COLORADO COURT OF APPEALS 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	
Appeal from District Court, Arapahoe County, Colorado Honorable Charles M. Pratt, District Court Judge Case No. 2011CV2239	
Appellants/Cross-Appellees: MOUNTAIN-PLAINS INVESTMENT CORPORATION; JOHN ROBERT FETTERS, JR.; JOANN DRANSFELDT FETTERS; A. SUE FETTERS; and JOHN R. FETTERS III **Appellee/Cross-Appellant:** PARKER JORDAN METROPOLITAN DISTRICT, a quasi-municipal corporation	**▲COURT USE ONLY ▲**
Attorney for Amicus Curiae: Geoffrey T. Wilson, #11574 COLORADO MUNICIPAL LEAGUE 1144 Sherman Street Denver, CO 80203-2207 Phone: 303-831-6411 Fax: 303-860-8175 E-mail: gwilson@cml.org	Case No. 12CA1034

BRIEF OF THE COLORADO MUNICIPAL LEAGUE; COLORADO COUNTIES, INC.; THE SPECIAL DISTRICT ASSOCIATION OF COLORADO; AND THE COLORADO ASSOCIATION OF SCHOOL BOARDS AS AMICUS CURIAE IN SUPPORT OF THE APPELLEE/CROSS-APPELLANT

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:

1. The brief complies with C.A.R. 28(g).
   Choose one:

   [√] It contains 3,556 words.

   [ ] It does not exceed 30 pages.

2. The brief complies with C.A.R. 28(k).

   [√] For the party raising the issue:

   It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

   [ ] For the party responding to the issue:

   It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

/s/ Geoffrey T. Wilson
Geoffrey T. Wilson, #11574

Attorney for the Colorado Municipal League

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COME NOW the Colorado Municipal League, Colorado Counties, Inc., the Special District Association of Colorado, and the Colorado Association of School Boards by undersigned counsel and, pursuant to Rule 29, C.A.R., submit this brief as amicus curiae in support of Appellee, the Parker Jordan Metropolitan District ("the District").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Amici hereby adopt and incorporate by reference the statement of the issues presented for review in the District's Opening-Answer Brief.

STATEMENT OF THE CASE & STANDARD OF REVIEW

Amici adopt and incorporate by reference the statement of the case in the District's Opening-Answer Brief, as well as the District's statement regarding the standard of review, which appears on pages 1-4 of the District's Opening-Answer Brief.

SUMMARY OF ARGUMENT

Amici will address three arguments made by Appellants, Mountain-Plains Investment Corp., *et al* ("Mountain-Plains") in their Opening Brief.

Mountain-Plains proposes both a dramatic expansion in the reach of the Colorado Open Records Act ("CORA"), C.R.S. §§ 24-72-200.1-206, with respect to records held by private government contractors, and new restrictions on governmental authority to levy research and retrieval fees in connection with CORA requests.

Appellant cites little or no Colorado legal authority in support of its various arguments that the decision of the trial court should be disturbed on appeal. While public policy arguments for changes to the law suggested by Appellant might be advanced, those arguments are better addressed to the General Assembly rather than to this Court.

The decision of the trial court, with respect to records held by government contractors and with respect to research and retrieval fees (with the exception of the portion of its decision addressed in the District's cross-appeal), are consistent with prior decisions of this court and of the Colorado Supreme Court. Accordingly, and respectfully, Amici urge that the decision of the trial court on the issues addressed in this brief should be affirmed.

ARGUMENT

Amici adopt and incorporate fully herein by reference the argument of the Appellee in its Opening-Answer Brief, including the District's cross-appeal, and respectfully submit the following.

I. THE RECORDS AT ISSUE ARE IN THE POSSESSION OF PRIVATE GOVERNMENT CONTRACTORS AND WERE NEITHER MAINTAINED TO ASSURE READY ACCESS BY THE GOVERNMENT, NOR IN FACT USED BY THE GOVERNMENT IN CONNECTION WITH A GOVERNMENT PROJECT. ACCORDINGLY, THEY ARE NOT "PUBLIC RECORDS" AND THE DECISION OF THE TRIAL COURT SHOULD BE AFFIRMED.

