

<p>DISTRICT COURT, PITKIN COUNTY, COLORADO</p> <p>Pitkin County Courthouse 506 East Main Street, Suite 300 Aspen, Colorado 81611</p>	
<p><b>Plaintiff:</b> MARILYN MARKS</p> <p>v.</p> <p><b>Defendant:</b> KATHRYN KOCH</p>	<p>▲ COURT USE ONLY ▲</p>
<p><b>Attorney for Plaintiff:</b></p> <p>Robert A. McGuire Robert A. McGuire, Attorney At Law, LLC 1624 Market Street, Suite 202 Denver, Colorado 80202</p> <p>Phone Number: 303-734-7175 FAX Number: 303-734-7166 E-mail: ram@lawram.com Atty. Reg. #: 37134</p>	<p>Case Number: 2009CV294</p> <p>Div.: 3                      Ctrm.:</p>
<p><b>MEMORANDUM OF MARILYN MARKS, PLAINTIFF, IN RESPONSE TO DEFENDANT’S MOTION TO DISMISS</b></p>	

This memorandum is submitted on behalf of the Plaintiff, Marilyn Marks, by and through her undersigned counsel, to review the facts and law establishing that an order granting dismissal for failure to state a claim or a judgment on the pleadings would be improper and that the Defendant’s Motion to Dismiss should therefore be denied.

**STATEMENT OF THE FACTS**

The public records at issue in this case are 2,544 electronic files maintained on a computer disk by the Defendant (the “TIFF files”). Each TIFF file is a scanned copy of a single ballot cast in the May 5, 2009, Aspen municipal election. (V. Compl. ¶ 15.) The TIFF files were

created and saved to disk as part of the vote tabulation process performed by the Defendant, her staff and City contractor, TrueBallot, Inc., on election night. (Id. ¶¶ 12-15, 25, 32-33.)

Voted portions of all of the TIFF files were completely or partially shown to the general public by the Defendant and her staff on election night using projector screens. (Id. ¶¶ 26-28.) Many of the projected TIFF files were simultaneously broadcast on live television, (Id. ¶ 29), and a recording of this election night broadcast remains available for public download over the Internet, (Id. ¶ 30). Hundreds of the TIFF files were also shown separately to individual members of the public who were present at a post-election audit conducted by the Defendant and her staff on May 7, 2009. (Id. ¶ 22.) For every ballot counted on election night, the Defendant has also released to the public an individual “data string” that identifies the vote content and rankings that the counting software extracted from the TIFF file for that individual ballot. (Id. ¶¶ 16-18.)

On June 1, 2009, Marilyn Marks, the Plaintiff, submitted a request to Aspen City Clerk Kathryn Koch, the Defendant, seeking to inspect the TIFF files as public records under the Colorado Open Records Act (“CORA”), §§ 24-72-100.1 to -502., C.R.S. (V. Compl. ¶ 39.)

The Defendant denied the Plaintiff’s right to inspect the TIFF files on grounds that a ballot preservation law, § 31-10-616(1), C.R.S., and the constitutional requirement of secrecy in voting, Colo. Const. art. VII, § 8, each prohibited public inspection of TIFF files. (V. Compl. ¶¶ 41-48.) When the Plaintiff offered to limit her inspection to exclude any TIFF files that the Defendant reasonably considered to have identifying marks that could compromise secrecy in voting, the Defendant continued to refuse the Plaintiff’s right of inspection, citing again the ballot preservation statute. (Id. ¶¶ 55-56.)

On August 27, 2009, the Plaintiff gave the Defendant notice of the Plaintiff's intention to apply to this Court under Section 24-72-204(5), C.R.S., for relief in the form of an order directing the Defendant to show cause why the Defendant should not permit the Plaintiff's inspection of the TIFF files and for injunctive relief. (V. Compl. ¶ 57.)

### **STATEMENT OF THE CASE**

On October 8, 2009, the Plaintiff filed her Verified Complaint and Application for Order Directing Custodian to Show Cause (the "Verified Complaint").

On October 16, 2009, the Court conducted a Status Conference, at which the Court granted the Plaintiff's requests for an order to show cause, for an order scheduling a hearing on the order to show cause, and for a preliminary injunction protecting the TIFF files from destruction until the conclusion of this action. (Tr. Status Conf. at 4-5, 11.) At the Defendant's request, the preliminary injunction was extended to protect the paper ballots cast in the May election as well as the TIFF files. (Id. at 4-5.) Also at the Status Conference, the Defendant informed the Court of her intention to file a motion to dismiss or a motion for summary judgment, (Id. at 6), and the Court accordingly set deadlines for filings related to the Defendant's proposed motion, (Id. at 14).

On November 6, 2009, the Defendant filed her Motion to Dismiss. In response, the Plaintiff now files this Memorandum of Marilyn Marks, Plaintiff, in Response to Defendant's Motion to Dismiss.

### **ARGUMENT**

Although the Defendant has styled her Motion to Dismiss as a C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted, her Memorandum in Support of Motion to Dismiss identifies no formal insufficiency in the Verified Complaint.

Instead, the Defendant's argument for dismissal is based entirely on the assertion of affirmative defenses. The Court should deny the Defendant's Motion to Dismiss because the Verified Complaint states a formally sufficient claim under CORA and because none of the Defendant's asserted defenses entitle the Defendant either to dismissal for failure to state a claim or to judgment on the pleadings.

