

DISTRICT COURT, BOULDER COUNTY, COLORADO 1777 6th Street Boulder, Colorado 80302	
Plaintiff: PATRICK MURPHY Defendants: CITY OF BOULDER, HEATHER BAILEY, in her official capacity as Executive Director of Energy Strategy and Electric Utility Development.	▲ COURT USE ONLY ▲
Attorney Name: Office of the City Attorney Thomas A. Carr, #42170 City Attorney Kathleen E. Haddock, #16011 Sr. Assistant City Attorney Address: P.O. Box 791 Boulder, CO 80306 Phone Number: (303) 441-3020 Fax Number: (303) 441-3859 E-mail: carrt@bouldercolorado.gov haddockk@bouldercolorado.gov	Case Number: 2014-CV-031594 Division: 2
DEFENDANTS CITY OF BOULDER and HEATHER BAILEY'S RESPONSE TO MOTION FOR ORDER TO SHOW CAUSE	

This matter comes before the Court upon the Complaint with Application for Order to show cause dated December 30 2014, served on the City of Boulder, and Heather Bailey in her official capacity as Executive Director of Energy Strategy and Electric Utility Development, (the "Defendants") on January 2, 2015. The Defendants hereby respond to the complaint and request that this Court order that the City has shown cause that the materials which are the subject of the Complaint are not public records and not subject to the Colorado Open Records Act (CORA).

1. The plaintiff, Patrick Murphy, is a resident of the City of Boulder, who has taken an active interest in the City's plan to create a municipal electrical utility. Although Mr. Murphy opposes the project, the City welcomes all views as important to a vital public discourse. As shown in the affidavits attached, this action arises after a number of increasingly detailed requests from Mr. Murphy. Notwithstanding the City's candid compliance with the requirements of CORA, and efforts by staff in writing and orally to explain the work done to analyze potential municipalization, Mr. Murphy has initiated this show-cause proceeding in an effort to compel the City to provide him with the computer software (referred to as "the Model") used by the City to analyze data it received. While the City has provided all of the inputs to the Model and assumptions made and described the outputs of running the Model, the Model software is not a

public record; it is the work product of the City to advise council. It is not the basis on which Council made its decision regarding whether the prerequisites of Section 178(a) of the charter had been met. For the reasons set forth in detail below, Mr. Murphy's complaint should be dismissed with prejudice.

Background

2. The Plaintiff submitted requests for documents as follows: (i) October 22, 2014, the Plaintiff asked for data, pertinent lists of consultants and employees, and emails all which the City provided; (ii) on October 28, 2014, Plaintiff requested algorithms which the City declined to provide those, for the reasons set forth below; and (iii) on October 30, 2014, Plaintiff requested assumptions and modeling results regarding the 20-year cash flow analysis and the City provided those, as shown below.

3. Specifically, on October 22, 2014, the plaintiff submitted a request under the Colorado Open Records Act for information related to projected costs associated with a municipal electrical utility. See Exhibit 1, Affidavit of Heather Bailey, ("Bailey Affidavit"). The request sought the following information:

- 1) Any and all data for which the city has based its energy costs projections for the included 20 year time line chart (cents per kWh),
- 2) Any and all data for the basis of Xcel's rates (cents per kWh),
- 3) Any and all data for the city's rates (cents per kWh),
- 4) Please include a list of any and all the consultants (paid or volunteer) or city employees who have worked on this chart?
- 5) Please denote whether they are paid city staff or consultant.
- 6) Please provide any and all emails between and among city staff and any and all consultants that directly or indirectly created or reference these charts or the data that went into creating these charts that were presented to City Council on February 26, 2013.

Id.

4. The City provided a timely and complete response to this request. See Bailey Affidavit at Attachment B.

5. On October 28, 2014, plaintiff made an additional request in an electronic mail message with the subject line "CORA Request for exact algorithms for rate calculations." See Bailey Affidavit.

The following requests are in reference to:
Figures 7, 8 and 9 of the February 26, 2013 memo to Council found at https://www.static.bouldercolorado.gov/docs/BEF_SS_Feb26_2013_Final_Packet-1-201306201201.pdf.

