

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock Street, Rm. 256 Denver, Colorado 80202</p> <hr/> <p>AMERICAN CIVIL LIBERTIES UNION OF COLORADO,</p> <p>Plaintiff,</p> <p>v.</p> <p>COLORADO DEPARTMENT OF CORRECTIONS; ROGER WERHOLTZ, in his official capacity as Interim Executive Director of the Department of Corrections,</p> <p>Defendants.</p>	<p style="text-align: right;">DATE FILED: August 1, 2013 3:36 PM</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
	<p>Case No.: 13CV32325</p> <p>Ctrm: 275</p>
<p>COURT'S ORDER RE: FINDINGS AND CONCLUSIONS OF LAW</p>	

THIS MATTER is before this Court for a hearing on the Court's Order to Colorado Department of Corrections (CDOC) to show cause why CDOC should not permit inspection and copying of certain criminal justice records. The Court, having reviewed the evidence, the Court's file and the applicable authority enters the following Findings and Conclusions of Law:

Plaintiff, the American Civil Liberties Union of Colorado (ACLU), is a Colorado nonprofit corporation with its headquarters in Denver, Colorado. Plaintiff brings this action pursuant to the Colorado Criminal Justice Records Act (CCJRA), C.R.S. § 24-72-301, et seq. Specifically, Plaintiff maintains that it is entitled to review Restricted Distribution protocols maintained by the CDOC setting forth the execution protocol, as well as communications related to the CDOC's efforts to acquire the chemicals to be used under that protocol. The ACLU is seeking these documents from CDOC to assist its effort to facilitate Colorado's public discussion about the death penalty. Plaintiff further argues that CDOC's refusal to produce these documents prevents Colorado's citizens from

knowing whether CDOC intends to carry out executions in accordance with Colorado law; whether CDOC has addressed the problems with lethal injection that have led to botched executions and public scrutiny of the death penalty across the United States; and whether Colorado pharmacies intend to supply drugs to CDOC to be used in lethal injections. The factual basis giving rise to Plaintiff's claim pertains to the execution of Nathan Dunlap. Dunlap's execution was originally set for the week of August 18, 2013, but has since been vacated under a reprieve granted by Governor Hickenlooper.

On or around June 1, 2011, CDOC revised Administrative Regulations, AR 300-14, relating to the subject of Capital Punishment/Execution by Lethal Injection. The regulation's purpose is "to establish procedures, consistent with Colorado statutes, governing death penalty-executions." The regulation also references a "RESTRICTED DISTRIBUTION" document (Execution Protocol) which provides procedures and guidelines for carrying out a death sentence by lethal injection to be distributed to CDOC employees on a "need-to-know" basis. On June 30, 2011, Dunlap, through counsel, filed an action asserting two causes of actions: (1) a claim that the CDOC violated certain rule-making provisions of the Colorado Administrative Procedure Act (APA) including provisions pertaining to publishing the protocol for public comment when it enacted AR 300-14; and (2) a claim under the Colorado Declaratory Judgment Statute requesting the district court to declare that the CDOC must comply with the rule-making procedures including publishing and public comment of the APA. The Court of Appeals concluded, as did the district court, that, by virtue of section 17-1-111, C.R.S., the regulation is exempt from the portions of the APA on which Dunlap relies, including those that require the CDOC to publish and seek public comment. The Court of Appeals affirmed the district court's dismissal of Dunlap's complaint, and on June 10, 2013, the Colorado Supreme Court denied Dunlap's Petition for Writ of Certiorari.

Dunlap also challenged and sought copies of the protocol in Denver District Court case no. 2013CV32155. That case remains pending.

Dunlap also sought an updated version of the protocol in his criminal case. In June of 2011 Dunlap's attorney, Philip A. Cherner, requested pursuant to CCJRA and received a prior version of the protocol, in which portions of that document were redacted. Dunlap sought an updated version of the protocol by way of a subpoena duces tecum. At that time, the protocol had not been finalized. The

criminal court granted the CDOC's Motion to Quash the Subpoena. Dunlap filed a Motion to Reconsider, which he withdrew after the Governor granted his reprieve.

In this current case, On May 1, 2013, Plaintiff submitted a records request under the Colorado Open Records Act and the Colorado Criminal Justice Records Act requested inspection of the Execution Protocol as well as communications related to the CDOC's efforts to acquire the chemicals to be used under that protocol. Plaintiff's Exhibit 1. On May 9, 2013, the CDOC responded to Plaintiff's request and denied much of the request. The CDOC did provide the text of a March 12, 2013 letter from Tom Clements to compounding pharmacies. However, the CDOC withheld the names and address information of the recipients. According to Plaintiff, the CDOC also provided 13 pages of documents that pre-date the March 12, 2013 letter.

