SUPREME COURT, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue, 4th Floor Denver, Colorado 80203	
COURT OF APPEALS, STATE OF COLORADO Opinion of: Judge Davidson, Judge Sternberg and Judge Nieto, Concurring Case Number: 2008CA2659 DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO Judge Morris B. Hoffman Case Number: 08-CV-7083	▲ **COURT USE ONLY** ▲
DENVER POST CORP., a Colorado corporation, d/b/a The Denver Post; and Karen Crummy, Petitioners v. Bill RITTER, Governor of the State of Colorado, Respondent	
Attorney for *Amicus Curiae* : Rachel L. Allen, #37819 COLORADO MUNICIPAL LEAGUE 1144 Sherman Street Denver, Colorado 80203 Phone: (303) 831-6411 Fax: (303) 860-8175 Email: rallen@cml.org	Case Number: 10 SC 94
BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF BILL RITTER, GOVERNOR OF THE STATE OF COLORADO	

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g) because it does not exceed 30 pages.

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Rachel L. Allen

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COMES NOW the Colorado Municipal League (the "League") by its undersigned counsel and, pursuant to Rule 29, C.A.R., submits this brief as *amicus curiae* in support of the position of Appellee, Bill Ritter, Governor of the State of Colorado (the "Governor").

INTERESTS OF THE LEAGUE

The League is a non-profit, voluntary association of 264 of the 271 municipalities located throughout the state of Colorado (comprising nearly 97 percent of the total incorporated state population), including all 100 home rule municipalities, 163 of the 171 statutory municipalities and the lone territorial charter city; all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less. The League has been appearing as an *amicus* before the Colorado Court of Appeals and the Colorado Supreme Court for decades in appeals where a significant decision affecting Colorado municipalities is possible. The League as an *amicus* in this case, will once again provide the Court with a statewide municipal perspective on the issues presented and assure that the general interest of the League's member municipalities is represented.

ISSUE PRESENTED FOR REVIEW

The League hereby adopts and incorporates by reference the statement of the issue presented for review in the Governor's Answer Brief.

STATEMENT OF THE CASE

The League adopts and incorporates by reference the statement of the case as stated in the Governor's Answer Brief.

SUMMARY OF ARGUMENT

This case involves a request by the Denver Post for Governor Ritter's private cell phone bill, based on the argument that the Governor made "official business" calls on the phone. The Court of Appeals held that this wasn't a record "kept" by the Governor in his official capacity, rather it was kept in his personal/ non-public capacity and was not used in the conduct of any public business; it was simply used by the Governor to pay his phone bill. This appeal is significant as the latest in a series of decisions by this Court exploring the line between the public and private records of public officials. This case has immense implications for local officials, particularly in our digital age.

ARGUMENT

I. THE COURT OF APPEALS WAS CORRECT IN FINDING THAT GOVERNOR RITTER'S PERSONAL CELL PHONE STATEMENTS ARE NOT PUBLIC RECORDS AS DEFINED BY THE COLORADO OPEN RECORDS ACT.

Governor Ritter possessed a state issued smart phone device and a personal cell phone, both of which were used to varying degrees in his official capacity as Governor for the State of Colorado. At issue in the instant case is whether the personal cell phone billing statements constitute a public record under CORA.

CORA defines public records as "all writings made, maintained, or kept by the state, any agency,...or political subdivision of the state...for the use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds." § 24-72-202(6)(a)(I), C.R.S. (2010). Applying the definition of CORA to the instant case, the Court of Appeals made a number of significant findings.

The Court of Appeals reasoned that Governor Ritter did not "make" his personal cell phone billing statements. Denver Post Corp. v. Bill Ritter, 230 P.3d 1238, 1242 (2009). While Governor Ritter was aware that his calls would be tolled by his cell phone provider and that the statements created by the service

provider reflect that the call occurred, the statements do not reveal a transcript of the actual conversation; nor is it essential that Ritter place calls for the service provider to generate a billing statement. Id. Therefore, Governor Ritter did not make the bills. Id.

The Court of Appeals found that Governor did not "maintain" his billing statements. Id. at 1243. The act of maintaining requires periodic updating or keeping the record in good repair, and Governor Ritter merely received the cell phone bills and paid them. Id. Therefore, Governor Ritter did not maintain his personal cell phone billing statements. Id.

In Wick, this Court held that where, as here, the public official in possession of the record has both a private and an official capacity, the applicant has a threshold burden to show that the record is likely made, maintained or kept by the custodian in his/her official capacity. Wick Commc'ns. Co. v. Montrose County Bd. of County Comm'rs, 81 P.3d 360, 364 (Colo. 2003). The burden is on the Applicant to Id. at 364. Because of the similarity of the Wick facts to those in the instant case, the Court of Appeals appropriately found Wick instructive. The Court of Appeals, as well as the trial court, agreed with Governor Ritter that while the Governor "kept" his cell phone bills, he did not keep them in his official

capacity. Wick v. Montrose County, 81 P.3d at 364; Denver Post Corp., 230 P.3d at 1243.

