

SUPREME COURT, STATE OF COLORADO

Court Address: 2 East 14th Avenue
Denver, Colorado 80203

Colorado Court of Appeals, Case No. 08-CA-2659

District Court, City and County of Denver
Case No. 08-CV-7083
The Hon. Morris B. Hoffman, presiding

Plaintiffs-Appellants:

DENVER POST CORP., a Colorado corporation, doing
business as *The Denver Post*; and
KAREN CRUMMY, a Colorado citizen

v.

Defendant-Appellee:

BILL RITTER, Governor of the State of Colorado

Counsel for Amici Curiae:

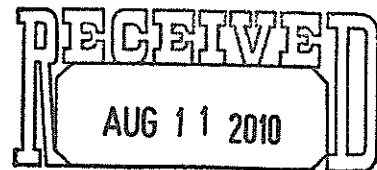
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**BRIEF OF AMICI CURIAE IN SUPPORT OF
DENVER POST CORP. & KAREN CRUMMY**

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth therein.

Specifically, the undersigned certifies that this brief complies with C.A.R. 28(g). It does not exceed 30 pages and contains 4,924 words in those portions subject to C.A.R. 28(g).

By 

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae represent both individual and institutional members of the press, as well as freedom of information advocacy groups, and submit this brief in support of DENVER POST CORP. and KAREN CRUMMY (collectively hereinafter, “the Denver Post”). As more fully set forth in the Unopposed Motion of The Reporters Committee for Freedom of the Press, et al., for Leave to File a Brief as *Amici Curiae* which identifies each of the *amici*, this case is of great concern to *amici* and the public in general as it concerns the ability of a public official to privatize business that is—and has traditionally been—subject to public review and scrutiny.

This brief is conditionally filed with the Unopposed Motion of The Reporters Committee for Freedom of the Press, et al., for Leave to File a Brief as *Amici Curiae* pursuant to C.A.R. 29. *Amici Curiae* respectfully request that this Court grant the motion and accept the filing of this brief.

INTRODUCTION

The Governor readily concedes, as he must, that the phone company generated log/billing statement of cell phone calls placed and received by Governor Ritter relating to the state’s official business on his state issued Blackberry are public records subject to disclosure under the Colorado Open

Records Act (“CORA”). Complaint, *Denver Post v. Ritter*, No. 08CV7083 (Denver County Dist. Ct. Aug. 11, 2008) at Exh. D (July 11, 2008 letter from the Office of the Governor to Steven D. Zansberg stating “Shortly after receiving the [CORA] request, the Office of the Governor (“Office”) provided *The Denver Post* with the cell phone records for the Governor’s state-paid cell phone.”). This case presents the issue of whether this Court will interpret and apply CORA to allow a public official such as the Governor the ability to avoid accountability and to conceal from public scrutiny those very same records of official State business by merely eschewing the use of the state provided cell phone in favor of a “personal” cell phone.¹ Because the purpose of the CORA is to allow the public to hold their government officials accountable and remain meaningfully informed of its daily operations, the court of appeals decision must be reversed and the records at issue must be held to be public records subject to disclosure under the CORA.

¹ The Governor stipulated that “Substantially all of the cellular phone calls that the Governor places and receives, *while he is acting as Governor*, during regular business hours, are placed and received on the Governor’s personal cell phone.” Stipulations of Fact, *Denver Post v. Ritter*, No. 08CV7083 (Denver County Dist. Ct. Oct. 13, 2008) at ¶ 3. *The Denver Post*’s CORA action was dismissed pursuant to C.R.C.P. 12(b)(5) before any hearings or discovery was conducted that would allow inquiry into the reason for the Governor’s decision not to use the state issued Blackberry device for those official state business calls. *Amici* can think of no reason – and none has been advanced by the Governor – why his reason for using a “personal” rather than a state issued cell phone to conduct official state business should trump the disclosure requirements of the CORA.

Allowing government officials the option to privatize the records of official state business based upon the ownership of the device used and shield such records from disclosure is antithetical to both the language and spirit of the CORA and would potentially permit government officials to conduct a wealth of government activity beyond public review.