**I. This Court should not dismiss the Verified Complaint under C.R.C.P. 12(b)(5) because the Verified Complaint is formally sufficient to state a claim upon which relief can be granted.**

In her Motion to Dismiss and Memorandum in Support of Motion to Dismiss, the Defendant has identified no inadequacy in the Verified Complaint that renders the Plaintiff's pleadings formally insufficient to entitle the Plaintiff to relief under Section 24-72-204(5), C.R.S. On the contrary, the Verified Complaint pleads a set of material facts that is formally sufficient to entitle the Plaintiff to her requested relief. For these reasons, dismissal of the Verified Complaint for failure to state a claim upon which relief can be granted under C.R.C.P. 12(b)(5) would be improper and should not be granted.

**A. Standard of review for failure to state a claim under C.R.C.P. 12(b)(5).**

The purpose of a motion under C.R.C.P. 12(b)(5) is to test the formal sufficiency of the complaint. See *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909 (Colo. 1996). In evaluating a motion to dismiss under C.R.C.P. 12(b)(5), a trial court may consider only those matters stated in the complaint, must accept all averments of material fact as true and must view the allegations in the light most favorable to the plaintiff. See *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256 (Colo. 2000). A complaint is sufficient to withstand a motion to dismiss if the plaintiff states a claim that would entitle the plaintiff to relief. See *Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992).

**B. The Verified Complaint is formally sufficient under C.R.C.P. 12(b)(5).**

The averments of material fact made in the Verified Complaint, when accepted as true and viewed in the light most favorable to the Plaintiff as required by *Town of Alma*, 10 P.3d at 1256, are sufficient to entitle the Plaintiff to relief under Section 24-72-204(5), C.R.S. Section 24-72-204(5), C.R.S., provides in pertinent part:

[A]ny person denied the right to inspect any record covered by [CORA] may apply to the district court...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...informing said custodian that the person intends to file an application with the district court. Unless the court finds that the denial of the right of inspection was proper, it shall order the custodian to permit such inspection....

The averments made by the Plaintiff in the Verified Complaint track the language of Section 24-72-204(5), C.R.S., insofar as they include, among other material facts, the following:

- a. The Plaintiff is a person entitled to inspect public records under CORA. (V. Compl. ¶¶ 3, 70.)
- b. The TIFF files are public records covered by CORA. (Id. ¶¶ 13-15, 25, 33, 71.)
- c. The Defendant is the custodian of the TIFF files. (Id. ¶¶ 6, 32-33, 72.)
- d. The Plaintiff requested to inspect the TIFF files. (Id. ¶¶ 39, 55.)
- e. The Defendant denied the Plaintiff's request. (Id. ¶¶ 41-48, 56, 58.)
- f. The Plaintiff gave the Defendant at least three business days notice before filing the Verified Complaint. (Id. ¶¶ 57, 75.)

Because these averments match the elements of Section 24-72-204(5), C.R.S., the Verified Complaint states a claim that entitles the Plaintiff to relief as required under *Shapiro &*

*Meinhold*, 823 P.2d at 120, and the Verified Complaint is therefore formally sufficient to withstand a C.R.C.P. 12(b)(5) motion to dismiss.

**C. Affirmative defenses cannot support a dismissal under C.R.C.P. 12(b)(5).**

The Defendant has nowhere identified a single necessary allegation that is absent from the averments set out in the Verified Complaint. Instead, the Defendant argues for dismissal on the basis of “two separate justifications” that she asserts for refusing to allow inspection of the TIFF files. (Def.’s Mem. Supp. Mot. Dismiss 6.) Her first asserted justification is the claim that allowing inspection of the TIFF files would violate the constitutional requirement of secrecy in voting, Colo. Const. art VII, § 8, (*Id.* at 7-8), and “would be contrary to [a] state statute” under Section 24-72-204(1)(a), C.R.S., (*Id.* at 6). Her second asserted justification is the “defense” permitted by Sections 24-72-204(6)(a) and 24-72-204(6)(b), C.R.S., that disclosure of the TIFF files “would do substantial injury to the public interest.” (*Id.*)

These justifications are each in the nature of affirmative defenses. *See State v. Nieto*, 993 P.2d 493, 507 (Colo. 2000) (“an affirmative defense is a legal argument that a defendant, who is capable of being sued, may assert to require the dismissal of a claim or to prevail at trial”). Affirmative defenses cannot constitute grounds for a C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim. *See Denver Parents Ass’n v. Denver Bd. of Educ.*, 10 P.3d 662 (Colo. App. 2000). Furthermore, a plaintiff does not need to anticipate and negate affirmative defenses in the complaint in order to survive a motion to dismiss for failure to state a claim. *See Davis v. Bonebrake*, 135 Colo. 506 (1957), 313 P.2d 982 (Colo. 1957). Where, as here, a motion to dismiss for failure to state a claim is based on an affirmative defense, the motion more accurately constitutes a motion for judgment on the pleadings under C.R.C.P. 12(c). *See Shaw v. City of*

*Colorado Springs*, 683 P.2d 385 (Colo. App., 1984); *Lin Ron, Inc. v. Mann's World of Arts & Crafts, Inc.*, 624 P.2d 1343 (Colo. App., 1981).

Because the Defendant's justifications for refusing to allow inspection of the TIFF files constitute affirmative defenses that do not bear on the formal sufficiency of the Verified Complaint under C.R.C.P. 12(b)(5) and because the Verified Complaint is in fact formally sufficient to entitle the Plaintiff to relief under Section 24-72-204(5), C.R.S., dismissal of the Verified Complaint under C.R.C.P. 12(b)(5) would be improper, and the Defendant's Motion to Dismiss should be denied.

