

<p>DISTRICT COURT, PITKIN COUNTY, STATE OF COLORADO</p> <p>Pitkin County Courthouse 506 East Main Street, Suite E Aspen, Colorado 81611</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Plaintiff:</p> <p>Marilyn Marks,</p> <p>Defendant:</p> <p>Kathryn Koch.</p>	<p>Case Number: 09 CV 294</p>
<p>Attorneys for Kathryn Koch:</p> <p>John P. Worcester, City Attorney Jim True, Special Counsel City of Aspen 130 S. Galena St. Aspen, Colorado 81611</p> <p>Telephone: (970) 920-5055 Facsimile: (970) 920-5119 E-mail: johnw@ci.aspen.co.us jimt@ci.aspen.co.us</p>	<p>Div.: 3</p>
<p>KATHRYN KOCH'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS</p>	

Comes now the Defendant, Kathryn Koch, by and through her undersigned counsel, and hereby submits the following memorandum in support of her Motion to Dismiss.

I. INTRODUCTION

Kathryn Koch's Motion to Dismiss is brought pursuant to Rule 12(b)(5), C.R.C.P., for failure to state a claim upon which relief can be granted and is predicated on the contention that all of Plaintiff's factual allegations in the Complaint are presumed to be true. This case can, and should, be decided on the pleadings. This case presents a question that can be decided by applying the law to the facts as alleged in the Complaint and presumed to be true for purposes of this motion: Does the Colorado Open Records Act, §§24-72-101.1, *et seq.*, C.R.S., ("CORA") require the city clerk of the City of Aspen to make available for public inspection the images of the ballots cast at the May 2009 municipal election held in the City of Aspen?

II. STANDARD OF REVIEW

The purpose of a Rule 12 (b)(5) motion to dismiss a complaint for failure to state a claim upon which relief can be granted is to test the formal sufficiency of the complaint. *Dunlap v Colorado Springs Cablevision*, 829 P.2d 186, 1290 (Colo. 1992). In deciding a motion to dismiss, all averments of material fact must be accepted as true, *Shapiro & Meinhold v Zartman*, 823 P.2d 120, 122 (Colo. 1992), and construe them in light most favorable to the plaintiff. *Titan Indemnification Comp. v Travelers Property Casualty Comp. of Am.*, 181 P.303, 306 (Colo.App.2007), *cert. denied*, 2008 WL 1777405 (Colo. Apr. 21, 2008); *Popovich v Ireland*, 811 P.2d 379 (Colo. 1991). Notwithstanding that courts may disfavor the granting of a motion to dismiss, *Dunlap, supra*, the claim before the court in the case at bar should be dismissed as the Plaintiff is not entitled to any relief "upon any theory of the law." *Hinsey v Jones*, 411 P.2d 242,244 (Colo. 1966) (emphasis in original).

III. MATERIAL FACTUAL ALLEGATIONS

Plaintiff's Complaint and Application for Order to Show Cause ("Complaint") consists of fourteen pages and 68 paragraphs of factual averments, legal conclusions, and quotations of documents and statutes. Only the averments of material fact should be considered by this court for purposes of this motion. Those factual averments that are material to Plaintiff's claims are summarized below. The remaining statements, even if assumed to be true for purposes of this motion, are simply not material, relevant or germane to the case at bar, consist of legal conclusions of counsel for the Plaintiff, or are quotations from or references to documents and state statutes.

The second part of paragraph 4, and paragraphs 5, 20 - 23, and 39 of the Complaint are factual averments, but they are simply not relevant to the case at bar. They attempt to explain why the Plaintiff wants to inspect the ballot images. For example, "she needs [the ballot images] to assess the merits of the instant runoff voting ('IRV') tabulation mechanism currently in use for elections in the City of Aspen." Complaint, ¶4. And, "[t]he Plaintiff seeks to participate knowledgeably in Aspen's ongoing public debate over IRV..." Complaint, ¶5. These stated reasons may well be admirable reasons for wishing to inspect the ballot images, but they are not relevant to the matter before the court. Persons seeking to inspect public records subject to CORA do not need to provide a reason. That right is guaranteed to them by the CORA without any requirement that the requestor provide a reason for inspecting the public records. *Denver Publishing Comp. v Dreyfus*, 520 P.2d 104, 108 (Colo. 1974) (CORA's public policy statement

that all public records shall be open to public inspection “eliminates any requirement that a person seeking access to public records show a special interest in those records in order to be permitted to do so.”)

