DISTRICT COURT, ARAPAHOE COUNTY STATE OF COLORADO 7325 SOUTH POTOMAC STREET CENTENNIAL, CO 80112 303-649-6253	DATE FILED: August 21, 2014 10:16 AM CASE NUMBER: 2014CV31595
In re Colorado Open Records Act Request No. 1834	**Δ COURT USE ONLY Δ**
	Case Number: 14CV31595 Division: 408

ORDER RE: THE CITY OF AURORA'S COLORADO OPEN RECORDS ACT REQUEST NO. 1834

This matter came before the Court on a Petition filed by the City of Aurora (the "City"), captioned In re Colorado Open Records Act Request No. 1834 (the "Petition"). Having considered the Petition, the underlying request for information, the file and the arguments of counsel, the Court finds, concludes and orders as follows:

BACKGROUND

On July 20, 2012, a gunman opened fire on the audience of a movie being shown at the Century 16 Theatre in Aurora, Colorado, and explosives were later found at the gunman's apartment (collectively the "Incident"). Approximately seventy people were shot, 12 of whom died. A suspect was arrested and charged with multiple counts in connection with the Incident. See, People v Holmes, 12CR1522 (the "Criminal Case"). The Criminal Case currently is set for trial, commencing on December 8, 2014. The Incident and the associated Criminal Case have generated a tremendous amount of publicity. As a result, the Court presiding over the Criminal Case has entered a number of Orders addressing matters relating to pre-trial publicity and the release of information in that case. See, e.g., Order re Motion to Unseal Court File (Including Docket) (C-4c), filed August 13, 2012; Amended Order re Motion to Limit Pre-Trial Publicity (D-2a), filed August 13, 2012; and Order re Motion Regarding Reconsideration of Pre-Trial Publicity Orders (D-2a), filed February 11, 2013. In its Orders, the Court presiding over the Criminal Case noted, among other things, that disclosure of information regarding the Criminal Case is governed in large part by the Colorado Open Records Act, C.R.S. § 24–72–201 et. seq., ("CORA") and the Colorado Criminal Justice Records Act, *See* C.R.S. § 24–72–301 et. seq. ("CCJRA").[1] The Court's jurisdiction to make decisions regarding the release of information

[1]The Court also noted that release of information regarding the Criminal Case by certain persons is subject to Colorado's Rules of Professional Conduct (the "Rules").

under CORA and CCJRA is limited to the procedures set forth in C.R.S. § 24–72–204(5) & (6) and C.R.S. § 24–72–305(7), respectively.

Following the Incident, the City commissioned an after action review report (the "AARR") which focused primarily on the response of the City's emergency forces, family and victim assistance, assistance to first responders, and support for the community on the day of, and in the days after, the Incident. On or about March 3, 2014, Ms. Ronda Clark submitted a request to the City under CORA under which Ms. Clark sought to obtain a copy of the AARR for use in her master's thesis (the "Request"). See Exhibit 4 to the Petition. The City concedes that the AARR is a public record which would be subject to disclosure under CORA. However, after analyzing the Request in good faith and exercising reasonable diligence and reasonable inquiry, the City concluded that it was unable to determine whether disclosure of the AARR would cause substantial injury to the public interest because disclosure of the AARR might materially prejudice the Criminal Case. As a result, the City filed the Petition pursuant to C.R.S. § 24-72-204(6)(a) of CORA. Through the Petition, the City asks the Court to determine whether disclosure of the AARR is prohibited.

The Court held a hearing on the Petition on August 14, 2014 at which the City was represented by counsel. Ms. Clark was given proper notice of the hearing but elected not to attend. No testimony or other evidence was presented at the hearing. However, the prosecution (the "People") and the defense (the "Defense") in the Criminal Case both were represented by counsel at the hearing, who appeared as friends of the Court, and the Court heard argument from each of them at the hearing due to their obvious interest in the issue raised by the Petition. Both the People and the Defense acknowledged the public's interest in the AARR, but argued that the AARR should not be released to the public until the trial in the Criminal Case has been completed.[2]

ANALYSIS UNDER THE CCJRA

The initial issue which must be determined is whether the AARR is a criminal justice record and, thus, is subject to the provisions of the CCJRA. As one of Colorado's open government laws, the CCJRA governs the public's access to criminal justice records. See Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't, 196 P.3d 892, 899 (Colo.2008); Madrigal v. City of Aurora, No. 12CA2551, 2014 WL 2148328 (Colo. App. May 22, 2014). The CCJRA defines criminal justice records as:

> all books, papers, cards, photographs, tapes, recordings, or other documentary materials, regardless of form or characteristics, that are made, maintained, or kept by any criminal justice agency in the state for use in the exercise of functions required or authorized by law or administrative rule, including but not limited to the results of chemical biological substance testing to determine genetic markers conducted pursuant to sections 16-11-102.4 and 16-23-104, C.R.S.

