

District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-3744	DATE FILED: January 7, 2015 CASE NUMBER: 2014CV31594  <p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<p><b>Plaintiff:</b> PATRICK MURPHY,</p> <p>vs.</p> <p><b>Defendants:</b> CITY OF BOULDER, and HEATHER BAILEY in her official capacity as Executive Director of Energy Strategy and Electric Utility Development.</p>	
<p><i>Attorney for Plaintiff:</i> Jason Marc Lynch</p> <p><i>Attorney for Defendants:</i> Thomas Carr and Kathleen Haddock</p>	Case Number: <b>2014 CV 31594</b>  Division: <b>2</b> Courtroom: <b>Q</b>
<b>ORDER RE: SHOW CAUSE HEARING</b>	

On January 6, 2014, the following actions were taken in the above-captioned case. The Clerk is directed to enter these proceedings in the register of actions:

**COURT REPORTER:** Penny Selleck

**APPEARANCES:**

Plaintiff appeared with counsel, Jason Marc Lynch.

Defendants appeared through counsel, Thomas Carr and Kathleen Haddock.

**WITNESSES:**

Kelly Crandall  
 Jonathan Koehn  
 Heather Bailey

**EXHIBITS:**

Plaintiff's Exhibits:

- 23 – Admitted without objection
- 24 – Admitted without objection
- 25 – Admitted without objection
- 26 – Admitted without objection

Defendants' Exhibits:

- A – Admitted without objection
- B – Admitted without objection

## **COURT ORDERS/ACTIONS:**

THIS MATTER came before the Court for a show cause hearing. Having heard and carefully considered the evidence presented and statements of counsel, the Court entered the following oral ORDERS, which it now reduces to written form:

### **PRELIMINARY MATTERS**

1. Mr. Carr informed the Court that Defendant City of Boulder provided Plaintiff Patrick Murphy with the twenty year “cash flow model” on January 5, 2015, asserting the City waived the work-product privilege as to that document. Mr. Carr subsequently moved to have the Court dismiss the Complaint, arguing Mr. Murphy did not request any additional documents or data from Defendants. Mr. Lynch stated that Mr. Murphy is requesting the detailed cash flow analysis, including digitally stored data—not the software program, but the inputs used with the software to produce the results. The Court finds Mr. Murphy requested the cash flow analysis and model, not just the cash flow report, in letters dated October 30, 2014 (Exhibit A to the Complaint) and December 19, 2014 (Exhibit C to the Complaint). Accordingly, the Court denies Defendants’ motion to dismiss.

### **FINDINGS OF FACT**

2. The City of Boulder responded to Mr. Murphy’s prior request and provided Mr. Murphy with the requested documents pursuant to the Colorado Open Records Act (“CORA”). The only remaining issue is with regard to the digitally stored data within the models.
3. The following individuals testified with regard to the City of Boulder’s twenty year cash flow model and analysis:
  - a. Kelly Crandall, an Energy Strategy Coordinator for the City of Boulder.
  - b. Jonathan Koehn, the Regional Sustainability Coordinator for the City of Boulder.
  - c. Heather Bailey, the Executive Director of Energy Strategy and Electric Utility Development for the City of Boulder since June 2012.
4. Ms. Crandall testified that the purpose of the model was to make reasonable assessments about the future and to determine whether the charter metrics could be met. Not everything discussed by the City of Boulder employees was placed into the model or into base materials for consideration. Ms. Crandall explained that working groups attempted to reach a consensus in determining what “inputs” would be placed into the model.
5. Ms. Crandall explained that inputs, which were made available to the public in a February 26, 2013 memorandum, are the different pieces of data programmed into the model, which the software analyzes to create “outputs.” Consultants created the software that analyzes the inputs. The formulas from the software have not been released as it is proprietary data and the city did not retain the licenses for the software. City staff was involved with transmission of data from the resource model into the financial documentation.

6. Mr. Koehn testified that he is not aware of any inputs not made public. He testified that after the inputs were placed into the models, the subsequent process was automated within the software program until employees received the outputs, which were evaluated and used to make recommendations to City Council.
7. Mr. Koehn testified that he does not have access to the algorithms or components of the software that makes up the model.
8. In a September 11, 2014 letter from Ms. Bailey, Exhibit 17, Ms. Bailey states that the model is robust and is producing results consistent with projections. Ms. Bailey also notes that the model included a detailed cash flow analysis for twenty years.
9. A pamphlet titled “Understanding the Money,” Exhibit 13, states that the modeling provides a complete financial picture of the money a municipal utility would need to operate.
10. Under Charter section 178(a), the output was to be reviewed by a third-party independent evaluator; there is no requirement to disclose work-product to anyone other than the third-party evaluator.
11. The City of Boulder created a Prezi, which is publicly available, to visually depict the input, processing, output, and financial model. The large “model” circles in the Prezi, including the load model, resource model, and financial model, are the software programs that interact with one another, transferring data by macros. Ms. Crandall testified that all of the information in the Prezi, except the software contained in the “models” has been available to the public since July or August 2013.
12. Exhibit 23/Exhibit A, a spreadsheet created in mid-2013 by Yael Gichon, a city employee, is populated with outputs from the modeling process to show the twenty year financial projection. The spreadsheet shows one deterministic model, however, there were 729 deterministic runs. The spreadsheet indicates that the cost in 2017 will be 9.25 cents per kilowatt-hour.
13. Exhibit 26, a portion of the Prezi, projects that the low cost in 2017 will be 9.05 cents per kilowatt-hour. This graphic is probabilistic meaning it is a result of the 729 runs that were performed so as to explain the discrepancy with Exhibit 23/Exhibit A.
14. Exhibit 24 shows pricing assumptions used in the financial modeling from 2017 to 2037 at five year increments. The City of Boulder used median solar power pricing at the five year intervals, and applied an inflation rate of 2.5 per cent for the interim years. Other variables, such as the resource mix and amount of power required, were changed on a yearly basis.
15. Exhibit 25, a portion of the Prezi, shows the resource mix at five year intervals, but not for the intervening years.