Paragraphs 30, 35 - 37, and 46 - 48 consist of quotations of documents or state statutes or references to those documents and are not averments of material fact. For example, paragraphs 35 - 37 consist of quotes directly from various sections of the CORA. Paragraphs 33, 49 - 54, and 62 - 64, are merely legal conclusion of counsel for the Plaintiff and are of no probative value to the court.

The remaining factual averments of the Complaint contain sufficient relevant content that the court should properly consider them to be true for purposes of this motion:

- The Plaintiff is a citizen of the City Aspen who was a losing candidate for Mayor at the last municipal election held in the City of Aspen. Complaint, ¶¶ 3, 4 & 11.
- The Defendant is the City Clerk of the City of Aspen and the custodian of the ballot images that Plaintiff seeks to inspect. Complaint, ¶ 6.
- The City of Aspen conducted its first municipal election “under new runoff voting rules” on May 5, 2009, pursuant to Section 2.2 of its Home Rule Charter. Complaint, ¶¶ 6 & 12.
- On election night, the tabulation of ballots was conducted by TrueBallot, a Maryland corporation engaged by the City of Aspen to conduct the tabulation of ballots in accordance with certain procedures agreed to beforehand by the City and TrueBallot. Complaint, ¶¶ 13 thru 17, and 19.
- In accordance with those procedures, the first step “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 format (‘TIFF’)...” Complaint, ¶ 15.
- A final step in the tabulation procedure was to have TrueBallot create data of all the ballots and release all of that data to the public “except for the digital

photographic images created in the very first step of the tabulation process.”
Complaint, ¶ 18.

- “Approximately 2,544 TIFF files, each containing a digital photographic image of a single ballot, were created by [TrueBallot] during the tabulation process on election night.” Complaint, ¶ 25.
- “[C]omplete 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” in the tabulation center at city hall. Complaint, ¶¶ 26-27.
- “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.” Complaint, ¶ 29.
- “The Defendant was aware that this public disclosure of the images of many individual TIFF files was happening on election night, but did not object or interfere.” Complaint, ¶ 31.
- The 2,544 TIFF files created by TrueBallot are stored on a computer disk and kept by the Defendant. Complaint, ¶¶ 32 and 33.
- Plaintiff submitted a request to the Defendant under CORA “seeking to inspect ‘the complete tiff images, including tiff file names of the ballots from the May, 2009, election.’” Complaint, ¶ 39.
- Counsel for the Defendant denied the CORA request on grounds that §31-10-616, C.R.S., prohibited the release of the ballots and ballot images, Colo. Const. Art. VII, §8 obligates the city to protect the right to a secret ballot, and ballot images are no different than the actual ballots and can’t be publicly released for the same reasons. Complaint, ¶ 41 thru 45.
- Plaintiff subsequently amended her CORA request to exempt from public inspection all ballot images that contain write-in candidates’ names and further narrowed her CORA request to allow the Defendant to exclude all ballot images that contained “markings that compromised the anonymity of the original paper ballot associated with that TIFF file.” Complaint, ¶ 45 and ¶ 55.
- The amended CORA requests were denied for essentially the same reasons given previously. Complaint, ¶ 56.

- Plaintiff wrote to the Defendant indicating that she would seek a court order pursuant to CORA to obtain access to the public records she repeatedly sought to inspect. Complaint, ¶ 57.
- The Defendant, through counsel, has repeatedly indicated that the City Clerk would destroy the ballots and ballot images in accordance with §31-10-616, C.R.S. six months after the May 2009 municipal election. Complaint, ¶¶ 60-61.
- The Defendant possesses the only copy in existence of the records sought by the Plaintiff and the “operational burden and expense borne by the Defendant as a result of preserving one or more computer disks are negligible.” Complaint, ¶¶ 66-67.

