

STATE OF COLORADO

John W. Hickenlooper, Governor
Christopher E. Urbina, MD, MPH
Executive Director and Chief Medical Officer

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

4300 Cherry Creek Dr. S. Laboratory Services Division
Denver, Colorado 80246-1530 8100 Lowry Blvd.
Phone (303) 692-2000 Denver, Colorado 80230-6928
Located in Glendale, Colorado (303) 692-3090

<http://www.cdphe.state.co.us>



Colorado Department
of Public Health
and Environment

February 15, 2013

VIA EMAIL AND U.S. POSTAL MAIL

Vincent C. Todd
12600 West Colfax Ave., Suite C400
Lakewood, Colorado 80215-3761

RE: Colorado Open Records Act Request

Dear Mr. Todd:

The Colorado Department of Public Health and Environment (department) is in receipt of your Colorado Open Records Act request dated February 12, 2013, wherein you request all of the following:

- 1) any policies, protocols or standards for the evaluation for accuracy, precision and analytical reliability of EBAT instruments pursuant to 5 CCR 1005-2 as of February 1, 2013 or later;
- 2) any documents establishing the current protocol for determination of what is a "Certified EBAT Instrument" pursuant to 5 CCR §1005-2 1.5 (2013);
- 3) any documents reflecting testing of any instrument, under its current software and hardware configuration, including the test protocols and test data, for certification as a "Certified EBAT Instrument" pursuant to 5 CCR § 1005-2 1.5 (2013).
- 4) any documents showing compliance with the conditions set forth in the January 8, 2013, letter from Jennifer Kresl to Cynthia Burbach, RE: Corrective Action Measures for UT-B and UT-C Proficiency Testing Events (documents previously produced should be itemized but need not be produced should be itemized but need not be produced.)
- 5) any documents showing decision making, along with any inquiries received, relating to how the CDPHE Toxicology Laboratory retained its Post Mortem certification while it was suspended for

EXHIBIT

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failure to meet proficiency standards for UT-B. Specifically, this includes any decisional diagram under 5 CCR § 1005-2, 6.5.6.6. (2009) justifying the recertification of the CDPHE Toxicology Laboratory.

6) all documents showing decision making, along with any inquiries received, relating to how the CDPHE Toxicology Laboratory was reinstated following suspension for failure to meet proficiency standards for UT-B. Specifically, this includes any decisional diagram under 5 CCR § 1005-2 6.5.6.6 (2009) justifying the recertification of the CDPHE Toxicology Laboratory.

With respect to requests 1 and 2, the department has identified responsive documents that are being withheld from disclosure pursuant to the deliberative process privilege identified at C.R.S. § 24-72-204(3)(a)(XIII). See enclosed affidavit from Jeff Groff for a description of the deliberative nature of these documents. The department has no records that are responsive to request number 3. The department is producing 71 pages of documents that are responsive to requests 4, 5 and 6. All of the records being produced are electronic and are included with this response email.

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

Sincerely,

Ann Hause, Director
Office of Legal and Regulatory Compliance

cc: Cindy Burbach, Laboratory Services Division
Jeff Groff, Laboratory Services Division
Alisa Campbell, Assistant Attorney General, Health Care Unit, Colorado Department of Law

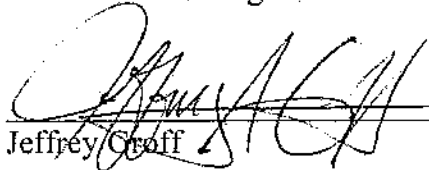
EXHIBIT
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1. I am over twenty-one (21) years old. I am employed as the Evidential Breath Alcohol Testing Program Manager, Laboratory Services Division of the Colorado Department of Public Health and Environment (the Department).
2. On February 12, 2013, Mr. Todd submitted a Colorado Open Records Act request to the Department that included the following two document requests:
 - Any policies, protocols or standards for the evaluation for accuracy, precision, and analytical reliability of EBAT instruments pursuant to 5 CCR 1005-2 as of February 1, 2013 or later.
 - Any documents establishing the current protocol for determination of what is a "Certified EBAT Instrument" pursuant to 5 CCR 1005-2, § 1.5(2013).
3. The Intoxilyzer 9000 is a field-operated breath alcohol testing instrument. The Colorado Board of Health approved it to become the state's sole evidential breath alcohol testing instrument for use by certified law enforcement personnel, replacing the current instrument, the Intoxilyzer 5000EN.
4. The Department is in the process of creating policies and protocols regarding the Intoxilyzer 9000, but those policies and protocols are in draft form and have not yet been finalized.
5. The draft policies contain employee opinions, concerns, comments, and suggestions about the Intoxilyzer 9000 breath alcohol testing instrument and about the Department's breath-testing program.
6. The draft materials contain both pre-decisional and deliberative information. Department employees involved in developing the Intoxilyzer 9000 policies have offered opinions and engaged in discussions about the proposed content of these draft policies and protocols as they are evolving.
7. The draft materials constitute a "work-in-progress" that is being developed into the final policies and protocols, which ultimately will be used by Department employees to

calibrate, verify and certify the Intoxilyzer 9000s that are going to be implemented statewide.

