

<p>District Court, Larimer County, Colorado 201 LaPorte Avenue Fort Collins, Colorado 80521</p> <hr/> <p>PLAINTIFF: Stacy Lynne</p> <p>v.</p> <p>DEFENDANTS: City of Fort Collins: Darin Atteberry Carrie Daggett Christopher Van Hall</p>	<p>2018 SEP 28 AM 8:41</p> <p>FILED IN COMBINED COURT LARIMER COUNTY CO</p> <p>RECEIVED</p> <p>SEP 28 2018</p> <p>▲ COURT USE ONLY ▲ CITY ATTORNEY</p>
<p>Stacy Lynne 305 West Magnolia Street #282 Fort Collins, Colorado 80521 970-402-1582 stacy_lynne@comcast.net</p>	<p>Case Number: 2018CV172</p> <p>Division: 4C</p>
<p align="center">PLAINTIFF'S LEGAL BRIEF</p>	

INTRODUCTION

Defendants City of Fort Collins, Darin Atteberry, Carrie Daggett, and Christopher Van Hall submitted a legal brief on September 25, 2018 to “assist the Court in resolving the issues set for hearing for Monday, October 1, 2018”. Plaintiff Stacy Lynne files this brief to correct the misinformation that is contained in the legal brief that was prepared by Ms. Kimberly Schutt. Stacy Lynne’s intention is to provide the Court with facts and evidence that are in accordance with actual truth so that the Court is provided the best opportunity for issuing decisions that are based on reality and the law. Fortunately, the record in this case makes it easy to clear up any intended obfuscation by Defendants Atteberry, Daggett, Van Hall and the City. Also, in the

interest of offering Ms. Schutt wide latitude, Plaintiff Stacy Lynne considers that the defendants accidentally misstated the facts, evidence, and legal foundations of this case. Either way, whether through intent or accident, the Defendants' legal brief is misleading...and, under those conditions, justice is impossible.

CORRECTIONS

1. Ms. Schutt claims in her Introduction that "Plaintiff declined to pay the fee to obtain the log, and proceeded to file this action." Ms. Schutt wants the Court to believe that Ms. Lynne simply didn't want to pay "a \$75 charge for the staff time required to produce the log". In fact, Ms. Lynne was explicitly clear that \$75 had nothing to do with this Complaint. In an email from Stacy Lynne to City Attorney Carrie Daggett on August 6, 2018, Ms. Lynne writes to Ms. Daggett (see Complaint, Exhibit 18):

"Because the April 25, 2018 email thread contained conflicting information, I met in person with Ms. Macrina on April 26, 2018 to clear up exactly what the City would be providing. You say in an email dated May 8, 2018 that I was hesitant to continue the request "in light of the cost of producing the summary". **The reason I balked at the cost was due to the insufficient fulfillment of the CORA request, not because of the additional cost.**"

Ms. Schutt knew when she wrote her legal brief that \$75 was not the issue. But she misleads the reader by making it appear as if Ms. Lynne filed this lawsuit because she didn't want to pay \$75.

2. Ms. Schutt, in her **Legal Authority Section A**, spends nearly two pages writing about attorney-client privilege, even though attorney-client privilege is not in dispute. Actually, Ms. Lynne wrote in her Complaint: "Obviously, attorney-client privilege exists as safeguards to our system of justice." Ms. Lynne referenced attorney-client privilege in

the Complaint (see Summary of the Case under the August 7, 2018 heading) because Attorney Christopher Van Hall oddly tried to justify withholding records under attorney-client privilege by citing cases that involved attorney-client **crime-fraud exceptions**.

Ms. Schutt, citing *Black* and *Clark v. Dist. Court* (the crime-fraud exception case) continues: “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.” And, that the City is withholding the 45 items “on the grounds of this privilege was proper.” With this, Ms. Schutt makes my case. How do we know the withholding “on the grounds of this privilege was proper”? Just because the Defendants say so? But what if the defendants are motivated to conceal their conversations...not because of legitimate attorney-client privilege...but for some other reason? Without the explicit privilege log, we do not and cannot know if, who, how, and what was or was not waived legally and properly, or illegally and improperly.

Attorney-client privilege is not the foundation of this Complaint, but Ms. Schutt uses a lot of words in her legal brief to divert attention from the actual issue: an explicit privilege log for those documents withheld allegedly under attorney-client privilege.

3. **Ms. Schutt, in Legal Authority Section B**, repeats her misleading and inaccurate claim. She says again, “Plaintiff declined to pay the fee, and instead filed suit.” Ms. Lynne did not decline to pay the fee so that she could file a lawsuit. Ms. Lynne declined to pay the fee for an insufficient record.

Next, Ms. Schutt explains the limited privilege log that was offered by the City:

“...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 identify of the recipient, and a detailed factual description of the email) would compromise the very protections behind the privilege being asserted.”

Simply because the “City took the position” does not equate with legality. Further, providing the precise date of each email, the identity of the recipient, and a detailed factual description of the email is exactly what is required so that we all know who, how, and what was or was not waived legally and properly, or illegally and improperly withheld. This is why Ms. Lynne cited in her Complaint *Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874 (Colo. App. 1987): “Privileges for attorney-client communication and attorney work product established by common law, though incorporated into open records law, ***are waived by voluntary disclosure by privilege holder to a third person.***” It is likely in this case that attorney-client privilege *was* waived through voluntary disclosure between third parties. But how will we know that to be true or false if we do not have an explicit privilege log? Are we simply to take the Defendants’ word for it, because the “City took the position”? Of course not. This is why we have open records laws in the first place. More simply, if we could just take the government’s word for being prima facie truth, then we would not need open records laws.