IV. LEGAL ARGUMENTS

Plaintiff argues that the CORA requires that images of ballots, cast in the May 2009, municipal election in the City of Aspen, be made available for public inspection. The CORA itself provides two separate justifications for the city clerks' refusal to publicly disclose the images of the ballots. First, § 24-72-204(1)(a), C.R.S., states that the custodian of any public record shall not allow public inspection of those records if “such inspection would be contrary to any state statute.” As noted below, §31-10-616, C.R.S., specifically prohibits the city clerk from making available for public inspection the ballots, or images of the ballots. Second, an additional exception to public disclosure is found at Section 24-72-204(6)(a), C.R.S. That section of the CORA requires the custodian of a public record to refuse to disclose a public record if in her opinion “disclosure of said record would do substantial injury to the public interest.” For the reasons that follow, the city clerk has properly exercised her legal duty to not release ballots or ballot images for public inspection as she has compelling reasons to believe that to do so would, in fact, be contrary to a state statute and, additionally, cause substantial injury to the public.

- A. State law requires the city clerk to keep secure and secret all ballots, and ballot images, cast in a municipal election.

The public policy behind CORA is set out in the legislative declaration of policy:

It is declared to be the public policy of this state that all public records shall be open for public inspection by any person at reasonable times, except ... as otherwise specifically provided by law."

§24-72-201 C.R.S. (emphasis added.) There is no dispute between the parties hereto that ballots, and ballot images, are "public records" within the meaning of the CORA.

1. CORA exempts the public inspection of public records that would be contrary to any state statute.

Section 24-72-204, C.R.S., reads in relevant part as follows:

24-72-204. Allowance or denial of inspection – grounds – appeal – definitions. (1) The custodian of any public record 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.

This section of the CORA sets forth a number of exceptions to the general rule that all public records are to be made available for public inspection. The very first exception quoted above is any public record the public inspection of which "would be contrary to any state statute." Thus, if any other state law requires that a public record be kept confidential or secret, then the CORA does not require that record to be made available for public inspection.

2. The Colorado Constitution and state statutes prohibit the public disclosure of ballots and ballot images.

Both the state constitution and state statutes prohibit the public disclosure of ballots and copies of ballots cast in an election. That prohibition stems from a desire to protect the right of

citizens to a secret ballot. It is axiomatic that every citizen in Colorado and the City of Aspen has a constitutional and statutory right to cast his or her vote in secret. Article VII, Section 8, of the Colorado Constitution reads as follows:

Section 8. Election by ballots or voting machines.

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.

“The leading object of this section [Section 8] was to preserve the purity of the election.” *People ex rel. Barton v Londoner*, 22 P.2d 764 (Colo. 1889). Indeed Section 11 of the same article of the Colorado Constitution commands the state legislature to “pass laws to secure the purity of elections, and guard against abuses of the elective franchise.” Pursuant to that mandate, the state legislature has enacted the Colorado Election Code, §§ 1-1-101, *et seq.*, C.R.S., and the Colorado Municipal Election Code, §§ 31-10-101, *et seq.*, C.R.S.¹, that contain numerous provisions to ensure the purity of elections. In reviewing each of these election codes, it is readily apparent that the legislature was concerned about two principal issues surrounding ballots. The first concern was ensuring the physical security of the ballots before the election, during the voting process, throughout the tabulation process, the verification or auditing process, and finally

¹ In accordance with the City of Aspen Home Rule Charter, city elections are governed by the Colorado Municipal

the post election period during which time law suits contesting the election could be filed. The second concern expressed in these state statutes is ensuring every citizen the right to a secret ballot. In other words, the concerns surround both the physical security of ballots and safeguarding the secrecy of the content or information contained on the ballots. "The principal object of the rules of procedure prescribed by statute for conducting an election is to protect the voter in his constitutional right to vote in secret; to prevent fraud in balloting and secure a fair count." *Littlejohn v Desch*, 121 P.2d 159 (Colo. 1912) (quoting from *Young v Simpson*, 42 P. 666, 667 (Colo. 1895).

Examples of statutes expressing a concern over the physical security of ballots are reflected throughout the Municipal Election Code. Some examples of that concern include the following statutes: §31-10-604, C.R.S., requires ballot boxes to be securely locked during voting and not be reopened until the time for counting; §31-10-610, C.R.S., requires extensive safeguards when opening the ballot boxes and counting the ballots and thereafter ensuring their safekeeping in a "carefully sealed" and locked ballot box before delivering the boxes to the city clerk; and, §31-10-901, C.R.S., describes the type of ballot boxes to be used and how they must be secured to avoid "tampering."

