



## Colorado Attorney General Resists Document Production at Superfund Site

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In an effort to resist the production of documents sought by an environmental group under the [Colorado Open Records Act](#), the [Colorado Attorney General](#) filed a petition on September 5, 2013, on behalf of the [Colorado Department of Public Health and Environment](#) (“Department”), seeking to protect disclosure under the “deliberative process privilege.” The case presents an intriguing question of exactly how much and what types of information must be made available to the public under the Colorado Open Records Act as it pertains to an environmental cleanup action.

The [Cotter Cañon City Uranium Mill in southern Colorado](#) is on the EPA’s National Priority List and is the subject of a federal court-ordered consent decree and remediation action plan. By agreement with the federal government, the Mill is regulated under state law by the Department.

Earlier this summer, Colorado Citizens Against Toxic Waste served an open records request on the Department seeking documents pertaining to clean up of the site. After producing hundreds of pages of documents, the Department refused to disclose certain communications, arguing that the withheld documents were “so candid and personal that disclosure of them would stifle frank and honest discussion, both within the Department and between the Department and the U.S. Environmental Protection Agency (“EPA”), to the detriment of the public interest.”

In a petition for protective order filed with the Denver District Court last week, the Colorado Attorney General asserts that the deliberative process privilege protects documents to, from and about EPA, including documentation resolving a dispute between the Department and EPA regarding how to decontaminate the Mill, and further protects documents containing internal Department discussions and deliberations on how to accomplish state and federal regulatory goals in conjunction with EPA.

The deliberative process privilege has been recognized by state and federal courts in Colorado where the materials sought to be protected are pre-decisional and deliberative, which typically include recommendations, advisory opinions, draft documents, proposals, suggestions and personal opinions – rather than agency policy. In this case, the Attorney General argues that disclosure of the particular materials at issue would injure “the ability of the Department and the EPA to work collaboratively” and ultimately harm the public interest. Following an *in camera* review, the trial court is expected to advise whether the withheld documents are privileged and whether they should remain beyond public inspection.