- 1) Any and all documents, spreadsheets or other media that show the final calculation or algorithm used for the basis of Xcel's rates (cents per kWh) for the 20 year period shown in the graphs referenced above,
- 2) Any and all documents, spreadsheets or other media that show the final calculation or algorithm used for the basis for the city's rates (cents per kWh) for the 20 year period shown in the graphs referenced above.

Thank you for the supporting data related to these final calculations, but the final calculations that were used to create the graphs were (sic) not identified in the various sources of information that you provided previously. The goal is to find out exactly how you arrived at the numbers that produced the graphs.

I have noted that the Xcel data provided in the attached spreadsheet that you sent (AttachClimax1-1.AISO---PUBLICVERSION--1-BASELINE.xls) seems to have been based on 2011 information that is now significantly outdated, and was also significantly outdated at the time of the 2013 presentation. For example page 23 in the related Memo

(https://www.static.bouldercolorado.gov/docs/Energy_Future_SS_Memo_07232013-1-201307241011.pdf) shows that for 2013 Xcel used about 66% coal in their fuel mix when it was actually 56%

(http://www.xcelenergy.com/About_Us/Our_Company/Power_Generation/Power_Generation_Fuel_Mix_-_PSCo) This is extremely significant since all comparisons between Boulder's and Xcel's rates and fuel mix must be based on actual values or actual future estimates. Xcel's values are constantly changing, are you including those changes, or locked into past, outdated values, thus crippling your model? For example, a 3%-6% reduction in coal use by Xcel could be a CO2 reduction equivalent to the best that Boulder could hope to achieve with Municipalization, and Xcel's current wind use as well as projections far exceed the data that you provide previously as a basis for the 2013 documents (<https://www.xcelenergy.com/staticfiles/xcel/Corporate/CRR2013/operations/resource-planning.html>).

Thus, by October 28, it was clear that Mr. Murphy was not seeking any specific public record or "writing" as that term is defined in the Colorado Open Records Act, but instead was seeking what he referred to as the "algorithm" used to create the records previously produced.

6. The "algorithm" is in fact computer software with many variables driven by inputs and assumptions and evaluation scenarios which produce options for the legal process and ultimate decisions. See Exhibit 2, Affidavit of Kelly Crandall ("Crandall Affidavit"). A consultant created the software for the City and that software is proprietary. The City's software links to other proprietary software, which the City has licensed. These include DPL a commercially available decision and risk analysis program, and HOMER which is software containing optimization and sensitivity analysis algorithms that allow for evaluation of the economic and technical feasibility of a large number of technology options and to account for variations in technology costs and energy resource availability. The entire system of the various programs was generally referred to by City staff as the "model." The outputs of the model were

used by City staff to advise the City Council. The model had five major areas of focus: financial, reliability, resource mix, asset acquisition, and legal issues (all of the software described in this paragraph collectively referred to as the “Model”).

7. When referring to the “financial model” or the “20-year cash flow analysis,” City staff was not referring to a document or even one computer program; they were referring to the outputs of the financial portion of the Model that summarized all components to produce annual total costs for a variety of scenarios. The financial portion of the Model alone consists of 27 separate analytic components, some containing as many as 26,000 populated cells, and includes a significant number of macros and complex formula functions. Because of the complexity of the programs making up the Model, the only documents created were the high-level outputs and portions of a few of the basic cash flow scenarios, including the assumptions and key inputs used in the modeling, all of which were summarized and included in the materials provided to council. Mr. Murphy has been provided with all of the inputs and outputs.

8. In a detailed electronic message on November 17, 2014, city staff explained this complexity to the plaintiff. *See* Crandall Affidavit ¶ 6, Exhibit 2.

9. On October 30, 2014, the City responded by referring the plaintiff to public records describing the inputs and assumptions of the financial portion of the Model.