In rejecting Mountain-Plains' CORA request for records in the hands of the District's contractors, the trial court noted the Colorado Supreme Court's recognition that records "never in the possession of the agency can become public records if they are used by the agency in the exercise of its official functions." Order 4 (citing *International Brotherhood of Electrical Workers, Local 68 v. Denver Metro Major League Baseball Stadium Dist.,* 880 P.2d 160 (Colo. App. 1994)). Nonetheless, the trial court concluded that, under the facts of this case, "records that defendant has not seen could not have been used by the agency to exercise its official functions." *Id.* Accordingly, the trial court held that the District was not obligated to produce records in the hands of its contractors "because those

communications are not public records and are thus not subject to CORA." Order 5.

The decision of the trial court was correct. Amici respectfully urge that it be affirmed by this Court.

The leading Colorado decision concerning access under CORA to records in the physical possession of government contractors is *International Brotherhood.* In this case, the union sought certain bid documents through a CORA request to the Stadium District. These records were made, maintained, and in the physical possession of the general contractor for construction of Coors Field. The Court of Appeals found the Stadium District to be the "custodian" of the records at issue for purposes of CORA.

The *International Brotherhood* court initially noted that the "trial court found with record support that the Stadium District used and relied upon the documents and was therefore the custodian of the documents for purposes of this action." *International Brotherhood*, 880 P.2d. at 163. The Court of Appeals affirmed the trial court on this point, focusing both on the actual use of the records in question by the Stadium District, and the fact that the records were maintained by the contractor in order to assure the Stadium District full access. The court first

noted that although "the documents were never in the possession of the Stadium District . . . the documents are nonetheless public records because they were used by the Stadium District in the exercise of its official functions." *Id.* at 164. The court went on to point out that the records at issue, "while never in the actual personal control or custody of any employee or officer of the Stadium District, were maintained by [the government contractor] in such a manner as to give the Stadium District full access to the documents." *Id.*

The facts here are very different from those present in *International Brotherhood.* The records held by the District's contractor in this case were not maintained in a manner intended to assure full access to the District. Indeed, under agreements between the District and its contractors, the contractors retained ownership of these private corporate records. They were to provide access to the District only *after* the project was complete, and then only for a limited period of time, and then only if the District agrees to pay for commercial printing or copying of the records. Record 131, at ¶ 9). The contractors in the case at bar were hardly in the position of persons "authorized" to serve as custodians of public records. These contractors were maintaining these records solely for their own private, corporate purposes, and plainly not in such a manner as to provide "full access" to the government. Furthermore, there is no evidence of access to or actual use by the

District of the records while the records were in possession of the contractors. Indeed, the government in the case at bar has never seen the records at issue.

Appellant urges here a dramatic expansion of the reach of CORA, based upon a reading of the definitions in the Act of "custodian" and "official custodian" that is, quite literally, without precedent in Colorado.

While CORA has always been principally focused on records in the actual *physical possession* of the government, these definitions do recognize that, in certain situations, records can be characterized as made, maintained, or kept by the government, even though they are in the physical possession of someone else. The Generally Assembly defined "official custodian" in CORA as "any officer or employee of the state, of any agency, institution, or political subdivision . . . who is responsible for the maintenance, care, and keeping of public records, *regardless of whether the records are in his or her actual personal custody and control.*" C.R.S. § 24-72-202(2) (emphasis added).

This definition contemplates physical possession of the public records by someone other than the government, but also plainly presumes that, in such a circumstance, responsibility for the maintenance, care, and keeping of such records remain with the "official" custodian. The definition of "custodian" reflects a

similar understanding. CORA defines "custodian" as including "the official custodian *or any authorized person having personal custody and control of the public records in question.*" C.R.S. § 24-72-202(1.1) (emphasis added).

