SUMMARY
July 14, 2022

2022COA78

No. 21CA0666, *Leonard v. Interquest* — Public Records — Colorado Open Records Act — Writings Involving the Receipt or Expenditure of Public Funds — Care, Custody, or Control of Documents

As a matter of first impression, a division of the court of appeals holds that when a public entity has a contractual right to access documents from a third party, that entity has "direct[ed] [the third party] to have care, custody, or control of the document[s]." *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1091 (Colo. 2011). If the documents are used for a public purpose, as they were here, the documents are therefore public records within the meaning of the Colorado Open Records Act (CORA), and the public entity must produce those documents upon a proper CORA request.

COLORADO COURT OF APPEALS **2022COA78**

Court of Appeals No. 21CA0666
El Paso County District Court No. 20CV30862
Honorable Laura N. Findorff, Judge
Honorable Frances R. Johnson, Judge

Timothy J. Leonard and Deepwater Point Company, a Colorado corporation,

Plaintiffs-Appellants,

v.

Interquest North Business Improvement District, a quasi municipal entity,

Defendant-Appellee.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE BERGER
Dailey and Tow, JJ., concur

Announced July 14, 2022

Nussbaum Speir Gleason, PLLC, Ian Speir, Edward A. Gleason, Colorado Springs, Colorado, for Plaintiffs-Appellants

Spencer Fane, LLP, John L. Watson, Jacob F. Hollars, Denver, Colorado, for Defendant-Appellee

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¶ 1 In this case arising under the Colorado Open Records Act (CORA), Timothy J. Leonard and the Deepwater Point Company (Leonard) requested certain documents from the Interquest North Business Improvement District (the District). When the District did not produce all the requested documents, Leonard sued. The district court ordered the production of some of the requested documents but denied the request to the extent it sought documents that were in the possession of entities other than the District. Leonard appeals that denial.

¶ 2 We hold that when a public entity has a contractual right to access documents from a third party, that entity has "direct[ed] [the third party] to have care, custody, or control of the document[s]." *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1091 (Colo. 2011). If the documents are used for a public purpose, as they were here, the documents are therefore public records within the meaning of CORA, and the public entity must produce those documents upon a proper CORA request. Accordingly, we reverse the judgment and remand for further proceedings.

I. Relevant Facts and Procedural History

¶ 3 The District was formed under the Business Improvement District Act. *See* §§ 31-25-1201 to -1228, C.R.S. 2021. Its purpose is to finance, operate, and maintain public improvements for the benefit of the property within its boundaries. The District has taxing authority and has both collected and expended public funds for public improvements within the District.

¶ 4 The District has a close relationship with the developer Nor'wood Development Group and its related entity InterQuest Marketplace LLC (collectively, the Developer). Many of the officers and employees of the Developer hold positions of authority with the District.[1]

¶ 5 To create both public and private improvements within the District, the Developer contracts for the construction of a project. Once construction is completed, the Developer seeks reimbursement from the District for the cost of the public improvements; the Developer bears the costs of the private

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[1] The District has no employees. Instead, an outside accounting firm, CliftonLarsonAllen LLP, manages the District's day-to-day affairs. Each of the District's five directors also works for or owns interests in the Developer.

improvements. After an independent engineer audits and approves as reasonable the Developer's reimbursement request, the District pays those monies to the Developer.[2] Under this arrangement, the District has reimbursed approximately $15 million to the Developer.

¶ 6 The parties formalized this arrangement in a "Facilities Funding and Reimbursement Agreement," which applied to projects that occurred both before and after its execution. Under the Reimbursement Agreement,

> [t]he District shall acquire any completed Public Improvements, as appropriate, upon receipt by the District [from the Developer] of the following as may be applicable to the specific project:
>
> . . . .
>
> (3) Copies of all contracts, pay requests, change orders, invoices, the final AIA payment form (or similar form), canceled checks and any other requested documentation to verify the amount requested[.]

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[2] The record is not clear as to who selected the engineer. The District has referred to the certifying engineer as the "District Engineer." But under the Reimbursement Agreement, the Developer "shall obtain and provide to the District a certification of an independent engineer that" the costs are reasonable.