10. On October 30, 2014, the plaintiff made another public record request with the subject “CORA Request for 20-year Cash Flow Analysis.” Complaint, Exhibit A. Much of the request is argumentative and not a request for any document. For example, the “request” includes the following statement:

In 2011 Boulder voters, by a thin margin, supported Boulder continuing to move forward with studying municipalization under the explicit requirement that Boulder meet certain new charter requirements such as having rates equal to or lower than Xcel Energy. The public, which funded the additional studies through a new tax, therefore has the right to know all assumptions and modeling results including the 20-year cash flow analysis. Boulder’s refusal to release their models is untenable and litigation is not a legitimate reason for denying access to records

Id.

11. On November 5, 2014, the city responded that all public records had been produced previously. City staff also offered to meet with the plaintiff to answer any questions that he might have.

12. The City provided the plaintiff with vast quantities of data and financial modeling outputs in response to his requests. The only thing that the City has declined to produce is the computer software that produced those outputs or what the plaintiff referred to as “algorithms.”

I. The Court Should Deny the Order to Show Cause and Dismiss the Complaint Because the Model is Not a Public Record Subject to the Colorado Open Records Act.

13. Although the public agency has the burden of proving an exception to production, the requester bears the burden of showing that a particular document is likely a public record. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1095 (Colo. 2011). The Plaintiff cannot meet that burden, because the model is not a public record subject to the Colorado Open Records Act.

A. A Government is Required by CORA to Disclose Only “Public Records”

14. The Colorado Open Records Act separates local government information into four categories:

- Information that does not meet the definition of “writings,” such as computer software. CRS § 24-72-202(7)
- Writings that are not "public records." The legislative declaration states that it only applies to public records. CRS § 24-72-201.
- Writings that are "public records" for which there is a presumption that they should be disclosed. CRS § 24-72-203(1)
- Writings that are "public records" for which there is a statutory exception to the public record being disclosed. CRS §24-72-204

Wick Communications Co. v. Montrose County Bd of County Comm'rs, 81 P.3d 360, 364 (Colo. 2003). The Model at issue here is not a public record subject to disclosure under the Colorado Open Records Act, because it is both computer software and work product. Neither computer software nor work product are subject to the Colorado Open Records Act.

B. The Model is Computer Software Not Subject to the Colorado Open Records Act.

15. To be a public record, the record must be a “writing.” C.R.S. § 24-72-202(6)(a)(I). The definition of writing specifically excludes computer software. C.R.S. § 24-72-202(7).

16. The Colorado Open Records Act defines “writings” as follows:

“Writings” means and includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics. “Writings” includes digitally stored data, including without limitation electronic mail messages, *but does not include computer software.*

C.R.S. § 24-72-202(7)(emphasis added).

17. The Colorado Open Records Act does not define “computer software.” The Model meets any common sense definition of that term. The Merriam-Webster Dictionary defines software as follows:

something used or associated with and usually contrasted with hardware: as

a : the entire set of programs, procedures, and related documentation associated with a system and especially a computer system specifically: computer programs

Merriam-Webster Dictionary¹ The Model is a complex series of instructions drafted by a consultant. It is computer software and therefore not a public record under the Colorado Open Records Act.

18. Plaintiff’s attempt to differentiate algorithms from software. Algorithm is defined as a procedure for solving a mathematical problem (as of finding the greatest common divisor) in a finite number of steps that frequently involves repetition of an operation; *broadly* :

a step-by-step procedure for solving a problem or accomplishing some end especially by a computer².

Comparing the definitions shows that algorithms are a subset of software. The Colorado Supreme Court has made clear that the court must look at what is being requested as “focusing on the form in which information appears can misconstrue the General Assembly’s intent to limit access to some types of information.” *City of Westminster v. Dogan Construction Co.*, 930 P2d. 585, 590 (Colo. 1997).