16. Attachment D to the February 26, 2013 memorandum, Exhibit B, lists all inputs that went into the model for a period of twenty years at five year intervals. The Prezi, available to the public online, includes the same information found in Attachment D, but is displayed in a different format.

### **CONCLUSIONS OF LAW AND ORDERS**

17. The Court has considered the relevant case law and statutes and finds the information provided by the City of Boulder to Mr. Murphy is consistent with, and does not violate, the standards under the Colorado Open Records Act (“CORA”).

18. Pursuant to CORA, “all public records shall be open for inspection by any person at reasonable times.” § 24-72-203(1)(a), C.R.S. Public records do not include “[w]ork product prepared for elected officials.” § 24-72-202(6)(b)(II), C.R.S.

19. A custodian may deny access to a “public record” pursuant to any provision in CORA or as otherwise provided by law. § 24-72-203(1)(a), C.R.S. One such exception includes “work product,” meaning “all intra- or inter-agency advisory or deliberative materials assembled for the benefit of elected officials, which materials express an opinion or are deliberative in nature and are communicated for the purpose of assisting such elected officials in reaching a decision within the scope of their authority.” § 24-72-202(6.5)(a), C.R.S. “Work product” does not include . . . [a]ny final version of a document that expresses a final decision by an elected official. § 24-72-202(6.5)(c), C.R.S.

20. Courts must interpret the work product exception narrowly. *Ritter v. Jones*, 207 P.2d 954, 959 (Colo. App. 2009).

21. With regards to work product, the deliberative process privilege only protects material that is predecisional and deliberative. *Colo. Springs v. White*, 697 P.2d 1042, 1051 (Colo. 1998). This is to ensure open discussion within an agency so as to permit the agency to perform its functions. *Id.* Predecisional material generally “retains its protection even after the decision is made.” *Id.* Typically, “[a] document from a subordinate to a superior official is more likely to be predecisional” and may aid in reaching a final determination. *Id.* at 1052. “In determining whether material is deliberative, courts have distinguished between ‘advisory materials which truly reflect[ ] the deliberative or policymaking processes of an agency’ and ‘purely factual, investigative material’ which is not protected.” *Id.* (quoting *Envtl. Prot. Agency v. Mink*, 410 U.S. 73, 89 (1973)).

22. Defendants previously provided Mr. Murphy with the factual data set forth in his CORA request.

23. The Court finds that the software that has not been provided to Mr. Murphy by the City of Boulder is not a public record. *See* § 24-72-202(7), C.R.S.

24. The other information Mr. Murphy seeks from the City of Boulder, which he describes as not being software, but rather electronically stored data, is advisory and part of the deliberative process. Staff for the City of Boulder reviewed 729 different scenarios, which were used to provide advice and recommendations to the Boulder City Council as part of the deliberative process. As in *Colorado Springs v. White*, the Court finds that the City Council made decisions based on this advisory and deliberative process information provided to it by employees of the City of Boulder. Accordingly, the Court finds such material is advisory and part of the deliberative process of the City Council and qualifies as work product. Therefore it is excluded from public records.
25. The Court finds that the cash flow analysis provided to Mr. Murphy by the City of Boulder on January 5, 2015 is a public record and that the City should have provided the cash flow analysis to Mr. Murphy as part of his CORA request, as it was factual data supporting a final decision. Because the cash flow analysis is a public record, the Court finds there is no issue with regard to whether the City of Boulder waived the work-product privilege in releasing this material.
26. The Court awards Mr. Murphy attorney fees pursuant to section 24-72-204(5), C.R.S. for the time Mr. Lynch spent to obtain the cash flow analysis, which the City of Boulder provided on January 5, 2015. The award of attorney fees shall not include time for the show cause hearing or any time spent attempting to obtain other documentation. Mr. Lynch shall file an affidavit of attorney fees within 14 days of the hearing. Defendants shall file their objection, if any, and request for a hearing on the reasonableness of such fees, if any, within 14 days of the filing of the affidavit.

### EXHIBITS

Counsel, for any party represented by counsel, is directed to efile any exhibits offered or admitted at the hearing in accordance with Chief Justice Directive 11-01 and Local Administrative Order 11-102.

DATED: 1/7/15, *nunc pro tunc*: January 6, 2014

BY THE COURT



\_\_\_\_\_  
Judith L. LaBuda  
District Court Judge