Examples of statutes expressing a concern about securing the secrecy of the contents or information contained on ballots include: §31-10-504, C.R.S., which requires voting booths to be designed so that "ballots are screened from observation"; §31-10-505, C.R.S., limiting the number of persons allowed within the voting booth area; §31-10-607, C.R.S., requiring that

ballots be folded by voters “without displaying the marks thereon” before depositing the ballot in a ballot box; §31-10-1514, C.R.S., making it a crime for any election official who aids a disabled voter from revealing how the disabled voter voted; and, interestingly, §31-10-1517, C.R.S., which also makes it a crime for any voter from revealing his or her own completed ballot to another person or to “place any mark upon his ballot by means of which it can be identified.”.

3. *Making ballot images available for public inspection is prohibited by Section 31-10-616(1), C.R.S.*

Section 31-10-616(1), C.R.S., indicates a desire to not only preserve the physical security of ballots, but also to secure, in perpetuity, the secrecy of the information that can be gleaned from cast ballots. This state statute specifically prohibits the city clerk from making available for public inspection the ballots, or images of the ballots, cast in the last municipal election in Aspen, absent a court order issued in the course of an election contest. This statute reads, in relevant part, as follows:

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, or by any other method approved by the executive director of the department of personnel. ...

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

(emphasis added.) This statute is not ambiguous and leaves no room for doubt as to its meaning: the city clerk shall ensure that cast ballots remain secure and secret for a period of six months

after an election and thereafter destroy them. The only exception is in the event they are required in an election contest.

4. Ballot images should be treated no differently than the original ballots.

Plaintiff suggests in her Complaint that ballot images are “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.” Complaint, ¶ 33. The implication is that since ballot images are not the “ballots” referenced in §31-10-616(1), C.R.S., they must necessarily be “other official election records” referenced in §31-10-616(2), C.R.S., and therefore, not subject to the mandate that ballots be destroyed. In other words, copies of ballots are somehow different than original ballots and therefor need not be destroyed and are subject to public inspection. This is a frivolous argument. It is akin to arguing that a document classified as “Top Secret” by the federal government loses its security classification upon being xerographically or digitally copied.

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. However, the concerns about ballot secrecy is not lessened one iota by releasing ballot images rather than the ballots themselves. The state law requirement that ballots be destroyed by “fire, shredding or burial” by the city clerk after any chance for an election contest reveals this overarching concern for the preserving the secrecy of the contents of the ballots. Following an election and after the time has expired for an election contest, there is no valid reason to be concerned with the physical security of the ballots. The only logical reason the law requires that ballots be destroyed is to protect the secrecy of the contents of the ballots and the privacy of

voters for all time. Thus, the city clerk is equally charged with protecting any copies or images of the ballots that might have been created in the course of the tabulation process. The law does not provide for opening the ballot box to permit the public to inspect the ballots pursuant to a CORA request even after the time has expired for filing election contests in court. Similarly, the law should not be interpreted to allow the city clerk to allow the public to inspect ballot images. At the end of the six month period, the city clerk is mandated to destroy the ballots and any ballot images. It would be absurd to allow the City Clerk to make copies of the ballots, permit her to only destroy the actual ballots and not the images, and then release for public inspection the ballot images. It is not the form of the document (copy or original) that determines whether it should be kept confidential, but the content of the document itself.

In *City of Westminster v Dogan Construction Co.*, 930 P.2d 585 (Colo. 1997), the Supreme Court held that a statutory exception to CORA disclosure for “letters of reference concerning employment” under section 24-72-204(3)(a), C.R.S., applied to questionnaires filled out by government employees checking references provided by a prospective contractor. Employing a content-based analysis, the court determined that although the questionnaires at issue were not “letters”, the contents of the questionnaires were still exempt from disclosure. *Id.* at 592. *See also, Ritter v Jones*, 207 P.3d 954, 959 (Colo. App. 2009) (“Our precedent eschews strict attention to form and mandates a content-based inquiry into CORA disclosure exceptions.”)