STANDARD OF REVIEW

When a request is made to inspect a particular criminal justice record that is not a record of an "official action," the decision whether to grant the request is consigned to the exercise of the custodian's sound discretion under sections Colo. Rev. Stat. §§ 24-72-304 and 305. *Freedom Colorado Information, Inc. v. El Paso County Sheriff's Dept.* 196 P.3d 892, 897 (Colo. 2008). The district court reviews the custodian's determination for abuse of discretion. *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1175 (Colo. 2005); see *People v. Bushu*, 876 P.2d 106, 107 (Colo. App. 1994). In evaluating such an action, the district court "should not substitute its judgment for that of the agency's ... [or] redo the custodian's balancing of the interests." *Id.* at 900. Instead, the district court is to apply an abuse of discretion standard to the custodian's criminal justice records request determination. *Id.* at 899.

A court can find an abuse of discretion only where the trial court's findings and conclusions are so manifestly against the weight of evidence in the record as to compel a contrary result, such that the trial court's ruling is manifestly arbitrary, unreasonable, or unfair. "Abuse of discretion means that the decision under review is not reasonably supported by any competent evidence in the record; that is, the decision is so devoid of evidentiary support that it is arbitrary and capricious. In determining whether the administrative agency abused its discretion, the reviewing court may consider whether the agency misconstrued or misapplied the law. If there is a reasonable basis for the agency's application of the law, the decision may not be set aside on review." *Platte River Environmental Conservation*

Organization, Inc. v. National Hog Farms, Inc., 804 P.2d 290, 291-92 (Colo. App. 1990) (citations omitted). When reviewing an agency decision involving the agency's exercise of discretion, a trial court is not to substitute its judgment nor base its decision on whether it would have reached the same conclusion on the same facts. See *Colorado Real Estate Commission v. Hanegan*, 947 P.2d 933, 936 (Colo. 1997).

DISCUSSION

Of Colorado's two open government laws, the Colorado Open Records Act (CORA) and the Colorado Criminal Justice Records Act (CCJRA), the courts have construed the CCJRA to favor less broad disclosure. The legislative policy regarding access to criminal justice records under the CCJRA is thus more limited than access to public records under CORA. See *Freedom Colorado Information, Inc. v. El Paso County Sheriff's Dept.* 196 P.3d at 899.

The CJRA creates two categories of records:

(1) Records of official action. The CJRA defines an official action as "an arrest; indictment; charging by information; disposition; pretrial or post trial release from custody; judicial determination of mental or physical condition; decision to grant, order, or terminate probation, parole or participation in correctional or rehabilitative programs, and any decision to formally discipline, reclassify, or relocate any person under criminal sentence." The records of official action "shall be open for inspection by any person at reasonable times, . . ."

(2) Except for records of official actions, which must be available for inspection, all other criminal justice records, at the discretion of the official custodian, may be open for inspection by any person at reasonable times, except as otherwise provided by law. In addition, the custodian is authorized to make such rules and regulations as are reasonably necessary for the protection of the records and the prevention of unnecessary interference with the regular discharge of duties.

The records at issue here would fall into the latter category. Thus, release of the records would be at the discretion of the official custodian, and any rules or regulations promulgated by the CDOC. As such, denial is evaluated as follows:

(1) The custodian of criminal justice records may allow any person to inspect such records or any portion thereof except on the basis of any one of the following grounds or as provided in subsection (5) of this section:

(a) Such inspection would be contrary to any state statute;

(b) Such inspection is prohibited by rules promulgated by the supreme court or by the order of any court.

...

(5) On the ground that disclosure would be contrary to the public interest, and unless otherwise provided by law, the custodian may deny access to records of investigations conducted by or of intelligence information or security procedures of any sheriff, district attorney, or police department or any criminal justice investigatory files compiled for any other law enforcement purpose.

C.R.S. § 24-72-305

The factors considered in evaluating a CCJRA request include: the privacy interests of individuals who may be impacted by a decision to allow inspection; the agency's interest in keeping confidential information confidential; the agency's interest in pursuing ongoing investigations without compromising them; the public purpose to be served in allowing inspection; and any other pertinent consideration relevant to the circumstances of the particular request. *Freedom Colorado Information, Inc. v. El Paso County Sheriff's Dept.* 196 P.3d at 899.