In this brief *amici* primarily will address two issues. First, *amici* will discuss journalists' need to access information such as Governor Ritter's state's business-related phone records in order to hold government officials accountable and shed light on government activities. To be sure, Governor Ritter is but part of the larger trend of public officials seeking to shield government conduct from public scrutiny through similar techniques. *Amici* provide ample evidence that public officials across the United States are constantly attempting to thwart records disclosure requirements by conducting the public's business on private communications platforms. This alarming trend is of grave concern to the media (and ultimately the citizens of Colorado) as it severely frustrates the media's ability to perform its watchdog role.

Second, *amici* will highlight how records such as the telephone call log information at issue here that document or memorialize official government action are essential to the investigative journalism newsgathering process. The

information that can be gleaned from phone logs and similar records (that is, questions related to who, what, when, and where) can often be just as newsworthy and enlightening as other substantive content.

Finally, *amici* also note that they adopt the Denver Post's position that Governor Bill Ritter's cell phone call logs meet the statutory definition of a "public record" under CORA.

ISSUE PRESENTED FOR REVIEW

Whether the court of appeals properly held that the personal cell phone billing statements of Governor Bill Ritter do not constitute public records subject to disclosure under the CORA.

STATEMENT OF THE CASE

Amici Curiae hereby adopt and incorporate the Denver Post's statement of the case including the nature of the case, the statement of facts giving rise to the litigation, the course of proceedings and the rulings in the courts below.

ARGUMENT

I. UPHOLDING THE COURT OF APPEALS' RULING WOULD DEFEAT THE PURPOSE OF THE CORA AND ALLOW GOVERNMENT OFFICIALS TO PRIVATIZE RECORDS REFLECTING CONDUCT THAT UNQUESTIONABLY IS PUBLIC BUSINESS AND THWARTS JOURNALISTS' ABILITY TO PERFORM THEIR CONSTITUTIONALLY PROTECTED WATCHDOG ROLE.

Allowing public officials to conduct their public business in the manner in which Governor Ritter freely admits to doing defeats the purpose of the CORA and thwarts the ability of the public to hold government officials accountable for their actions. If the court of appeals ruling is left undisturbed, a government official could shield government conduct from public scrutiny simply by opting to engage in the activity on personally owned devices. Indeed, in the case at hand, the costs associated with maintaining a personal cell phone (which many people already maintain) can be a small price to pay in order to conduct one's affairs in secret. The same would hold true for a substantial portion of the information generated through the use of private e-mail accounts even though Governor Ritter readily admits that such records would be subject to disclosure under CORA. Governor Ritter's Reply in Further Support of His Motion to Dismiss, *Denver Post v. Ritter*, No. 08CV7083 (Denver County Dist. Ct. Oct. 1, 2008) at 10, n.1. The marginal out-of-pocket cost to a public official of opting to conduct public business over

private e-mail can literally be nothing if one already pays for Internet access in their home or through a cell phone provider data plan.

In short, the CORA was never intended, nor should it be construed, to allow public officials willing to “pay the freight” to avoid the disclosure of conduct traditionally done on government-provided equipment. In fact, this Court has held that with regard to whether a communication should be subject to CORA, the act “specifically distinguishes between those messages that relate to the performance of public functions...and those that do not.” *Denver Publishing Co. v. Board of County Commissioners*, 121 P.3d 190, 196 (Colo. 2005). Without question, Governor Ritter’s decision to conduct his public business on his private phone and thereafter refuse to disclose the most basic details as to whom he speaks with runs counter to the CORA.

It is only when citizens are provided with complete and truthful information about government that they can best evaluate the choices their leaders have made and hold them accountable. The news media is often the critical link between accessing important government information and providing it to the public. The United States Supreme Court has recognized that the journalistic “fourth estate” is the surrogate for the public in cases such as this. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980). “[T]he press serves and was designed to serve

as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.” *Mills v. Alabama*, 384 U.S. 214, 219 (1966). Justice Potter Stewart wrote about the importance of the press in a free society. “The primary purpose of the constitutional guarantee of a free press was...to create a fourth institution outside the Government as an additional check on the three official branches.” Potter Stewart, *Or of the Press*, 26 *Hastings L.J.* 631, 634 (1975).

A. Access To Public Records, Including Logs Of The Governor’s Official Business Calls, Is Critical To The Media’s Ability To Carry Out Its Watchdog Function.