5. *The public display of portions of some ballot images on election night cannot constitute a waiver of voters' rights to a secret ballot.*

Plaintiff states in her Complaint that “[b]ecause the Defendant has previously permitted

the public disclosure of the public records sought by the Plaintiff [ballot images], the Defendant cannot now in good faith deny the Plaintiff's right of inspection of those same records." Complaint ¶74. This statement appears to suggest that the city clerk, by allowing portions of some ballot images to be displayed to the public, somehow "waived" the right of all the voters in the City of Aspen to their rights to a secret ballot. Thus, apparently, Plaintiff argues that the city clerk should now publicly disclose all the ballot images since the statutory exception to CORA disclosure and the mandate to destroy all ballots in accordance with §31-10-616(1), C.R.S., no longer apply.

The argument that the city clerk can waive every voter's right to a secret ballot by partially disclosing ballot images as part of the tabulation process is seriously flawed. The concept of waiver is appropriate when discussing various privileges recognized by the common law and state statutes. For example, the attorney-client or physician-patient relationships may create privileges for confidential information. These privileges, however, are not absolute and may be waived by the person for whom the privilege is created. For example, a client may waive the attorney-client privilege and a patient may waive the physician-patient privilege. In either case, only the person for whom the benefit is created may waive the privilege. *See generally, 1 McCormick on Evid. §93 & 103 (6th Ed.); 6 Colo. Prac., Civil Trial Practice §7.3 (2d Ed.)* Moreover, even if a particular privilege is subject to a waiver, the waiver does not necessarily amount to a general disclosure, ... but rather a limited [disclosure]." *Cardenas v Jerath*, 180 P.3d 415, 424 (Colo. 2008).

The right to a secret ballot, however, may not be waived; and if the right could be waived,

it certainly would not fall upon the city clerk to exercise. The city clerk simply does not have the legal authority to waive the right of all the voters in Aspen to a secret ballot. Indeed, not even voters may waive the statutory prohibition against revealing their own ballot to another person. *See*, §31-10-1517, C.R.S. Thus, even if some ballot images were publicly displayed “onto large video screens,” there can be no “waiver” of the contents of the ballots. The city clerk continues to have a legal duty to secure the ballots, and ballot images, for a period of six months and thereafter destroy them as mandated by §31-10-616, C.R.S.

6. *CORA should be read in pari materia with §31-10-616(1), C.R.S.*

The CORA does not conflict with the requirement that ballots remain secret and not made available for public inspection. The CORA specifically exempts from the requirements of the Act the public inspection of records that “would be contrary to any state statute.” §24-72-204(1), C.R.S. In the instant case, making available ballot images for public inspection would be contrary not only to a state statute, but our state constitution. The CORA should be read *in pari materia* with §31-10-616(1), C.R.S., and construed together to hold that ballots, and ballot images, are not required to be made available for public inspection pursuant to CORA because §31-10-616(1), C.R.S., mandates that they be secured for six months following an election and thereafter destroyed.

Even if it is determined that CORA does, in fact, conflict with the requirements of §31-10-616, C.R.S, the Colorado Supreme Court has repeatedly and consistently held that general legislation does not repeal specific laws unless the intent to do so is clear and unmistakable. *Goslinger v Denver Election Commission*, 552 P.2d 1010 (Colo. 1976) (the general Colorado

Public Meeting Law did not divest home rule city of its specific constitutionally granted plenary power to deal with municipal elections); *Associated Students of University of Colorado v Regents of University of Colorado*, 543 P.2d 59 (Colo. 1975) (because special constitutional and statutory authority is granted to regents empowering it to supervise University of Colorado, the Colorado Open Meeting Law did not preclude regents from entering into executive sessions); *People v Burke*, 521 P.2d 783 (Colo. 1974) (general probation statute did not repeal mandatory sentence provisions of earlier enacted statute governing specific offense of driving under the influence); *Denver v Rinker*, 366 P.2d 548 (Colo. 1961). The CORA is general legislation whereas §31-10-616, C.R.S., is a specific law requiring that ballots be secured for a specific period of time after an election and thereafter destroyed. In sum, the CORA cannot be held to override the specific statute requiring election materials to be preserved and destroyed by the city clerk.

