

# STATE OF COLORADO

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Executive Director and Chief Medical Officer

Dedicated to protecting and improving the health and environment of the people of Colorado

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Colorado Department  
of Public Health  
and Environment

April 27, 2012

Timothy R. Bussey  
The Bussey Law Firm, P.C.  
12 East Boulder Street  
Colorado Springs, Colorado 80903

RE: Colorado Open Records Act Request

Dear Mr. Bussey:

The Colorado Department of Public Health and Environment (Department) is in receipt of your Colorado Open Records Act request dated April 20, 2012. A response to each request is set forth below. The responsive records will be provided to you on a CD upon receipt of payment as described in the attached invoice.

**Request 1:** Any and all memoranda, records, electronic email, or other media concerning the Colorado CDPHE Toxicology Laboratory (hereafter referred to as the "Tox Lab") quality assurance system, to include, but not limited to, procedures, manuals, and policy for the quality assurance system and testing methods.

**Response:** Standard operating procedures are being provided.

**Request 2:** Any and memoranda, records, electronic email, or other media concerning the Tox Lab's internal investigations or quality assurance system reviews in 2010-present, including but not limited to, reports of inaccurate blood test results to include inter-office and intra-office communications.

**Response:** See response to Request #1. A blank corrective action log is being provided. Corrective action logs are completed with regard to individual cases when blood alcohol results are outside of appropriate ranges.

**Request 3:** Any and all memoranda, records, electronic email, or other media concerning any internal affairs investigation including but not limited to inaccurate blood results or blood samples reported outside of appropriate ranges from 2010-present.

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**Response:** The Department is not releasing its investigatory files pursuant to C.R.S. § 24-72-204(2)(a)(I). Additionally, these records contain deliberative process privileged information regarding an ongoing investigation, and as such are not subject to disclosure pursuant to C.R.S. § 24-72-204(3)(a)(XIII). Investigation materials that contain the personally identifying information, in this instance for defendants in criminal matters, are not subject to disclosure pursuant to C.R.S. § 24-72-204(3)(a)(IV). Finally, to the extent these investigatory materials contain information maintained pursuant to the employer-employee relationship, they constitute personnel files as defined in C.R.S. § 24-72-202(4.5) and are not subject to disclosure pursuant to C.R.S. § 24-72-204(3)(a)(II)(A).

**Request 4:** Any and all memoranda, records, electronic email, or other media concerning communications between CDPHE, law enforcement (to include District Attorney's Offices), courts and the defense bar or individual defense counsel (pro se), concerning information of an inaccurate blood results or blood sample reported out of the range from 2010-present.

**Response:** Emails to and from the Department to a third party regarding the results of blood alcohol testing are being provided.

**Request 5:** Any and all memoranda, records, electronic email, or other media concerning any internal affairs investigations concerning the inaccurate blood results or blood samples out of range for 2010-present at the Tox Lab.

**Response:** See responses to Requests 3 and 4.

**Request 6:** Any and all memoranda, records, electronic email, or other media concerning inaccurate blood alcohol tests at the Tox Lab from 2010-present including, but not limited to, the inaccurate tests that have been identified, to include any forensic reports or memoranda from each inaccurate blood test result.

**Response:** See responses to Requests 3 and 4.

**Request 7:** Any and all memoranda, records, electronic email, or other media concerning information regarding any laboratory testing for inaccurate blood tests at the Tox Lab including, but to limited to [*sic*]:

a. The name, training, experience, and certification of the person who managed the laboratory and of all persons who handled, processed, and tested material in inaccurate [*sic*] blood result or blood samples reported outside appropriate ranges from 2010-present at the Tox Lab.

**Response:** Curricula vitae are being provided. Training records constitute information maintained because of the employer-employee relationship and are exempt from disclosure pursuant to C.R.S. § 24-72-204(3)(a)(II)(A).

b. Certificates of compliance with accrediting agencies for the previous five years for the Tox Lab.