C. The Model is Work Product Not Subject to the Colorado Open Records Act

19. The Model is work product prepared for elected officials. Work product is excluded from the definition of “public records.” C.R.S. § 24-72-202(6)(II). Work Product includes all material prepared to assist an elected official in making a final decision. C.R.S. § 24-72-202 (6.5)(a).³

(6.5)(a) “Work product” means and includes 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. Such materials include, but are not limited to:

(I) Notes and memoranda that relate to or serve as background information for such decisions;

¹ Accessed online on January 2, 2015 at <http://www.merriam-webster.com/dictionary/software>.

² Accessed online on January 2, 2015 at <http://www.merriam-webster.com/dictionary/algorithm>

³ CORA also recognizes the common law deliberative process privilege as an exception to disclosure of public records, so if a document was found to be a public record, the court would still have to analyze whether the documents was exempt from disclosure under the common law privilege. CRS 24-72-204(3)(a)(XIII).

(II) Preliminary drafts and discussion copies of documents that express a decision by an elected official.

C.R.S. § 24-72-202 (6.5)(a).

20. In a case directly on point, the Court of Appeals considered whether a spreadsheet prepared by city staff to provide background for a city council decision constituted “work product.” *City of Fort Morgan v. Eastern Colorado Pub. Co.*, 240 P.3d 481, 483 (Colo. App. 2010). The *Fort Morgan* Court found the spreadsheet to be advisory and that it did not express a final decision by any councilmember; therefore it was work product and not a public record. The *Fort Morgan* court explained that the legislature intended to use the common dictionary meaning of “advisory or deliberative.” *Fort Morgan*, 240 P.3d at 486-87 (Colo. App. 2010).

21. The Complaint asserts that the Model at issue is not work product, because it is not “advisory or deliberative.” Complaint ¶ 31. This suggests an overly narrow construction of those terms, which differs from the reading given by the Court of Appeals in *Fort Morgan*. The *Fort Morgan* court explained that the legislature intended to use the common dictionary meaning of “advisory or deliberative.” *Fort Morgan*, 240 P.3d at 486-87 (Colo. App. 2010).

22. The City is allowed to form an electric utility only if it can demonstrate, with verification by a third party independent expert, that the City can acquire the electric system and operate it meeting certain criteria. Boulder Home Rule Charter Sec 178(a). The City Council adopted metrics by which it would measure whether the criteria could be met on November 15, 2012. The City paid for the development of the Model to have a means to analyze the variety of different data that was gathered to determine whether the charter prerequisites could be met under any potential scenario. *See* Bailey Affidavit.

23. The Model assisted staff in providing background and advice to the City Council as the Council considered whether the City could comply with Boulder City Charter § 178. *See* Complaint ¶¶ 9-12. The Council considered information from the Model to the extent staff used the Model outputs in the materials presented to the Council. Notably, Charter § 178 only requires that the municipal utilities performance be measured “at the time of acquisition.”⁴ The Model projecting 20 years into the future provided advice for the Council’s deliberations regarding the viability of the enterprise.

24. The Model was part of the staff work to assist in preparing materials and making a recommendation of whether charter test could be met.

25. The Council directed staff of the information it wanted and the background work that staff was to perform and adopted metrics to measure whether the information presented demonstrated the requirements of Sec 178(a) on November 15, 2012.

26. City staff performed research, worked with a variety of engineering, legal, and other consultants; prepared maps and spreadsheets; used the Model to analyze the data being

⁴ The plaintiff excluded this language from its quotation of Charter § 178. *See* Complaint ¶ 9.

used and measure various results; and worked with citizens who participated in working groups to evaluate whether the metrics adopted by council could be demonstrated.

27. On February 26, 2013, staff presented preliminary results to Council including written materials consisting of 287 pages which can be found here: [02.26.13 Boulder's Energy Future Municipalization Exploration](#).⁵ The Model was described in the cover memo on pages 6-16, and in Attachment B, p. 51 (general summary), Attachment D, pages 55-86 (Key Assumptions and Inputs for the 2012/2013 Modeling). However, the Model was not presented to council and was not part of the "Base Material" defined in Ordinance No. 7989.⁶ See Ord No. 7898, Finding D. On April 16, 2013, Council adopted Ord. 7898 making preliminary findings that the metrics had been met, and directed the City Manager to retain a third party independent expert to verify whether the requirements of Sec 178(a) could be demonstrated.