7. *The mandatory destruction of cast ballots is not unique to Colorado.*

Section 31-10-616, C.R.S., is not unique to Colorado. Many states have similar statutes that require the custodian of ballots and other election materials to keep them secure for a period of time and thereafter, absent a court order, to destroy them. *See, e.g., State ex rel. Schmeding v District Court*, 271 N.W. 137 (N.D., 1937) (power of subpoena does not authorize an order for the production of ballots required to be kept secure for 4 months following an election); *Miller v O'Malley*, 117 S.W.2d 319 (Mo., 1938) (court refused to make ballots available to grand jury investigating election fraud even though they were still available following the time statute required their destruction); *Parks v Taylor*, 678 S.W.2d 766 (Ark., 1984) (court refused to order recount of ballots even though the ballots had not been destroyed 2 years after the election in

violation of statute requiring destruction of ballots after 6 month); *In re Post*, 17 A.2d 326 (Vermont 1941) (statute requiring clerk to keep ballots securely sealed for three years after election is mandatory); *Miller v Price*, 86 S.W.2d 152 (Ky. App. 1935) (county clerk has duty to destroy ballots within certain period of time absent court order to the contrary); *In Re Primary Election of 1936*, 1940 WL 2321 (Pa.Com.Pl. 1936) (ballot boxes are to be preserved for 11 months and thereafter may be destroyed; accordingly, court lacks jurisdiction to order preservation of election records 14 months after an election). *See, generally* 29 C.J.S. *Election* §356 (Preservation and disposition of ballots.)

In 2008, the Georgia Supreme Court was required to decide a case remarkably similar to the case at bar. In *Smith v DeKalb County*, 654 S.E. 2d 469 (Ga. App. 2007) *cert. denied* (Mar. 10, 2008), the court was asked to determine whether a request under the Georgia open records act should be honored. The request was for CDs generated in a recent election to “include all ballot images and ballot styles ... from the election management system.” *Id.* at 470. The open records request was opposed on two separate grounds: First, Georgia’s open records law excludes from public disclosure those records which “by law are prohibited or specifically excluded from being open to inspection by the general public.” *Id.* at 472. Second, the request was denied since the CDs requested were exempt from the state open records law as they contained “material which if made public could compromise security against sabotage, criminal, or terrorist acts.” *Id.*

The court ruled that the CDs containing ballot images were not subject to public disclosure as Georgia has a law similar to Colorado’s that requires election materials, including ballots and ballot images, to be “maintained *under seal* following an election for at least 24 months , unless otherwise

directed by a superior court” and then destroyed. *Id.* at 471. “Because the CD-ROM is statutorily designated to be kept under seal, it is by law prohibited or specifically exempted from being open to inspection by the general public and, therefore, is not an open record subject to disclosure.” *Id.* at 472. The court further agreed with the trial court that release of the CD-ROMs “could compromise security against sabotage, criminal, or terrorist acts.” *Id.* (The CD-ROMs apparently contained security encryption technology.) While the city clerk in the case at bar does not argue that the release of the Aspen ballots would compromise our national security, she does argue, as did the custodian of the ballot images in Georgia, that the law excludes ballot images from public disclosure and, as argued below, that the public interest and potential for substantial injury should be given serious consideration before any ballots, or copies of ballots, are released for public inspection.

B. Making ballots available for public inspection would do substantial injury to the public interest.

Section 24-72-204(6), C.R.S., reads, in relevant part, as follows:

24-72-205. Allowance or denial of inspection – grounds – procedure – appeal – definitions. ...

(6)(a) If, in the opinion of the official custodian of any public record, disclosure of the contents of said record would do substantial injury to the public interest, notwithstanding the fact that said record might otherwise be available to public inspection ... the official custodian may apply to the district court ... for an order permitting him or her to restrict such disclosure. ...

(b) In defense against an application for an order under subsection (5) of this section, the custodian may raise any issue that could have been raised by the custodian in an application under paragraph (a) of this subsection (6).

Plaintiff has brought her Complaint under the CORA seeking an order from the court

requiring the city clerk to make available for public inspection images of the ballots cast at the last municipal election. The city clerk, as the official custodian of the ballots and ballot images, seeks to avail herself of subsection (6)(b) as set forth above “in defense against an application for an order” from the court². In doing so, the city clerk accepts that to rely on this “defense” she has the burden of proving that the release of the ballots would do substantial injury to the public interest. *Zubeck v El Paso County Retirement Plan*, 961 P.2d 597 (Colo. App. 1998.)

