SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203 Colorado Court of Appeals Case No. 12CA2613 – Division IV Opinion by J. Webb J. Bernard concurred and J. Dunn dissented Chaffee County District Court Case No. 2011CV1132 The Honorable Charles M. Barton **Petitioner:** Joyce Reno in her official capacity as Chaffee County Clerk and Recorder v. **Respondent:** Marilyn Marks Attorneys for Amicus Curiae Colorado Counties, Inc., Colorado County Clerks Association, Special District Association Of Colorado, Colorado Association Of School Boards, the Colorado Municipal League Thomas J. Lyons, #8381 Stephanie A. Montague, #26184 Hall & Evans, L.L.C. 1001 Seventeenth Street, Suite 300 Denver, Colorado 80202 Phone No.: 303-628-3300 Fax No.: 303-628-3368 E-Mail: lyonst@hallevans.com montagues@hallevans.com	**▲ COURT USE ONLY ▲** Case Number: 2014SC235

AMICUS BRIEF FROM COLORADO COUNTIES, INC., COLORADO COUNTY CLERKS ASSOCIATION, SPECIAL DISTRICT ASSOCIATION OF COLORADO, COLORADO ASSOCIATION OF SCHOOL BOARDS, and COLORADO MUNICIPAL LEAGUE

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).

Choose one:
__X__ It contains 3,040 words.
_____ It does not exceed 18 pages.

C.A.R. 28(k) is not applicable in that this is an amicus brief in a C.A.R. 21 proceeding, and the Counties are neither the party raising the issue nor the party responding to the issue.

__X__ Undersigned counsel certifies that this **Amicus Brief** complies with all the requirements as to typeface, font and line spacing, pursuant to C.A.R. 32.

s/ Stephanie Montague
Signature of attorney or party

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUE PRESENTED

The issue accepted for review pursuant to the Court's Order dated August 18, 2014, is whether the Court of Appeals erred by mandating an award of attorney fees to a Colorado Open Records Act ("CORA") records requestor in a proceeding under C.R.S. § 24-72-204(6)(a), even though that section does not expressly provide for an award of fees.

STATEMENT OF THE CASE

Amicus Curiae adopts and incorporates by reference the statement of the case as stated in the Petitioner's Opening Brief.

STANDARD OF REVIEW

Whether a statute permits an award of attorney fees is a question of statutory interpretation and therefore presents a question of law subject to *de novo* review. *Crandall v. City & County of Denver*, 238 P.3d 659, 661 (Colo. 2010)(internal cites omitted).

SUMMARY OF ARGUMENT

The petitioner, Joyce Reno, Chaffee County Clerk and Recorder ("Clerk"), filed a petition seeking review of the Court of Appeals' ruling that Respondent Marilyn Marks ("Marks") is entitled to attorney fees where she neither applied to the district court for, nor received, any order requiring the Clerk to disclose any voted ballots requested pursuant to CORA. The Court of Appeals ("Court") held Marks

was entitled to attorney fees on the basis that the Clerk commenced an action as the custodian of the records pursuant to C.R.S. §24-72-204(6)(a) to determine the propriety of Marks' CORA requests. This result arose despite the absence of any statutory provision allowing for the award of attorney fees to the CORA records requestor in such an instance.

The Court of Appeals erred in concluding that Marks was entitled to fees pursuant C.R.S. § 24-72-204(5). Marks did not initiate the district court action. Further, during the district court proceedings, the Clerk and Marks stipulated to hold all proceedings in abeyance to allow House Bill 12-1036 to be considered by the Colorado Legislature. Once that bill passed, the Clerk produced a single anonymous voted ballot in accordance with the Marks request and the guidelines established by the bill, enacted as C.R.S. § 24-72-205.5. No such circumstances establish Marks as a "prevailing applicant" entitled to attorney fees, as recently defined by this Court in *Benefield v. Colorado Republican Party*, 329 P.3d 262 (Colo. 2014).

ARGUMENT

I. No attorney fees to a CORA records requestor is proper when the custodian of a public record seeks a district court order, as authorized by C.R.S. § 24-72-204(6)(a), either permitting the custodian to restrict disclosure of the record or determining whether disclosure of the record is prohibited.