The media’s watchdog role in democratic society is undoubtedly crucial to ensuring an accountable government. “Protecting the free flow of information and countering undue government secrecy are essential underpinnings, not only of individual freedom, but also of our whole government system of checks and balances. A free press that has access to, and the right to publish information about executive branch policies, is a critical pillar of both congressional oversight and judicial review.” Nadine Strossen, *Constitutional Overview of Post-9/11 Barriers to Free Speech and a Free Press*, 57 *Am. U. Law. Rev.* 1203, 1209 (2008).

In this case, the Court of Appeals erred in allowing the Governor to conduct public business in private, thereby denying the press and the public the opportunity to fully evaluate his public actions and performance. This unfortunate result is wholly at odds with the legislative intent behind the public records law. The CORA was enacted to implement the policy of providing the public with complete information about the affairs of government and the official acts of public officials and their employees, while also balancing against legitimate privacy considerations. This Court has noted that the very definition of a “public record” under CORA “was intended to protect individual privacy and narrow the focus of the open records act to those records *directly related to functions of government.*” (emphasis added). *Denver Publishing Co. v. Board of County Commissioners*, 121 P.3d 190, 197 (Colo. 2005). The making and receipt of calls relating to the state business, whether done on the state issued cell phone or Governor Ritter’s “personal” phone, are actions and generate information that unquestionably relate to his government functions. Further, courts have long held that individuals do not have an expectation of privacy in phone records that simply memorialize that a particular conversation took place. *Reporters Comm. for Freedom of the Press v. AT&T Co.*, 593 F.2d 1030, 1045-46 (D.C. Cir. 1978) (citing numerous prior cases holding likewise). This Court should not interpret and apply the CORA to allow

(and even encourage) Governor Ritter or any other public official to dodge the disclosure requirements of CORA through the mere selection of the device he or she uses to conduct the public's business.

This Court has recognized that the CORA was born from the belief that “[p]ublic business is the public's business.” *Denver Publishing Co. v. Board of County Commissioners*, 121 P.3d 190, 196 (Colo. 2005) (quoting Legislative Council of the Colo. Gen. Assembly, *Open Public Records for Colorado* 1-2 (Research Publ'n No. 126, 1967)). Were this Court to uphold a rigid differentiation between private and public affairs based on a public official's ability to export his governmental actions to private devices, many types of communications would potentially be outside the ambit of the public records law, to the detriment of the broad purpose and policy of access toward information that underlies the law.

This alarming trend has not gone unnoticed and some have warned that too fine a line between personal and official communications “threatens to shield from disclosure e-mails that do not necessarily memorialize the performance of required government functions but that could nevertheless reveal official malfeasance, misfeasance, or nonfeasance.” Peter S. Kozinets, *Access to the E-Mail Records of Public Officials: Safeguarding the Public's Right to Know*, 25-2 Comm. Law. 17 (2007).

Allowing public officials to undermine the purpose of the CORA by electing to conduct public business on privately owned devices will improperly shield government employees from the appropriate level of accountability and leave Colorado citizens and journalists without access to information they would traditionally have a right to examine under the public records law.

B. In A Disturbing Trend, Public Officials Across The Country Attempt To Thwart Journalists' Newsgathering Ability By Using "Private" Communication Platforms To Conduct State Business, Contrary To The Intent Behind The Open Records Laws And The Public Interest.

Assuredly, if the Court of Appeals' decision is affirmed, Colorado public officials' use of private communication platforms to conduct state business will thwart journalists' newsgathering ability. For many such public officials, this is in fact the intent behind the decision to conduct public business in secret. Governor Ritter's actions are not uncommon and part of a larger, disturbing trend of government officials attempting to privatize official conduct.

The below examples demonstrate how commonplace it is for public officials to attempt to avoid public disclosure by conducting business beyond the purview of public scrutiny. The CORA is intended to prevent such subterfuge.

During the course of a public records lawsuit filed by *The News & Observer* and various other media outlets seeking access to former North Carolina Governor Mike Easley's e-mail communications, it was revealed that the governor maintained a private e-mail account that he used for state business, and advised staff to circumvent the public records laws by following his lead and routinely delete e-mail communications. Easley is currently under federal and state criminal investigation relating to, among other things, improper air travel, improper use of vehicles and questionable real estate transactions. *Easley Kept Secret Email Account*, *The News & Observer*, Feb. 3, 2010;² *Driving Mr. Easley: Feds, State Elections Officials Looking Into Former Governor's Business Dealings*, *Capitol Monitor*, June 26, 2010.³

In March 2009, the city of Venice, Fla., banned the use of private e-mail accounts for city business in order to settle a lawsuit filed by a Sarasota citizen who alleged city council members and city officials had violated state open government laws by conducting city business through private e-mails. Prior to the

² *Available at:* http://projects.newsobserver.com/under_the_dome/easley_kept_secret_email_account.