[2] On August 19, 2014, various members of the media (collectively the "Media") filed a Motion to Intervene in this case (the "Motion"). In the Motion, the Media maintains that the AARR should be released to the public. The Court has considered the Motion, and the arguments set forth therein, and find that the interests of the Media already are adequately represented by the existing parties. As a result, the Motion is denied.

C.R.S. § 24-72-302(4). The CCJRA defines criminal justice agency as:

> any court with criminal jurisdiction and any agency of the state, including but not limited to the department of education, or any agency of any county, city and county, home rule city and county, home rule city or county, city, town, territorial charter city, governing boards of institutions of higher education, school district, special district, judicial district, or law enforcement authority that performs any activity directly relating to the detection or investigation of crime; the apprehension, pretrial release, posttrial release, prosecution, correctional supervision, rehabilitation, evaluation, or treatment of accused persons or criminal offenders; or criminal identification activities or the collection, storage, or dissemination of arrest and criminal records information.

C.R.S. § 24-72-302(3).

Under the CCJRA, there are two types of criminal justice records: (1) records of "official actions," and (2) all other criminal justice records. C.R.S. §§ 24–72–301(2), –302(7); Madrigal, supra, citing Freedom Colo. Info., 196 P.3d at 898. An "official action" includes, among other things, records regarding an arrest, indictment, disposition, or release from custody. C.R.S. § 24–72–302(7). Subject to some exceptions barring disclosure, records of official actions generally "shall be open for inspection by any person"; all other criminal justice records "may be open for inspection" at the discretion of the custodian of the records. C.R.S. §§ 24–72–303, –304, –305, C.R.S.2013; Freedom Colo. Info., 196 P.3d at 898; Madrigal, supra.

Under the CCJRA, the custodian of a criminal justice record may deny access to the record on the ground that disclosure would be contrary to the public interest. C.R.S. § 24–72–305(5); Madrigal, supra.[3] Any person denied access to a criminal justice record may apply to the District Court for an order directing the custodian to show cause why inspection should not be permitted. C.R.S. § 24–72–305(7); Madrigal, supra. "Unless the court finds that the denial of inspection was proper," the court shall order the custodian to permit inspection. Id. A District Court reviews the custodian's decision under an abuse of discretion standard. Freedom Colo. Info, 196 P.3d at 899-900 (The custodian's determination constitutes an abuse of discretion when it is manifestly arbitrary, unreasonable, or unfair; it reflects a misapplication of the law; or it is not reasonably supported by competent evidence in the record.); Madrigal, supra.

In this case, the People maintain that the AARR is a criminal justice record (as opposed to being a record of an "official action") and, therefore, the decision to deny access to the AARR must be left to the discretion of the custodian of the AARR.[4] The Court agrees that the AARR is not a record of an "official action". However, the Court also finds and concludes that the AARR is not a criminal justice record. The AARR was prepared by a private company at the request of the City for the purpose of reviewing and analyzing how its various agencies, including but not limited to the Aurora Police Department ("APD"), responded to the Incident. Although the

[3] If the custodian does so, the applicant for the record may request a written statement of the ground for the denial. § 24–72–305(6), C.R.S.

[4] The City took the position that it could not determine whether the AARR was a criminal justice record. The Defense did not directly address this issue, but the Court assumes that the Defense agrees with the People's characterization of the AARR as a criminal justice record.

People and the Defense each have been given a copy of the AARR by the City, the AARR was not prepared as part of the criminal investigation or in the exercise of any other functions required or authorized by law or administrative rule. Indeed, the AARR specifically notes that investigation of the Incident itself, including the shooter's background and motivation, was largely outside the scope of the review. The goal of the AARR is to learn from the response to the Incident and thereby improve response by all city officials, including but not necessarily limited to the APD, the fire department, emergency medical personnel, and family and victim advocates, in the event that they have to respond to another mass casualty incident in the future. It must be noted that any such other future mass casualty incident would not necessarily be tied to any sort of criminal activity. It could be the result of a natural disaster (such as a fire or flood) or an accident (such as an airplane crash). The mere fact that the AARR relates to an investigation of the City's response to a criminal act does not automatically make the AARR a criminal justice record. Rather, the Court must look to the purpose and focus of the report. See, Losavio v. Mayber, 496 P.2d 1032, 1034 (Colo. 1972) (Whether a record is to be regarded as a public record in a particular instance will depend upon the purposes of the law which will be served by so classifying it. A record may be a public record for one purpose and not for another.). Where, as in this case, the purpose and focus of a report is on the City's response to a criminal act, as opposed to an investigation of the criminal act itself, the report cannot be said to constitute a criminal justice record.

