

EXHIBIT A



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August 1, 2007

Ms. Chantell Taylor
Colorado Citizens for Ethics in Government
1630 Welton Street, Suite 415
Denver, Colorado 80201

RE: CCEG Open Record Request

Dear Ms. Taylor:

I am responding to your letter of July 27, 2007 in which you request clarification of certain outstanding issues.

First, the Secretary disclosed almost all of the documents listed in your request. Very few documents were withheld. No documents involving communications between the Secretary and the Secretary's attorneys were given to the auditor. None of the withheld documents are subject to the deliberative process privilege in section 24-72-204(3) (a) (XIII), C.R.S. (2006). The records were not prepared for an elected official other than the Secretary of State.

The records withheld by the Secretary fall into four categories:

- Personnel files, which includes information maintained as a result of the employer-employee relationship. Section 24-72-204 (3) (a) (II), C.R.S. (2006).
- Documents reflecting discussions between the Deputy Secretary and attorneys in the Attorney General's office. Section 24-72-204(3) (a) (IV), C.R.S. (2006).
- State Auditor materials. These documents fall into two categories. The first category is an engagement letter sent by the Auditor's Office and marked "confidential" by the state auditor. The second category is a compilation prepared at the request of the state auditor. This document constitutes a state auditor work paper. Work papers are not limited to documents originating from the auditor's office. Work papers may also consist of documents prepared by the Secretary at the request of the state auditor. The Secretary is not authorized to disclose this information without approval by the legislative audit committee. Section 2-3-103(3), C.R.S. (2006); section 24-72-204(1) (a),

C.R.S. (2006) (custodian shall deny right of inspection when “such inspection would be contrary to any state statute.”)

- Many of the documents in the first three categories are also “work product” prepared for the Secretary. They include “notes and memoranda that relate to or serve as background information for decisions” that assist him in reaching decisions within the scope of his authority. These documents are not public records. Section 24-72-202 (6) (b) (2) and (6.5) (a), (b), C.R.S. (2006).

Briefly, I would also like to address your analysis regarding the waiver of the attorney-client privilege when such documents are disclosed to the state auditor. The law has changed since the decision in *Denver Post v. Univ. of Colo.*, 739 P.2d 874, 880-81 (Colo. App. 1987). Section 2-3-108(2) (a), C.R.S. (2006) provides, that with the exception of certain tax records, the state auditor “shall have access at all times” to all records, including records “exempt from public disclosure.” (Emphasis added.) In other words, the state auditor has access to all confidential information, with or without voluntary disclosure. In addition, the state auditor cannot be a potential adversary. No person in the auditor’s office can testify with regard to working papers or other documents or communications made during the course of service to the legislative audit committee. Section 13-90-107(1) (f) (II), C.R.S. (2006).

You suggest that the Secretary must support any withholding of deliberative documents under the work product privilege with a sworn statement. The Secretary does not assert a governmental or deliberative process privilege. Instead, he is asserting that some of the documents are work product as that term is defined in the Open Records Act. Such records are not public records. Section 24-72-202(6.5). The Secretary is not required to provide a sworn statement regarding a document that is not a public record.

Finally, you have asked why “e-mails that did not contain the phrase ‘politicallivewires.com’ were retrieved in a search” using only that phrase. We have been unable to ascertain with any certainty why this retrieval occurred. A plausible explanation is that e-mails from another search concerning your request, such as for e-mails between Dan Kopelman and Secretary Coffman, were inadvertently placed in the “politicallivewires.com” stake of e-mails by mistake. It would not be productive to engage in additional speculation at this time.

I hope this letter provides the clarification that you requested.

Sincerely,

FOR THE ATTORNEY GENERAL



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EXHIBIT B



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February 22, 2008

Ms. Chantell Taylor
Ethics Watch
1630 Welton Street, Suite 415
Denver, CO 80202

RE: 1/29/08 CORA request to Colorado Secretary of State Mike Coffman as revised
on February 13, 2008.

Dear Ms. Taylor,

Today we are making available for your inspection responsive records to Ethics Watch's 1/29/08 Colorado Open Records Act ("CORA") request, as revised on February 13, 2008 via telephone conversation and written correspondence. As agreed, you will ensure that a check in the full amount of \$184.11 for research and retrieval of your CORA request will be received by the Secretary no later than the close of business on Tuesday, February 26, 2008. As you know, the Secretary is permitting this exception to the general rule that fees must be provided prior to inspection due to the fact that you were not informed of the fee until yesterday, February 21, 2008. You indicated that your company's checks are issued out of Washington, D.C., and therefore the soonest you could get a check would be Monday, February, 25, 2008. The Secretary believes that your inability to provide the check prior to inspection is primarily due to the late notice provided regarding the fee, and thus is not due to any lack of action on your part or Ethics Watch.

