

DISTRICT COURT, COUNTY OF ARAPAHOE, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲ COURT USE ONLY ▲
Plaintiff: <b>People of the State of Colorado</b>  v.  Defendant: <b>Holmes, James Eagan</b>	Case No. <b>12CR1522</b>  Division: <b>22</b>
<b>ORDER RE: MOTION REGARDING RECONSIDERATION OF PRE-TRIAL          PUBLICITY ORDERS (D-2a)</b>	

This Matter comes before the Court on the City of Aurora's Motion Regarding Reconsideration of Pre-Trial Publicity Orders (D-2a), filed January 15, 2013; Defendant's Response to City of Aurora's Motion Regarding Reconsideration of Pre-Trial Publicity Orders (D-2a), filed February 5, 2013, and the People's Response to D-2a, City of Aurora's Motion for Reconsideration of the Pre-Trial Publicity Orders, filed February 5, 2013. The Court has reviewed the pleadings and applicable law and FINDS and ORDERS as follows:

### FACTS

The City of Aurora has requested that this Court revisit and potentially modify its Amended Order Re: Motion to Limit Pre-Trial Publicity (D-2a), issued August 13, 2012 ("Order D-2a"). The City of Aurora states that it has received many requests for information regarding the theater shooting on July 20, 2012, and that it has refrained from disclosing any information out of respect for the investigation and proceedings in this criminal case. In doing so, the City of Aurora has denied requests from media entities, educational institutions, and individuals, and it has refused requests from law enforcement agencies across the nation to give presentations regarding its response to the theater shootings. Because the People have revealed underlying evidence about this case during the preliminary/proof evident hearing, the City of Aurora asks that this Court consider whether the proscription against public extrajudicial statements by law enforcement as set out in Order D-2a is now moot. The City of Aurora is requesting that it be allowed to speak publically about its response to the theater shootings and to release the recordings of the two 911 calls played in open court during the preliminary/proof evident hearing on January 8, 2013.

Defendant responded and objects to the City of Aurora's request for reconsideration of Order D-2a. Defendant first asserts that the City of Aurora does not have a legally cognizable interest in this case, and therefore this Court should reject the City of Aurora's intervention and dismiss the Motion. Second, Defendant states that the City of Aurora's Motion is both vague and broad and that the City of Aurora does not explicitly state what information it wishes to share, or how this Court's orders prevent it from sharing that information. Defendant asserts that the City of Aurora's arguments have been adequately addressed in Order D-2a, and it is Defendant's position that there is a high likelihood that release of some information related to this case could jeopardize his right to a fair trial by an impartial jury. Therefore, Defendant asks this Court to keep Order D-2a in place as currently issued and deny the City of Aurora's Motion.

The People also filed a response and reaffirmed their previous arguments regarding the release of information related to this case. The People did not articulate any direct objections to the City of Aurora's Motion.

## LAW & ANALYSIS

### 1. *Intervention*

Defendant states that by its Motion, the City of Aurora is actually seeking limited intervention into this criminal case. Defendant asserts that such intervention is prohibited under *People v. Ham*, 734 P.2d 623 (Colo. 1987). In *Ham*, the Colorado Supreme Court dismissed an appeal of a criminal sentence by the Department of Corrections ("DOC"). 734 P.2d at 625. Neither the criminal defendant nor the district attorney appealed the sentence. *Id.* The court stated that the DOC's request would have required the trial court to consider the DOC's financial resources, budget allocation, and the legal responsibility to convicted offenders. The court observed that "[t]hese issues should not be permitted to encumber the criminal process, which is fashioned to provide a speedy and just resolution of issues totally different in character from the fiscal impact of a sentence on the operating budget of a department of government." *Id.* at 626. Dismissing the DOC's appeal, the court determined that third party intervention into criminal prosecution should be prohibited absent "truly exceptional circumstances." *Id.* at 627.

