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SUMMARY
October 13, 2022

2022COA121

Nos. 22CA0740 & 22CA0815, *DiPietro v Coldiron* — Public Records — Colorado Open Records Act — Allowance or Denial of Inspections — Attorney-Client Privilege — Deliberative Process Privilege — Person in Interest

In this C.A.R. 4.2 interlocutory appeal, a division of the court of appeals considers as a matter of first impression whether records protected by the attorney-client privilege or the deliberative process privilege are nevertheless subject to disclosure to a “person in interest” under the Colorado Open Records Act. The division concludes that they are not subject to disclosure under the plain language of section 24-72-204(3)(a), C.R.S. 2022.

COLORADO COURT OF APPEALS **2022COA121**

Court of Appeals Nos. 22CA0740 & 22CA0815
Larimer County District Court No. 21CV183
Honorable Gregory M. Lammons, Judge

Michele DiPietro,

Plaintiff-Appellee,

v.

Delynn Coldiron, in her official capacity; Moses Garcia, in his official capacity; and the City of Loveland, Colorado,

Defendants-Appellants.

ORDERS REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division A
Opinion by JUDGE YUN
Navarro and Pawar, JJ., concur

Announced October 13, 2022

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¶ 1 This C.A.R. 4.2 interlocutory appeal asks us to decide whether records protected by the attorney-client privilege or the deliberative process privilege are nevertheless subject to disclosure to a "person in interest" under the Colorado Open Records Act (CORA). We conclude that they are not subject to disclosure and, therefore, reverse the district court's orders.

I. Background

¶ 2 Plaintiff, Michele DiPietro, was a paralegal for the Loveland City Attorney's Office. After DiPietro's employment ended, she made CORA requests for records in which she was the "person in interest" — the subject of the records. Defendants, Delynn Coldiron (the Loveland City Clerk) and Moses Garcia (the Loveland City Attorney), in their official capacities, and the City of Loveland (collectively, the City), notified DiPietro that, pursuant to CORA, the City was withholding some emails that involved her because they fell under the deliberative process privilege or the attorney-client privilege.

¶ 3 DiPietro then filed an application for an order to show cause why the City should not allow DiPietro to inspect the records under CORA. DiPietro also asked for (1) a declaratory judgment that the

City of Loveland's open records regulation, which dictates the City's administrative and procedural responses to CORA requests, violates state law; and (2) injunctive relief permanently precluding the City from enforcing that regulation.[1]

¶ 4 The City moved for an in camera review of the withheld emails and "judgment in favor of defendants and against plaintiff, denying DiPietro's application for an order to show cause." After the district court reviewed the withheld emails in camera, it issued two orders: one requiring the City to disclose the emails protected by the attorney-client privilege and the other requiring the City to disclose the emails protected by the deliberative process privilege. In both orders, the court found that, although the privileges applied to the records at issue, DiPietro was entitled to inspect those emails because section 24-72-204(3)(a), C.R.S. 2022, unambiguously requires disclosure to the "person in interest."

¶ 5 The City now appeals both orders.

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[1] The City of Loveland regulation that DiPietro challenges in the court below is not at issue in this interlocutory appeal.

II. Jurisdiction

¶ 6 Before addressing the merits of the City's appeal, we explain why interlocutory review of the district court's orders is appropriate.

¶ 7 Under section 13-4-102.1(1), C.R.S. 2022, and C.A.R. 4.2(b), we may grant interlocutory review of orders in a civil case when the district court certifies and we agree that "(1) immediate review may promote a more orderly disposition or establish a final disposition of the litigation; (2) the order[s] involve[] a controlling question of law; and (3) that question of law is unresolved." *Affiniti Colo., LLC v. Kissinger & Fellman, P.C.*, 2019 COA 147, ¶ 12. The district court has certified this case for interlocutory appeal, so we address each requirement in turn.

¶ 8 First, our review will promote a more orderly disposition because the district court's orders are central to the litigation as a whole. *See id.* at ¶ 16 (concluding that interlocutory review is appropriate when it would "directly affect the court's resolution" of an issue in the litigation). Moreover, "the damage that could result from the disclosure of the privileged communications could not be undone on direct appeal." *Id.* at ¶ 15; *see also People v. Bloom*, 85 N.E. 824, 826 (N.Y. 1908) ("[W]hen a secret is out, it is out for all

time, and cannot be caught again like a bird, and put back in its cage.”).