As discussed, it is understood that the Secretary is voluntarily disclosing his calendar and that of Ms. Jacque Ponder. As you know, it is the Secretary's position that the calendars are not public records as contemplated by CORA, but are primarily for personal use and convenience. *See Bureau of National Affairs, Inc. v. United States Dept't of Justice*, 742 F.2d 1484, 1495 (C.A.D.C. 1984); *Bloomberg L.P. v. United States Securities and Exchange Com'n*, 357 F. Supp.2d 156, 163-167 (D.D.C 2004); *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Voinovich*, 654 N.E.2d 139, 143 (Ohio App. 1995). As agreed, the

Secretary's disclosure of these documents shall not be used for any future purposes, such as to argue that this disclosure amounts to an admission that the records are public pursuant to CORA. We take the same position with respect to any other entity or individual seeking to review the same records we are providing you: that this is a voluntarily disclosure, that the records are not public, and that this disclosure cannot be interpreted as an admission that the records are public. I understand that you disagree with the Secretary's position that these records are not public. In the spirit of cooperation and to permit the quick release of these records, we agreed to continue the discussions on that issue at a later date.

With respect to the calendars, we have redacted the following categories of information: telephone numbers and email addresses that are not obviously public, home addresses, and notations regarding any medical appointments. I also redacted one sentence as attorney-client privilege. *See* § 24-72-204(2)(a), C.R.S. (2007) (permitting the withholding of email addresses); § 24-72-204(3)(a)(I) (requiring custodian to deny inspection of medical records); § 24-72-204 (3)(a)(IV) (prohibiting the public release of privileged information); *Black v. S.W. Water Conserv. Dist.*, 74 P.3d 462, 467 (Colo. App. 2003) (noting the attorney-client privilege has been incorporated into the Colorado Open Records Act); *see also* § 13-90-107(1)(b).

In addition, via email dated February 15, 2008, you seem to add a request for information regarding any events which do not appear on the calendars for Ms. Ponder and Secretary Coffman. I quote, "if a meeting occurred that does not appear on their schedules or calendars please provide relevant documents as to those meetings." Unfortunately, it is not possible to meet this request. The Secretary and Ms. Ponder cannot recall with any specificity meetings that may have taken place, but do not appear on their calendars. It is not uncommon that impromptu meetings take place due to issues arising at the moment which must be immediately addressed. Neither the Secretary nor Ms. Ponder retroactively add the information regarding the meeting to their calendars, so the only way they could respond to that request is based upon their memory alone. They cannot recall impromptu meetings. For the foregoing reasons, the Secretary is unable to produce records related to meetings that occurred but do not appear on his calendar.

Moreover, you should be aware that the calendars themselves do not represent an accurate and complete record of activities, but are merely a planning tool, including plans for personal matters. For instance, some meetings are posted to their calendars for informational purposes only. There are many recurring events as well as nonrecurring events that are not removed or added to the calendars. Cancelled events are not updated on the calendars. Events which neither the Secretary nor Ms. Ponder attended are not removed from the calendars. The calendar also may not reflect the holidays the Secretary took off, and what vacation days he took. Moreover, the calendars do not reflect the hours the Secretary worked. Thus, although it is evident that you would like an accurate and complete record of events, the calendars are not designed for this purpose and will not fulfill that need.

As previously discussed, you will review the calendars and let me know for which calendar events you would like more documents. Please be sure to specify the type of record sought. There may be additional fees associated with providing such records if research and retrieval requires more than one hour of staff time. See § 24-72-205, § 24-21-104(3), and C.C.R. 1505-12, rule 4.

Regarding the second request for campaign related emails, the Secretary is providing you with all public and responsive records in his possession. There were very few redactions to those, which only included redaction of email and home addresses of constituents and telephone numbers. See § 24-72-204(2)(a).

However, the Secretary is not disclosing campaign related documents sent through his personal email account. It is the Secretary's position that regardless of what time such emails were sent from his personal email account, such emails are not public records as defined by CORA. See Section 24-72-202(6)(a)(I) (defining a public record as all writings by an agency "for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds."); *Denver Publishing Co. v. Bd of County Com'rs of Arapahoe*, 121 P.2d 190, 199, 202-03 (Colo. 2005) (holding that just because a person is employed in the public sector and may use publicly funded resources to create or store a document does not convert the document into a public record; instead, the content of the document determines whether it is a public record subject to disclosure). The content of documents concerning a campaign for a congressional seat clearly indicate that the records are not public because they are not used for the Secretary's required functions or authorized by law or rule.

To be clear, the Secretary is not "withholding" those records as contemplated by 24-72-204(4), C.R.S. Rather, since the records are not public, they do not fall under the ambit of CORA at all.

Please contact me at if you would like to discuss this matter.

Sincerely,

FOR THE ATTORNEY GENERAL

/s/ Melody Mirbaba
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