**II. Even if the Court evaluates the Defendant's Motion to Dismiss as a motion for judgment on the pleadings under C.R.C.P. 12(c), the Court should still deny the Defendant's Motion to Dismiss because none of the Defendant's affirmative defenses entitles the Defendant to a judgment on the pleadings.**

The Plaintiff objects to the Defendant's assertion of affirmative defenses by motion. However, if the Court chooses to consider the Defendant's Motion to Dismiss as a C.R.C.P. 12(c) motion for judgment on the pleadings under *Shaw*, 683 P.2d at 385, and *Lin Ron, Inc.*, 624 P.2d at 1343, and permits the Defendant's motion itself to serve in effect as a responsive pleading, then the Court should still deny the Defendant's Motion to Dismiss because the affirmative defenses of constitutional infirmity and contrary state statute are based on erroneous constructions of the Colorado Constitution and Colorado statutes and therefore do not entitle the Defendant to judgment as a matter of law; and because the defense of "substantial injury to the public interest" under CORA requires the Court to resolve a disputed issue of material fact, which renders judgment on the pleadings inappropriate.

**A. Standard of review for judgment on the pleadings under C.R.C.P 12(c).**

Under *Shaw*, 683 P.2d at 385, and *Lin Ron, Inc.*, 624 P.2d at 1343, if a motion to dismiss for failure to state a claim is based on an affirmative defense, the motion more accurately constitutes a motion for judgment on the pleadings under C.R.C.P. 12(c). The standard of review for evaluating a motion for a judgment on the pleadings is effectively the same as that used to evaluate a motion to dismiss for failure to state a claim. See *Abts v. Board of Ed.*, 622 P.2d 518 (Colo. 1980). In other words, a court must construe the allegations of the pleadings strictly against the movant and the allegations of the party resisting the motion as true. See *Smith v. TCI Communications, Inc.*, 981 P.2d 690 (Colo. App. 1999). Importantly, judgment on the pleadings under C.R.C.P. 12(c) is only appropriate if the trial court can determine that the moving party is entitled to judgment as a matter of law merely by inspecting the pleadings and the controlling law. See *City and County of Denver v. Qwest Corp.*, 18 P.3d 748 (Colo. 2001). Where material facts are disputed, judgment on the pleadings is not appropriate. See *Koch v. Whitten*, 140 Colo. 109 (1959), 342 P.2d 1011 (Colo. 1959); *Quiroz v. Goff*, 46 P.3d 486 (Colo. App. 2002).

**B. The Defendant is not entitled to a judgment on the pleadings on the basis of Article VII, Section 8, of the Colorado Constitution because the public inspection of TIFF files does not violate secrecy in voting.**

The Defendant asserts that Article VII, Section 8, of the Colorado Constitution prohibits the public disclosure of “ballots and copies of ballots” cast in an election. (Def.’s Mem. Supp. Mot. Dismiss at 7.) This contention is erroneous both because the public’s inspection of the TIFF files cannot violate secrecy in voting where the underlying ballots themselves comply with the Colorado Constitution and because TIFF files created from underlying ballots that are illegally marked to be personally identifiable should not be constitutionally shielded from public disclosure purely as a result of their illegality.

**1. The Colorado Constitution protects as secret the anonymity of ballots, not their content.**

Section 8 of Article VII of the Colorado Constitution provides in pertinent part (emphasis added):

All elections by the people shall be by ballot, and in case paper ballots are required to be used, no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the person casting it. The election officers shall be sworn or affirmed not to inquire or disclose how any elector shall have voted. In all cases of contested election in which paper ballots are required to be used, the ballots cast may be counted and compared with the list of voters, and examined under such safeguards and regulations as may be provided by law. Nothing in this section, however, shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election, provided that secrecy in voting is preserved.

....

In interpreting the Colorado Constitution, Colorado courts look to the plain language of the text and will avoid interpretations that produce absurd results. *See People v. Rodriguez*, 112 P.3d 693, 696 (Colo. 2005).

Applying *Rodriguez*, 112 P.3d at 696, it is readily apparent from the plain language of Article VII, Section 8, that the secret protected by the Colorado Constitution in the voting context is the anonymity of the voter casting a legal ballot. The first sentence of Article VII, Section 8, prohibits the marking of ballots in a way that makes them personally identifiable, while the last sentence of the initial paragraph imposes a general requirement that “secrecy in voting” should be preserved using wording that ties the secrecy requirement to the act of “receiving and registering” votes, a stage in the voting process at which a voter casting a ballot would be personally identifiable.

The Defendant argues that the Colorado Constitution requires the actual *content* of the ballot itself to be kept secret. (Def.’s Mem. Supp. Mot. Dismiss at 7-8.) The Defendant cites to a number of statutory provisions, (see id. at 9-10 [citing § 31-10-504, -505, -607 and -1514,

C.R.S.]), and cases, (see id. at 9, 19-21 [citing *Taylor v. Pile*, 391 P.2d 670 (Colo. 1964); *Littlejohn v. Desch*, 121 P.2d 159 (Colo. 1912); *Young v. Simpson*, 42 P. 666 (Colo. 1895); and various decisions from other States and the federal courts]), which she mistakenly characterizes as supporting her argument that secrecy in voting goes to the “contents or information contained on ballots,” (Def.’s Mem. Supp. Mot. Dismiss at 9).