The statutory provision at issue states as follows:

(6) (a) If, in the opinion of the official custodian of any public record, disclosure of the contents of said record would do substantial injury to the public interest, notwithstanding the fact that said record might otherwise be available to public inspection or if the official custodian is unable, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if disclosure of the public record is prohibited pursuant to this part 2, the official custodian may apply to the district court of the district in which such record is located for an order permitting him or her to restrict such disclosure or for the court to determine if disclosure is prohibited. Hearing on such application shall be held at the earliest practical time. In the case of a record that is otherwise available to public inspection pursuant to this part 2, after a hearing, the court may, upon a finding that disclosure would cause substantial injury to the public interest, issue an order authorizing the official custodian to restrict disclosure. In the case of a record that may be prohibited from disclosure pursuant to this part 2, after a hearing, the court may, upon a finding that disclosure of the record is prohibited, issue an order directing the official custodian not to disclose the record to the public. In an action brought pursuant to this paragraph (a), the burden of proof shall be upon the custodian. The person seeking permission to examine the record shall have notice of said hearing served upon him or her in the manner provided for service of process by the Colorado rules of civil procedure and shall have the right to appear and be heard. The attorney fees provision of subsection (5) of this section shall not apply in cases brought pursuant to this paragraph (a) by an official custodian who is unable to determine if disclosure of a public record is prohibited under this part 2 if the official custodian proves and the court finds that the custodian, in good faith, after exercising reasonable diligence, and after making reasonable inquiry, was unable to determine if disclosure of the public record was prohibited without a ruling by the court.

C.R.S. § 24-72-204(6)(a)(2011). The plain language of this provision fails to describe a basis for awarding attorney fees to *either* party.

Colorado follows the traditional "American Rule" that the parties in a lawsuit must bear their own legal expenses, "absent a specific contractual, statutory, or procedural rule providing otherwise." *City of Wheat Ridge v. Cerveny*, 913 P.2d 1110, 1114 (Colo. 1996)(internal cites omitted); *In re Estate of Klarner*, 113 P.3d 150, 157 (Colo. 2005). Colorado courts do not "construe a fee-shifting provision as mandatory unless the directive is specific and clear on that score." *Cerveny, supra.*

Section 24-72-204(6)(a), C.R.S. lacks any specific provision for the payment of attorney fees. The section provides no language to allow any relief or benefit to any CORA records requestor. Absent wording that allows for the recovery of attorney fees by a CORA records requestor, no award of attorney fees should be permitted pursuant to an action brought under this statute.

The section authorizes a custodian of a public record to initiate an action for the purposes described in the statute. It exists to provide a method by which a custodian may receive guidance in the form of a court order regarding whether a document sought pursuant to a CORA request may be withheld entirely or disclosed with restrictions. *See, Benefield v. Colo. Republican Party*, 329 P.3d 262, 264 (Colo.

2014). In doing so, the statute offers no basis for a custodian to recover, or pay, attorney fees when initiating a proceeding pursuant to Section 24-72-204(6)(a).

In contrast, the legislature wrote an entirely separate section into the CORA statute to describe the process by which a CORA records requestor may seek access to a public record. *See,* C.R.S. § 24-72-204(5). This section contains provisions for both a CORA requestor and a custodian to recover attorney fees, subject to specified conditions, respectively. *Benefield*, 329 P.3d at 266. As the only statutory provision mandating an award of attorney fees to persons denied the right to inspect a record covered by the statute, however, this section also establishes the initial condition that the CORA records requestor initiate an action in district court to compel disclosure of the requested record. *Id.*

The relevant circumstances in this case involve the Clerk exercising her discretion to file a district court action under Section 24-72-204(6)(a). Marks never filed a responsive pleading in the underlying district court matter and she did not file her own action. Because this case never involved a records request initiated under Section 24-72-204(5), there is no statutory authority that allows for an award of attorney fees to Ms. Marks.

The legislature created two separate statutory sections, with separate remedies, for actions brought by each party to a CORA records dispute. In doing so,

"We must assume that the General Assembly made intentional distinctions in the language of these two related provisions." *Hall v. Walter*, 969 P.2d 224, 231 (Colo. 1998). The legislature intended for an award of attorney fees, as applicable to either party, under the express conditions created in Section 24-72-204(5). The failure to include any similar language in Section 24-72-204(6)(a), must be presumed intentional, with the result that no attorney fees can be available when the custodian initiates the action. Any other outcome ignores the necessity that "A statute has meaning according to the legislative intent expressed in the language actually chosen by the legislature." *Benefield*, 329 P.2d at 266.

II. The American Rule precludes the fee-shifting provision in C.R.S. § 24-72-204(5) from applying to a custodian's action under Section 24-72-204(6)(a), even when exceptions to that rule are construed.

To conclude that Marks is entitled to attorney fees, the Court of Appeals referenced the last sentence of Section 24-72-204(6)(a), which states:

> The attorney fees provision of subsection (5) of this section shall not apply in cases brought pursuant to this paragraph (a) by an official custodian who is unable to determine if disclosure of a public record is prohibited under this part 2 if the official custodian proves and the court finds that the custodian, in good faith, after exercising reasonable diligence, and after making reasonable inquiry, was unable to determine if disclosure of the public record was prohibited without a ruling by the court.