The legislature did not mandate disclosure of criminal justice records. Rather, subject to certain exceptions provided by law not applicable here, the General Assembly has consigned to the custodian of a criminal justice record the authority to exercise its sound discretion in allowing or not allowing inspection. See Colo. Rev. Stat. §§ 24-72-304(1), 305(1). Specifically, the CCJRA provides that relating to records encompassed within the Act:

[A]t the discretion of the official custodian, may be open for inspection by any person at reasonable times, except as otherwise provided by law, and the official custodian of any such records may make such rules and regulations with reference to the inspection of such records as are reasonably necessary for the protection of such records and the prevention of unnecessary interference with the regular discharge of the duties of the custodian or his office.

C.R.S. § 24-72-304(1)

“The General Assembly has described this public and private interests balancing function as a weighting process involving the ‘public interest’ verses the ‘harm to ... privacy ... or dangers of unwarranted adverse consequences.” *Id.* at 898 (quoting § 24-72-308(1)(c), C.R.S. (2008)).

The statute provides that if denied, the requesting party may request a written justification for the denial, and file an action in district court at which a hearing is held requiring the custodian to show cause justifying the decision. The district court would review the decision of the custodian applying an abuse of discretion standard to the custodian’s determination which accords the proper deference to the custodian, while maintaining the reviewing court’s authority to order inspection if the custodian. *Freedom Colorado Information, Inc. v. El Paso County Sheriff’s Dept.* 196 P.3d at 899.

Accordingly, under an abuse of discretion standard for reviewing the CCJRA custodian’s determination, the district court does three things. First, the court reviews the criminal justice record at issue. Second, the court takes into account the custodian’s balancing of the interests and articulation of his or her determination. Lastly, the court decides whether the custodian has properly determined to: (1) allow inspection of the entire record, (2) allow inspection of a redacted version of the record, or (3) prohibit inspection of the record.

As noted above, Plaintiff sought inspection the Execution Protocol as well as communications related to the CDOC’s efforts to acquire the chemicals to be used under that protocol. CDOC argues that it properly exercised its discretion when it partially denied Plaintiff’s request base on the following:

Security sensitive information

The Execution Protocol is a document that contains information relative to processes for the completion of an execution warrant in addition to the operational responsibilities of the facility. The requested protocol contains security sensitive information about the protocol to be used in the execution process including offender movement, security procedures in place during the execution process, emergency response operations, key control, room numbers, cell numbers, key numbers, types of locks used, names of personnel involved, checklists, as well as the names of individuals whose safety and security could be compromised by disclosure. Release of the complete documents creates a potential security breach of CDOC and jeopardizes the safety and security of the inmate population, CDOC staff, and the public. According to the Colorado Criminal Justice Records Act,

§24-72-301, et seq., C.R.S., the custodian of criminal justice records may refuse inspection of a criminal justice record if disclosure would be contrary to the public interest. See § 24-72-305, C.R.S. and *Johnson v. Colorado Dep't. of Corr.*, 972 P.2d 692 (Colo. App. 1998), cert. denied (Colo. 1999).

Restricted Distribution

The duties of the executive director shall be:

(1)(p) Notwithstanding the provisions of parts 2 and 3 of article 72 of title 24, C.R.S., commonly referred to as the "Open Records Act", to adopt such policies and guidelines as may be necessary concerning the release of records to inmates.

§ 17-1-103, C.R.S.

Thus, the CDOC Executive Director has statutory authority to adopt policies or regulations concerning the release of records to inmates without consideration of the provisions of the CCJRA.

In accordance with the above referenced statutes, the CDOC promulgated Administrative Regulation 100-01. The Regulation expressly regulates access to Restricted Distribution Administrative Regulations. Administrative Regulation 100-01 defines Restricted Distribution (RD) as:

Administrative regulations, implementation/adjustments, operational memorandums, or executive directives that have an extremely limited distribution and are not available under any circumstances for public and/or offender use through offender libraries or other sources. (Emphasis in original)

The Restricted Distribution ARs are not released to all CDOC employees. The materials are only provided to a very few CDOC employees who must follow strict security procedures with respect to the documents because the safety and security of CDOC staff and inmates would be compromised by disclosure. Pertinent provisions of Regulation 100-01 regarding the dissemination of restricted regulations provide:

Subject to any other provisions of law, offenders and members of the public may not review RESTRICTED DISTRIBUTION ARs, as identified by the OPR and appropriate director.

Administrative Regulation 100-01 at p. 2, Section IV, A,4 (emphasis in original).