It is a well-established rule of statutory construction that "[a]ll related provisions of an act must be construed as a whole; thus, if more than one statute addresses an issue, the statutes should be read together." *Foiles v. Whittman,* 233 P.3d 697, 699 (Colo. 2010) (citing *Board of Medical Examiners v. Duhon*, 895 P.2d 143, 146 (Colo. 1995)).

A fair construction of the reference to "authorized person" in the definition of "custodian" is that this is the person also contemplated in the definition of "official custodian." Thus, an "authorized person" is one who may hold records in his "personal custody and control", but does so in circumstances where the official custodian can be said to remain ultimately responsible for the maintenance, care, and keeping of the records at issue. This responsibility may be inferred from situations where records are maintained by a government contractor so as to be readily accessible by the government and are in fact *used* by the government in connection with a government function or the expenditure of public funds.

In its Opening Brief, Mountain-Plains suggests an approach to addressing records in the hands of third parties that ignores the *International Brotherhood* precedent altogether. Instead, Mountain-Plains proposes that all records relating to a public project in the hands of a third party are public records, simply because they concern the public project. Actual access by or use of the records by the government does not matter. As Appellants argue, "These statutory definitions of 'custodian' and 'official custodian' make clear that *all records relating to the [public project]*–regardless of who maintains possession of them and regardless of whether [the District] received a copy of them–are subject to CORA." Opposition Brief ["Opp'n Br."] 12 (emphasis added).

Mountain-Plains cites no Colorado judicial authority for its construction of CORA, and none exists.

Amici respectfully urge that, by focusing on the government's actual access and use of the records in the hands of contractors, the *International Brotherhood* court articulated a practical approach. It focuses on the relationship between the official custodian and the actual custodian, and specifically whether the person "maintaining" or "keeping" the records in question is doing so in order to afford

full access to the records by the government, and whether the records were actually used by the government.

By defining "public records" as writings made, maintained, or kept by the state, or any agency or political subdivision of the state, the General Assembly purposefully limited the universe of records to which CORA applies. Notably, the General Assembly did *not* define public records as "all writings made, maintained or kept by *anybody*" concerning a government-funded project. Amici urge that any arguments to be made as to why the law ought to be amended should be addressed to the General Assembly, rather than this Court. The dramatic expansion in the reach of CORA proposed here could suddenly expose to examination voluminous and previously private records held by scores of private businesses that have chosen in the past, or may choose in the future to contract with the government. Such an expansion of this critical statute deserves the benefit of full legislative debate in the General Assembly.

II. NO COLORADO LAW PRECLUDES COLLECTION OF A PORTION OF A CORA RESEARCH AND RETRIEVAL FEE PRIOR TO ACTUAL RECORD RETRIEVAL, NOR REQUIRES THAT A "POLICY" BE IN PLACE BEFORE SUCH FEES MAY BE CHARGED. ACCORDINGLY, THE DECISION OF THE TRIAL COURT SHOULD BE AFFIRMED.

Mountain-Plains' opening brief raises several issues relating to the research and retrieval fees that records custodians may charge in connection with CORA requests. Among Appellants' arguments are that the government may not collect any of such fee in advance of retrieving the records, and that the government must have a policy in place relating to research and retrieval fees, or they may not be charged at all. Amici will address these two issues in turn.

A. The law does not preclude collection of a portion of the research and retrieval fee prior to retrieval of the records.

Mountain-Plains argues that the District "violated CORA by taking no action to retrieve or collect responsive emails until Mountain-Plains paid" a deposit against the full research and retrieval fee. Opp'n Br. 15. Much of this portion of Mountain-Plains' brief actually addresses not when these fees may be charged, but rather Appellants' various complaints about the amount of fees charged. Opp'n Br. 16-18. Appellants' argument seems to be that because various aspects of the government fee may eventually turn out to be invalid, no one should have to pay in advance any part of a research and retrieval fee.

Appellants cite no judicial authority to support their argument that charging a portion of a research and retrieval fee prior to retrieval of the records is contrary to Colorado law. No such authority exists.

