DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: 1437 Bannock Street Denver, Colorado 80202 Bill Ritter, in his official capacity as Governor, **Governor Ritter** v. Brad Jones, an individual; State Representative Rosemary Marshall, in her official capacity, **Interested Parties**.	**▲ COURT USE ONLY▲** Case Number: 07CV9160 Ctrm: 9

ORDER

THIS MATTER is before the Court on Governor Bill Ritter's Application for Determination of Disclosure of Public Records, filed September 21, 2007. The Court has reviewed the Briefs and all pertinent pleadings thereto, has held a hearing in regard to the matter, and has conducted an in camera review of the appendix, which is the subject matter of this application. The Court makes the following findings of fact and order.

BACKGROUND

This case arises from an Application for Determination of Disclosure of Public Records, submitted by Governor Ritter on September 21, 2007. Governor Ritter seeks resolution of the issues identified in his application, but he has not taken an active adversarial role before the Court. The primary parties to the dispute in this case are Respondent Brad Jones and Intervenor Representative Rosemary Marshall ("Rep. Marshall").

Rep. Marshall is a Colorado State Representative and served as such at all times relevant to this litigation. (Stipulated Fact ¶ 1). In 2006 and 2007 Rep. Marshall began working on draft legislation related to the state personnel system. (*Id.* at ¶ 2). During this time, at Rep. Marshall's request, the Office of Legislative Legal Services ("OLLS") drafted legislation regarding the implementation of a state employee partnership system in the state of Colorado. (*Id.* at ¶ 11).

Rep. Marshall submits that in her legislative capacity, she often partakes in the practice of discussing potential legislation with third parties, experts, and interest groups when drafting said legislation, and to her knowledge, this is a common practice amongst members of the General Assembly. (*Id.* at ¶ 2). During 2006 and 2007, Rep. Marshall discussed aspects of her draft legislation with certain people who held interest in labor and employment issues. (*Id.* at ¶ 3-4, 10). Steven Ury, the assistant general counsel for the Service Employees International Union, a

labor union based in California, was one such person with whom Rep. Marshall discussed her draft legislation. (*Id.* at ¶ 3-5, 10). Rep. Marshall authorized the OLLS to release her draft legislation to Mr. Ury for review and comment. (*Id.* at ¶ 12). On August 14, 2007, Mr. Ury sent a memorandum ("Ury Memo") to the Governor's Chief Legal Counsel. (*Id.* at ¶ 16(c)-(d)). Unbeknownst to Rep. Marshall, the appendix to the Ury Memo contained verbatim excerpts of her employee partnership draft legislation. (*Id.*). Although it is common for legislators, including Rep. Marshall to consult with the Governor's office on legislative matters, particularly if they implicate state agencies, programs, or employees, Rep. Marshall was unaware that Mr. Ury had included the verbatim excerpts from her draft legislation in his correspondence to the Governor's office until she was so advised by the Governor's staff. (*Id.* at ¶ 14, 16(e)).

On August 20, 2007, Respondent served a request for all correspondence between Governor Ritter or his employees and any labor organization on the Governor's office, pursuant to the Colorado Open Records Act ("CORA"). (*Id.* at ¶ 16(a)). Upon being advised of Mr. Jones' CORA request, Rep. Marshall informed the Governor's legal counsel that the appendix to the Ury Memo was her confidential work product, and therefore was exempt from public disclosure. (*Id.* at ¶ 16 (f)). Thereafter, the Governor's office provided the documents to Mr. Jones on September 4, 2007, pursuant to his CORA request, but redacted the appendix to the Ury Memo, based upon Rep. Marshall's claim of work product. (*Id.* at ¶ 16(g)). On September 19, 2007 Mr. Jones informed the Governor's legal counsel that he objected to Rep. Marshall's claim of work product and demanded that the entire Ury Memo be disclosed pursuant to the CORA. (*Id.* at ¶ 16 (h)).