1. Standard of review.

A review of court decisions that address this issue have uniformly indicated that the task before the court is to balance CORA's general presumption in favor of public access to public records versus the public interest asserted to be injured by the release of the public records. For example, in *Denver Post Corp. v University of Colorado*, 739 P.2d 874 (Colo. App. 1987), the custodian refused to disclose the results of certain internal investigations of university employees. The court held that “[a]gainst the privacy interests at stake must be weighed the Act's general presumption in favor of public access.” *See also, Daniels v City of Commerce City, Custodian of Records*, 988 P.2d 648, 651 (Colo. App. 1999) and *Denver Publishing Company v University of Colorado*, 812 P.2d 682 (Colo. App. 1991.)

A “substantial injury to the public interest” is not defined in the CORA. However, the public interests involved in the present case are compelling and evident; and, the injuries that will

² If the court decides that §31-10-616(1), C.R.S., creates a statutory exception to CORA, the court need not decide whether making ballot images available for public inspection would do substantial injury to the public interest. *Denver Publishing Company v Board of County Commissioners of Arapahoe County*, 121 P.3d 190, 203-204 (Colo. 2005).

be caused to those public interests if ballot images are made available for public inspection are also self evident and substantial. The city clerk asserts that the public release of the ballot images from the last municipal election would not only be against the law, but would cause substantial injury to the public interest. The public interest that the city clerk is most concerned with is the preservation of citizens' constitutional and statutory rights to a secret ballot in the recently completed municipal elections and, perhaps more importantly, in all future elections to be held in the City of Aspen. When citizens' rights to a secret ballot are weighed against CORA's stated public policy of ensuring public access to certain public records, the right to a secret ballot must surely carry greater weight.

The public right to know ought not be absolute when its exercise reveals private political convictions. Secrecy, like privacy is not per se criminal. On the contrary, secrecy and privacy as to political preferences and convictions are fundamental in a free society. For example, one of the great political reforms was the advent of the secret ballot as a universal practice.

Buckley v Valeo, 424 U.S. 1 (1976.)

2. *The Public Interest – The right to cast a secret vote.*

The public interest advanced by the city clerk is quite obviously substantial and compelling. The U.S. Supreme Court has recognized that the “right to vote freely for the candidate of one's choice is of the essence of a democratic society.” *Reynolds v Sims*, 377 U.S. 533, 555 (1964).

Indeed,

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Wesberry v Sanders, 3676 U.S. 1 (1964).

The right to cast a secret vote is the “right to vote one’s conscience without fear of retaliation.” *McIntyre v Ohio Elections Commission*, 514 U.S. 334, 343 (1995.) The right ensures that “there should be privacy in the preparation of the ticket by a voter, so that he might exercise his own volition in the choice of candidates, and that he might feel, when he is preparing the ballot to express his volition or election as to the different candidates, that he is free from all observation by the prying eyes of those who might be interested in having him vote for certain other candidates.” *State v Carswell*, 50 S.E. 2d 621, 624 (Ga. App. 1948) “The right is ‘an important and valuable safeguard for the protection of the voter, and particularly the humble citizen, against the influence which wealth and situation may supposed to exercise.’ The right to secrecy encompasses not only the right to cast one’s vote in private, but also the right to maintain the confidentiality of one’s vote following an election.” *Greene v Marin County Flood Control and Water Conservation District*, 91 Cal.Rptr.3d 27 (Cal. App. 2009) (citations omitted)(emphasis added.)

The U.S. Supreme Court has recognized that a state “indisputably has a compelling interest in preserving the integrity of the election process.” *Eu v San Francisco County Democratic Central Committee*, 489 U.S. 214, 231 (1989). *See also*, *Burson v Freeman*, 504 U.S. 191 (1992) (Tennessee statute prohibiting campaigning within 100 feet of polling place was narrowly tailored to serve compelling state interest in preventing voter intimidation and election fraud); *Citizens for Police Accountability Political Committee v Browning*, 572 F.3d 1213 (11th Cir., 2009) (statute prohibiting exit solicitation about issue not on the ballot within 100 feet of polling places in

Florida did not violate First Amendment).

