevented production within 3 days.

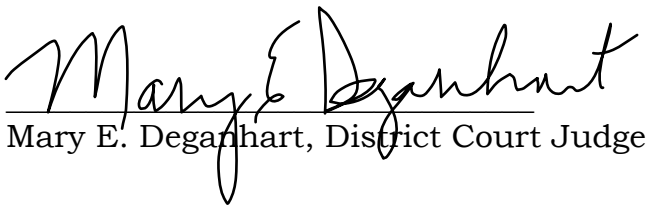
Based upon the evidence, the Court finds that it would not have been possible for the records custodian to comply with the request within the time limits set forth at CRS §24-72-203(3)(b). Citizens Progressive Alliance v. Southwestern Water Conservation Dist., 97 P.3d 308, 313 (Colo. App. 2004). Further, Plaintiffs were made aware of the efforts being made by the County to comply with the request and there was ongoing discussion between counsel in that regard. There was no effort to improperly withhold the records and ultimately the records were provided to Plaintiffs. For the reasons stated, a sanction regarding CORA 4 would be inappropriate.

III. CONCLUSION

Based upon the evidence and applicable authority, and for the reasons set forth above, the Court cannot find that the County denied the right to inspect any record requested by Plaintiffs in CORA requests 1 to 4. The Plaintiffs' claims are dismissed. The Court does not find that the action filed by the Plaintiffs was frivolous, vexatious, or groundless and therefore awards no fees or costs to the County.

Dated this 17th day of April, 2023

BY THE COURT:



Mary E. Degenhart, District Court Judge