Rep. Marshall's drafted legislation was never finalized or presented to the General Assembly or to a public agency. (*Id.* at ¶ 13). Rep. Marshall is the party asserting privilege in this case. (Application, ¶ 13). On September 21, 2007, Governor Ritter filed this Application Pursuant to § 24-72-204(6)(a), C.R.S. (2007) for a determination by the Court of whether disclosure is required or prohibited. (*Id.* at ¶ 11). On January 7, 2008, the Court held a hearing on this matter and heard arguments from counsel for Mr. Jones and counsel for Rep. Marshall. During this hearing, the Court conducted an in camera review of the appendix to the Ury Memo and concluded that it did in fact contain verbatim excerpts of Rep. Marshall's draft legislation. The Court has determined and the parties agree that this case is one of first impression regarding the scope and applicability of the exemption provisions of the CORA.

STANDARD OF REVIEW

The issue of statutory interpretation is a matter of law. *Ryals v. St. Mary-Worwin Reg'l Med. Ctr.*, 10 P.3d 654, 659 (Colo. 2000). In construing a statute, the Court will strive to give effect to the intent of the legislature and adopt the statutory construction that best effectuates the purposes of the legislative scheme, looking first to the plain language of the statute. *Spahmer v. Gullette*, 113 P.3d 158, 162 (Colo. 2005). A statute must be considered in its entirety and should be read in a manner that gives consistent, harmonious, and sensible effect to all parts of the statute. *State v. Nieto*, 993 P.2d 493, 501 (Colo. 2000).

If the plain language of the statute is clear and unambiguous, the Court will apply the statute as written, unless it leads to an absurd result. *E-470 Pub. Highway Auth. v. Kortum Inv.*

Co., 121 P.3d 331, 333 (Colo. App. 2005). However, if the statutory language unambiguously sets forth the legislative purpose, the Court need not apply additional rules of statutory construction to determine the statute's meaning. *People v. Cooper*, 27 P.3d 328, 354 (Colo. 2001). The Court will construe a statute so as to give effect to every word and will not adopt a construction that renders any term superfluous. *Spahmer*, 113 P.3d at 162. The Court's task in construing statutes is to ascertain and give effect to the intent of the General Assembly, not to second guess its judgment**.** *Rowe v. People*, 856 P.2d 486, 489 (Colo.1993).

ANALYSIS

Because it is necessary when interpreting statutes to give effect to the intent of the legislature when adopting a statute, the Court's analysis must begin with a review of the plain language of the CORA. Colorado has adopted a broadly stated policy favoring openness in state government, and in furtherance of that policy, the CORA expressly provides that "all public records shall be open for inspection by any person at reasonable times." C.R.S. § 24-72-201. However, there are certain exceptions to this policy. *See* C.R.S. § 24-72-202. For example, certain criminal justice records, work product prepared for elected officials, trade secrets, and marketing plans are among the records specifically not included in the term "public records." C.R.S. § 24-72-202(6)(b)(I)-(III). In keeping with the stated policy of openness in government, disclosure exemptions under the CORA are to be narrowly construed. *Bodelson v. Denver Publishing Company*, 5 P.3d 373, 377 (Colo. App. 2000).

Applying these standards to the present case, the Court will first assess whether the excerpts of Rep. Marshall's draft legislation, as contained in the appendix to the Ury Memo, qualify as work product. Work product is defined in the CORA as follows:

> "(a)…all intra- or inter-agency advisory or deliberative materials assembled for the benefit of elected officials, which materials express an opinion or are deliberative in nature and are communicated for the purpose of assisting such elected officials in reaching a decision within the scope of their authority. Such materials include, but are not limited to:
>
> (I) Notes and memoranda that relate to or serve as background information for such decisions;
>
> (II) Preliminary drafts and discussion copies of documents that express a decision by an elected official.
>
> (b)'Work product' also includes all documents relating to the drafting of bills or amendments, pursuant to section 2-3-505(2)(b), C.R.S., but it does not include the final version of documents prepared or assembled pursuant to section 2-3-505(2)(c), C.R.S. § 24-72-202(6.5)(a)-(b)." C.R.S. § 24-72-202(6.5)(a)-(b).

As the CORA cross-references to § 2-3-505(2)(b) and incorporates the definition of work product contained in that provision, the Court must expand its analysis of the term "work product." C.R.S. § 2-3-505(2)(b) describes work product as "[a]ll documents prepared or assembled in response to a request for a bill or amendment, other than the introduced version of a bill or amendment that was in fact introduced, shall be considered work product, as defined in section 24-72-202(6.5), C.R.S."

