

DISTRICT COURT, PITKIN COUNTY, COLORADO Court Address: 506 E. Main, Suite 300 Aspen, Colorado 81611	▲ COURT USE ONLY ▲
Plaintiff(s): MARILYN MARKS, a resident of the City of Aspen, Colorado v. Defendant(s): KATHRYN KOCH, City Clerk of the City of Aspen, Colorado	
Attorney for Plaintiff: Robert A. McGuire ROBERT A. MCGUIRE, ATTORNEY AT LAW, LLC 1624 Market Street, Suite 202 Denver, Colorado 80202 Phone Number: 303-734-7175 FAX Number: 303-734-7166 E-mail: ram@lawram.com Atty. Reg. #: 037134	Case Number: Div.: Ctrm.:
VERIFIED COMPLAINT AND APPLICATION FOR ORDER DIRECTING CUSTODIAN TO SHOW CAUSE	

Plaintiff, Marilyn Marks, by and through her undersigned counsel, Robert A. McGuire, Attorney at Law, LLC, for her Complaint against the Defendant, states as follows:

NATURE OF THE COMPLAINT AND APPLICATION

1. This is a civil action brought under the Colorado Open Records Act (“CORA”), § 24-72-201, *et seq.*, C.R.S., in which the Plaintiff applies to this Court for an order under § 24-72-204(5), C.R.S., directing the Defendant to show cause why the Plaintiff should not be permitted to inspect approximately 2,544 individual computer files containing the scanned graphical images of anonymous ballots cast in the Aspen municipal election held on May 5, 2009; and in which the Plaintiff seeks injunctive relief restraining the Defendant from destroying or permitting the destruction of the records sought by the Plaintiff until after the final resolution of this action, including the final resolution of all appeals.

2. Because the Defendant has improperly denied the Plaintiff's statutory right to inspect these records, the Plaintiff seeks an award of court costs and reasonable attorney fees under § 24-72-204(5), C.R.S.

PARTIES, JURISDICTION, AND VENUE

3. The Plaintiff, Marilyn Marks, is a resident of the City of Aspen, Colorado.

4. The Plaintiff is a former candidate for mayor of the City of Aspen, who seeks to obtain certain public records that she needs in order adequately to assess the merits of the instant-runoff voting ("IRV") tabulation mechanism currently in use for elections in the City of Aspen.

5. The Plaintiff seeks to participate knowledgeably in Aspen's ongoing public debate over IRV and to learn enough about the IRV tabulation process to prepare appropriate proposals for needed election reforms.

6. Defendant Kathryn Koch is the City Clerk of the City of Aspen, Colorado. Defendant is sued in her capacity as the custodian of the public records that the Plaintiff seeks to inspect.

7. This Court has jurisdiction over the subject matter at issue because this is a civil action, Colo. Const. Art. VI, § 9(1), brought under § 24-72-204(5), C.R.S., which specifically confers jurisdiction to hear the Plaintiff's application upon this Court as the district court of the district wherein the public records sought by the Plaintiff are found.

8. CORA governs inspection of the public records sought by the Plaintiff because of its general statewide application and pursuant to Section 4.15 of the Home Rule Charter for the City of Aspen, Colorado.

9. Venue properly lies in Pitkin County, Colorado, pursuant to C.R.C.P. 98(c) because the City of Aspen, where the Defendant performs her official duties as custodian of the records sought by the Plaintiff, is located in Pitkin County and because the Plaintiff resides in Pitkin County at the time service of this Complaint is made there on the Defendant.

GENERAL ALLEGATIONS

10. The Plaintiff incorporates by reference the foregoing paragraphs as if fully rewritten here.

11. The City of Aspen conducted its most recent biennial municipal election on May 5, 2009, pursuant to Section 2.2 of the Home Rule Charter of the City of Aspen, Colorado.

12. The May 5, 2009, election was the first election conducted by the City of Aspen under new instant runoff voting rules established by the Aspen City Council for use in the mayoral and two city council races.