The Wick Court in determining whether a public official's diary was kept in his "official capacity" applied the following factors: (1) whether the official was required to keep the diary; (2) where it was kept; (3) who had access to it; (4) whether a public entity had ever attempted to exercise control over it; and (5) to what use it was put. Wick, 81 P.3d at 364-66. Governor Ritter was not required to use a cell phone; did not keep the cell phone billing statements in his office at the state Capitol; did not offer his staff access to the bills; did not allow other governmental officials to exercise control over the bills; and used the bills to verify the amount owed and pay them from his personal funds. Denver Post Corp., 230 P.3d at 1243-44. For the reasons explained herein, Governor Ritter's personal cell phone statements were not kept for the Governor's official use and do not constitute a public record under CORA. Id.

The Court of Appeals rejected Petitioners argument that the Governor's private phone records should be made public, notwithstanding Wick, because of the "possibility of some future official use" of the records kept by the Governor. Denver Post Corp., 230 P.3d at 1244. The Court of Appeals found that an otherwise private document will not be transformed into a public document merely

by speculation about some future official use "in the absence of any other indicia that a record is made, maintained or kept in an official capacity." Id. The Court of Appeals observed, correctly, that to do so would subject "almost any document kept by a public official or employee to CORA's disclosure requirements." Id.

The Court of Appeals accordingly upheld the Governor's non-release of his personal phone records. The decision of the Court of Appeals was consistent with CORA and the decisions of this Court. The League respectfully urges that the decision of the Court of Appeals be upheld.

II. COLORADO CASE LAW RECOGNIZES THE PRIVACY INTERESTS OF PUBLIC OFFICIALS AND APPROPRIATELY PROTECTS THOSE INTERESTS BY DISTINGUISHING THE PRIVATE AND PUBLIC NATURE OF RECORDS IN THE POSSESSION OF PUBLIC OFFICIALS.

Courts are often asked to police the line between what records are public and what records are private. This is not surprising, as CORA requires the records custodian to release certain records and expressly excepts others. § 24-72-204, C.R.S. (2010). Records custodians often find themselves caught between those seeking release and those opposing release of the same records (as when a newspaper seeks news in the details of a personnel dispute).

In both Wick and Denver Publ'g Co., this Court took notice that CORA and its "prior case law steadfastly guard against disclosure of private papers and concluded that the purpose behind CORA was not furthered by "disclosing public officials' every thought and feeling [to the public]."" Denver Publ'g Co. v. Bd. Of County Comm'rs of Arapahoe County, 121 P.3d 190, 195-6 (quoting Wick, 81 P.3d at 361). In the present case, the Court of Appeals concluded that, much like the county manager's private diary in Wick, Governor Ritter's personal cell phone billing statements were not public records kept by the Governor in his official capacity subject to disclosure. Denver Post Corp., 230 P.3d at 1238.

This Court has taken a deliberate approach to the challenge of applying CORA to find the proper balance between transparency in government and the privacy interests of public officials. In Denver Publ'g Co., this Court addressed the openness of e-mails exchanged between an elected official and a county employee. Denver Publ'g Co., 121 P.3d at 190. While the e-mails were clearly maintained by Arapahoe County, the majority of them included sexually explicit and/or romantic messages that were in no way related to county business. Id. This Court looked to the content of the messages to see if there was a "demonstrable connection" between the records at issue and "the performance of public functions or involve the receipt and expenditure of public funds." Denver Publ'g Co., 121

P.3d at 202-3; § 24-72-202(6)(a)(I), C.R.S. (2010). This Court found that, "it is apparent that a large portion of the e-mail messages...contain only sexually-explicit exchanges between Baker and Sale..., [and] it is clear they were sent in furtherance of their personal relationship and were not for use in the performance of the public functions of the Clerk and Recorder's Office." Denver Publ'g Co., 121 P.3d at 203. After observing that "[CORA] does not eliminate the privacy protection inherent in the "public records" definition," this Court found that mandating disclosure of these personal e-mail messages would have violated the privacy interests of the public officials. Denver Publ'g Co., 121 P.3d at 202.

Even if the phone records at issue here were held in the Governor's official capacity, there is no "demonstrable connection" between the records at issue and "the performance of public functions or involve the receipt and expenditure of public funds." Denver Publ'g Co., 121 P.3d at 202-3; § 24-72-202(6)(a)(I), C.R.S. (2010). There is no official requirement for the Governor to use a cell phone, and he used his personal funds to pay the bill. Denver Post Corp., 230 P.3d at 1243-44. As the Court of Appeals found, the billing statements were simply used to pay the Governor's personal cell phone bill. Id.