³ *Available at:* <http://www.capitol-monitor.org/in-a-pickle/driving-mr-easley-feds-reporte.php>.

settlement a judge had ordered city officials to turn over their private computers in order to obtain public documents stored within.

Despite the settlement, Mayor Ed Martin continued to use his private e-mail account to strategize with two candidates in upcoming city elections, even though the settlement agreement of an open records lawsuit and the city policy prohibited officials from using anything but a city-issued e-mail account to discuss city business. Kim Hackett, *Venice Officials Move to Put E-mail Suit Behind Them*, Sarasota Herald-Tribune, Mar. 11, 2009 at A01; Kim Hackett, *E-mail Defies a Court Order*, Sarasota Herald-Tribune, July 14, 2009 at A01.

Records disclosed after newspaper requests for messages sent or received by San Jose, Calif., city council members revealed that lobbyist messages to council members were providing directions on how to vote on a controversial downtown retail development project that would provide millions of dollars in city aid. In response, the city ultimately voted to require disclosure of messages received during meetings on personal devices from financially interested lobbyists and also to require disclosure of any communications received on personal computers and phones relevant to public business.

Peter Scheer, executive director of the First Amendment Coalition, told the paper in response to the policy, "[t]he city has recognized that if you don't take this

step, the public's right to electronic records is not really very meaningful, because it's so easy to transfer important communications from official e-mail to a private e-mail account." After the new policy was enacted, lobbyists' messages to government officials on private accounts dropped off significantly. John Woolfolk, *San Jose Poised to Close Electronic Message Loophole*, San Jose Mercury News, Jan. 21, 2010; Denis C. Theriault, *In California Assembly, New Limits on Text Messages from Lobbyists*, San Jose Mercury News, Mar. 2, 2010; John Woolfolk, *San Jose Council Members: Texts from Lobbyists Greatly Reduced*, San Jose Mercury News, May 16, 2010.

An investigation into alleged corruption and fraud in the San Bernardino County, Calif., assessor's office revealed that "[County Assessor] Postmus and others utilized the Blackberry messenger process, where they could communicate and bypass the county servers," in order to circumvent public records laws. David Danelski and Mark Muckenfuss, *Open Records Questions Raised: A Report Says Assessor's Office Staff Used A Blackberry System To Conceal Communications*, The Press-Enterprise, May 17, 2009 at A01.

After inquiries from The Associated Press, Iowa Governor Chet Culver agreed to release e-mails from a private computer used for his campaign after it came to light that during his first two years in office, he rarely used his state e-mail

account, and conducted most of his official state business on a private server. After one of the governor's election team attorneys concluded that the records would be subject to disclosure under the state open records act, the governor released the e-mails and changed his policy of using his private account. "It's a pleasant surprise, and I think references the fact that the governor understands something very fundamental about access to e-mail: When you're conducting public business, it should be agnostic as to platform," said Charles Davis, a University of Missouri-Columbia journalism professor. Nigel Duara, *Lawyer Agrees to Release Culver's Private E-mails*, The Associated Press, *reprinted in Times-Republican*, May 7, 2009.⁴

White House officials during the George W. Bush administration came under fire for using the Republican National Committee's e-mail system to communicate on government business. Tom Hamburger, *GOP-issued Laptops Now a White House Headache*, Los Angeles Times, Apr. 9, 2007 at A1. These tactics have allegedly continued in the Obama administration despite its professed commitment to government transparency. Obama administration officials have been accused of flouting federal recordkeeping and disclosure laws though the use of private e-mail accounts to hide official contact with lobbyists. Jonathan Strong,

⁴ Available at: <http://www.timesrepublican.com/page/content.detail/id/16502.html>.