¶ 9 Second, the challenged orders involve a controlling issue of law because the question of whether DiPietro is entitled to disclosure (1) directly affects her claim for relief on the application for an order to show cause under section 24-72-204(5); and (2) has widespread public interest, as “novel attorney-client privilege issues are issues of ‘great significance to our legal system.’” *Affiniti*, ¶ 19 (quoting *Wesp v. Everson*, 33 P.3d 191, 194 (Colo. 2001)); *see also Kowalchik v. Brohl*, 2012 COA 25, ¶ 15 (concluding that an order involved a controlling issue of law because it was potentially case-dispositive and “[t]he challenged order present[ed] issues of widespread public interest”).

¶ 10 Finally, the issue of whether privileged information must be disclosed to a person in interest under CORA is one of first impression in Colorado courts. *See Affiniti*, ¶ 14.

¶ 11 Accordingly, we conclude that our review of the City’s appeal is appropriate under section 13-4-102.1 and C.A.R. 4.2(b).

III. Analysis

¶ 12 We turn next to the merits of the City’s interlocutory appeal.

A. Standard of Review and Principles of Statutory Interpretation

¶ 13 We review issues of statutory interpretation de novo. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011).

¶ 14 "In construing a statute, our primary purpose is to ascertain and give effect to the legislature's intent." *McCoy v. People*, 2019 CO 44, ¶ 37. "To do so, we look first to the language of the statute, giving its words and phrases their plain and ordinary meanings." *Id.* "We read statutory words and phrases in context, and we construe them according to the rules of grammar and common usage." *Id.*

¶ 15 "We must also endeavor to effectuate the purpose of the legislative scheme." *Id.* at ¶ 38. "In doing so, we read that scheme as a whole, giving consistent, harmonious, and sensible effect to all of its parts, and we must avoid constructions that would render any words or phrases superfluous or lead to illogical or absurd results." *Id.*

B. CORA

¶ 16 Through the passage of CORA, sections 24-72-200.1 to -205.5, C.R.S. 2022, the General Assembly declared that "all public records shall be open for inspection by any person at reasonable times,

except as . . . provided by law." § 24-72-201, C.R.S. 2022; *see Jefferson Cnty. Educ. Ass'n v. Jefferson Cnty. Sch. Dist. R-1*, 2016 COA 10, ¶ 14 ("CORA's clear language creates a strong presumption in favor of disclosing records."). Thus, "[u]nder CORA, the custodian of a public record is generally required to make that record available to the public, subject to certain exceptions." *Ritter*, 255 P.3d at 1089.

¶ 17 Those exceptions are codified in CORA. As relevant here, section 24-72-204(3)(a) provides as follows:

> The custodian *shall deny* the right of inspection of the following records, unless otherwise provided by law; *except that the custodian shall make any of the following records*, other than letters of reference concerning employment, licensing, or issuance of permits, *available to the person in interest in accordance with this subsection (3)* . . . .

(Emphasis added.) A "person in interest," in turn, is defined as "the person who is the subject of a record or any representative designated by said person." § 24-72-202(4), C.R.S. 2022.

¶ 18 As mentioned above, this appeal concerns two categories of records under subsection (3): (1) records that fall within the deliberative process privilege, section 24-72-204(3)(a)(XIII), and

(2) records that fall within the attorney-client privilege, section 24-72-204(3)(a)(IV).

¶ 19 The law is well settled that records falling within these two categories are not subject to public inspection under CORA. *See Bjornsen v. Bd. of Cnty. Comm'rs*, 2019 COA 59, ¶ 54 ("Privileged information, including information falling under the attorney-client privilege, is not subject to public inspection under the CORA."); *Land Owners United, LLC v. Waters*, 293 P.3d 86, 95 (Colo. App. 2011) ("[T]he General Assembly . . . add[ed] a statutory deliberative process privilege to CORA's list of exemptions to disclosure.").

¶ 20 Still, no Colorado appellate case has addressed the question confronted by the district court here: Is a custodian required to disclose records that fall within the deliberative process privilege or the attorney-client privilege to a "person in interest" under section 24-72-204(3)(a)?[2]

[2] We note that this appeal does not involve the questions of whether the deliberative process privilege or attorney-client privilege apply to the contested records. The district court determined that the records fall within these privileges, and no party has asked us to review those findings. Thus, for purposes of this appeal, we assume that the deliberative process privilege and the attorney-client privilege apply.

C. Discussion

¶ 21 We conclude that the district court erred because (1) the plain language of CORA exempts from disclosure records protected by the deliberative process privilege and the attorney-client privilege and (2) the district court's contrary interpretation of CORA leads to an absurd result.