Finally, Administrative Regulation 100-01 provides for strict procedures regarding access to, storage of, and handling of Restricted Distribution Administrative Regulations. For example, the regulation provides:

6. Restricted distribution documents must be kept in a secure environment.
7. Restricted documents will not be stored or used in any areas where an offender may have access.
8. Restricted documents may never be viewed, handled by, or discussed in the presence of offenders or ex-offenders.
9. Restricted documents may not be released, even to an attorney, by anyone other than the central agency policy analyst Staff who have received a copy of a restricted document are responsible for shredding the document or returning the document to the central agency policy analyst when no longer needed. If a restricted distribution document is either lost or stolen it shall be reported to the supervisor and the central policy analyst immediately upon discovery. Those not authorized to have a restricted distribution document in their possession, or any compromise of a restricted document, may result in corrective and/or disciplinary action.

Administrative Regulation 100-01 at p. 9, Section IV, M, 6-9 (emphasis in original)

Pursuant to statutory authority, the CDOC Executive Director has adopted a policy of not distributing these materials to all CDOC employees, the general public, or especially CDOC inmates. The policy provides that these restricted materials may not be viewed, handled by, or even discussed in the presence of offenders or ex-offenders. The specific protocol requested by Plaintiff relates to confidential procedures for management of inmates, security issues, and prison operations associated with the execution process. Release of the document would create a security breach and jeopardize the safety and security of the inmate population, CDOC staff, and the public. Because the CDOC Executive Director has statutory authority to designate such regulations as restricted distribution, the Records custodian properly denied the request for the protocol.

According to the Colorado Criminal Justice Records Act, §24-72-301, et seq., C.R.S., the custodian of criminal justice records may refuse inspection of a criminal justice record if disclosure would be contrary to the public interest. See § 24-72-305, C.R.S. and *Johnson v. Colorado Dep't. of Corr.*, 972 P.2d 692 (Colo. App. 1998), cert. denied (Colo. 1999).

The CDOC's interest in keeping certain security sensitive information in the protocol away from any public forum outweighs any need that the public may have in this information. On the other hand properly redacted copy of the Execution Protocol does not. By "properly redacted copy" the Court means the removal of any information that creates a potential security breach of CDOC and jeopardizes the safety and security of the inmate population, CDOC staff, and the public; and it would compromise prison operations associated with the execution process.

The Court finds that the Execution Protocol does contain security sensitive information, which if released could jeopardize security and safety of those entrusted with the carrying out of this particular sentence. However, even though the Execution Protocol contains security sensitive information, the majority of its content does not. In June of 2011 CDOC released the previous version the Execution Protocol, which is essentially the same as the current version, to Dunlap's counsel, without restrictions. In fact, the Plaintiff provided a copy of the previously released protocol to this Court in this case. That document too was also designated for RESTRICTIVE DISTRIBUTION and contained substantially the same security sensitive information. Yet, after redactions, it was released and now open to the general public for scrutiny. The previous release of prior version of the Execution Protocol, with redactions, is significant evidence that the Executive Director decision to deny release of the entire document is arbitrary and an abuse of discretion.

CDOC has failed to demonstrate that disclosure of a properly redacted Execution Protocol would be contrary to the public interest. Particularly in light of Governor Hickenlooper's recent reprieve, which calls for a public conversation about the death penalty in Colorado, disclosure of these records would further the public interest. CDOC's decision to withhold records related to its Execution Protocol procedures constitutes an abuse of discretion in violation of the CCJRA.

Denial of the request for chemical information

The Plaintiff argues that the public has an interest in knowing whether Colorado pharmacies are supplying drugs that will be used in executions and who the pharmacies are. The public may have an interest in knowing who the pharmacies are and if they are supplying the drugs for executions; however, knowledge of the source of the drugs used will not facilitate Colorado's public discussion about the death penalty. Even if it did, releasing the information could possibly expose the pharmacy and its employee to ridicule, raise safety concerns and possibly have a negative impact on its business,

which far outweighs the public need for the information. The Records Custodian properly denied the request for information pertaining to the source of lethal injection chemicals. Further, the disclosure of any responses that the CDOC may have received concerning the availability of lethal injection drugs could impact the availability of the drug and create unnecessary interference with the regular discharge of the CDOC's duty to carry out the death sentence.

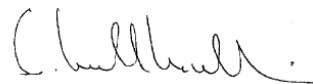
CONCLUSION AND ORDER

For the foregoing reason, CDOC's refusal to produce a redacted Execution Protocol, which addressed the security issue, similar to the previous released Execution Protocol, was arbitrary and an abuse of discretion. On the other hand, the CDOC's decision not to release the responses to its inquiry about the availability of the drugs require for lethal injections was not arbitrary or an abuse of discretion.

IT IS THEREFORE ORDERED that CDOC shall disclose a redacted Execution Protocol consistent with this Court's Order.

SO ORDERED this 1st day of August, 2013.

BY THE COURT



R. MICHAEL MULLINS
District Court Judge