None of the Defendant’s cited authorities support her view that the Colorado Constitution’s conception of secrecy in voting protects any secret other than the anonymity of the voter casting a legal ballot. Each of the Colorado statutory provisions cited by the Defendant operates only to obscure the connection between an identifiable voter and the contents of his ballot. See § 31-10-504, -505, -607 and -1514, C.R.S. None of the cases cited by the Defendant suggests that the right to vote in secret requires the content of a ballot to be kept secret, rather than (or even in addition to) the anonymity of the ballot. See *Taylor v. Pile*, 391 P.2d 670 (Colo. 1964); *Littlejohn v. Desch*, 121 P.2d 159 (Colo. 1912); *Young v. Simpson*, 42 P. 666 (Colo. 1895). Indeed, in a decision handed down subsequently to *Taylor*, 391 P.2d at 670, which is the most recent case that the Defendant cites, the Colorado Supreme Court affirmed that *anonymity*, as expressed by the Court in the form of the conclusion that, “good faith voters cannot be compelled to disclose how they voted,” is essential to secrecy in voting. *Mahaffey v. Barnhill*, 855 P.2d 847, 850 (Colo. 1993).

Furthermore, the Defendant’s interpretation that the contents of a ballot are themselves required to be secret ultimately cannot be correct, since requiring the *contents* of ballots to be secret would produce the absurdity that votes in an election could not constitutionally be counted. After all, the government is nowhere exempted from the requirements of Article VII, Section 8; so if secrecy in voting shields a ballot’s content from the eyes of the *public*, then it

must equally shield that ballot's content from the eyes of the *government*, including from a government tabulator who can only count votes by accessing the “content or information contained on the ballots.” (*Id.* at 9.)

Because the Defendant's interpretation produces an absurdity and because the plain language of Article VII, Section 8, supports the more reasonable conclusion that secrecy in voting protects the anonymity of ballots, rather than their contents, the Defendant's interpretation of the scope of the constitutional requirement of secrecy in voting must be rejected under *Rodriguez*, 112 P.3d at 696. The plain language of Article VII, Section 8, is properly interpreted only to require that ballots be anonymous, not that their contents should also be secret.

**2. *Secrecy in voting cannot be violated by the public inspection of an anonymous TIFF file created from an anonymous, unmarked ballot.***

Since the Colorado Constitution requires that “no ballot shall be marked” in a way that allows it to be “identified as the ballot of the person casting it,” Colo. Const. art. VII, § 8, the ballots cast in the Aspen municipal election in May must be presumed to be unmarked (at least by the City of Aspen acting through its employees and agents) and must therefore be presumed to be anonymous.<sup>1</sup> As the TIFF files are simply electronically scanned images of the voted ballots, (V. Compl. ¶ 15), the TIFF files necessarily share the anonymity of the underlying ballots to at least the same extent that the ballots themselves are anonymous. Public inspection of the TIFF files cannot violate secrecy in voting under these circumstances unless the secrecy requirement of the Colorado Constitution has already been violated by the underlying ballots.

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<sup>1</sup> If these presumptions were proven to be false, it would be the duty of this Court to void the election *ab initio*. *See Taylor v. Pile*, 154 Colo. 516, 523 (1964).

3. ***The act of illegally marking a ballot should be interpreted under Mahaffey as a determination by the voter not to invoke the personal privilege of secrecy in voting.***

The Defendant raises the possibility that some voters may have marked their ballots in a way that makes those ballots personally identifiable. (Def.'s Mem. Supp. Mot. Dismiss at 26-27). Her position is not only that illegally marked ballots should benefit from the constitutional protection of secrecy in voting, but also that the mere possibility that some underlying ballots may be illegally marked justifies restricting the public's right of inspection of all of the TIFF files. The Court should reject this argument, since a voter who has illegally marked his own ballot can hardly be justified in relying upon the protection of Article VII, Section 8, when it is that voter's own illegal act that has compromised the anonymity of his ballot.

In *Mahaffey v. Barnhill*, 855 P.2d 847, 851 (Colo. 1993), the Colorado Supreme Court ruled that, while a voter cannot be compelled to reveal how he or she voted, the constitutional protection of secrecy in voting is nevertheless a privilege that "is personal, and it is for the voter to determine whether to invoke its protection." Given 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 of 1965, § 31-10-1517, C.R.S., and for elections held under the Uniform Election Code of 1992, § 1-13-712(1), C.R.S., this Court should hold that a voter's affirmative act of illegally marking a ballot in a way that makes that ballot personally identifiable implicitly constitutes a determination by that voter under *Mahaffey* not to invoke the protection of the constitutional privilege of secrecy in voting. To decide otherwise would create the perverse result that the Colorado Constitution "rewards" illegality by shielding marked ballots from public disclosure while permitting their unmarked counterparts remain subject to public inspection. This outcome cannot be countenanced and the Court should reject it.

Because the TIFF files do not violate secrecy in voting where the underlying ballots themselves comply with the Colorado Constitution and because the personal privilege of secrecy in voting should be deemed to be not invoked where the underlying ballots have been illegally marked, the Court should not grant the Defendant a judgment on the pleadings on the basis of her defense that inspection is contrary to the Colorado Constitution's requirement of secrecy in voting.

**C. The Defendant is not entitled to a judgment on the pleadings on the basis of a contrary state statute because Section 31-10-616(1), C.R.S., is not properly construed as contrary to public inspection of the TIFF files.**

The Defendant argues under Section 24-72-204(1)(a), C.R.S., that the TIFF files are exempt from public inspection because such inspection would be contrary to Section 31-10-616(1), C.R.S., which requires the preservation of ballots and election records. (Def.'s Mem. Supp. Mot. Dismiss at 6, 10-12, 14-15.) The Court should reject this affirmative defense as a basis for judgment on the pleadings because TIFF files are not ballots under Section 31-10-616(1), C.R.S., and because Section 31-10-616(1), C.R.S., is not sufficiently specific to create an exception to CORA that is "specifically provided by law."

