DISTRICT COURT, LARIMER COUNTY, COLORADO Larimer County Justice Center 201 Laporte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 498-6100 **Plaintiff: STACY LYNNE** **v.** **Defendant: CITY OF FORT COLLINS; DARIN ATTEBERRY; CARRIE DAGGETT; CHRISTOPHER VAN HALL**	DATE FILED: September 25, 2018 4:58 PM FILING ID: AFA9E8A321CE6 CASE NUMBER: 2018CV172 COURT USE ONLY
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CITY DEFENDANTS' LEGAL BRIEF	

COMES NOW the Defendants, City of Fort Collins ("City"), Darin Atteberry, Carrie Daggett and Christopher Van Hall, by and through their counsel, the Fort Collins City Attorney's Office and Wick & Trautwein, LLC, and respectfully submit the following legal brief to assist the Court in resolving the issues set for hearing for Monday, October 1, 2018 at 10:00 a.m.:

I. INTRODUCTION

The Plaintiff, Stacy Lynne, submitted a request to the City Clerk for the City of Fort Collins on March 19, 2018, seeking certain public records under the Colorado Open Records Act ("CORA"), C.R.S. §24-72-201, et seq. In response to the Plaintiff's CORA request, the City

provided her with a flash drive consisting of approximately 321 items responsive to her request. The City withheld approximately 45 items on the grounds of attorney-client privilege, pursuant to C.R.S. §24-72-204(3)(a)(IV). The attorney-client privilege was the only ground on which the City withheld documents from the Plaintiff.

On or about August 9, 2018, Plaintiff filed this action in the Larimer County District Court contending that the City has allegedly unlawfully denied full access to the requested public records and seeking an order compelling production of the items the City withheld on the grounds of attorney-client privilege. Prior to the Plaintiff filing this suit, the City advised Plaintiff it would provide a privilege log of the items withheld upon her payment of a $75 charge for the staff time required to produce the log. The City offered to do so notwithstanding the fact that C.R.S. §24-72-204(3)(a)(IV) does not require the City to provide a privilege log for documents held pursuant to the attorney-client privilege. The only "privilege log" requirement is contained in one specific subpart to Section 24-72-204(3)(a), namely 24-72-204(3)(a)(XIII), which protects documents under a "deliberative process" privilege, which was not a ground asserted by the City for withholding any documents here. Plaintiff declined to pay the fee to obtain the log, and proceeded to file this action.

The Court has set this matter for a hearing to occur on Monday, October 1, 2018. The City respectfully submits the legal authority outlined below, which it believes provides the proper legal framework for the Court's analysis of and ruling on the Plaintiff's claims:

II. LEGAL AUTHORITY

A. The Attorney-Client Privilege

The City withheld the documents at issue here pursuant only to C.R.S. §24-72-204(3)(a)(IV), which states in pertinent part as follows:

> "(3)(a) The custodian shall deny the right of inspection of the following records, unless otherwise provided by law…
>
> > (IV) Trade secrets, *privileged information*, and confidential commercial, financial, geological, or geophysical data, including a social security number…" [emphasis added].

The Colorado appellate courts have made clear that the exemption for "privileged information" in this statutory section includes various common law evidentiary privileges, including the attorney-client privilege. *See*, *Black v. Southwestern Water Conserv. Dist.*, 74 P.3d 462, 467 (Colo. App. 2003); *City of Colorado Springs v. White*, 967 P.2d 1042, 1055 (Colo. 1998); *Denver Post Corp. v. University of Colo.*, 739 P.2d 874, 880 (Colo.App. 1987).

"The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law." *In re 2015-2016 Jefferson Cty. Grand Jury*, 410 P.3d 53, 59, 2018 CO 9 (Colo. 2018) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)). The privilege applies to "confidential matters communicated by or to the client in the course of obtaining counsel, advice, or direction with respect to the client's rights or obligations." *Id.; People v. Madera*, 112 P.3d 688, 690 (Colo. 2005).