C.R.S. § 24-72-204(6)(a). The Court of Appeals decided this sentence requires the "conclusion that the attorney fees provision in section 24-72-204(5) also

applies...where, as here, the custodian seeks an order 'permitting him or her to restrict such disclosure.'" *Reno v. Marks,* 2014 COA 7, 10.

No such conclusion is appropriate. The plain language of the statute makes it impossible to determine whether the last sentence of Section 24-72-204(6)(a) refers to the provision in Section 24-72-204(5) that allows attorney fees in favor of a CORA requestor or the custodian. By contrast to the outlook adopted by the Court of Appeals, this final sentence of Section 24-72-204(6)(a) could be seen to preclude an award of attorney fees to a custodian initiating an action because of an inability to determine whether disclosure was prohibited. In other words, if the custodian requires the assistance of the district court to discern whether a record is subject to disclosure or not, the custodian may not seek to recover attorney fees. *See,* Section 24-72-204(5)("In the event the court finds that the denial of the right of the inspection was proper, the court shall award court costs and reasonable attorney fees to the custodian, if the court finds that the action was frivolous, vexatious, or groundless."). This language suggests that the legislature intended the attorney fee award provision(s) of Section 24-72-204(5) to apply when a custodian sues under Section 24-72-204(6)(a) but limits the circumstances under which a custodian may seek fees.

The ambiguity created between the two sections of the statute also compels the conclusion that the statute as a whole fails to express a clear legislative intent required to mandate an award of attorney fees to a CORA requestor when a custodian sues under Section 24-72-204(6)(a). *Cerveny, supra.* Absent clear or express authority permitting the fee shifting urged in favor of a CORA requestor when a custodian pursues remedies available under Section 24-72-204(6)(a), the Court should not draft an attorney fees provision for a CORA requestor into this provision.

The underlying principles of the American Rule support this approach. The essence of this rule requires each party to bear its own legal expenses as a way to encourage the settlement of cases. *Bernhard v. Farmers Ins. Exch.,* 915 P.2d 1285, 1287 (Colo. 1996). In this matter, Marks was not required by the terms of Section 24-72-204(6)(a) to file any responsive pleading (and in fact, did not) or otherwise appear in the district court matter or incur attorney fees, although she was entitled to do so. The custodian also bore the burden of proof in proceedings under section 24-72-204(6)(a), while the district court's determination is appealable regardless of participation by the records requestor. Marks was not required to incur any expense due to the Clerk's choice to present the issue to the district court for determination. In this sense, granting Marks the ability to pursue a fee insures her a windfall.

Moreover, an interpretation that Section 24-72-204(5) permits an award of attorney fees to a CORA records requestor in an action brought by the custodian under Section 24-72-204(6)(a) will generate an absurd result, allowing this Court a further basis to examine the intent of the legislature. *Crandall v. City & County of Denver*, 238 P.3d 659, 662 (Colo. 2010). "In determining legislative intent, 'it is presumed that a just and reasonable result is intended, and that the public interest is favored over any private interest; and, in making that determination, we may consider, among other things, the consequences of a particular construction.' (internal cites omitted). When considering alternative consequences, we will defer to results that encourage the settlement of disputes." *Smith v. Zufelt*, 880 P.2d 1178, 1185-1186 (Colo. 1994).

The absurdity here arises on considering that the parties agreed to hold the case in abeyance pending the outcome of House Bill 12-1036 in the State Legislature. House Bill 12-1036 specifically addresses the ballot secrecy that earlier precluded the Clerk from producing the requested record without guidance from the district court. Once that bill passed, the Clerk produced a single anonymous voted ballot in accordance with the newly enacted statute, C.R.S. § 24-72-205.5. Beforehand, the parties stipulated to cease the litigation activities and minimize expenditures. If a CORA requestor can collect attorney fees even where that

requestor brought no suit and incurred no expenses, no incentive to stipulate or otherwise seek cost reduction will exist. Further, the Clerk's effort to provide the records sought, with the agreement of the requestor, is thwarted if the requestor may receive attorney fees, with an added risk of unnecessarily prolonging litigation, just to secure an attorney fees award. To any extent interpreting Section 24-72-204(5) to allow a CORA records requestor to recover attorney fees for an action under 24-72-204(6)(a) initiated by a custodian, settlement of such disputes is discouraged and private interests in fee awards is elevated above the public interest in reducing litigation expenses and promoting judicial economy. No such result is practical or sensible.