At the outset, the Court notes that the Colorado Supreme Court has recognized standing of third parties in criminal cases in the context of the right of public access to trial court records in a criminal case. *See People v. Thompson*, 181 P.3d 1143 (Colo. 2008); *Star Journal Publ'g Corp. v. Cnty. Ct.*, 591 P.2d 1028 (Colo. 1979). Federal courts have similarly recognized a third party's limited rights to intervene. *See Harrelson v. United States*, 967 F. Supp. 909, 912-13 (W.D. Tex. 1997) (discussing cases). In this case, the City of Aurora seems not to be asking to intervene, but to be asking the Court for clarification and reconsideration of a Court Order that directly affects it.

However, the Colorado legislature has articulated specific statutory mechanisms that custodians of public records can utilize when determining whether certain records should be released. *See e.g.* C.R.S. § 24-72-204(5)–(6) (analysis under CORA); C.R.S. § 24-72-305(5) (analysis under the CCJRA). Third parties with an interest in the release of court records also have standing to contest court orders regarding those documents. *See Bodelson v. Denver Pub. Co.*, 5 P.3d 373, 380 (Colo. App. 2000) (stating “[a]s parties claiming to be injured by the trial court's ruling, they have standing to seek reversal of the ruling on appeal” in upholding parents’ standing to appeal trial court’s release of son’s autopsy reports). As further explained below, the Court FINDS that the City of Aurora should utilize these statutory mechanisms to address its concerns, rather than petitioning this Court to issue an order in this case.

## 2. *Motion to Reconsider*

The City of Aurora states that it has received CORA requests for information and that it would like to give public presentations regarding the City of Aurora’s emergency response related to this case. The City of Aurora’s Motion asks the Court to authorize the release of public statements by the City of Aurora and the release of the two 911 calls that were played at the preliminary hearing.

### a. *Public Statements*

The Court’s Order D-2a directly tracks Rules 3.6 and 3.8 of the Colorado Rules of Professional Conduct. Both rules apply for the entirety of a case, particularly a criminal case. *See* Colo. RPC 3.6(a) (“A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”); Colo. RPC 3.6 cmt. 6 (“Criminal jury trials will be most sensitive to extrajudicial speech.”); Colo. RPC 3.8(f) (stating prosecutors shall “refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused,” and shall “exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or [3.8]”). Therefore, the ethical rules referenced in Order D-2a continue to apply to counsel and law enforcement agencies associated with counsel in this case.

“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.” Colo. RPC 3.6 cmt. 1. The Court does note that “[t]he Rules of Professional Conduct are rules of reason,” Colo. RPC Preamble at 14, and “the public has a right to know about threats to its safety and measures aimed at assuring its security.” Colo. RPC 3.6 cmt. 6. It is difficult to strike a

balance between protecting the right to a fair trial and safeguarding the right of free expression, but the attorneys and law enforcement officials in this case must work to preserve both of these important values, using Rules 3.6 and 3.8 for guidance.

The City of Aurora, as a law enforcement agency associated with the prosecutor in the investigation of this case, may disseminate information, even if it is related to this case, so long as the disclosure comports with the Colorado Rules of Professional Conduct and all state and federal laws, and thereby is in compliance with this Court's Order D-2a. The Rules of Professional Conduct allow statements that are "necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose," Colo. RPC 3.8(f), and that state "information contained in the public record," so long as such information is not substantially likely to materially prejudice an adjudicative proceeding in this case, Colo. RPC 3.6(a), (b)(2). The prosecution should serve as a valuable resource for individuals associated with the prosecution's work in this case in making the determination whether information may be disseminated or not.

*b. CORA and CCJRA Requests*

The Colorado Open Records Act ("CORA") generally requires that "all public records shall be open for inspection by any person at reasonable times." C.R.S. § 24-72-201 (2012). Certain kinds of records are exempted from this mandatory disclosure by statute or other law, including records of investigations conducted by "any sheriff, prosecuting attorney, or police department," which may be denied if disclosure would be "contrary to the public interest." C.R.S. § 204(2)(a)(I). Additionally, CORA specifically exempts from the definition of "public records" such criminal justice records. C.R.S. § 24-72-202(6)(b)(I). "Criminal justice records" are defined 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." C.R.S. § 24-72-302(4).