Issa Eyes Google in Investigating White House E-mail Abuses, The Daily Caller, July 12, 2010.⁵

As the above examples clearly demonstrate, public officials across the nation, at all levels of government, and from all political persuasions, constantly seek to shield official conduct (albeit often illegal and unethical) from public scrutiny through the use of private communications devices. A public official's temptation to selectively privatize official conduct is often too great and only encourages the nefarious conduct highlighted above. This is exactly what the CORA is intended to combat.

Amici note that Governor Ritter concedes that e-mails sent to and from his personal e-mail account regarding official business would be public under CORA. Governor Ritter's Reply in Further Support of His Motion to Dismiss, *Denver Post v. Ritter*, No. 08CV7083 (Denver County Dist. Ct. Oct. 1, 2008) at 10, n.1. This would include a wealth of automatically generated information (including, e.g., sender, recipient and date/time information) that Governor Ritter makes and knows will be created every time he sends an e-mail. The instant case is no different. Every time Governor Ritter uses his personal cell phone for public business he

⁵ Available at: <http://dailycaller.com/2010/07/12/issa-eyes-google-in-investigating-white-house-e-mail-abuses/>.

knows that call log data is automatically generated at his initiation and with his knowledge.

If left undisturbed, however, the Court of Appeals ruling imparts in Governor Ritter impermissible discretion to determine what kinds of automatically generated information he makes should be public. Even worse and somewhat paradoxically, it would allow him to withhold from disclosure the very kinds of automatically generated information he makes—and admits is public—every time he sends an e-mail message.

This Court should not construe CORA in any manner that sanctions public officials continually deciding for themselves what government business will be done in the open and what will be done behind closed doors.

II. CELL PHONE RECORDS AND SIMILAR RECORDS MEMORIALIZING OFFICIAL CONDUCT ARE STANDARD INVESTIGATIVE SOURCES FREQUENTLY USED BY JOURNALISTS TO REPORT ON GOVERNMENT ACTIVITY AND SIGNIFICANTLY AID JOURNALISTS IN FULFILLING THEIR CONSTITUTIONALLY PROTECTED WATCHDOG ROLE.

Cell phone call logs often set forth in billing statements have utility far beyond simply confirming accurate billing amounts. Such records are, in fact, frequently used by investigative journalists as a means to verify that particular conduct has, or has not, occurred. Indeed, the very fact that a public official did or

did not have contact with another person, along with the duration and frequency of such contacts, is often itself a newsworthy fact of great public interest.

To take the myopic view that such records only exist for payment purposes, as in the case of phone records, completely ignores the fact that these kinds of records have long been used by investigative journalists and are standard fare for those covering government.⁶ To be sure, the potential to use phone logs and similar kinds of records to shed light on government conduct is not merely conjectural. The examples below highlight investigative journalists' routine use of records documenting official conduct (and misconduct) and the critical role they have in the newsgathering process.

Telephone records identifying the parties and dates of a call illuminate decisions affecting the public by helping the reporter "connect the dots" between a communication of a public official to a third party and a decision by the official benefiting that party. They aid in helping journalists explain, for example, how tax dollars are spent, how contracts are awarded, how government action is initiated, or expose general abuse and mismanagement in government.

⁶ Although facts have yet to be developed in this case through discovery, information in the record suggests that the Governor's "personal" cell phone is billed at a monthly "flat-rate" and that the log of calls placed and received serves no billing function. *See e.g. The Denver Post's* Petition for a Writ of Certiorari 11-14.

In 1994, *The Arizona Republic* used cell phone records obtained through an open records request to show that George Leckie, a deputy chief of staff to then-Governor J. Fife Symington III, improperly called a former Symington campaign treasurer, John Yeoman, who since had been working for an accounting firm seeking a \$1.5 million state contract. Jonathan Sidener, *Ex-Symington Aide Tied to Improper Calls to Pact Bidder*, *The Arizona Republic*, Mar. 13, 1994, at A1. The records showed that Leckie “telephoned Yeoman’s house and office on three different days during the bidding process. Each call was placed soon after the end of meetings of the selection committee.” *Id.* Soon after the calls were made, the firm lowered its bid by \$400,000 and won the contract. *Id.* at A18. The state attorney general investigated the alleged bid rigging, resulting in Leckie and Yeoman signing settlement agreements with the state to avoid civil and criminal proceedings. John Dougherty, *Analysis: SLIM Pickings AG’s Project SLIM Probe Hasn’t Targeted Symington, Despite Evidence of His Involvement*, *Phoenix New Times*, July 20, 1995.⁷