Then, Ms. Schutt spends half a page on the \$75 fee. Why does she do it? Never, not at any time, did Ms. Lynne have an issue with being charged \$75 for staff’s time to prepare the record. In fact, Ms. Lynne regularly, as part of her work as an investigative journalist, pays for open records requests. She has a reputation for respecting the staff who are responsible for open records fulfillment. Ms. Lynne did not include in her Complaint a single reference

to having a problem with being charged for an open record. Ms. Schutt wastes our time with arguments that are not at issue.

4. In **Section C of Ms. Schutt's Legal Authority**, she argues against an *in camera* inspection of the 45 withheld documents. If the Court accepts that the City is properly withholding documents from a public records request, just because the City *says* it is being honest, then the open records laws are meaningless. Ms. Schutt exaggerates *People v. Trujillo* by equating an *attorney's case file* with documents that are withheld from a public record. The key distinction is that the Court would not be delving into the *attorney's case file*. The Court would simply be looking at a specific group of public records that are being withheld under the guise of attorney-client privilege to determine whether the documents are being withheld legally. But then, again, Ms. Schutt makes my case by explaining in *Trujillo* that inspection of an attorney's case file should only be done "when the information sought to be discovered is well-defined and all other reasonable means of discovering the information have been exhausted." How can we define (well) the information without a privilege log? And all other means of discovering the information have been exhausted because the City denied the means of discovering the information via an explicit privilege log. That is why we are now faced with this Complaint.

If the *Court* can't even inspect the public records via *in camera* review to determine whether the Defendants are legally blocking access to the documents, then the legislative intent and the Colorado Open Records Access laws are a ruse.

5. Ms. Schutt asks for attorney's fees in **Legal Authority Section D**. She throws down on Ms. Lynne the dangerous, inaccurate, and offensive words "frivolous, vexatious,

groundless”. The City forced this issue into the courtroom because they refused to provide an explicit privilege log. If the City doesn’t even want the Court to determine via *in camera* review, that Defendants properly withheld the 45 documents, then how can the Court determine that withholding was proper...and at the same time penalize Ms. Lynne for not being able to figure out whether withholding was proper?

CONCLUSION

Judge Devin Odell, in his SPECIFIC FINDINGS OF FACT, CONCLUSIONS OF LAW AND ANALYSIS in *John Doe and Jane Doe v. The Poudre School District* (2011CV1118) explains it so thoroughly:

The District also argues that the General Assembly’s inclusion of a more detailed index provision with respect to records withheld under the common law or deliberative process privilege indicates that it did not intend to impose a similar requirement with respect to other exemptions under CORA. C.R.S. § 24-72-204(3)(a)(XII). The Court finds this unconvincing. The two provisions are actually, as a practical matter, quite similar, with the primary differences being that the latter provision requires an entity to “specifically describ[e] each document withheld” and explain “why disclosure would cause substantial injury to the public interest.” Id. The first requirement, however, is implicit in the first provision, as discussed above, since a statement of privilege without any identification of the withheld documents would be meaningless. Rather, the statute appears to assume that all parties know the particular document at issue. The second requirement is plainly inapplicable in the context of other exemptions. Therefore, in this case, the Court grants the Does’ request for an index listing the title of each document withheld; the date of the document, the identity of the author and its recipients, and as detailed a factual description as possible without revealing the exempt material; and the statutory exemption claimed for that item or category. In addition, to the extent that District is withholding documents responsive to Request 1 and 2 because it contends that they are not “public records” under CORA, as discussed above, it must also include those documents in the index to carry forward its burden under Wick Commc’ns.”

Ms. Lynne filed this Complaint and Application for Order to Show Cause based on sound legislative intent, open records laws, case law, and the thorough analysis provided by Eighth Judicial District Court Judge Devin Odell. If we can't rely on those guideposts to lead us toward logical decisions, what else is there?

And so, Plaintiff Stacy Lynne requests that the Court:

- A. Enter an Order requiring the City of Fort Collins et al to allow Stacy Lynne access to all responsive public records in the City of Fort Collins et al possession, custody and control;
- B. Allow Plaintiff's witnesses to testify so that she can adequately prove her case;
- C. Enter an Order requiring the City of Fort Collins et al to provide a privilege log that indexes all documents that the City claims are not "public records" under CORA, including without exception and to meet its burden under Wick Commc'ns:
 - o An index listing the title of each document withheld, including:
 - the date of the document
 - the identity of the author and its recipients
 - a detailed and factual description of the document (without revealing the exempt material)
 - the statutory exemption claimed for that item or category
- D. Conduct an *in camera* review of the withheld documents to determine the legality of the City's withholding;
- E. Award Stacy Lynne fees and costs associated with this action.

Respectfully filed on Friday, September 28, 2018.



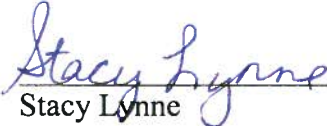
Stacy Lynne

CERTIFICATE OF SERVICE

I certify that on Friday, September 28, 2018, a true and accurate copy of the foregoing **PLAINTIFF'S LEGAL BRIEF** was served by hand-delivery to all parties:

John Duval
Deputy City Attorney
City of Fort Collins
300 LaPorte Avenue
City Hall West
Fort Collins, Colorado 80521

Kimberly Schutt
Wick & Trautwein, LLC
323 South College Avenue
Suite 3
Fort Collins, Colorado 80524


Stacy Lynne