13. On election night, the tabulation of ballots under the new IRV rules was conducted by TrueBallot, Inc. (“TBI”), a Maryland corporation engaged in the business of election and ballot administration, under a Balloting Agreement between TBI and the City of Aspen.

14. TBI’s procedures for tabulating ballots in Aspen’s municipal election, a true and complete copy of which is attached hereto as **Exhibit 1**, consisted of a five-step process, see Ex. 1, at 3, that was performed collaboratively by TBI and election officials working together on election night.

15. The first step of the TBI tabulation process was to scan the original paper ballots cast in the election and save each resulting digital photographic image as a single computer file in tagged image file format (“TIFF”) under a unique filename that ended in a numbered suffix related to the ballot’s sequential position in the scanning order. See id.

16. The second and third steps of the TBI tabulation process involved extracting, reviewing and correcting voter rankings, not from the original paper ballots, but rather from the *digital photographic images* generated by scanning in the first step of the tabulation process. See id.

17. The fourth and fifth steps of the TBI tabulation process involved tallying the results in the mayoral and city council races by performing further processing on the vote rankings extracted from the images in the second and third steps. See id.

18. The Defendant and/or the City of Aspen has, on information and belief, released to the public all of the data created by TBI during the vote tabulation process, except for the digital photographic images created in the very first step of the tabulation process.

19. TBI’s written explanation of its procedures states that independent verification of the second and third steps of the tabulation process is accomplished by comparing the data extracted in those steps against the digital photographic images created in the first step. See id.

20. Without access to the digital photographic images of the original paper ballots, therefore, independent verification of the tabulation process is impossible.

21. The Plaintiff, who ran in the election as a candidate for mayor of Aspen, received 1,124 votes (or approximately 46.4% of the votes counted in the mayoral race), but was defeated by her opponent, the incumbent mayor, who was credited with 1,301 votes (or 53.6% of the votes counted).

22. The Plaintiff is aware of irregularities that occurred in the May 5 election involving the IRV tabulation procedure and the Defendant’s subsequent auditing of the tabulation process including, on information and belief, at least the following:

- On election night, TBI used a tabulation program configuration that was different from the one it had tested in the public Logic and Accuracy Test and that reflected the IRV tabulation rules of Cambridge, Massachusetts, instead of the IRV rules approved for Aspen's election by the Aspen City Council. As a result, the vote tally reported in the Plaintiff's mayoral race on election night was incorrect. See Sally Spaulding, Press Release, Mayoral Vote Tally Corrected; Outcome Stays the Same, May 28, 2009, attached hereto as **Exhibit 2**.
- TBI informed the Defendant of this error on or about May 19, 2009, when three days still remained in the statutory period for initiating an election contest, but the Defendant did not act to make TBI's error or the corrected vote totals known to the community, the Election Commission or the candidates, including the Plaintiff, until a full nine days later, or almost a week after the statutory period for contesting the election had expired.
- An "audit" of the ballots by the Defendant conducted on May 7, 2009, to "make sure that the rankings on the ballots corresponded to the electronic records," see Ex. 2, at 2, was performed using a non-random selection from a subset of ballots that excluded over 800 walk-in votes and approximately 239 mail votes (i.e., approximately 41% of the total mayoral votes counted) and thus is an inadequate indicator of the accuracy of the second and third steps of TBI's tabulation process.

23. In order to precisely understand how this election worked, the Plaintiff desires to perform a truly independent verification of the IRV tabulation procedure, and the Plaintiff therefore requires access to the digital photographic images created and saved as TIFF files during the first step of TBI's tabulation process.

THE PUBLIC RECORDS SOUGHT BY THE PLAINTIFF

24. The Plaintiff incorporates by reference the foregoing paragraphs as if fully rewritten here.

25. Approximately 2,544 TIFF files, each containing a digital photographic image of a single ballot, were created by TBI during the tabulation process on election night.