***1. Exceptions to the general right of public inspection under CORA are to be narrowly construed and must be specifically provided by law if set out in contrary statutes.***

The broad, general policy of CORA provides a presumption in favor of disclosure of public records. See *City of Westminster v. Dogan*, 930 P.2d 585, 589 (Colo. 1997); *Zubeck v. El Paso County Retirement Plan*, 961 P.2d 597, 601 (Colo. App. 1998). Exceptions to this broad, general policy are to be narrowly construed, subject only to the explicit language of the exception. See *Sargent Sch. Dist. No. RE-33J v. Western Serv., Inc.*, 751 P.2d 56, 60 (Colo.1988); see also *Gumina v. City of Sterling*, 119 P.3d 527 (Colo. App. 2004). Furthermore,

the only permissible exceptions to the right of inspection are those “provided for in the act itself or otherwise specifically provided by law.” *Denver Publ’g Co. v. Dreyfus.*, 184 Colo. 288, 293 (1974), 520 P.2d 104, 107 (Colo. 1974) (emphasis in original).

**2. Section 31-10-616(1), C.R.S., is nothing more than a records preservation statute that requires a particular method of storage for ballots.**

Section 31-10-616, C.R.S.,<sup>2</sup> which the Defendant has asserted is contrary to the Plaintiff’s right to inspect TIFF files under CORA, provides in pertinent part:

31-10-616. Preservation of ballots and election records.

(1) The ballots, when not required to be taken from the ballot box for the purpose of election contests, shall remain in the ballot box in the custody of the clerk until six months after the election at which such ballots were cast or until the time has expired for which the ballots would be needed in any contest proceedings, at which time the ballot box shall be opened by the clerk and the ballots destroyed by fire, shredding, or burial....

(2) The clerk shall preserve all other official election records and forms for at least six months following a regular or special election.

This provision makes use of two key defined terms, “ballot” and “election records,” each of which is defined in the Uniform Election Code of 1992, §§ 1-1-101 to 1-13-803, C.R.S., as follows:

(1.7) "Ballot" means the list of all candidates, ballot issues, and ballot questions upon which an eligible elector is entitled to vote at an election.

§ 1-1-104(1.7), C.R.S.

(11) "Election records" includes but is not limited to accounting forms, certificates of registration, pollbooks, certificates of election, signature cards, all affidavits, mail-in voter applications, mail-in voter lists and records, mail-in voter return envelopes, voted ballots, unused ballots, spoiled ballots, and replacement ballots.

§ 1-1-104(11), C.R.S. (emphasis added).

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<sup>2</sup> Pursuant to Section 2.1 of the Home Rule Charter for the City of Aspen, Colorado, Aspen’s elections are governed by the Colorado Municipal Election Code of 1965, §§ 31-10-101 to -1540, C.R.S.

Section 31-10-616(1), C.R.S., requires the clerk to preserve election records, including ballots, for a certain period of time following an election. As part of its requirements, the statute specifies a certain storage method in particular that must be used for storing ballots. The Defendant argues at length that the general intent underlying the particularity of the statute's treatment of ballots is to protect both their contents and their physical security. (Def.'s Mem. Supp. Mot. Dismiss at 8-12.) However, her content argument has already been shown in the constitutional context to be ill-conceived for reasons that apply equally well in the realm of statutory construction, see Section II.B.1., *supra*, and the Defendant expressly concedes that her physical security argument has no actual application to TIFF files, (Def.'s Mem. Supp. Mot. Dismiss at 11 ["It is certainly true that making ballot images, as opposed to the ballots themselves, available for public inspection would not compromise the physical security of the original ballots."]) (emphasis in original)).

The plain fact is that Section 31-10-616, C.R.S., says nothing at all on its face about whether ballots or election records should be exempted from the right of public inspection under CORA. The Defendant broadly construes the preservation statute to be an exception to CORA solely because it requires that ballots "shall remain in the ballot box," and because this requirement appears superficially to be incompatible with allowing the physical inspection of ballots. If this language constitutes an exception to CORA, then it constitutes only a tenuous and indirect exception at best.

Under the cases controlling statutory interpretation of exceptions to CORA, in order for the Defendant successfully to assert that Section 31-10-616(1), C.R.S., is a contrary state statute that exempts the TIFF files from public inspection, the Defendant must persuade the Court, first, that the term "ballots" in Section 31-10-616(1), C.R.S., properly includes the TIFF files even

under *Sargent*'s requirement that exceptions to CORA must be narrowly construed; and, second, that the exemption from CORA that is supposedly created by Section 31-10-6161(1), C.R.S., is sufficiently specific to satisfy the requirement of *Dreyfus* that exceptions to CORA must be specifically provided by law. This is a burden of persuasion that the Defendant cannot bear on the basis of a definition of "ballot" that plainly excludes TIFF files, which is used in a preservation statute that itself contains no language that is even plausibly indicative of an intent to exempt any specific type of records from public inspection.

**3. *The TIFF files cannot properly be construed to be "ballots" under Section 31-10-616(1), C.R.S.***

Under *Sargent*, 751 P.2d at 56, the term "ballots" in Section 31-10-616(1), C.R.S., must be narrowly construed where the term would create an exception to the broad, general right of public inspection under CORA. Because a broader construction of the term "ballot" would have the effect of excluding more records from public inspection under CORA (if the Defendant's theory is correct that Section 31-10-616(1), C.R.S., exempts "ballots" from public inspection), the narrow construction rule of *Sargent* dictates that the term, "ballot," must be interpreted strictly, with reference only to the "explicit language" of the definition. See *Sargent*, 751 P.2d at 60. In performing this exercise of statutory construction, the Court should give the words used in the statute their plain and ordinary meaning, in keeping with the underlying legislative intent, see id., and should not strain to give the language other than its plain meaning unless the result is absurd, see *City of Westminster v. Dogan Construction Co.*, 930 P.2d 585, 590 (Colo. 1997). Where statutory language is unambiguous, legislative intent is to be gleaned from the language itself, taking into consideration the entire statute. See *Sargent*, 751 P.2d at 60. Only where there is ambiguity in the plain language may the Court consider the object sought to be attained and

the consequences of a particular construction. See Ritter v. Jones, 207 P.3d 954, 957 (Colo. App. 2009).