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**Response:** Certificates of compliance are being provided.

c. Internal audits, logs, and reports concerning blood alcohol testing for the last two years for the Tox Lab.

**Response:** Three responsive documents are being provided.

d. The litigation packets (as defined in 5 CCR 1005-2) of any blood samples deemed to be outside of appropriate ranges from 2010-present from the Tox Lab.

**Response:** Litigation packets contain personally identifying information and are not subject to disclosure pursuant to C.R.S. § 24-72-204(3)(a)(IV).

**Request 8:** Pursuant to CDPHE (Colorado Department of Public Health and Environment) regulations, provide the following information for the blood alcohol tests at the Tox Lab to include:

a. Personnel qualifications, to include curriculum vitae's.

**Response:** Curriculum vitae and position descriptions are being provided.

b. Standard operating procedure manual for testing blood samples at the Tox Lab.

**Response:** Standard operating procedures are being provided.

c. Analytical process for the Tox Lab blood alcohol testing.

**Response:** Standard operating procedures are being provided.

d. Proficiency testing for the Tox Lab blood alcohol testing.

**Response:** Proficiency tests are being provided.

e. Quality control for the Tox Lab blood alcohol testing.

**Response:** A quality control policy is being provided.

f. Security for the Tox Lab blood alcohol testing.

**Response:** A policy is being provided.

g. Chain of custody procedure for blood alcohol testing for the Tox Lab.

**Response:** A chain of custody procedure is being provided.

h. Specimen retention for blood alcohol tests at the Tox Lab.

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**Response:** A specimen retention procedure is being provided.

i. Records for any errors discovered for blood alcohol testing at the Tox Lab for the last five years.

**Response:** Two responsive documents are being provided.

**Request 9:** Any and all memoranda, records, electronic email, or other media concerning forensic analysis for ethyl alcohol used by the Tox Lab.

**Response:** This request is overbroad and unduly burdensome. These records exist only at the individual test result level. The Toxicology Lab conducts approximately 800 blood alcohol tests per month, and cannot possibly go through each and every test result for purposes of responding to this request.

**Request 10:** Any and all memoranda, records, electronic email, or other media concerning any lapses in the Tox Lab's certification.

**Response:** The Department has no responsive documents.

**Request 11:** Any and all memoranda, records, electronic email on [sic] other media concerning a corrective action taken or plans of corrective action concerning inaccurate blood testing or blood samples out of range for 2010-present at the Tox Lab.

**Response:** Corrective actions are documented at the individual test result level, and contain personally identifying information, which is not subject to disclosure pursuant to C.R.S. § 24-72-204(3)(a)(IV).

**Request 12:** Any and all memoranda, records, electronic email, or other media identifying all persons [sic] who participated in the testing or signed off on test [sic] results for any inaccurate blood testing or blood samples out of range for 2010-present.

**Response:** The Department has no responsive documents.

**Request 13:** Any and all memoranda, records, electronic email, or other media concerning inaccuracies, misreporting, and errors in analysis of blood alcohol tests in 2010-present.

**Response:** See responses to prior requests.

**Request 14:** Any and all information concerning Mitchell Fox-Rivera including but not limited to his resume, application for employment, personal [sic] records, performance reviews, and performance reports.

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**Response:** Mr. Fox-Rivera's resume, application, and performance rating are being provided. Personnel records and the content of the performance review, other than the performance rating, are exempt from disclosure pursuant to C.R.S. § 24-72-204(3)(a)(II)(A).

If you wish to receive a CD containing the responsive, public documents described above, please remit payment in accord with the attached invoice.

This concludes the department's good faith effort to respond to your Colorado Open Records request. If you have further questions, I may be reached at 303-692-3472 or [ann.hause@state.co.us](mailto:ann.hause@state.co.us).

Sincerely,

Ann Hause, Director  
Office of Legal and Regulatory Affairs

cc: Cindy Burbach, Laboratory Services Division  
Dave Butcher, Laboratory Services Division  
Jennifer Weaver, First Assistant Attorney General, State Services Section, Colorado Department of Law