26. During the tabulation process, on information and belief, complete or partial contents of each of the 2,544 individual TIFF files were disclosed to the public at least once by projection for approximately 1-3 seconds onto large video screens that the Defendant and TBI had set up in the tabulation center to facilitate both public observation and official review of the tabulation process.

27. Members of the public in the tabulation center at City Hall, where TBI and the Defendant performed the tabulation process, observed the projected images of many individual TIFF files.

28. This public accessibility conformed to TBI's and the Defendant's agreed predetermined process for conducting the tabulation. See Ex. 1, at 1 ("All steps performed by TrueBallot will be publicly observable and will occur under direction of city election officials. Projectors can be attached to each of the TrueBallot computers to make it easy for the audience to follow the steps.")

29. A large number of the projected images showing contents of TIFF files were also broadcast live to the public on Grassroots TV Channel 12 in Aspen.

30. A recording of the Grassroots TV 12 election-night broadcast, including footage of ballot images projected in the tabulation center, continues to be available for download on the Internet at Show Detail: 2009 City of Aspen Municipal Election Coverage LIVE, (May 5, 2009) <<http://vod.grassrootstv.org/cablecast/public/Show.aspx?ChannelID=1&ShowID=8097>>. A selection of four example frozen frames from this recorded broadcast, showing four photographic images of TIFF file contents that were publicly disclosed during the tabulation, are attached hereto as **Exhibit 3**.

31. The Defendant was aware that this public disclosure of the images of many individual TIFF files was happening on election night but, on information and belief, did not object or interfere.

32. On information and belief, the 2,544 TIFF files created by TBI in the first step of its tabulation process conducted on May 5, 2009, are stored on a computer disk that TBI provided to the Defendant after the tabulation of the Aspen election results was completed on or about May 5, 2009.

33. On information and belief, the disk containing these approximately 2,544 digital photographic images of anonymous ballots is currently being kept and maintained as "other official election records" by the Defendant in Pitkin County pursuant to section 31-10-616(2), C.R.S.

APPLICABLE PROVISIONS OF CORA

34. The Plaintiff incorporates by reference the foregoing paragraphs as if fully rewritten here.

35. Section 24-72-204, C.R.S., provides, in pertinent part, as follows:

(1) The custodian of any public records shall allow any person the right of inspection of such records or any portion thereof except on one or more of the following grounds or as provided in subsection (2) or (3) of this section:

(a) Such inspection would be contrary to any state statute.

- (b) Such inspection would be contrary to any federal statute or regulation issued thereunder having the force and effect of law.

....

36. Section 24-72-202, C.R.S., provides, in pertinent part, as follows:

- (1.1) “Custodian” means and includes the official custodian or any authorized person having personal custody and control of the public records in question.
- (2) “Official custodian” means and includes any officer or employee of...any...political subdivision of the state...who is responsible for the maintenance, care and keeping of public records, regardless of whether the records are in his or her actual personal custody and control.
- (5) “Political Subdivision” means and includes every...city...within this state.
- (6)(a)(I) “Public records” means and includes all writings made, maintained, or kept by...[a] political subdivision of the state...for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.
- (7) “Writings” means and includes...all...documentary materials, regardless of physical form or characteristics. “Writings” includes digitally stored data....

37. Section 24-72-204(5), C.R.S., provides, in pertinent part, as follows:

...any person denied the right to inspect any record covered by this part 2 may apply to the district court of the district wherein the record is found for an order directing the custodian of such record to show cause why the custodian should not permit the inspection of such record;

except that, at least three business days prior to filing an application with the district court, the person who has been denied the right to inspect the record shall file a written notice with the custodian who has denied the right to inspect the record informing said custodian that the person intends to file an application with the district court.

Hearing on such application shall be held at the earliest practical time.

Unless the court finds that the denial of the right of inspection was proper, it shall order the custodian to permit such inspection and shall award court costs and

reasonable attorney fees to the prevailing applicant in an amount to be determined by the court.