Under a narrow construction of its plain language, the definition of “ballots” set out in Section 1-1-104(1.7), C.R.S., cannot properly be understood to include TIFF files. The language of the statute is unambiguous: “‘Ballot’ means the list of all candidates, ballot issues, and ballot questions upon which an eligible elector is entitled to vote at an election.” § 1-1-104(1.7), C.R.S.

This plain language describes a ballot as the physical list on which voters make their marks to signify their electoral preferences. The definition’s use of the definite article indicates a specific list, namely the one “upon which” voters make their actual voting mark “at” the election. The TIFF files cannot be properly described by this definition because a TIFF file is obviously not “the list ... upon which an eligible elector is entitled to vote at an election.” § 1-1-104(1.7), C.R.S. (emphasis added). No voter appears to have been given physical access to any TIFF file in the same way that voters were provided with ballots on election day. On the contrary, the TIFF files are electronic computer files that were only created after the close of voting on election night by scanning the voted paper ballots. (V. Compl. ¶¶ 1, 15, 25.) A TIFF file can no more be a “ballot” for purposes of the legal definition in Section 1-1-104(1.7), C.R.S., than a copy of a driver license can be an actual driver license.

The Defendant has in fact conceded on the record that substantive differences exist between TIFF files and ballots. She did so at the Status Conference, when she asked the Court to extend the Plaintiff’s requested preliminary injunction to preserve the original ballots as well as the TIFF files because, “we don’t know where this case is going, but we believe that the ballots themselves are the best evidence.” (Tr. Status Conf. at 5 (emphasis added).)

Consideration of the substantive provisions of the Colorado Municipal Election Code that surround Section 31-10-616(1), C.R.S., as required under *Sargent*, 751 P.2d at 60, shows that much of the statute uses the term “ballot” in ways that are rendered non-sensical if the term is interpreted to include TIFF files. See, e.g., §§ 31-10-901 to -906 (detailing physical requirements for paper ballots); § 31-10-803 (specifying requirements for the use of ballots in electronic voting); §§ 31-10-606 to -607, -610 (discussing the use of ballots in voting generally).

The plain language of Section 1-1-104(1.7), C.R.S., taken together with the Defendant’s admission and giving consideration to the legislative intent gleaned from the use of the term, “ballot,” in the entire statute, all refute the Defendant’s argument that the TIFF files may be included within the meaning of the defined term, “ballot,” under the narrow construction that must be given to the exceptions from CORA under *Sargent*.

The Defendant suggests that the decision in *City of Westminster v. Dogan*, 930 P.2d 585 (Colo. 1997), supports including the TIFF files within the meaning of “ballots” because the Court in *Dogan* eschewed a literal, form-based approach to construing an exemption from CORA’s right of public inspection where a content-based approach was more consistent with the Court’s understanding of the legislative intent. (Def.’s Mem. Supp. Mot. Dismiss at 12.) The Defendant ignores the fact that the Court only departed from its own rule of narrow construction in *Dogan* because it found, in interpreting an exemption from CORA that was set out in CORA itself, that a literal, strict construction of the phrase, “letters of reference,” actually produced a construction that was “contrary to the ascertainable legislative purpose” of the exception itself. *Dogan*, 930 P.2d at 592 (emphasis added).

*Dogan* is completely inapposite here because the plain language of Section 31-10-616(1), C.R.S., is indicative of no “ascertainable legislative purpose” whatsoever to do anything more

than subject *literal ballots* to a particularly specified method of storage for the sole purpose of preservation and safekeeping. Nothing in Section 31-10-616(1), C.R.S., provides any basis at all for discerning the legislative intent to exempt either ballots or other official election records from public inspection except perhaps indirectly. Given the absence of any basis for perceiving such intent, it would turn *Dogan* completely on its head to treat Section 31-10-616(1), C.R.S., as a situation in which there was “ascertainable legislative” intent for “ballots” to be affirmatively and broadly construed as a specifically referenced exception to public inspection CORA, instead of narrowly construed, as required under *Sargent*, simply as actual ballots that are subject to a particular storage requirement.

Indeed, if the Court were to accept the Defendant’s content-over-form argument based on *Dogan*, then one absurd implication that arises from interpreting “ballots” as including TIFF files for purposes of Section 31-10-616(1), C.R.S., is that all of those TIFF files *qua* ballots that temporarily resided in the memory of the City of Aspen’s tabulating computers on election night as a part of the scanning process must be regarded as “ballots” that were required to be preserved for six months under Section 31-10-616(1), C.R.S. The deletion of these TIFF files from computer memory during the course of the vote counting operation and from the computer storage hard drives afterward would therefore both constitute violations of the very preservation statute that the Defendant seeks to rely upon to shield the surviving TIFF files, safely burned to a disk, from the Plaintiff’s right of public inspection.

