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Colorado Supreme Court Confirms Public Entities May Not Deny Open Records Requests Simply Because Requestor is in Litigation with the Public Entity

Many practitioners in Colorado who have represented a party in litigation with a public entity or the public entity itself have wondered if records can be obtained by the non-public-entity party in that litigation through a request under the Colorado Open Records Act (CORA). Until recently, the Colorado Supreme Court had not squarely addressed that issue. But in *Archuleta v. Roane*, a majority of the Colorado Supreme Court held that a party to litigation with a public entity is not prohibited from requesting records from that public entity under CORA. To the contrary, as the Court held "a litigant may obtain records under CORA *even if* those records are relevant to pending litigation and the litigant has propounded no document requests under the Rules of Civil Procedure."

In *Archuleta*, the plaintiff had sued the Archuleta County Board of Commissioners (BOCC). During that litigation, the plaintiff did not engage in formal discovery. Instead, the plaintiff sent a request for records to the Archuleta County Clerk and Recorder under CORA. The Clerk and Recorder denied the request on the basis that the request circumvented the discovery limitations found in the Colorado Rules of Civil Procedure. The Clerk and Recorder specifically cited C.R.S. § 24-72-204(1)(c), which allows a public entity to deny an open records request when the "inspection is prohibited by rules promulgated by the supreme court of by the order of any court" and Rule 34 of the Colorado Rules of Civil Procedure.

The plaintiff sued under CORA asserting that his open records request had wrongly been denied. The district court agreed and ordered that the County Clerk and Recorder produce the request recording. The County Clerk and Recorder appealed to the Colorado Court of Appeals. The Court of Appeals affirmed, and the County

Clerk and Recorder asked the Colorado Supreme Court to review. The Court agreed to do so and affirmed.

In affirming, the Court in *Archuleta* began its analysis by emphasizing that "Colorado law favors transparency." And although CORA does allow denial of an open records request when the Colorado Rules of Civil Procedure prohibit inspection, the Court found that nothing in the Colorado Rules of Civil Procedure contains such a prohibition. The *Archuleta* court found that although various Rules may address document requests, none of them contain a prohibition on obtaining through CORA documents relevant to any ongoing litigation.

The *Archuleta* court also noted that another provision of CORA seems to contemplate that a party to litigation with the public entity may obtain documents relevant to the litigation from that public entity by submitting an open records request under CORA. Section 24-72-204(5)(b) requires a court to award attorney fees and costs to a party whose open records request under CORA has been denied and successfully challenges that denial, *except* when that party is a "person who has filed a lawsuit against" a public entity and the "records being sought are related to the pending litigation and are discoverable."

So the Court found that the plain language of CORA does not prohibit a party to litigation with a public entity from seeking and obtaining documents relevant to that litigation from the public entity through a CORA request.

The Court then turned to precedent. The County Clerk and Recorder argued that the Court's prior precedent prevents "civil litigants from using the statute to bypass discovery procedures." But the Court disagreed finding its prior precedent did not establish so broad a rule.

The Court also determined that analogous provisions of other states' open records laws, as well as the federal Freedom of Information Act (FOIA) support its interpretation of CORA. And those states that have found the prohibition advocated by the County Clerk and Recorder placed the prohibition directly in the text of the statute. Because the Colorado General Assembly did not do so (though it perhaps could have), the *Archuleta* court declined to do so through judicial fiat.

Footnote three of the majority's opinion is worth highlighting. In that footnote, the majority states that nothing "in this opinion should be construed to limit the authority of the court presiding over the declaratory-judgment action to otherwise regulate discovery and the admissibility of evidence in that action." The footnote continues that records "and information obtained under CORA are not immune from scrutiny under the governing procedural and evidentiary rules once a party seeks to deploy them as evidence in a civil proceeding. Legal authority to obtain records does not automatically bestow authority to use those records in court."

This footnote appears to permit the court presiding over the litigation to which the request sought under a CORA request to issue an order prohibiting use of CORA to obtain documents relevant to the litigation. As noted above, the text of CORA expressly permits a trial court to do so. Thus, *Archuleta* should not be read to prohibit a trial judge from managing discovery in a case involving a public entity, including by prohibiting the use of a CORA request to obtain documents relevant to that litigation. This read of footnote three is backed up by footnote four in Chief Justice Marquez's separate opinion concurring in the judgment. In footnote four, Chief Justice Marquez acknowledges "that today's decision seems to leave open the possibility that a case management order could expressly prohibit the parties from using CORA to obtain discoverable documents."

It is also worth noting that, although the Colorado Supreme Court was unanimous in the outcome of the case, Chief Justice Marquez, joined by Justice Samour, wrote separately to express their "grave concern" with the majority's reasoning and its consequences. Although Chief Justice Marquez has such concerns, she and Justice Samour nevertheless agree in the outcome because the plaintiff's open records request under CORA could be construed as a proper discovery request under the Colorado Rules of Civil Procedure. And, in Chief Justice Marquez's estimation, doing so would avoid the troubles she predicts the majority's opinion will cause.

Given footnotes three and four, and Chief Justice Marquez's separate opinion, parties to cases involving a public entity should discuss whether the trial court's case management order will regulate in any way the use of CORA requests to obtain documents that could otherwise be obtained in discovery through that litigation. Of course, attorneys representing those public entities will likely advocate for such regulations but attorneys for those litigating against the public entities will resist

such limitations. Counsel for all parties will be well-served to come armed with compelling arguments for their respective positions.

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