This Court's decision in Denver Publ'g Co. follows the statement three years earlier in Wick that: "CORA was not intended to cover information held by a

governmental official in his private capacity." Wick Commc'ns. Co. v. Montrose County Bd. of County Comm'rs, 81 P.3d 360, 364 (Colo. 2003). The Wick Court confronted the question of whether a county manager's private diary, which he relied upon in preparing an official report was a public record. Wick, 81 P.3d at 360. As noted above, the Wick Court held that where the custodian of the record has both a private and an official capacity, the initial burden is on the requesting party to demonstrate that the record is "likely" made, maintained or kept by the custodian in his/her "official" capacity. Wick, 81 P.3d at 364. This Court found that the county manager's diary was made in his private capacity, the County did not maintain the diary and the diary was not kept by the County or the county manager in his official capacity. Id.

The test that this Court laid out in Wick protects the private interest of public officials and places the burden on the Petitioners to meet their threshold burden of proof, which, as the Court of Appeals determined in the case at bar, Petitioners did not meet. Denver Post Corp., 230 P.3d 1238.

III. THE COURT OF APPEALS DECISION APPROPRIATELY REFLECTS THE PUBLIC POLICY CONSIDERATIONS AND PURPOSES OF CORA.

The policy behind the Colorado Open Records Act ("CORA") is for citizens to have reasonable access to inspect public records. § 24-72-201, C.R.S. (2010).

This Court clarified the purpose of CORA in Wick, "while the general purpose of CORA is to provide open government through disclosure of public records, CORA's purpose is not to disclose information that is not held by the government or that otherwise falls under an exception." Wick, 81 P.3d at 364 (2003).

Town trustees and city council members serve the vast majority of Colorado's cities and towns as part-time volunteers. Such officials, as well as municipal employees, are generally not issued cell phones paid for by the municipality. It is reasonable to presume that those local officials and employees, at some point in their service, will discuss public business on their personal cell phones. The decision in the instant case will apply to records kept by local officials and employees serving all Colorado governments, just as it will to the Governor. And, of course, the direction provided by this case will extend well beyond simply personal phone bills.

Petitioners propose a rule that by its logical application would expose a huge new universe of records kept by public officials and employees at the State and every political subdivision to public examination because such personal documents might possibly be implicated in their role as a public servant. Brief of Petitioner at 30-34, Denver Post Corp. v. Ritter, No. 10-SC-94 (Colo. Aug. 11, 2010).

Making virtually every personal document a public record and every public official a custodian of his/her personal documents would be an onerous burden to place on Colorado's public servants. It is especially excessive to place such burden on elected officials and government employees with respect to personal documents that, as here, reveal little or nothing of substance about official business, and which therefore do very little to further CORA's purpose of openness in government. As this Court recognized in Denver Publ'g Co. by requiring release of such public records, CORA would not only "discourage public service, [it] would create an arena of gossip and scandal instead of facilitating a forum of open and frank discussion about issues concerning public officials and the citizenry they serve." Denver Publ'g Co., 121 P.3d at 205 (quoting Wick, 81 P.3d at 365-66).

The Court of Appeals took a common sense approach in resolving the practical application of CORA to a real world dilemma. The Court of Appeals declined to depart from the purpose of CORA and this Court's direction in Wick, in order to compel Governor Ritter to disclose his personal cell phone statements. Instead, the Court of Appeals respected the privacy interest of the Governor, upholding his decision to deny the Denver Post's request to produce his private bills. Denver Post Corp., 230 P.3d 1238.

This Court crafted a good balance between openness in government and the privacy interest of elected officials that the Court of Appeals appropriately followed in the instant case. For those seeking to readjust that balance, it is appropriate for them urge the Legislature to revisit the Colorado Open Records Act. As this Court acknowledged, "although generally CORA favors broad disclosure, the General Assembly recognized that not all documents should be subject to public disclosure." Wick, 81 P.3d at 364. The Legislature in its infinite wisdom can once again consider the parade of horribles created by encroachment upon transparency in government by the assertion of privacy rights from elected public officials as the Legislature does with so many other problems.

We ask this Court to enforce CORA's purpose and plain meaning by upholding the Court of Appeals decision that Governor Ritter's personal cell phone billing statement is not a record made, maintained or kept in his official capacity and therefore not subject to disclosure under CORA.

CONCLUSION

WHEREFORE, for all of the reasons set forth above, the League respectfully requests that the decision of the Court of Appeals be affirmed.

Respectfully submitted this 25th day of October, 2010.

COLORADO MUNICIPAL LEAGUE

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