Even if the plain language of Section 31-10-616(1), C.R.S., is insufficiently persuasive that TIFF files cannot be deemed to be ballots, this single example of the kind of unintended consequences that will result the Defendant’s interpretation of the term, “ballot,” emphasizes

why the Court should refuse to construe the definition of “ballot” so broadly as to include the TIFF files.

4. ***Even if the Court does regard the TIFF files as ballots, Section 31-10-616(1), C.R.S., still does not create an exception that is sufficiently specific under Dreyfus to overcome CORA’s legislative intent for election records to be open to public inspection.***

Exceptions to CORA that are set out in a contrary state statute must be “specifically provided by law” in that statute. *Denver Publ’g Co. v. Dreyfus*, 184 Colo. 288, 296 (1974), 520 P.2d 104, 108 (Colo. 1974)(emphasis added). Under *Dreyfus*, Section 31-10-616(1), C.R.S., cannot be construed to exempt the TIFF files from the Plaintiff’s right of public inspection under CORA because nothing in the ballot preservation statute specifically addresses either TIFF files or the availability of unavailability of ballots or election records for public inspection.

In *Dreyfus*, the Colorado Supreme Court examined a provision of CORA that prohibited the public inspection of “Medical...data on individual persons, exclusive of coroners’ autopsy reports,…” Because autopsy reports were specifically carved out of the types of medical data that CORA excluded from public inspection, the Court ruled that, “This is convincing evidence of legislative intent to classify autopsy reports as public records open to inspection, rather than directing the denial of a right of inspection...as is the case with other medical...data.” Id. Since the supposedly contrary laws asserted by the custodian as prohibiting the disclosure of autopsy reports did not actually contain a “specific reference to autopsy reports,” the Colorado Supreme Court ruled that CORA’s legislative intent controlled, and the custodian’s assertion of contrary law was not valid. Id. As the Court stated in opening its discussion of the issue, “The act [CORA] itself requires that exceptions be specifically provided by law.” Id.

The rule in *Dreyfus* must apply to Section 31-10-616(1), C.R.S., because the legislative intent of CORA, as expressed in the plain language of the CORA statute, clearly favors the public inspection of “election records” that do not contain certain types of personally identifiable information. Specifically, the Colorado Open Records Act, in Section 24-72-204(8)(a), C.R.S., provides the following:

A designated election official shall not allow a person, other than the person in interest, to inspect the election records of any person that contain the original signature, social security number, month of birth, day of the month of birth, or identification of that person, including electronic, digital or scanned images of a person’s original signature, social security number, month of birth, day of the month of birth, or identification.

“Election records” for purposes of this provision are defined in Section 1-1-104(11), C.R.S. See § 24-72-204(8)(c). This definition consists of a non-exclusive, catch-all list of election-related materials. The list expressly includes ballots and plainly encompasses other election-related materials such as the TIFF files.

Section 24-72-204(8)(a), C.R.S., prohibits the public inspection of election records that contain certain items of personally identifiable information. It is significant that CORA prohibits the public inspection of only certain election records because *Dreyfus* reads this as “convincing evidence of legislative intent to classify” the remaining records “as public records open to inspection, rather than directing the denial of a right of inspection.” *Dreyfus*, 184 Colo. at 296, 520 P.2d at 108. This application of *Dreyfus* is consistent with basic canons of statutory construction, including the canon of *expressio unius est exclusio alterius*, which holds that to express or include one thing implies the exclusion of the alternative. In this case, because CORA expressly identifies specific kinds of election records that are not intended to be subject to public inspection, the application of *expressio unius* dictates that all other kinds of election records are intended to be subject to public inspection under CORA.

The fact that CORA addresses election records establishes its legislative intent for those records to be open to public inspection. Because the TIFF files are scans of anonymous ballots,<sup>3</sup> (V. Compl. ¶ 1), they are properly understood to contain none of the items of personal information that would place them within the category of election records that are exempted from public inspection under Section 24-72-204(8)(a), C.R.S. The TIFF files therefore belong to the class of non-personally identifiable election records that the General Assembly must be intended for CORA to make available to public inspection. In light of CORA’s legislative intent that non-personally identifiable election records like the TIFF files should be available for public inspection, the imposition by Section 31-10-616(1), C.R.S., of a ballot storage requirement that appears incompatible with the physical inspection of ballots simply cannot be regarded as an exception to CORA that is “specifically provided by law.” *Dreyfus*, 184 Colo. at 296, 520 P.2d at 108. The exception asserted by the Defendant is too tenuous and indirect to overcome the requirement of *Dreyfus* that exceptions to CORA based in contrary state must be specific enough to justify the subordination of CORA’s own legislative intent with respect to the records in question.

For the Defendant to obtain judgment on the pleadings on the basis of asserting that Section 31-10-616(1), C.R.S., is contrary law, she must persuade the Court, under *City and County of Denver v. Qwest Corp.*, 18 P.3d 748 (Colo. 2001), that by merely inspecting the pleadings and controlling law the Court can arrive at the following two conclusions as a matter of law: First, that the term “ballot” in Section 31-10-616(1), C.R.S., is properly construed to

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<sup>3</sup> This averment appears to be conceded by the Defendant, (Def.’s Mem. Supp. Mot. Dismiss at 24), subject to the caveat that anonymity may nevertheless be compromised where voters have illegally marked their ballots, (*Id.* at 24, 26-27). The implications of illegally marked ballots are addressed in Section II.B.3., *infra*.

include TIFF files under the Colorado Municipal Election Code of 1965, §§ 31-10-101 to -1540, C.R.S.; and second, that Section 31-10-616(1), C.R.S., when narrowly construed, see *Sargent School District No. RE-33J v. Western Services, Inc.*, 751 P.2d 56 (Colo.1988), specifically exempts the TIFF files from public inspection, see *Denver Publ'g Co. v. Dreyfus*, 184 Colo. 288 (1974), 520 P.2d 104 (Colo. 1974), sufficiently to overcome CORA's legislative intent for non-personally identifiable election records such as the TIFF files to be open to public inspection. The Defendant fails to bear this burden of persuasion, and therefore the Court should not grant the Defendant a judgment on the pleadings on the basis that Section 31-10-616(1), C.R.S., is a contrary state statute.