1. The Plain Language of CORA Does Not Compel Disclosure of Privileged Records to a "Person in Interest"

¶ 22 The district court concluded that a custodian is required to disclose records that fall within the deliberative process privilege and the attorney-client privilege to a person in interest. It found that the plain language of section 24-72-204(3)(a) is clear: the custodian "shall make any of the following records," including records otherwise protected by the deliberative process privilege or the attorney-client privilege, "available to the person in interest in accordance with this subsection (3)." According to the court, "[t]he exception to public disclosure is limited by subsection (3)(a)'s over-arching requirement of disclosure to a person in interest."

¶ 23 But the district court's interpretation does not give effect to the phrase "in accordance with this subsection (3)" or explain what

that phrase means. *See McBride v. People*, 2022 CO 30, ¶ 23 (When interpreting a statute "we avoid constructions that would render any words or phrases superfluous.").

¶ 24 The plain meaning of "in accordance with" is "in agreement or harmony with; in conformity to." *Krainewood Shores Ass'n v. Town of Moultonborough*, 260 A.3d 804, 808 (N.H. 2021) (quoting The Oxford English Dictionary 83 (2d ed. 1989)). By including this phrase in section 24-72-204(3)(a), the General Assembly made clear that any disclosure to a person of interest must be done in conformity to or in harmony with the rest of subsection (3).

¶ 25 This interpretation of the phrase "in accordance with" makes sense when subsection (3) is viewed as a whole because many of its parts include detailed requirements for disclosing certain records to a person in interest. *See* § 24-72-204(3)(a)(I) (medical records); § 24-72-204(3)(a)(X) (sexual harassment complaints and investigations); § 24-72-204(3)(a)(XIV) (veterinary records); § 24-72-204(3)(a)(XIX) (marriage licenses). Other parts of subsection (3), by contrast, do not specifically allow disclosure to a person in interest. Thus, any disclosure of the records in subsection (3) to a person in interest must conform with these

requirements. *See M.T. v. People*, 2012 CO 11, ¶ 8 ("The language at issue must be read in the context of the statute as a whole and the context of the entire statutory scheme." (quoting *Jefferson Cnty. Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010))).

¶ 26 Applying those principles to the subsections before us, we turn first to the deliberative process privilege under CORA, section 24-72-204(3)(a)(XIII), which outlines an extensive process to determine whether the privilege applies:

> If any public record is withheld pursuant to this subparagraph (XIII), the custodian shall provide the applicant with a sworn statement specifically describing each document withheld, explaining why each such document is privileged, and why disclosure would cause substantial injury to the public interest. If the applicant so requests, the custodian shall apply to the district court for an order permitting him or her to restrict disclosure. The application shall be subject to the procedures and burden of proof provided for in subsection (6) of this section. All persons entitled to claim the privilege with respect to the records in issue shall be given notice of the proceedings and shall have the right to appear and be heard. In determining whether disclosure of the records would cause substantial injury to the public interest, the court shall weigh, based on the circumstances presented in the particular case, the public interest in honest and frank discussion within government and the beneficial effects of public

> scrutiny upon the quality of governmental decision-making and public confidence therein.

¶ 27 The district court followed this process and found that the records at issue were protected by the deliberative process privilege:

> The emails contain discussions of personnel matters that are, in fact, pre-decisional and deliberative in nature. The emails frequently represent communications between city employees who are in the process of planning communications with Plaintiff. Taken as a whole, these discussions are frank discussions that, if disclosed to the public writ large, would chill open discussion of these matters over regular channels of communication.

Given this finding, however, the court should *not* have then concluded that the custodian was required to disclose the records to a person in interest. Doing so would not be in accordance with section 24-72-204(3)(a)(XIII) — to the contrary, it would directly conflict with that provision. Nothing in section 24-72-204(3)(a)(XIII) permits disclosure of records protected by the deliberative process privilege to a person in interest when disclosure would harm the public interest.

¶ 28 Turning next to records protected by the attorney-client privilege, the district court is correct that CORA carves out an exception to disclosure for

> [t]rade secrets, *privileged information*, and confidential commercial, financial, geological, or geophysical data, including a social security number unless disclosure of the number is required, permitted, or authorized by state or federal law, furnished by or obtained from any person.

§ 24-72-204(3)(a)(IV) (emphasis added). The Colorado Supreme Court has interpreted "privileged information" under this provision to include attorney work product and information protected by the attorney-client privilege. *See City of Colorado Springs v. White*, 967 P.2d 1042, 1055 (Colo. 1998).