In his Opening Brief, Mr. Jones contends that Rep. Marshall's claim of work product is limited to the provisions set forth in C.R.S. § 24-72-202(6.5)(b) because that is the statute referenced by the Governor's office in declining to produce the appendix to the Ury Memo. Accordingly, Mr. Jones encourages this Court to constrict its analysis solely to § 24-72-202(6.5)(b). (Jones' Opening Brief, p.3). The Court is not persuaded. First, Rep. Marshall's claim of work product is broader in scope than that stated by Mr. Jones. (Application Pursuant to Section 24-72-204(6)(A), C.R.S.(2007), Exhibit E). Nothing in *Exhibit E* limits Rep. Marshall's claim of work product to a particular subsection of C.R.S. § 24-72-202(6.5). To the contrary *Exhibit E* expressly provides that the appendix is being withheld at the behest of Rep. Marshall "pursuant to C.R.S. § 24-72-202(6.5)." *Id.* Further, Rep. Marshall has consistently maintained her objection to disclosure of her draft legislation as it is precluded under CORA. Therefore, in considering whether the appendix to the Ury Memo is exempted from disclosure under the CORA, the Court must properly assess whether Rep. Marshall's claim of work product is supported by any of the provisions exempting disclosure, without limitation.

Mr. Jones next argues that a private memorandum sent to the Governor by a private citizen is not draft legislation, and therefore cannot be exempted from disclosure under the CORA (Jones' Response Brief, p. 2). Were the issues raised before the Court here truly as stated by Mr. Jones, the Court's analysis would necessarily begin and end with the presumption that disclosure be made. Correspondence between private citizens or entities and our public officials is exactly the type of information subject to open inspection by the public. *See* C.R.S. § 24-72-202(6)(a)(II). However, Mr. Jones contention here disregards the undisputed fact that, but for the appendix containing the verbatim excerpts of Rep. Marshall's draft legislation, the Ury Memo has already been produced in its entirety by the Governor in compliance with Mr. Jones' CORA request. To be clear, the appendix to the Ury Memo *and* the verbatim excerpts of Rep. Marshall's draft legislation are precisely the material Mr. Jones seeks to obtain. The parties do not contend that the Ury Memo standing alone is protected work product. The question is whether Rep. Marshall's excerpted draft legislation contained in the appendix to the Ury Memo is protected work product.

It is clear from viewing the stipulated facts submitted by the parties that the document the OLLS assembled for Rep. Marshall, which was later used in excerpted form in the appendix to the Ury Memo, was clearly work product, as defined in the CORA. *See* C.R.S § 24-72-202(6)(b)(II), (6.5)(a). It is without question that the original document was produced to Mr. Ury at Rep. Marshall's request to assist her in her decision-making, thus coming squarely within the definition of work product per C.R.S. § 24-72-202(6.5)(a). In fact, one of the specific examples of work product listed in C.R.S. § 24-72-202(6.5)(a)(II) is "[p]reliminary drafts and discussion copies of documents that express a decision by an elected official." Therefore, Rep. Marshall's original draft legislation is properly considered work product under the CORA and is thus exempted from disclosure.

The Court next turns to the question of whether Rep. Marshall's draft legislation retained its protected work product status after Mr. Ury unilaterally incorporated verbatim excerpts from the drafts into his memorandum. This Court finds that it does. Nothing in the actions of Mr. Ury recasts what is fundamentally work product. In making this determination, the Court again applies the plain language of the CORA, C.R.S. § 24-72-202(6.5)(b), which provides that work

product includes "*all* documents relating to the drafting of bills…pursuant to § 2-3-502(2)(b)." Here, Rep. Marshall's draft legislation was a document "prepared or assembled in response to [her] request for a bill or amendment," and was not an introduced version of a bill or amendment. *See* C.R.S. § 2-3-505(2)(b). The excerpted version of her draft legislation is logically protected because it qualifies as a document "relating to the drafting of bills."