Under the Colorado Criminal Justice Records Act ("CCJRA"), the inspection of criminal justice records by the public is controlled by the custodian of such criminal justice records. C.R.S. § 24-72-305. A custodian may prohibit inspection of criminal justice records if (a) such inspection would be contrary to any state statute, or (b) such inspection is prohibited by court order. C.R.S. § 24-72-305(1). A custodian may also generally prohibit inspection on the ground that disclosure would be contrary to the public interest if the request involves sheriff, district attorney, or police records of investigations, intelligence information, or security procedures. C.R.S. § 24-72-305(5). The CCJRA allows a district court to review a custodian's denial of inspection, but only after the custodian has made a final determination, including an articulation of the custodian's balancing of the public and private interests in the record. *Freedom Colorado Info., Inc. v. El Paso County Sheriff's Dept.*, 196 P.3d 892, 903 (Colo. 2008).

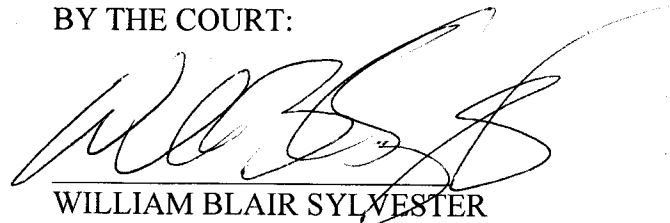
The City of Aurora must conduct the proper statutory analysis to determine whether to release information that is subject to requests under CORA. To the extent that the CORA requests at issue include requests for criminal justice records held by the City of Aurora, the proper analysis is whether the custodian of the criminal justice records may allow inspection of the information. *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1172 (Colo. 2005); C.R.S. § 24-72-304(1). The Colorado legislature has stated that the appropriate agency, as designated by statute, must determine whether the release of information is proper under CORA. A district court does not have jurisdiction to make such a determination except as provided by the procedures in C.R.S. § 24-72-204(5)–(6) or through a declaratory judgment. *See Citizens progressive Alliance v. Sw. Water Conservation Dist.*, 97 P.3d 308, 312 (Colo. App. 2004); *People in Interest of A.A.T.*, 759 P.2d 853, 855 (Colo. App. 1988). It would be improper for this Court to prejudge the CORA issues identified in the City of Aurora’s Motion. The City of Aurora, as the custodian of the records at issue, should determine whether disclosure of the requested records is proper using the discretionary analysis pursuant to CORA, the CCJRA, and any other applicable law.

### CONCLUSION

The Court FINDS that counsel in these proceedings are still bound by Rules 3.6 and 3.8, and its Order D-2a has not been rendered moot and needs no modification. The Court appreciates that the City of Aurora, as a custodian of records related to this case, is in a difficult position. The Court commends the City of Aurora for its prudence and caution in releasing these records. However, this Court is not in a position to authorize, or prohibit, the release of information as requested by the City of Aurora. Such a determination must be made by the City of Aurora utilizing the proper statutory analysis and the Colorado Rules of Professional Conduct. Therefore, the Motion by the City of Aurora requesting this Court revise its Order D-2a and authorize the release of 911 call recordings and presentations by the City of Aurora is hereby DENIED.

DATED this 11th day of February, 2013.

BY THE COURT:



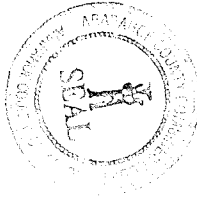
WILLIAM BLAIR SYLVESTER  
CHIEF JUDGE  
18TH JUDICIAL DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2013, a true and correct copy of **Order re: Motion Regarding Reconsideration of Pre-Trial Publicity Orders (D-2a)** was served upon the following parties of record.

Karen Pearson  
Amy Jorgenson  
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A handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to read "John A. [unclear]".