¶ 7 After this litigation began, however, the District adopted a "Resolution Regarding Reimbursement of Costs Expended for Public Improvements." The Resolution states that the District accepts "the District Engineer's opinion in lieu of the documentation requirements outlined in the District Reimbursement Agreement."

¶ 8 Part of Leonard's CORA request sought the production of "[c]ontracts with those who performed the construction and consulting work for the installation of the public improvements paid for by the District" and "[i]nvoices and payments made to Nor'wood and Interquest Marketplace, LLC, or any related entity of either, for work or services performed on behalf of the District." The District claimed that it produced all responsive documents in its possession.

¶ 9 The district court ordered production of construction-related records the District had in its possession. The court also concluded that if the District did not have "any such construction-related records, even if those records exist in the possession of InterQuest or other business entities connected to the improvements, the court does not order that the District must obtain them from those private entities." The court reasoned that it did not have "authority

to order the District to obtain and produce or disclose the requested documents from the private engineers."

II. Analysis

¶ 10 Leonard contends that the district court misconstrued CORA by denying his request for the construction contracts and payment records on the ground that the documents were not in the District's possession. We agree.

A. Standard of Review, Preservation, and Principles of Statutory Interpretation

¶ 11 This issue presents a question of statutory interpretation. We "review de novo questions of law concerning the correct construction and application of CORA." *Prairie Mountain Publ'g Co., LLP v. Regents of Univ. of Colo.*, 2021 COA 26, ¶ 10 (quoting *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1170 (Colo. 2005)). The parties agree, as do we, that Leonard preserved this issue for appeal.

¶ 12 When considering questions of statutory interpretation, our ultimate goal is to effectuate the legislature's intent. *Id.* at ¶ 12. We do so by giving "all the statutory words their plain and ordinary meaning, harmonizing potentially conflicting provisions, and

resolving conflicts and ambiguities in a way that implements the legislature's purpose." *Mountain-Plains Inv. Corp. v. Parker Jordan Metro. Dist.*, 2013 COA 123, ¶ 14.

B. The Construction Contracts and Payment Records are "Public Records" under CORA

¶ 13 The General Assembly has declared that "all public records shall be open for inspection by any person, at reasonable times," subject to certain exceptions. *Ritter*, 255 P.3d at 1089 (quoting § 24-72-201, C.R.S. 2021).

¶ 14 "As in other CORA cases, the central issue in this case is whether the records requested by [Leonard] are 'public records' under CORA." *Id.* "When it is not clear whether the record is private or public, the court must determine as a threshold matter whether the requested records are likely public records as defined by CORA." *Mountain-Plains*, ¶ 23.

¶ 15 CORA defines a "public record" as

> all writings *made, maintained, or kept* by the state, any agency, institution, a nonprofit corporation incorporated pursuant to section 23-5-121(2), C.R.S., or political subdivision of the state, or that are described in section 29-1-902, C.R.S., and held by any local-government-financed entity for use in the exercise of functions required or authorized by

> law or administrative rule *or involving the receipt or expenditure of public funds*.

§ 24-72-202(6)(a)(I), C.R.S. 2021 (emphasis added).

¶ 16 The statute thus creates a two-part framework for analyzing whether a writing is a "public record" under CORA: a court must determine "(1) who made, maintained, or kept the requested record, and (2) why he, she, or it did so." *Ritter*, 255 P.3d at 1089.

¶ 17 When, as here, the requested documents are so intimately related to public funds, CORA's purpose is at its zenith. To provide public improvements, the District, a public entity, has paid the Developer approximately $15 million in public funds. The construction contracts and payment records obviously shed light on both the propriety and reasonableness of those payments. These requested documents therefore clearly involve "the receipt or expenditure of public funds." § 24-72-202(6)(a)(I).

¶ 18 The closer question is whether the requested documents were "made, maintained, or kept" by the District. *Id.* The Colorado Supreme Court has held that, under CORA, one "keeps" a "writing" when the writing is "in his care, custody, or control" or "*if he directs*

another to have care, custody, or control of the document." *Ritter*, 255 P.3d at 1091 (emphasis added).