In 2009, *The News-Press* of Fort Myers, Fla., used cell phone records to show that Lee County Sheriff Mike Scott violated his office’s own policy

⁷ Available at: <http://www.phoenixnewtimes.com/1995-07-20/news/analysis-slim-pickings-ag-s-project-slim-probe-hasn-t-targeted-symington-despite-evidence-of-his-involvement>

forbidding employees from associating with convicted felons, forming a close friendship with Dick Spence, who had been convicted in 1995 of laundering \$100 million for the Colombian Cali drug cartel, a major supplier of cocaine to the United States. Rachel Revehl, *Lee County Sheriff's Link With Felon Raises Influence Fears*, The News-Press, Aug. 16, 2009, at A1. Scott had demoted, transferred, or fired several deputies connected to a corruption investigation targeting Spence. *Id.* The records showed that for three years beginning in August 2005, Scott had more than 500 phone conversations with Spence, who was reported to have also managed the sheriff's 2008 re-election campaign. *Id.*

The Oakland Tribune uncovered an alleged attempt at a political takeover of the local public schools system by reviewing phone records from top officials at the state Fiscal Crisis and Management Assistance Team (FCMAT), a relatively obscure agency charged with overseeing the fiscal health of many California schools. Records showed that agency officials communicated frequently with prominent politicians and a future Oakland schools superintendent. Robert Gammon, *Phone Logs Link 'Politics' to School Takeover; Records Show FCMAT Officials Made Repeated Calls to City's Leaders Before Chaconas' Ouster*, Oakland Tribune, Aug. 18, 2003, at Local & Regional. FCMAT officials made at

least 40 phone calls to Oakland Mayor Jerry Brown, state Senator Don Perata, and future superintendent Randy Ward. *Id.*

A variety of similar kinds of records that memorialize official conduct have been used by journalists to hold government accountable in much the same way as cell phone records. For example, visitor logs are similar to cell phone records because they allow an investigative reporter to identify the persons with whom a public official deals with on the public's business. *The Orlando Sentinel* used visitor logs to show that Orlando's mayor and city commissioners had met multiple times with food service companies seeking vendor contracts at the city's new professional basketball arena. Mark Schlueb, *Big Names Line Up for Arena Food Deal*, *The Orlando Sentinel*, Oct. 13, 2009, at B1. The newspaper compared names on the logs with campaign finance disclosure forms and found that some prospective concessionaires had contributed thousands of dollars to several commissioners' re-election campaigns. *Id.*

White House visitor logs showed that lobbyist Jack Abramoff, who later pled guilty to seeking to corrupt public officials, among other charges, had met with senior administration officials. Philip Shenon, *Abramoff Visits in White House Logs Are Linked to Rove and a Budget Aide*, *The New York Times*, May 11, 2006, at A32. The Times reporter used the information in the logs to verify information

from human sources that Abramoff had met with Karl Rove, President George W. Bush's top political advisor, about hiring two people for jobs with the U.S. Department of the Interior. *Id.* The department positions were of interest to Abramoff, who was purporting to lobby on behalf of Native American gambling interests. *Id.*

Similarly, investigative journalists have also used credit card statements to inform the public on how government officials spend their workdays. Credit card statements reviewed by *The Arizona Republic* showed that administrators and board members of Mesa Community College went on sightseeing tours and shopping excursions while on overseas trips where the stated purpose was to increase the college's international presence and create educational partnerships. Robert Anglen, *College Leaders' Trips Scrutinized; Pricey Hotels, Meals Common; Mesa Community Defends Global Outreach Efforts*, *The Arizona Republic*, Oct. 15, 2006. The trips were intended to be "exhaustive working sessions that involved back-to-back meetings with little or no time for sightseeing." *Id.* Yet, credit card statements and travel itineraries showed the officials used workdays to tour monuments and historical sites and shop. *Id.* The study team trips, which included 87 faculty, staff and at least two elected members of the Maricopa Community Colleges Governing Board at a cost of more than

\$300,000 to taxpayers over five years, were canceled following the newspaper's investigation. *Id.*; Robert Anglen, *Mesa College Officials Banned From All-Expenses-Paid Trips*, The Arizona Republic, Nov. 9, 2006.