The Court acknowledges that the People constitute a criminal justice agency, and that the People were given, and have maintained, a copy of the AARR in connection with their prosecution of the Criminal Case, which is a function required or authorized by law. However, the Court is not aware of any authority holding, and does not believe, that a non-criminal justice agency[5] can convert an otherwise public record, which was prepared by a private party at the non-criminal justice agency's request and which does not purport to investigate the underlying criminal act, into a criminal justice record merely by giving a copy of the record to the prosecution for its potential tangential use in a criminal proceeding.[6] Such a broad rule would allow non-criminal justice agencies to convert virtually any record into a criminal justice record. This would be contrary to the intent expressed by the legislature when it distinguished between criminal justice records (which are subject to CCJRA) and other public records (which are subject to CORA). It also would be inconsistent with the provision in C.R.S. § 24–72–204(2)(a)(IX)(C), which provides in part that a record that is maintained in a civil or administrative investigative file is not subject to withholding (except as set forth in C.R.S. § 24–

[5] The People acknowledged at the hearing that although certain agencies of the City, such as the APD, constitute criminal justice agencies, not all agencies of the City are criminal justice agencies. In order to be a criminal justice agency, the agency must engage in activity directly relating to the detection or investigation of crime; the apprehension, pretrial release, posttrial release, prosecution, correctional supervision, rehabilitation, evaluation, or treatment of accused persons or criminal offenders; or criminal identification activities or the collection, storage, or dissemination of arrest and criminal records information. C.R.S. § 24-72-302(3). In this case, it appears that the AARR was commissioned by the City Council, which would not constitute a criminal justice agency.

[6] This case is distinguishable from the situation presented in Harris v. Denver Post Corp., 123 P.3d 1166, 1172–73 (Colo.2005), in which the Colorado Supreme Court held that certain private recordings made by Eric Harris and Dylan Klebold that were obtained by law enforcement through a proper search warrant as part of a criminal investigation were subject to CCJRA not CORA. Unlike Harris, this case involves a report prepared at the request of a non criminal justice agency that would be governed by CORA but for the fact that it gratuitously was shared with a criminal justice agency (the People).

72–204(6)(a)) if it was received from a governmental entity and would be available if requested directly from the transmitting entity.[7] Under the circumstances presented in this case, the Court finds and concludes that the issue of whether the AARR should be produced should be governed by CORA, not the CCJRA.

The Court's conclusion that the AARR is not a criminal justice record is further supported by the fact that the City did not present any evidence suggesting that the City had the custodian of the AARR conduct the balancing test required under the CCJRA.[8] See, Freedom Colo. Info., 196 P.3d at 899 (identifying five factors which the custodian should consider when determining whether to permit inspection of a criminal justice record). This fact, coupled with the fact that the City brought the Petition under CORA,[9] compels the conclusion that the City did not believe the AARR was a criminal justice record.

ANALYSIS UNDER CORA

It is the public policy of this state, with certain exceptions, that all public records shall be open for inspection by any person at reasonable times. *See* C.R.S. § 24–72–201. This declaration has eliminated any requirement that a person seeking access to public records show a special interest in those records in order to be permitted access to them. Denver Publishing Co. v. Dreyfus, 520 P.2d 104 (1974); Bodelson v. Denver Pub. Co., 5 P.3d 373, 376-80 (Colo. App. 2000). C.R.S. § 24-72-204(6)(a) provides, in part, as follows:

> If, in the opinion of the official custodian of any public record, disclosure of the contents of said record would do substantial injury to the public interest, notwithstanding the fact that said record might otherwise be available to public inspection or if the official custodian is unable, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if disclosure of the public record is prohibited pursuant to this part 2, the official custodian may apply to the district court of the district in which such record is located for an order permitting him or her to restrict such disclosure or for the court to determine if disclosure is prohibited.

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[7] As noted above, the City conceded at the hearing that, assuming that the AARR is not a criminal justice record and thus is governed by CORA, unless disclosure of the AARR is barred by the public interest exception in CORA the AARR would be regarded as a public record that is subject to disclosure under CORA. Neither the People nor the Defense took exception to this concession, although the People argued that the CCJRA, not CORA, should apply to Ms. Clark's request.