8. Release of the draft policies and procedures, with employee pre-decisional, deliberative discussions would cause substantial harm to the public by creating confusion among law enforcement personnel whom will utilize the Intoxilyzer 9000s, misleading the legal community, including defense and prosecution attorneys and Department of Motor Vehicles hearing officers. distorting the public perception about the Department's breath alcohol testing program, and jeopardizing the state's DUI/DWAI enforcement operations.
9. I am called as a witness in many criminal cases where evidential breath alcohol testing is part of the evidence being considered by the court, and I am often asked to discuss Department policies and protocols concerning the EBAT instrument. Releasing draft versions of a yet-to-be-completed policy or protocol will cause unnecessary confusion regarding what standards are in effect with respect to the EBAT instruments.
10. I have nothing further to say.


Jeffrey Croff

2.19.2013
Date

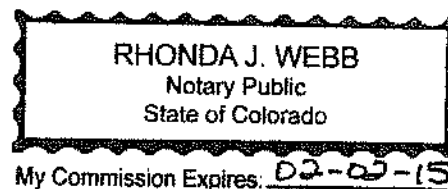
State of Colorado)
County of Denver)

Subscribed and sworn to before me in the county of Denver, State of Colorado, this 19 day of February 2013.

Notary Public 

My Commission expires:

02-02-15



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Colorado Department
of Public Health
and Environment



April 4, 2013

VIA EMAIL AND U.S. POSTAL MAIL

Vincent C. Todd
12600 West Colfax Ave., Suite C400
Lakewood, Colorado 80215-3761

RE: Colorado Open Records Act Request

Dear Mr. Todd:

The Colorado Department of Public Health and Environment (department) is in receipt of your Colorado Open Records Act ("CORA") request dated April 1, 2013, wherein you request all of the following:

- 1) any policies, protocols or standards for the evaluation for accuracy, precision and analytical reliability of EBAT instruments pursuant to 5 CCR 1005-2 as of February 1, 2013 or later; (restatement of February 1, 2013 CORA request.)
- 2) any documents establishing the current protocol for determination of what is a "Certified EBAT Instrument" pursuant to 5 CCR §1005-2 1.5 (2013); (restatement of February 1, 2013 CORA request.)
- 3) any determination under 5 CCR 1005-2 (2013) as to what is a "Certified EBAT Instrument: and when and that was determined.

You further indicated that requests 1 and 2 are duplicative of your February 12, 2013 request, and that you were not seeking draft documents. With this clarification, the department is excluding draft documents from its response. The department has no responsive records for any of the three requests at

Vincent C. Todd

April 4, 2013

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this time. You will be notified when any responsive documents relevant to this request are final, along with any costs associated with the production of such documents.

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

Sincerely,

Ann Hause, Director

Office of Legal and Regulatory Compliance

cc: Jeff Groff, Laboratory Services Division

Alisa Campbell, Assistant Attorney General, Health Care Unit, Colorado Department of Law

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Colorado Department
of Public Health
and Environment

May 24, 2013



VIA EMAIL AND U.S. POSTAL MAIL

Vincent C. Todd
12600 West Colfax Ave., Suite C400
Lakewood, Colorado 80215-3761

RE: Colorado Open Records Act Request

Dear Mr. Todd:

The Colorado Department of Public Health and Environment (department) is in receipt of your Colorado Open Records Act request dated May 20, 2013, wherein you request the following:

- 1) Any document replied upon by Jeffrey Groff in making his assertion, in his February 19, 2013, Affidavit that,
 3. The Intoxilyzer 9000 is a field-operated breath alcohol testing instrument. The Colorado Board of Health approved it to become the state's sole evidential breath alcohol testing instrument for use by certified law enforcement personnel replacing the current instrument, the Intoxilyzer 5000EN.
- 2) For each Toxicology Laboratory submitting an Application to the Colorado Department of Public Health and Environment for certification in 2012 as a DUI and DUID Forensic Toxicology Laboratory, the filled out Application cover page (Appendix 2B to 5 CCR 1005-2 (2009)), any amendments to the disclosure of laboratory director and all Curriculum Vitae submitted for Laboratory Directors, Supervising Analysts and Analysts.

Vincent C. Todd
May 24, 2013
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With respect to request no. 1, the department has no responsive information. With respect to request no. 2, the department is producing records. The responsive records are in PDF format and are enclosed with this response.

This concludes the department's good faith effort to respond to your Colorado Open Records Act request. If you have further questions, I may be reached at 303.692.2034, or via email, betsy.harrah@state.co.us .

Sincerely,

Betsy Harrah, Paralegal
Office of Legal and Regulatory Compliance

cc: Ann Hause, Director, Office of Legal and Regulatory Compliance
Jeff Groff, Laboratory Services Division
Alisa Campbell, Assistant Attorney General, Health Care Unit, Colorado Department of Law