As noted by the Courts, "our legislature has also embraced this time-honored privilege" in its adoption of C.R.S. § 13-90-107(1) to (1)(b), C.R.S. (2017). *In re 2015-2016 Jefferson Cty. Grand Jury*, 410 P.3d at 59. That statutory section states in pertinent part as follows:

> "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate....
> ....
> 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...."

This exemption from discovery for attorney-client privileged materials, as embodied in Section 24-72-204(3)(a)(IV), 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." *Id.; A v. Dist. Court*, 191 Colo. 10, 550 P.2d 315, 324 (1976).

Because the attorney–client privilege exists for the benefit of the client, it may be waived only by the client. *Id*. at 323. While the burden of establishing the applicability of the attorney-client privilege rests with the claimant of the privilege, the burden of establishing a waiver is on the party seeking to overcome the claim of privilege. *Black*, 74 P.3d at 467; *Clark v. Dist. Court*, 668 P.2d 3 (Colo.1983). The City denies that any such waiver occurred here, and that its withholding of the 45 items on the grounds of this privilege was proper.

B. <u>Privilege Log Issues</u>

Plaintiff complains in part that the City allegedly failed to provide a privilege log for the items withheld from production. It should be first noted that CORA does not require the City to provide a privilege log for items withheld in response to an open records request on the basis of attorney-client privilege.

Rather, the only "privilege log" requirement in CORA is contained in one specific subpart to Section 24-72-204(3)(a), namely 24-72-204(3)(a)(XIII), which protects documents under a "deliberative process" privilege. That subpart (3)(a)(XIII) was added to CORA by amendment in 1999 following the Colorado Supreme Court's decision in *White, supra*, a case

which dealt only with the deliberative process privilege. That limited section requires the custodian to provide the applicant with a sworn statement specifically describing each document withheld under this deliberative process privilege, explaining why each such document is privileged, and why disclosure would cause substantial injury to the public interest. That sworn statement requirement, referred to as *Vaughn* index in the *White* case, is only found in that specific statutory subpart relating to documents withheld under the deliberative process privilege, not the attorney-client privilege protected by subpart (3)(a)(IV), nor any of the other exemptions embodied in Section 24-72-204(3)(a).

Notwithstanding the fact that the City was not legally required to provide a privilege log to the Plaintiff, it nevertheless offered to provide one to her upon her payment of a $75 charge for the staff time required. Plaintiff declined to pay the fee, and instead filed suit.

With regard to the contents of the privilege log, the City indicated it was willing to provide a privilege log that listed (1) the attorney that was sending or receiving the email; (2) the month that the email was sent; and (3) a statement that the email was for the purpose of furnishing or obtaining professional legal advice or assistance related to the sign code provision. Given the attorney-client privileged nature of the items being withheld, the City took the position that providing information beyond that description as demanded by the Plaintiff (such as the precise date of each email, the identity of the recipient, and a detailed and factual description of the email) would compromise the very protections behind the privilege being asserted. This danger was specifically recognized by the Supreme Court in *White* with regard to the *Vaughn* index requirement for the deliberative process privilege, when it indicated "the index need not be so detailed that it compromises the purposes served by the privilege." *White*, 967 P.2d at 1052.

With regard to the imposition of the fee, the City's request for Plaintiff's payment of $75 for creation and production of the privilege log was proper pursuant to C.R.S. § 24-72.205(3). That statutory section specifically authorizes the charging of a reasonable fee where, as here, a request requires the "manipulation of data so as to generate a record in a form not used by the state or by said agency, institution or political subdivision." *See, also, Mountain Plains Investment Corp. v. Parker Jordan Metropolitan Dist.,* 312 P.3d 260, 268, 2013 COA 123 (Colo. App. 2013) ("compilation of a privilege log equates to 'generat[ing] a record in a form not used by the' public entity). The fee charged was consistent with the City's open record request policies, promulgated pursuant to C.R.S. §24-72-203.