28. The city staff prepared additional materials in response to council questions and were part of the packet for a study session held on July 23, 2013 . The Council had also requested that the staff stress-test the Model to find if there was a breaking point if certain variables were increased exponentially. The written materials presented on July 23, 2013 consisted of an additional 172 pages⁷, including a description of the results of the stress-testing beginning on p. 6.

29. The third-party independent expert selected by the City Manager, PowerServices, Inc., reviewed the City's Model to make sure they made sense and included all of the costs that an electrical utility needed to have covered. However, in making its analysis, PowerServices did not adopt the City's Model, or the materials presented to Council, or other work of the city staff and consultants. PowerServices, as the third-party independent expert retained by the City Manager, relied on its own experience and its own models in verifying that the City had demonstrated that the metrics could be met. See Affidavit of Gregory Booth, President of PowerServices attached as Exhibit 3, ("Booth Affidavit").

30. The third-party independent expert presented its findings to Council on July 23, 2013. On August 20, 2013, by Ord. No. 7917,⁸ Council made the final determination that the prerequisites of Sec 178(a) had been met, relying on the "Base Materials." Again the Model was not part of the Base Materials.

31. These proceeding facts show how the Model was used as a tool to advise council as it deliberated whether the charter metrics had been met. The decision of the council was based on the analysis of the outputs of the Model communicated to council as a part of a vast amount of materials council considered in making its decisions in adopting Ord. No. 7917. The Model was not part of the Base Materials used for the Council's final decision. The Model was both advisory to the Base Materials prepare by staff and integral to the deliberative processes, the protection of which is a fundamental objective of the Legislature's exclusion of "work product" from CORA's definition of "public records."

⁵ <https://documents.bouldercolorado.gov/WebLink8/0/doc/121319/Page1.aspx>

⁶ <https://documents.bouldercolorado.gov/WebLink8/0/doc/121265/Electronic.aspx>

⁷ <https://documents.bouldercolorado.gov/WebLink8/0/doc/121330/Electronic.aspx>

⁸ <https://documents.bouldercolorado.gov/WebLink8/0/doc/123429/Page1.aspx>

D. There has been no Waiver

32. The Complaint also asserts that even if the Model is work product, there was “waiver,” because the model was mentioned in some public materials. For work product protection to be waived, the waiver must come under a specific statutory provision for waiver. *Ritter v. Jones*, 207 P.3d 954, 960 (Colo. App. 2009). The Court explained as follows:

CORA designates several ways that an elected official can waive the disclosure exemption for what would otherwise be work product. Elected officials may release or authorize the release of all or any part of work product prepared for them. § 24-72-202(6)(b)(II). Additionally, if materials are “distributed to the members of a public body for their use or consideration in a public meeting or cited and identified in the text of the final version of a document that expresses a decision by an elected official,” they are no longer work product. § 24-72-202(6.5)(c)(IV), C.R.S. 2008. Finally, all final versions of documents that express a final decision by an elected official are not work product. § 24-72-202(6.5)(c)(I), C.R.S.2008.

Id.

33. The complaint does not allege that any action by a city elected official meets the specific statutory criteria for waiver. The Model was expressly not made part of the Base Materials cited for the Council decisions. The Model has never been made public. Merely speaking about its existence does not waive its status as work product. The outputs that were made public were provided to the Council and to the plaintiff and have been publicly available for over a year.

34. The City respectfully requests that the Court dismiss find that the City has shown cause that the materials which are the subject of the Complaint are not public records and not subject to the Colorado Open Records Act and award the City reasonable court costs and attorneys fees.

Respectfully submitted this 5th day of January, 2015.

BOULDER CITY ATTORNEY’S OFFICE

BY: /s/ signatures on file
Thomas A. Carr, #42170, City Attorney
Kathleen E. Haddock, #16011, Senior Asst. City Attorney

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of January, 2015, a true and correct copy of the foregoing was electronically served via ICESS as follows:

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