....

THE PLAINTIFF'S CORA REQUEST

38. The Plaintiff incorporates by reference the foregoing paragraphs as if fully rewritten here.

39. On June 1, 2009, the Plaintiff, seeking to assess IRV implementation at the May 5, 2009, Aspen municipal election for purposes of participating in future public debate on Aspen's use of the IRV voting method, submitted a request to the Defendant under the Colorado Open Records Act, § 24-72-201, et seq., C.R.S., seeking to inspect "the complete tiff images, including tiff file names of the ballots from the May, 2009 election." A true and correct copy of this request is attached hereto, and incorporated, as **Exhibit 4**.

THE DEFENDANT'S DENIALS OF THE PLAINTIFF'S RIGHT OF INSPECTION UNDER CORA

40. The Plaintiff incorporates by reference the foregoing paragraphs as if fully rewritten here.

41. On June 4, 2009, counsel for the Defendant denied the Plaintiff's CORA request to inspect digital photographs *created from* ballots, citing as grounds a state statute that provides for the safekeeping of, and restricts physical access to, *actual ballots*, § 31-10-616, C.R.S. A true and correct copy of this letter is attached and incorporated as **Exhibit 5**.

42. The Defendant's letter of June 4 also cited as grounds for denying the Plaintiff's right of inspection the City's obligation to ensure the constitutional guarantee of a secret ballot, Colo. Const. Art. VII, § 8. See Ex. 5.

43. Subsequent private correspondence between the Plaintiff and the Defendant's counsel showed that the Defendant had adopted the legal view that the TIFF files, although not ballots themselves, were to be regarded as "ballots" for purposes of § 31-10-616(1), C.R.S.

44. On July 9, 2009, for example, counsel for the Defendant reiterated the Defendant's denial of the Plaintiff's right of inspection on the basis of § 31-10-616, C.R.S., by stating that "if we are prohibited from providing direct access to the ballots, we also cannot provide access to the images." A true and correct copy of this email is attached and incorporated as **Exhibit 6**.

45. The Defendant in subsequent correspondence with the Plaintiff also cited as grounds for denial the Defendant's concern that anonymity of the ballots would be jeopardized by disclosure of TIFF files showing write-in votes written in personally identifiable handwriting.

46. During July, the Plaintiff noted that the City had posted on its official website a statement under the link “Why has City staff denied a citizen’s request to inspect the ballot images from the last municipal election?” that appeared to be intended as a public response to the Plaintiff’s CORA request. A true and correct copy of this statement is attached and incorporated as **Exhibit 7**.

47. The Defendant’s public statement disputed the significance of the prior public disclosure of TIFF files on election night; and reiterated the Defendant’s concern, as grounds for denial, that anonymity of the ballots in the election would be jeopardized if the TIFF files were disclosed to the Plaintiff. The statement stated: “Anonymity, or secrecy, is guaranteed only by ensuring that the ballots, and copies of the ballots, are kept completely secure and eventually destroyed.” See Ex. 7, at 2.

48. The Plaintiff also noted further public statements made in July and August by identified officials of the City of Aspen apparently setting forth grounds for the Defendant’s denial of the Plaintiff’s right to inspect the TIFF files, including the following:

- “There are ways that those anonymous ballots could become identifiable. Simply if people put a mark in the corner or something they would recognize their ballot. Later on you could identify whose ballot is whose.” See Aspen: Ballots are exempt from state open records law, Face The State (July 31, 2009) <<http://facethestate.com/articles/17853-aspen-ballots-are-exempt-state-open-records-law>> (statement of John Worcester, counsel for Defendant).
- “Although ballots cast don’t include the voter’s name, it’s possible the ballot could be otherwise identified if the voter made some distinctive marking on the ballot.” See Curtis Wackerle, City Sticks to Position Not to Release Ballots, Aspen Daily News (Aug 12, 2009) <<http://www.aspendailynews.com/section/home/136054>> (statement of City of Aspen Mayor Mick Ireland)
- “[I]t might be possible for someone to run a sophisticated calculation matching voter rolls with the order in which ballots were cast. If this were to happen, the city would be in clear violation of the law for releasing the ballots.” See Curtis Wackerle, More Calls for Release of Ballots, Aspen Daily News (Aug. 24, 2009), <<http://www.aspendailynews.com/section/home/136238>> (statement by counsel for Defendant Jim True).
- “It is correct to refer to the ballots as being ‘anonymous,’ but only as long as they remained locked up. State laws that prohibit the release of ballots seek to guarantee that no one can discern anyone else’s ballot after they have been cast. This preserves the anonymity of the ballots.” See Sally Spaulding, City Responds to Ballot Issue, Aspen Times (Aug. 27, 2009) <<http://www.aspentimes.com/article/20090827/LETTER/908269987>> (letter to the editor by the Community Relations Director of the City of Aspen).

49. The Defendant's concern (expressed through counsel and by several other Aspen officials apparently on the Defendant's behalf) that the Plaintiff's inspection of the requested records might threaten ballot secrecy to the extent that some voters could have made distinctive markings on their ballots disregards the fact that it is illegal in Colorado for a voter to mark his own ballot so as to render it identifiable, both for elections held under the Colorado Municipal Election Code, § 31-10-1517, C.R.S., and for elections held under the Uniform Election Code of 1992, § 1-13-712(1), C.R.S.

50. Furthermore, the Defendant's broader concern that the Plaintiff's inspection of the requested records might threaten ballot secrecy generally can only be understood to mean that the Defendant believes the ballots used by the City of Aspen contain some kind of information that makes them personally identifiable.

51. If it is indeed the Defendant's position that the ballots are somehow inherently personally identifiable (through inspection of the TIFF files), then the ballots themselves must violate the anonymity in balloted voting that is required by Article VII, Section 8, of the Colorado Constitution.

52. The proper remedy for such a patterned violation of the constitutional requirement of ballot secrecy is not for the Defendant to engage in a prophylactic denial of the Plaintiff's right to inspect public records under CORA, but is, rather, for this Court to perform its "duty" of declaring any such tainted election to be void *ab initio*. See Taylor v. Pile, 154 Colo. 516, 523 (1964).

53. Voiding the election is not the relief that the Plaintiff requests in this action, but it is the only relief properly warranted if the Defendant insists the TIFF files cannot be inspected by the Plaintiff consistently with ballot anonymity.

54. The Colorado Constitution's guarantee of secrecy in voting means that a voter's ballot should not be personally identifiable to *anyone*, including the government. To the extent that the Defendant asserts that the constitutional provision for secrecy in voting will be violated by allowing the Plaintiff to inspect the requested records, that secrecy must already be breached by virtue of the government's own possession of those same records.

55. Without conceding any merit in the Defendant's assertion that the Plaintiff's inspection of the TIFF files might somehow threaten ballot secrecy, the Plaintiff nevertheless offered on July 20, 2009, to narrow her request expressly to exclude any TIFF files showing write-in votes (this July correspondence, with the Defendant's reply, is attached and incorporated as **Exhibit 8**); and again offered on September 15, 2009, to narrow her request to permit the Defendant to withhold altogether any TIFF image that the Defendant reasonably believed to show markings that compromised the anonymity of the original paper ballot associated with that TIFF file (this September correspondence, with the Defendant's reply, is attached and incorporated as **Exhibit 9**).

56. Both of the Plaintiff's proposed narrower versions of her CORA request were denied by the Defendant through counsel on substantially the same grounds as set out in the Defendant's initial denial and in the statements publicly made by City officials and referred to above. See Ex. 8; Ex. 9.