Accordingly, it is the City's position that it was not required to provide <u>any</u> privilege log to the Plaintiff, but its offer to provide one in exchange for payment of a $75 charge was certainly reasonable and proper.

C. *<u>In Camera</u>* <u>Inspection</u>

Plaintiff has not specifically sought *in camera* inspection of the documents withheld by the City here, and the City does not offer to make the documents available for such inspection. Nevertheless, to the extent the Court entertains such an order, the Court must exercise extreme caution in considering such review in this context.

As noted above, the attorney-client privilege is a "time-honored" and important privilege recognized by the Colorado courts. Because of the importance attached to this privilege, the Supreme Court of Colorado has urged caution in ordering *in camera* review of such materials:

> "A trial court should be hesitant to review the contents of an attorney's case file, however, because of the importance of the privilege involved. In camera disclosure to the court is still a form of disclosure. The court's review could have

> a chilling effect on attorneys and their clients, especially if in camera review occurred frequently or was easily obtained."
>
> *People v. Trujillo,* 144 P.3d 539, 542 (Colo. 2006).

Accordingly, "the decision of a trial court to conduct an *in camera* review of [an attorney's] case file has serious implications and should be undertaken only in the clearest of cases, when the information sought to be discovered is well defined and all other reasonable means of discovering the information have been exhausted." *Id.* (quoting from *Madera,* 112 P.3d at 689). Toward this end, the Supreme Court articulated in *Trujillo* a six-part test which the trial court must employ before allowing *in camera* review of an attorney's file, stating that the Court must determine:

> (1) As precisely as possible, the information sought to be discovered,
> (2) whether the information is relevant to a matter at issue,
> (3) whether the information could be obtained by any other means,
> (4) whether the information is privileged,
> (5) if it is privileged, whether the privilege has been waived, and
> (6) if it is privileged, but has been waived, either explicitly or impliedly, the scope of the waiver.
>
> *Id.* at 691.

Thus, to the extent this issue is raised at the hearing, the Court must exercise great caution in considering any such request and must examine this issue in light of the six-part test set forth above.

D. Award of Attorney's Fees Upon Determination that Withholding was Proper

Section 24-72-204(5)(b) specifically provides that, "[i]n the event the court finds that the denial of the right of inspection was proper, the court shall award court costs and attorney fees to the custodian if the court finds that the action was frivolous, vexatious or groundless." It is a

fundamental principle of statutory construction that use of the word "shall" in a statute indicates the General Assembly intended the provision to be mandatory. *Tubbs v. Farmers Ins. Exch.,* 353 P.3d 924, 926, 2015 COA 70 (Colo. App. 2015); *DiMarco v. Dep't of Revenue,* 857 P.2d 1349, 1352 (Colo. App. 1993).

The City contends that the Plaintiff's action is indeed frivolous, vexatious and groundless, entitling the City to an award of its reasonable attorney's fees incurred in its defense.

III. CONCLUSION

WHEREFORE, the City respectfully requests the Court apply the above-referenced legal authority to the evidence produced at the hearing on Monday, to find that the City properly granted denial of inspection of the 45 items subject to the attorney-client privilege, and to grant the City an award of its reasonable attorney's incurred in defense of this action.

RESPECTFULLY SUBMITTED this 25th day of September, 2018.

WICK & TRAUTWEIN, LLC

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And

FORT COLLINS CITY ATTORNEY'S OFFICE

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CERTIFICATE OF ELECTRONIC FILING

The undersigned hereby certifies that a true and correct copy of the foregoing **CITY DEFENDANTS' LEGAL BRIEF** was filed via the Colorado Courts E-Filing System and served this 25th day of September, 2018, on the following:

Stacy Lynne
305 W. Magnolia Street #282
Fort Collins, CO 80521

A courtesy copy was also emailed to Ms. Lynne at *stacy_lynne@comcast.net*

s/ Jody L. Minch

[The original signed document is on file at Wick & Trautwein, LLC)