¶ 29 Like the deliberative process privilege subsection, section 24-72-204(3)(a)(IV) does not carve out an exception for a "person in interest." Accordingly, it likewise follows that the "person in interest" provision of subsection (3)(a) does not apply to records protected by the attorney-client privilege. *See White*, 967 P.2d at 1055.

¶ 30 Moreover, a second provision of CORA specifically exempts from disclosure records protected by the attorney-client privilege. Section 24-72-204(1) provides, in relevant part, that

> [t]he custodian of any public records shall allow any person the right of inspection of such records or any portion thereof *except on one or more of the following grounds* . . . :
>
> (a) Such inspection would be contrary to any state statute.

¶ 31 In Colorado, the attorney-client privilege is codified in section 13-90-107(1)(b), C.R.S. 2022, which states as follows:

> An attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment; nor shall an attorney's secretary, paralegal, legal assistant, stenographer, or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity.

¶ 32 Thus, "giv[ing] consistent, harmonious, and sensible effect to all [of CORA's] parts," *Ritter*, 255 P.3d at 1089, we conclude that a person in interest is not entitled to the disclosure of records protected by the attorney-client privilege.

2. The District Court's Interpretation Leads to an Absurd Result Contrary to CORA's Purpose

¶ 33 Furthermore, to conclude that the records protected by the deliberative process privilege or the attorney-client privilege are nevertheless subject to disclosure to any person who is the subject of the records at issue would produce an absurd result, which we must avoid. *See Ritter*, 255 P.3d at 1089.

¶ 34 First, the General Assembly and the Colorado Supreme Court have long recognized the importance of the deliberative process privilege as "rest[ing] on the ground that public disclosure of certain communications would deter the open exchange of opinions and recommendations between government officials, and it is intended to protect the government's decision-making process, its consultative functions, and the quality of its decisions." *White*, 967 P.2d at 1047. To conclude that a person who is the subject of those important communications is entitled to inspect them would directly contradict the General Assembly's express intent in creating this exception to CORA disclosures.

¶ 35 Second, reading section 24-72-204(3)(a) as an exception to the attorney-client privilege would create an extraordinary and absurd

exception contrary to the legislature's express intent to protect attorney-client communications, both in the context of CORA and otherwise. Indeed, reading subsection (3)(a) as an exception to the attorney-client privilege would be entirely unlike any other exception to the privilege established by common law. *See DCP Midstream, LP v. Anadarko Petroleum Corp.*, 2013 CO 36, ¶ 40 (noting that the attorney-client privilege is not absolute in light of the crime-fraud and third-party exceptions to the privilege (citing *People v. Trujillo*, 144 P.3d 539, 542-43 (Colo. 2006))). To require disclosure of privileged documents between governmental officials and their attorneys to a person in interest would deprive the officials of effective and complete legal representation. *See A v. Dist. Ct.*, 191 Colo. 10, 22, 550 P.2d 315, 324 (1976) ("The attorney-client privilege is rooted in the principle that candid and open discussion by the client to the attorney without fear of disclosure will promote the orderly administration of justice."). We decline to interpret CORA in a way that would effectively destroy the attorney-client privilege for governmental entities.

¶ 36 While the district court is correct that, generally, "the attorney-client privilege is not absolute, and when the social

policies underlying the privilege conflict with other prevailing public policies, the attorney-client privilege must give way," that principle itself is not absolute. In the legislative declaration of CORA, the General Assembly specifically noted that exceptions are part of the public policy: "[A]ll public records shall be open for inspection by any person at reasonable times, *except as provided in this part 2 or as otherwise specifically provided by law*." § 24-72-201 (emphasis added).

¶ 37 Further, in *Losavio v. District Court*, the Colorado Supreme Court addressed a conflict between the attorney-client privilege and a competing public policy: the importance of the grand jury's subpoena power. 188 Colo. 127, 132-36, 533 P.2d 32, 34-36 (1975). In that case, the supreme court held that, while an attorney must testify in response to a grand jury subpoena, they may not testify regarding privileged information. *Id.* at 135, 533 P.2d at 36.

¶ 38 We conclude the dynamic in this case is similar to that in *Losavio*. While CORA compels the disclosure of most public records, withholding those limited documents that are protected by the attorney-client privilege or deliberative process privilege does not impermissibly curtail CORA's accountability function.

IV. Conclusion

¶ 39 For these reasons, we reverse the district court's orders and remand the case to the district court with directions to resolve DiPietro's remaining claims.

JUDGE NAVARRO and JUDGE PAWAR concur.