57. Foreseeing the likelihood that the Plaintiff would need to seek an application to this Court for an Order under § 24-72-204(5), C.R.S., on August 27, 2009, the Plaintiff, through her undersigned counsel, wrote the Defendant advising of the Plaintiff's intent to file this action pursuant to CORA based upon the Defendant's repeated denials of the Plaintiff's CORA request. A true and correct copy of this letter is attached and incorporated as **Exhibit 10**. This letter provided the three business days notice required pursuant to § 24-72-204(5), C.R.S., that the Plaintiff intended to seek judicial relief in this Court in the absence of the Defendant's production of the records sought.

58. As of the date of filing of this action, the Defendant continues to refuse to permit the Plaintiff to inspect the public records at issue.

DEFENDANT'S INTENTION TO DESTROY RECORDS

59. The Plaintiff incorporates by reference the foregoing paragraphs as if fully rewritten here.

60. The Defendant has communicated to the Plaintiff publicly and through counsel that she considers herself obliged to destroy the TIFF files sought by the Plaintiff on or around November 5, 2009, because of the Defendant's view that the records sought are equivalent to actual ballots and because § 31-10-616(1), C.R.S., requires ballots to be destroyed six months after an election. See Ex. 9, at 1.

61. Based on the Defendant's view that the records sought are equivalent to ballots, the Defendant may also at any time adopt the view that she is required to destroy the TIFF files by the Plaintiff sooner than November 5, 2009, since the second trigger for mandatory destruction of ballots in § 31-10-616(1), C.R.S., occurs when "the time has expired for which the ballots would be needed in any contest proceedings," and such time may already have expired.

62. Plaintiff contends that the records sought are not "ballots," including for purposes of § 31-10-616(1), C.R.S., but are instead "official election records" for purposes of § 31-10-616(2), C.R.S.

63. Official election records must be preserved "for at least six months following a regular or special election" (emphasis added), § 31-10-616(2), C.R.S., but their continued preservation thereafter appears to be at the discretion of the Defendant.

64. The Plaintiff reasonably anticipates that this action will not reach a final resolution, including the final resolution of all appeals, on or before November 5, 2009.

65. The TIFF files sought by the Plaintiff as public records are therefore in danger of being destroyed by the Defendant unless this Court orders the Defendant to refrain from destroying such records.

66. On information and belief, the Defendant possesses the only copy in existence of the records sought that are subject to the Plaintiff's right of public inspection under CORA.

67. On information and belief, the operational burden and expense borne by the Defendant as a result of preserving one or more computer disks are negligible.

68. On information and belief, the Defendant would suffer no damage or costs if she were obliged to continue to preserve the computer disk(s) that contain the records sought by the Plaintiff for the duration of this action.

CLAIM FOR RELIEF

(Application for Order Directing Custodian to Show Cause under § 24-72-204(5), C.R.S.)

69. The Plaintiff incorporates by reference the foregoing paragraphs as if fully rewritten here.

70. The Plaintiff is a "person" entitled to inspect public records under § 24-72-204(1), C.R.S.

71. Because the records requested by the Plaintiff are digitally stored data that constitute "writings", § 24-72-202(7), C.R.S., that are "made, maintained or kept" by a "political subdivision" of the State, for use in the exercise of the functions required or authorized by law, the records requested by the Plaintiff are "public records." See § 24-72-202(6)(a)(I), C.R.S.

72. The Defendant as City Clerk of the City of Aspen is, pursuant to § 31-10-616(2), C.R.S., the official custodian and a "custodian" of the public records sought by the Plaintiff. See § 24-72-202(1.1), C.R.S.

73. The Defendant is unable to establish that the public records sought by the Plaintiff are exempt from the Plaintiff's right of inspection established by § 24-72-204(1), C.R.S.

74. Because the Defendant has previously permitted the public disclosure of the public records sought by the Plaintiff, the Defendant cannot now in good faith deny the Plaintiff's right of inspection of those same records.

75. The Plaintiff gave the Defendant more than three business days written notice of the Plaintiff's intention apply to this Court, pursuant to § 24-72-204(5), C.R.S., before she filed this Verified Complaint and Application For Order Directing Custodian To Show Cause.