Mr. Jones next contends that C.R.S. § 2-3-505(2)(b) protects only documents, and cannot be read to apply to the content of those documents. (Jones' Op. Brief, p. 6). However, the Court does not agree. In *City of Westminster v. Dogan Constr. Co., Inc.*, the Colorado Supreme Court found that whether a document is shielded from public inspection "is best determined by focusing on the legislature's concern with access to content, rather than on the form in which the information appears." 930 P.2d 585, 592 (Colo. 1997). The pedantic distinguishing of draft legislation excerpts, and the original draft legislation under the confines of the CORA promotes a distinction without a difference and is unwarranted given the plain language of that statute. Extending Mr. Jones' argument to its illogical conclusion leads to the absurd result that Rep. Marshall's otherwise protected work product would no longer be exempt from disclosure merely because a private, non-legislative party converted verbatim excerpts of the draft legislation for his own purpose. Such is a statutory construction in which this court cannot engage. *See E-470 Pub. Highway Auth.*, 121 P.3d at 333.

Finally Mr. Jones argues that under the plain meaning of the Colorado Open Records Act, the excerpts in the appendix to the Ury Memo are excluded from the definition of work product. However, the CORA specifically provides what documents do not constitute work product. The applicable exceptions under the statute are found in C.R.S. § 24-72-202(6.5)(c), which reads:

> "'Work product' does not include: (I) Any final version of a document that expresses a final decision by an elected official…(IV) [a]ny materials that would otherwise constitute work product if such materials are produced and distributed to the members of a public body for their use or consideration in a public meeting or cited and identified in the text of the final version of a document that expresses a decision by an elected official…"

Here, the parties agree that the verbatim excerpts do not constitute a final version of a document as defined in C.R.S. § 24-72-202(6.5)(c)(I). Rather, the sole remaining question raised by Mr. Jones is whether Rep. Marshall had a reasonable expectation of confidentiality when she gave the draft legislation to Mr. Ury who proceeded to give portions of it to the Governor's office. (Jones' Response Brief, p. 14). Mr. Jones' argument is tantamount to a purported waiver of the work product exemption by Rep. Marshall. However as pertinent here, C.R.S. § 24-72-202(6.5)(c)(IV) of the CORA provides that a waiver of work product occurs when a document is "produced and distributed to members of a public body for use or consideration in a public meeting." C.R.S. § 24-72-202(6.5)(c)(IV). In this case, the Ury Memo with the attached appendix was forwarded to the Governor's office for private review. The Governor's office is not a public body, and more importantly, the Ury Memo and its appendix were not intended to be used for consideration in a public meeting. In fact, it never was used for consideration in a public meeting. Therefore, under the CORA, the appendix cannot be excluded from the definition of work product.

Mr. Jones raises further common law arguments in support of his position that Rep. Marshall affected a waiver of her work product claim by providing her draft legislation to Mr. Ury. In light of the Courts factual analysis and statutory construction stated herein, further consideration of Mr. Jones' Freedom of Information Act and common law arguments is unnecessary. Therefore, the Court declines to address them because when the statutory language unambiguously sets forth the legislative purpose, the Court need not apply additional rules of statutory construction to determine the statute's meaning. *Cooper*, 27 P.3d 328 at 354.

CONCLUSION

Given the plain meaning of the applicable provisions of the Colorado Open Records Act, the excerpts of Rep. Marshall's draft legislation contained in the appendix to the Ury Memo constitute work product and are therefore exempt from disclosure pursuant to C.R.S. § 24-72-202(6.5). The interpretation of the plain language of the CORA, applied to the Stipulated Facts submitted by the parties, affords a consistent, harmonious, and sensible effect to all parts of the statute. The General Assembly clearly demonstrated its intent that disclosure of public records be compelled with certain limited exceptions to this policy. As work product is one such exception, this Court can reach no other conclusion than the appendix attached to the Ury Memo is work product and is therefore exempt.

To require Rep. Marshall to disclose her draft legislation, excerpts or otherwise, contravenes stated public policy and would be detrimental to the legislative process, as it would negatively impact an elected official's ability to consult with experts, constituents, and special interest groups when considering and drafting legislation.

Done and signed this 24th day of January 2008.

BY THE COURT:

Michael A. Martinez
District Court Judge