Similar to call logs that are automatically generated by the actions of a public official in placing a call on a cell phone, digital system metadata - "information describing the history, tracking, or management of an electronic document"⁸ - is information that is automatically generated by word processing systems as a result of the actions of public officials using the system. Courts that have addressed whether metadata is subject to open records laws have held that it is. *Lake v. City of Phoenix*, 218 P.3d 1004 (Ariz. 2009); *O'Neill v. City of Shoreline*, 187 P.3d 822 (Wash. Ct. App. 2008); *Irwin v. Onondaga County Resource Agency*, 895 N.Y.S.2d 262 (N.Y. App. Div. 2010); *Hearst Corp. v. New York*, 882 N.Y.S.2d 862 (N.Y. Sup. Ct., Albany Cty. 2009). The phone logs at

⁸ *Lake v. City of Phoenix*, 218 P.3d. 1004, 1005, n.1 (2009). For example, in a Microsoft Word document metadata is automatically generated and embedded in a file regarding a document's authorship, the dates it was created, accessed, edited, printed, or e-mailed, the file type and size; and revisions or comments. Peter S. Kozinets, *Access to Metadata in Public Records: Ensuring Open Government in the Information Age*, 27-2 Comm. Law. 1 (2010). This type of metadata is accessible if the document is opened with the software application with which it was created, but it is invisible if printed or converted to a static image file such as a PDF. *Id.* Metadata can be used to show how data has been altered, when and by whom.

issue should not be subject to a different rule. It is the actions of the public official that causes the creation of the phone log records.

Metadata is a relatively new, yet equally important type of record memorializing conduct that aids journalists in shedding light on government conduct. For example, electronic copies of a 2005 United Nations report on the assassination of Lebanese Prime Minister Rafik Hariri contained metadata that showed the deletion of names of Syrian officials allegedly involved in the plot, including the Syrian president's brother and brother-in-law. Tom Zeller, Jr., *Beware Your Trail of Digital Fingerprints*, New York Times, Nov. 7, 2005, at C5.

Metadata analysis was critical to the *The Miami Herald's* Pulitzer Prize-winning investigation into patterns of destruction wrought by Hurricane Andrew. Jeff Leen, Stephen K. Doig & Lisa Gettler, *Failure of Design and Discipline*, Miami Herald, Special Section, Dec. 20, 1992 (finding that building codes, loosened by city commissioners at the urging of real-estate developers, greatly amplified the destruction caused by the storm). For the report, the Herald's Stephen K. Doig analyzed databases of Miami-Dade County storm damage inspections, tax rolls, and building permits – altogether composed of tens of millions of records. *How This Was Done*, The Miami Herald, Special Section, Dec. 31, 1992 (describing how the newspaper used imbedded metadata—data that

explained appraiser code symbol meanings and how to import records—in its research into the destruction caused by Hurricane Andrew).

As the above examples illustrate, records, such as cell phone logs, that memorialize or document official action are of critical importance to investigative journalism, are frequently used to keep government accountable to the people and can result in positive change. This Court must not allow the Governor, or other public officials through its decision in this case, to circumvent the safeguards CORA was intended to provide.

III. GOVERNOR BILL RITTER'S PERSONAL CELL PHONE RECORDS FALL WITHIN THE DEFINITION OF A "PUBLIC RECORD" AS DEFINED UNDER COLORADO LAW

Governor Bill Ritter's cell phone records meet the statutory definition of a "public record" under the CORA. For all the reasons cited by *The Denver Post*, the records were made, maintained and kept by him in his official capacity. *Amici* support and incorporate herein the entirety of the Denver Post's argument as to why the cell phone records are subject to disclosure under the CORA.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court of appeals and hold that the portion of his "personal" cell phone billing statements that contain information relating to the official state business calls Governor Ritter

placed and received on that phone are public records subject to disclosure under the Colorado Open Records Act to the same extent that calls placed to and received from those very same persons on the state issued Blackberry are subject to disclosure under the CORA. To hold otherwise will allow Colorado public officials to defeat and make a mockery of the will of the people and the intent of the General Assembly in enacting the CORA.

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By 

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of August, 2010, a true and correct copy of the foregoing **BRIEF OF AMICI CURIAE IN SUPPORT OF DENVER POST CORP. & KAREN CRUMMY** was served on the following counsel via U.S. Mail, postage prepaid:

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