76. Pursuant to § 24-72-204(5), C.R.S., the Plaintiff is now entitled to and does hereby apply for an Order directing the Defendant to show cause why the Defendant should not permit inspection of the public records sought by the Plaintiff.

77. The Plaintiff is now entitled to a hearing on this application “at the earliest practical time,” as provided by § 24-72-204(5), C.R.S.

**DEMAND FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTIVE RELIEF**

78. The Plaintiff incorporates by reference the foregoing paragraphs as if fully rewritten here

79. The Plaintiff requests that this Court enter a temporary restraining order and preliminary injunction restraining the Defendant from destroying or permitting the destruction of the records sought by the Plaintiff until after the final resolution of this action, including the final resolution of all appeals.

80. There is a reasonable probability that the Plaintiff will prevail on the merits, since the records sought by the Plaintiff are within the meaning of “public records” as defined in CORA, § 24-72-202(6)(a)(I), C.R.S., and the records sought are not subject to any exception to the Plaintiff’s right of inspection set out in the CORA statute or established by other applicable law.

81. If the Defendant were to destroy the records sought before the final resolution of this action on the merits, such destruction would cause a real, immediate, and irreparable injury to the Plaintiff in the form of a permanent frustration of the Plaintiff’s right to inspect the destroyed public records.

82. There is no plain, speedy, and adequate remedy at law sufficient to protect the Plaintiff’s rights other than the injunctive relief hereby requested, because the Defendant may, unless enjoined by this Court, at any moment destroy the records sought by the Plaintiff and render the Plaintiff’s action moot.

83. The temporary restraining order and preliminary injunction requested, if issued, would not be adverse to the public interest because neither would impair the interests or rights of persons not parties to this action.

84. At the same time, both the temporary restraining order and preliminary injunction would prevent the Defendant from frustrating the judicial remedy established by § 24-72-204(5), C.R.S., which exists specifically to protect members of the public, like the Plaintiff, from improper denials by custodians of the right to inspect public records.

85. The injury to the Plaintiff threatened by the Defendant’s destruction of the records sought greatly outweighs whatever damage the proposed temporary restraining order and preliminary injunction may cause the Defendant, since the Defendant will suffer, at most,

negligible costs or damages as a result of being enjoined from destroying the records, even if the Defendant is wrongfully enjoined or restrained until the final resolution of this action.

86. The injunctive relief requested by the Plaintiff will preserve the status quo pending a final resolution of this action on the merits, since the Defendant already serves as the current custodian of the records sought by the Plaintiff and would continue to do so if enjoined by this Court from destroying those records until after the final resolution of this action.

87. A temporary restraining order and preliminary injunction are appropriate under C.R.C.P. 65 and should be granted by the Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Marilyn Marks respectfully requests that the Court will:

- a. Schedule a hearing “at the earliest practical time” on the Plaintiff’s application for an Order directing the Defendant to show cause why the Defendant should not permit the inspection of the records sought by the Plaintiff; and on the Plaintiff’s demand for a temporary restraining order and preliminary injunction;
- b. Enter forthwith an Order directing the Defendant to show cause in the form of the attached [Proposed] Order Granting Application for Order Directing Custodian to Show Cause;
- c. Enter forthwith a temporary restraining order in the form of the attached [Proposed] Order Granting Temporary Restraining Order;
- d. Enter a preliminary injunction in the form of the attached [Proposed] Order Granting Preliminary Injunction;
- e. Schedule a hearing at which the Defendant shall show cause;
- f. Unless the Defendant is able to show cause, enter an Order directing the Defendant to permit inspection of the records sought by the Plaintiff as required by § 24-72-204(5), C.R.S.;
- g. Unless the Defendant is able to show cause, award the Plaintiff her court costs and reasonable attorney fees as required by § 24-72-204(5), C.R.S.; and
- f. Award such other relief as the Court deems just and proper.

Respectfully submitted this 8th day of October, 2009.

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