[8] The City did not even present any evidence from which the Court could identify the custodian of the AARR. The People's representative, Mr. Orman, stated that he reviews records requests submitted to the People and that he routinely denies these requests when the records relate in any way to an ongoing criminal case. He acknowledged, however, that the request in this case was made to the City, not to the People. Because the People are not an agency of the City, the People cannot be viewed as the custodian of the City's copy of the AARR. Based on the limited information presented to the Court, it appears that the custodian of the City's copy of the AARR is the City Council which commissioned preparation of the AARR.

[9] The Court recognizes that the CCJRA does not contain a provision similar to the provision in CORA at C.R.S. § 24–72–204(6)(a) which allows a custodian to seek guidance from the Court where the custodian is not sure if release of the otherwise public record is prohibited. However, the City could have brought a claim under C.R.C.P. 57 seeking a declaratory judgment that the AARR was a criminal justice record if the City felt that was the case.

The intent of the legislature to restrict access to information where substantial harm to the public interest would occur is evident from the plain language of § 24–72–204(6), which provides that the court may restrict disclosure of a record "notwithstanding the fact that said record might otherwise be available for public inspection." Civil Serv. Comm'n v. Pinder, 812 P.2d 645, 648 (Colo. 1991).

A substantial injury to the public interest is not defined in the CORA. However, the substantial injury to the public interest exemption contained in § 24–72–204(6)(a) is to be used only in those extraordinary situations which the legislature could not have identified in advance. Bodelson, 5 P.3d at 377, citing Freedom Newspapers, Inc. v. Tollefson, 961 P.2d 1150 (Colo.App.1998). In considering whether disclosure of what otherwise would be public information is prohibited by the public interest exception set forth in § 24–72–204(6)(a), the Court must keep in mind that exceptions to the CORA must be narrowly construed. Bodelson, 5 P.3d at 377, (citing Sargent School District No. RE–33J v. Western Services, Inc., 751 P.2d 56 (Colo.1988)).

In its Orders regarding pre-trial publicity and the disclosure of information relating to the Criminal Case, the Court presiding over that case stressed its commitment to ensuring fairness and preserving the integrity of that proceeding—fairness for the victims, their families, the Defendant and everyone else touched by the Incident, including the public at large. This Court shares that commitment. Although the public certainly has a legitimate interest in the results of the review commissioned by the City which are set forth in the AARR, this legitimate interest must yield to the Court's ability to conduct a fair trial in the Criminal Case. See, e.g., Rules of Professional Conduct, Rule 3.6, comment 1 (Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved) and comment 6 (Criminal jury trials will be most sensitive to extrajudicial speech). Thus, this Court finds and concludes that the AARR can be disclosed to Ms. Clark and other members of the public only to the extent that disclosure will not substantially prejudice the Court's ability to conduct a fair trial in the Criminal Case.

At the hearing, the City expressed general concern that disclosure of the AARR might taint the jury pool by exposing them to additional publicity regarding the Incident. The People also expressed this concern, and stressed that if the AARR is released it certainly will be posted on the internet and, thus, will be available to virtually the entire world. The People maintained that there was some information regarding the Incident in the AARR that had not yet been made public.[10] The People also argued that because the AARR is an "official" document, the preparation of which was commissioned by the City, it likely will be viewed as an authoritative and absolutely accurate statement of what took place, and likely would be given more weight than the public gives to news articles regarding the Incident.[11] The People were concerned that

[10] In an attempt to determine the extent to which information regarding the Incident and the Criminal Case already is in the public domain, the Court reviewed a number of Orders that have been issued in the Criminal Case and a variety of news articles concerning the Incident and the Criminal Case. Based on this review, the Court generally believes that the information in the AARR regarding the Incident (as opposed to the response to the Incident) is consistent with the information that already has been made public. That being said, the Court cannot say that there is nothing in the AARR regarding the Incident that has not already been made public. The Court simply does not have sufficient knowledge regarding what has and has not been made public to make this determination

because the AARR contains some information regarding the Incident which the People believe is factually incorrect, release of the AARR would taint the jury pool by exposing them to incorrect information regarding the Incident. [12] The People urged the Court to consider the guidance set forth in Rule 3.6, and particularly comment 5 to Rule 3.6, of the Rules of Professional Conduct, which the Court has done. The Defense generally argued that disclosure of the AARR would violate Defendant's constitutional right to a fair trial. More specifically, the Defense stressed that statements in the Report regarding the Incident itself had not been tested for accuracy by cross examination or other means and thus could be giving an inaccurate statement of what took place. These are all serious, and legitimate, concerns.