The stated legislative purpose of The Colorado Open Records Act is to promote access to public records. C.R.S. § 24-72-201. In furtherance of this purpose, § 24-72-204(5) provides a mechanism by which attorney fees are explicitly available to a records requestor, but pursuant to a preliminary requirement of notice to the custodian of the requestor's intent to seek enforcement of the request from the district court. As this Court stated in *Benefield*, the statutory scheme "includes disincentives [to the custodian] to forcing an applicant to vindicate his right of inspection by filing with the district court and *encouragement for resolution of the matter otherwise*." 329 P.3d at 264 (emphasis supplied). The public policy behind

the fee-shifting provision of CORA is not fulfilled when a custodian complies with the statute and seeks judicial guidance regarding the requested record, proposes alternative methods of resolving the matter, and in fact satisfies the request for documents. The public access purpose of CORA is satisfied under such circumstances and no authority exists to suggest that the legislature intended to punish public entities for making affirmative efforts to comply with CORA.

III. If C.R.S. § 24-72-204(5) applied to this Section 24-72-204(6)(a) action, the term "prevailing applicant" forecloses any award of attorney fees under these circumstances.

This Court recently interpreted the term "prevailing applicant" as used in Section 24-72-204(5) in determining when attorney fees may be awarded to a CORA requestor pursuant to the terms of that section. The Court found that 24-72-204(5), "when properly construed, mandates an award of costs and reasonable attorney fees in favor of any person who applies for and receives an order from the district court requiring a custodian to permit inspection of a public record..." *Benefield,* 329 P.3d at 268. To reach this result, the legislative history was reviewed, which discusses that the proposed legislation contemplated an award of attorney fees to persons "that have to go to court to get access to those records" "[I]f the court rule[s] against the custodian of records." *Id.* at 265 fn.2. The opinion makes clear that the person seeking the record must apply to the district court for, and the district court must

issue an order compelling production of the requested record, in order for any person to be entitled to attorney fees under the statute. Nowhere in the language of the statue or the legislative history of the legislation is the notion that a requestor could recover fees when the custodian seeks judicial guidance.

As the facts of this case reveal, Marks cannot meet the definition of the term "prevailing applicant" because she neither requested nor received an order from the district court compelling production of the record she requested. Therefore, this requestor cannot seek or receive any reasonable attorney fees or costs associated with this matter.

CONCLUSION

Amicus Curiae Colorado Counties, Inc., the Colorado County Clerks Association (the "Clerks"), the Special District Association of Colorado (SDA), the Colorado Association of School Boards, and the Colorado Municipal League (CML) urge the Court to conclude that no circumstances exist in this case allowing the recovery of attorney fees based upon a request for records submitted to the Chaffee County Clerk in September 2011. The result reached by the Court of Appeals was never warranted under the terms of Section 24-72-204(6)(a). Further, after this dispute arose, this Court clarified the issue stating that an award of attorney fees under Section 24-72-204(5) requires a person seeking a record to first apply for and

receive a district court order requiring a custodian to permit inspection of a public record. On such basis, it is now certain that the statute does not permit an award of attorney fees unless and until at CORA records requestor applies to the district court for and receives an order compelling production of the requested records. Any other result would be contrary to the law in Colorado and would subject the Clerks of every county in the state to attorney fees even upon the voluntary production of a record.

Dated this 29th day of September, 2014.

Respectfully submitted,

s/ Stephanie A. Montague
Stephanie A. Montague, #26184
Thomas J. Lyons, #8381
Hall & Evans, L.L.C.
1001 Seventeenth Street, Suite 300
Denver, Colorado 80202
303-628-3300
303-628-3368 (fax)

ATTORNEY FOR AMICUS CURIAE COLORADO COUNTIES, INC., COLORADO COUNTY CLERKS ASSOCIATION, SPECIAL DISTRICT ASSOCIATION OF COLORADO, COLORADO ASSOCIATION OF SCHOOL BOARDS, COLORADO MUNICIPAL LEAGUE

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 2014, a true and correct copy of the foregoing **AMICUS BRIEF FROM COLORADO COUNTIES, INC., COLORADO COUNTY CLERKS ASSOCIATION, SPECIAL DISTRICT ASSOCIATION OF COLORADO, COLORADO ASSOCIATION OF SCHOOL BOARDS, COLORADO MUNICIPAL LEAGUE** was filed and served via ICCES, addressed to the following:

Jennifer A. Davis
Chaffee County Attorney's Office
104 Crestone Avenue
P.O. Box 699
Salida, CO 82101

Robert A. McGuire
Robert A. McGuire Law Firm
9233 Park Meadows Drive
Lone Tree, CO 80124

s/Susan Small