As the trial court noted, research and retrieval fees were recognized as appropriate in *Black v. Southwestern Water Conservation Dist.,* 74 P.3d 462, 472 (Colo. App. 2003) and *Citizens Progressive Alliance* v. *Southwestern Water Conservation Dist.,* 97 P.3d 308, 314 (Colo. App. 2004). Government authority with respect to assessing fees is subject to various limitations, *see, e.g., Bloom* v. *City of Fort Collins* 784 P.2d 304 (Colo. 1989) (amount of fee must be reasonably related to cost of program for which fee is charged; "fee" distinguished from "tax") *and Barber* v. *Ritter* 196 P.3d 238, 248-249, (Colo. 2008). However, neither *Black* nor any other Colorado authority hints that assessment of a portion of this fee before the records retrieval occurs is improper. Indeed, charging fees before services are rendered is commonplace in Colorado local government, whether building permit fees, plan review fees, street cut permit fees, business licensing fees, or any of a myriad of other fees.

A research and retrieval fee is a type of "service fee", which has been defined by the Colorado Supreme Court as "a charge imposed on persons or property for the purpose of defraying the cost of a particular government service."

Krupp v. *Breckenridge Sanitation Dist.*, 19 P.3d 687, 693 (Colo. 2001). The *Krupp* court describes some of the limitations on service fees, but also the deference by courts to the way in which government chooses to assess these fees.

> Because a service fee is designed to defray the cost of a particular governmental service, the amount of the fee must be reasonably related to the overall cost of the service. Mathematical exactitude is not required, however, and *the particular mode adopted by the governmental entity in assessing the fee is generally a matter of legislative discretion* . . . Because the setting of rates and fees is a legislative function that involves many questions of judgment and discretion, we will not set aside the methodology chosen by an entity with rate making authority unless it is inherently unsound. *Id.* at 693-694 (citing *Bloom v. Fort Collins*, 784 P.2d 304 at 308 (Colo. 1989) and *Bennett Bear Creek Farm Water & Sanitation Dist. v. Denver*, 928 P.2d 1254, 1268 (Colo. 1996)) (emphasis added).

Here, the District chose to charge a portion of its research and retrieval fee as a deposit prior to actual retrieval of the records. There is nothing "inherently unsound" about how the District calculated or assessed the fees here at issue. Indeed, payment of fees "in consideration of the costs of services *to be rendered*" has been approved by the Supreme Court. *Commerce City v. Cooper,* 609 P.2d 106, 107 (Colo. 1979) (emphasis added). The trial court observed that this is a matter of simple practicality, stating "It is a reasonable regulation to require up-front payment before releasing the record; else the custodian will potentially have to pursue collection after it had expended monies complying with a request." Order 10.

Respectfully, Amici urge that this court affirm the trial court's conclusion that the District "did not violate CORA when it required a deposit prior to production of the records." *Id.* Should the General Assembly wish to limit the fee authority of local governments in the manner suggested by the Appellant, they will do so. Indeed, the General Assembly has recently shown itself to keep a close eye on the fees that citizens pay under CORA in connection with review of government records. In 2007, the General Assembly passed S.B. 07-045, amending CORA to reduce the amount that records custodians may charge for copies of public records. *See* C.R.S. § 24-72-205(5).

Absent enactment of a limit on collecting any portion of research and retrieval fees prior to record retrieval by the General Assembly, and absent any citation of legal authority for such a limitation by the Appellants, the decision of the trial court should be affirmed.

B. Colorado law does not preclude governments from charging a research and retrieval fee even if the government has not first adopted a "policy" providing for imposition of such a fee.

It is certainly true, as Mountain-Plains points out in its opening brief, Opp'n Br. 18, that CORA permits records custodians to develop "such regulations with reference to the inspection of [public] records as are reasonably necessary" for the protection of the records and to prevent interference with the duties of the

custodian. C.R.S § 24-72-203(1)(a); *see also Tax Data Corp. v. Hutt*, 826 P.2d 353 (Colo. App. 1991). It is also true, as Appellant notes, that in both *Black* and *Citizens Progressive Alliance,* the court of appeals evaluated research and retrieval fees that were provided for in a policy of the Southwestern Water Conservation District. Opp'n Br. 19-20.