¶ 19 The District has the contractual right under the Reimbursement Agreement to condition payments to the Developer on receipt of the construction contracts and payment records, the very records sought by Leonard. That contractual right to access the documents necessarily requires the Developer to retain the documents. Through this contract, the District has "direct[ed] [the Developer] to have care, custody, or control of the document[s]." *Id.*[3]

¶ 20 The critical question is whether the District has the right to access these documents, not whether the District, in any particular matter, acted on its authority. It makes no difference that the

[3] The District argues that if we accept Leonard's position, any records a regulatory agency has the authority to request from private entities are public records under CORA, even if the documents have not been requested by the agency. That is not this case, and we decide only the case before us. We note that the District's hypothetical situation is easily distinguishable from this case, where a private entity bargained with a public entity to give the latter a contractual right to access documents intimately related to the expenditure of public funds.

District has apparently not exercised its right to access these documents.[4]

¶ 21 To the contrary, the District's Resolution accepting the engineer's "opinion in lieu of the documentation requirements outlined in the" Reimbursement Agreement further proves that the District directed the Developer to keep these documents. The Resolution acknowledged that the District had the authority to receive these documents from the Developer and was foregoing that right.

¶ 22 This court's opinion in *International Brotherhood of Electrical Workers Local 68 v. Denver Metropolitan Major League Baseball Stadium District*, 880 P.2d 160, 164 (Colo. App. 1994) (*IBEW*), supports our analysis. In that case, a special district hired a general contractor to construct Coors Field. *Id.* at 162. The general contractor then selected a subcontractor to perform electrical work. *Id.* As a part of the selection process, the subcontractor submitted

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[4] We express no opinion whether the District, consistent with its responsibilities to the residents of the District, could completely forego the right to review and inspect documents that so relate to the expenditure of the District's public funds.

certain documents to the general contractor. *Id.* The court held those documents were "public records" under CORA:

> Testimony at the hearing indicated that the documents at issue, while never in the actual personal control or custody of any employee or officer of the [district], were maintained by [the general contractor] in such a manner as to give the [district] full access to the documents. The documents were used by at least one employee of the [district] in the process of approving the selection . . . .
>
> Thus, that the records were not made or kept by the [district] is not determinative and the record supports the trial court's factual determination that the documents were public records in the custody of the [district].

Id. at 164.

¶ 23 Similarly, under the Reimbursement Agreement, the Developer maintained the documents "in such a manner as to give the [District] full access to the documents." *Id.* True, the District itself apparently never used the documents, unlike the district employee in *IBEW*. (But the "District Engineer" apparently did use the documents in the course of certifying the reasonableness of the payments sought by the Developer). Nevertheless, the District "direct[ed] [the Developer] to have care, custody, or control of the

document[s]" through the Reimbursement Agreement. *Ritter*, 255 P.3d at 1091.

¶ 24 The District argues that it did not make, maintain, or keep these documents under *Mountain-Plains*. In that case, a division of this court held that emails among private third parties (that were not received by a public entity) were not public records under CORA. *Mountain-Plains*, ¶¶ 30-36.

¶ 25 *Mountain-Plains* is distinguishable because here the District bargained with the Developer for the right to access the construction contracts and payment records. The public entity in *Mountain-Plains* had no similar contractual obligation to keep the requested emails from private parties.[5]

¶ 26 For these reasons, we reverse the district court's judgment concluding that it did not have the authority to order the production of the construction contracts and payment records.

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[5] In any event, we are not bound by the decisions of another division of this court. We must, however, apply the Colorado Supreme Court's binding holding in *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1089 (Colo. 2011). *Doe v. Univ. of Denver*, 2022 COA 57, ¶ 88.

III. Leonard's Request for Attorney Fees

¶ 27 Leonard requests attorney fees under section 24-72-204(5), C.R.S. 2021, and C.A.R. 39.1. *See Benefield v. Colo. Republican Party*, 2014 CO 57, ¶ 9. The district court already has awarded some attorney fees to Leonard. As to the issues presented in this appeal, Leonard has succeeded, and he is entitled to additional attorney fees on appeal and in the district court proceedings under section 24-72-204(5). On remand, the district court must enter an additional award of attorney fees for both the district court and appellate proceedings.

IV. Disposition

¶ 28 The district court's judgment denying access to the construction contracts and payment records is reversed. The case is remanded for further proceedings, including proceedings to determine whether any statutory redactions to the records are necessary and to determine the amount of additional fees to which Leonard is entitled.

JUDGE DAILEY and JUDGE TOW concur.