**D. The Defendant is not entitled to a judgment on the pleadings on the basis of the defense that inspection of the TIFF files will do “substantial harm to the public interest” because material facts are in dispute and therefore judgment on the pleadings is inappropriate.**

Finally, the Defendant has asserted as an affirmative defense, permitted by Sections 24-72-204(6)(a) and -204(6)(b), C.R.S., the argument that allowing public inspection of the TIFF files would do substantial injury to the public interest. (Def.'s Mem. Supp. Mot. Dismiss at 6.) The Court should deny the Defendant's Motion to Dismiss on the basis of this defense because substantial injury to the public interest is a question of disputed material fact that is inappropriate for judgment on the pleadings.

**1. Under Pinder, the question of whether disclosure of a public record will do “substantial harm to the public interest” under Section 24-72-204(6), C.R.S., is an issue of material fact.**

What constitutes a substantial injury to the public interest under Section 24-72-204(6), C.R.S., is not defined in CORA. See *Bodelson v. Denver Publ'g Co.*, 5 P.3d 373, 377 (Colo. App. 2000). However, this catch-all exemption from disclosure is applicable only in “those

extraordinary situations which the General Assembly could not have identified in advance.” *Id.*; see also *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1156 (Colo. App. 1998). Furthermore, the question of whether a substantial injury to the public interest will result from the disclosure of public records is an issue of material fact for the trial court to resolve. See *Civil Serv. Comm'n v. Pinder*, 812 P.2d 645 (Colo. 1991). The custodian bears the burden of proving that a substantial injury to public interest will occur. See *Denver Publishing Co. v. Dreyfus*, 184 Colo. 288, 295 (1974), 520 P.2d 104, 108 (Colo. 1974); *Zubeck v. El Paso County Retirement Plan*, 961 P.2d 597, 601 (Colo. App. 1998).

**2. Under *Koch* and *Quiroz*, judgment on the pleadings is not appropriate where material facts are in dispute.**

As set out in Section II.A., *supra*, the standard of review for evaluating a motion for a judgment on the pleadings is effectively the same as that used to evaluate a motion to dismiss for failure to state a claim, see *Abts v. Board of Ed.*, 622 P.2d 518 (Colo. 1980), which means that the Court must construe the allegations of the pleadings strictly against the movant and the allegations of the party resisting the motion as true, see *Smith v. TCI Communications, Inc.*, 981 P.2d 690 (Colo. App. 1999). Where material facts are disputed, judgment on the pleadings is not appropriate. See *Koch v. Whitten*, 140 Colo. 109 (1959), 342 P.2d 1011 (Colo. 1959); *Quiroz v. Goff*, 46 P.3d 486 (Colo. App. 2002).

**3. Material facts are in dispute on the question of whether disclosure of the TIFF files would do substantial injury to the public interest.**

The Plaintiff has alleged a number of facts in the Verified Complaint that are material to the Court’s determination of whether disclosure of the TIFF files will do substantial injury to the public interest. (V. Compl. ¶¶ 4-5, 20, 22-23, 26-31, 39.) Among the Plaintiff’s averments are factual allegations showing both that the public interest affirmatively favors disclosure of the

TIFF files, (Id. ¶¶ 4-5, 20, 22-23, 39), and that the Defendant has already allowed public disclosure of the TIFF files in ways that are inconsistent with the Defendant's contention that public inspection of the TIFF files under CORA will do substantial injury to the public interest, (Id. ¶¶ 22, 26-31).

The Defendant not only fails to admit material facts set out by the Plaintiff in paragraphs 4-5, 20, 22-23, 30 and 39 of the Verified Complaint, but she expressly denies that the allegations in these paragraphs are variously either relevant or material. (Def.'s Mem. Supp. Mot. Dismiss at 3-4.) At the same time, the Defendant advances a number of arguments, unsupported by any factual evidence of her own introduced by affidavit or otherwise, to sustain the assertion that public inspection of the TIFF files will do substantial injury to the public interest. (Id. at 19-29.) Under these circumstances, the Court must consider the material facts that pertain to the issue of substantial injury to the public interest to be in dispute.

Because the question of whether public inspection of the TIFF files would do substantial injury to the public interest is an issue of material fact under *Pinder*, 812 P.2d at 645, and because the material facts that bear on this issue are in dispute between the parties, a judgment on the pleadings is inappropriate under *Koch*, 140 Colo. at 109, 342 P.2d at 1011, and *Quiroz*, 46 P.3d at 48. Therefore the Court should not grant the Defendant a judgment on the pleadings on the basis of her affirmative defense that substantial injury to the public interest would result from public inspection of the TIFF files.

**CONCLUSION**

For the foregoing reasons, the Plaintiff respectfully requests that the Defendant's Motion to Dismiss be denied.

Respectfully submitted this 1st day of December, 2009,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 1st day of December, 2009, I served a true and correct copy of the foregoing **MEMORANDUM OF MARILYN MARKS, PLAINTIFF, IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS** by the method indicated below to each of the following:

<b><u>Attorney</u></b>	<b><u>Firm And/Or Address:</u></b>	<b><u>Method</u></b>
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