Where Amici differ from Mountain-Plains is in Mountain-Plains' argument that these opinions support the notion that "[the Appellee] violated CORA by assessing any of these fees when it had no policy in place." Opp'n Br. 20. *Black* and *Citizens Progressive Alliance* do not say as much. The court in *Black* was dealing with a challenge to a fee embodied in a district policy, so the court began its analysis with a nod to the custodian's statutory authority to develop "reasonable" records management rules. *See* C.R.S. § 24-72-203(1)(a). But the existence or absence of a policy was not really the court's focus in *Black*. Rather, the court's focus was whether the fee authority existed at all. The *Black* court was presented with an argument that the express authority for research and retrieval fees found in the Colorado Criminal Justice Records Act, *see* C.R.S. § 24-72-306(1), meant, applying the canon of statutory construction "*expressio unius est exclusio alterius*", that no similar fee authority existed under CORA.

The court rejected this argument. It looked at the legislative history of CORA, in which an express prohibition of research and retrieval fees was deleted from an early draft of the Act, and concluded that "[T]here is support in the legislative history to suggest that there was no legislative intent to prohibit charging some fee." *Black*, 74 P.3d at 472. That the Southwestern Water District happened to have a policy in place had nothing to do with the court's opinion.

In *Citizens Progressive Alliance*, the records policy of the Southwestern Water Conservation District was directly challenged as contrary to CORA. Those challenging the Southwestern Water District's policy argued that the research and retrieval fee requirement, along with other aspects of the policy, were not "reasonable regulations," were outside of the standard set forth in C.R.S. § 24-72-203(1)(a), and thus actually served to deny access to public records. *Citizens Progressive Alliance,* 97 P.3d at 312. The court rejected this challenge, and upheld the Southwestern Water District's policy as reasonable.

> While CORA does not allow a records custodian to promulgate a policy that denies access to otherwise accessible public records or contravenes the statutory requirements for responding to records request, SWCD's [Southwestern Water Conservation District] policy does neither. Although plaintiffs contend the policy denies access to SWCD records, there is no provision in the policy that can be read as a denial of access. *Id.* at 312-313.

While the practices of the Appellee in the case at bar certainly meet the test applied by the court in *Citizens Progressive Alliance* to the records policy at issue (access to the documents was not denied and the policies of CORA were not contravened), there is simply nothing in the *Citizens Progressive Alliance* opinion that requires some sort of policy as a necessary prerequisite to imposition of research and retrieval fees.

Mountain-Plains cites no Colorado authority for its position, and Amici were unable to locate any Colorado authority conditioning local government fee authority upon the existence of some sort of policy. Accordingly, Amici respectfully urge this court to decline Appellant's invitation to use this case as an opportunity to read such a requirement into the law. As we urged above, with respect to the issue of charging a deposit against the research and retrieval fee, whether such a policy should be required is a matter more appropriately addressed by the General Assembly.

CONCLUSION

WHEREFORE, for all of the reasons set forth above, Amici respectfully request that the decision of the Arapahoe County District Court be affirmed, except as to

the matters addressed in the cross-appeal of the Appellee, where Amici urge that the Arapahoe County District Court be reversed.

Respectfully submitted this 4th day of October, 2012.

COLORADO MUNICIPAL LEAGUE

COLORADO COUNTIES, INC.

THE SPECIAL DISTRICT ASSOCIATION OF COLORADO

THE COLORADO ASSOCIATION OF SCHOOL BOARDS

Original signature on file at the offices of the Colorado Municipal League

/s/ Geoffrey T. Wilson

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2012, a true and correct copy of the foregoing was filed with the Court and served on the parties named below via LexisNexis File & Serve:

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