The Court has reviewed the AARR, the public portions of the file in the Criminal Case, and various news reports regarding the Incident and the Criminal Case and has considered arguments of counsel. Based on this review, the Court finds and concludes that to the extent that the AARR contains a description of the Incident itself (including the arrest of the suspect and what was, or was not, found at the suspect's apartment) release of this information would have a substantial likelihood of materially prejudicing the Criminal Case and, thus, would result in a substantial injury to the public interest. The information in the AARR regarding the Incident itself merely repeats what the authors maintain they were told about the Incident. This information has not been tested for accuracy, either through cross examination or by other means, and may or may not be accurate. This information relates to factual determinations regarding the Incident that ultimately will have to be made by the jury in the Criminal Case. Exposing the public, which necessarily includes members of the jury pool, to this type of untested information involves an unacceptable risk of tainting the jury pool. This particularly is true given the fact that the AARR is an "official" document prepared at the request of the City as opposed to merely one more news report regarding the Incident.

The Court further finds and concludes that to the extent that the AARR merely reflects the authors' findings, conclusions and recommendations regarding the City's response to the Incident, release of this information would not have a substantial likelihood of materially prejudicing the Criminal Case and, thus, would not result in a substantial injury to the public interest. Additionally, the Court finds and concludes that the AARR does not contain any confidential information that would infringe upon the privacy rights of individuals named in the AARR.[13] The information in the AARR regarding the response to the Incident does not relate to factual determinations regarding the incident that the jury will have to make in the Criminal Case. For example, whether the first responders were able to communicate and coordinate

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[11] The People maintain that based on their experience only about 70% of what is reported in the media is accurate and that the public generally is skeptical of news reports. The Court believes that the accuracy of news reports varies dramatically, with some being very reliable and others being completely unreliable, and that it cannot determine in this case whether any news reports regarding the Incident are reliable. That being said, the Court does believe that the public generally is somewhat skeptical regarding news reports.

[12] Because the hearing was open to the public, the People did not give a specific example of information in the AARR that the People felt was factually inaccurate. Based on the limited information available to the Court regarding the Incident, the Court would not have been able to determine whether the allegedly inaccurate information was in fact inaccurate even if it had been specifically identified.

[13] The Court notes that the AARR generally does not identify persons by name. To the extent that individuals are referred to by name, it is not in the context of a personnel matter or other matter involving confidential information regarding that individual.

effectively during their response to the Incident is irrelevant to the issues that the jury will have to decide in the Criminal Case. Thus, release of the findings, conclusions and recommendations in the AARR regarding the response to the Incident does not create any meaningful risk of tainting the jury pool. This is true regardless of whether the City (or the public) accepts or rejects the findings, conclusions and recommendations in the AARR regarding the response to the Incident,

The Court has reviewed the AARR in detail and has redacted those portions of the AARR which the Court feels would prejudice the Court's ability to conduct a fair trial in the Criminal Case. A copy of the redacted AARR is attached, under seal, to this Order.[14] For the reasons stated above, the Court finds and concludes that disclosure of the redacted version of the AARR to Ms. Clark, and to the public at large, would not result in substantial injury to the public interest and the Court orders that the City may release the redacted version of the AARR to both Ms. Clark and to other members of the public who wish to see it.[15] Once the trial in the Criminal Case is completed, the City may release an un-redacted version of the AARR.

The Court hereby finds and concludes that the City, in good faith and after exercising reasonable diligence, and after making reasonable inquiry, was unable to determine whether release of the AARR was prohibited without a ruling by the Court. Accordingly, pursuant to C.R.S. § 24-72-204(6)(a), the attorneys fees provision in C.R.S. § 24-72-204(5) does not apply and, therefore, no costs or attorneys' fees are awarded.

The Court recognizes that the Petition raises controversial questions that do not have clear answers. The Court also recognizes that the City may wish to appeal the Court's decision and that any appeal would be rendered meaningless if the redacted version of the AARR was released pending the appeal. Accordingly, the Court hereby stays this Order for 21 days (to and including September 11, 2014) in order to give the City an opportunity to appeal this Order if it wishes to do so.[16]

Done this 21st day of August, 2014.

BY THE COURT:

F. Stephen Collins
District Court Judge

[14] The Court is maintaining a clean version of the AARR, without redactions, in its file for purposes of appellate review.

[15] The City advised the Court at the hearing that it had received at least one additional request under CORA for release of the AARR.

[16] The sealed redacted version of the AARR shall not be released to Ms. Clark or the public until the stay of this Order has expired.