The State of Colorado has recognized the public interest at issue as well. As noted previously, *infra* at 7-8, Colorado has guaranteed to its citizens the right to a secret ballot in its constitution and its legislature has enacted numerous statutes to preserve the integrity of the election process. *See, infra* at 8-10. Particularly, among those statutes is §31-10-616, C.R.S. which requires the city clerk, absent a court order to the contrary, to secure the ballots and ballot images and destroy them after six months from the date of the election. As early as 1895 the Colorado Supreme Court recognized that state statutes enacted to prescribe the procedures for conducting elections were intended to protect voters' constitutional right to vote in secret. *See, Young v Simpson*, 42 P. 666 (Colo. 1895). *See also, Taylor v Pile*, 391 P.2d 670, 673 (Colo. 1964) (even in the context of an election contest, the "constitutional and statutory right to cast a secret ballot carries with it the accompanying right to refuse to testify as to how or for what the vote was cast.")

3. *The Public Interest – Finality in the results of elections.*

There is one further interest that has been recognized by the courts in Colorado that would be affected if ballot images are made available for public inspection. Courts in Colorado have recognized that an important interest is achieved by the destruction of all election materials including ballots, and ballot images, after the period of time has lapsed for any court contest to be filed and adjudicated. That public interest is having finality in the result of elections. State statutes allow any registered voter to contest the outcome of an election, §31-10-1301, C.R.S., but the contest must be filed within a certain period of time following the election. §31-10-1303, C.R.S. (Within 10 days after the expiration of the period which a recount may be requested or after the

recount, whichever is later.)

Even in an election contest, courts will not order the opening of a ballot box absent some evidence of fraud or tampering of ballots. “To order the opening of ballot boxes in every election contest, and to order a recount of the ballots in every case merely because it is asked, without a proper basis therefor, would invite a contest after every election, no matter how honestly and efficiently conducted.” *Gray v Huntley*, 238 P. 53, 56 (Colo. 1925); *See also, Kindel v LeBert*, 48 P. 641 (Colo. 1897) (“Where the grounds of an election contest are fraud and mistake, it is not error to refuse to allow the ballot boxes to be opened, and a recount had, until some testimony is offered tending to establish such fraud.”)

4. *The Substantial Injury.*

History demonstrates the importance of the secret ballot and, for the purposes of the case at bar, evidences the substantial injury to the public interest that would ensue by the public release of ballots or ballot images cast in municipal elections. The U.S. Supreme Court in *Burson, supra* at 200-206 (1992), documents the problems of intimidation and electoral fraud that led to the adoption of the secret ballot by all 50 states³. The opinion describes that in the early years of our nation, voters expressed their preferences orally or by a showing of hands. When paper ballots were introduced in the late 1700's individuals prepared their own handwritten ballots at home, marked them, and took them to the polling place. Later, political parties and candidates printed their own specially colored or designed paper ballots for voters to use. None of these methods was secret and

³ The Constitution of West Virginia still permits voters the option to cast “open ballots.”

all were open to widespread intimidation of voters, fraud, and violence⁴. *Id* at 203.

“Polling places on Election Day often were ‘scenes of battle, murder and sudden death.’ In addition to real violence, sham battles were staged to frighten away the elderly and timid voters.” *George v Municipal Election Commission of the City of Charleston*, 516 S.E.2d 206 (S.C. 1999)(quoting from *Burson, supra.*) To combat violence and corruption, most states adopted measures to guarantee the secret ballot. The reasons most often given to explain the importance of the secret ballot are:

To reduce or eliminate the potential intimidation of voters, to reduce or eliminate the chance for voters who are willing to sell their votes to prove they have ‘delivered the goods’ by allowing someone to watch them cast their ballot, and to ensure the overall integrity of the electoral process.

Burson, supra, at 210.

As discussed previously, Colorado adopted the “Australian system”⁵ in 1877 with the incorporation of Article VII, Section 8, into its Constitution and the state legislature enacted numerous state statutes to secure the purity of elections and guard against abuses of the elective franchise. *See infra* at 8-10. “The success achieved through these reforms was immediately noticed and widely praised. ... One commentator remarked of the New York law of 1888: ‘We have

⁴ Before the secret ballot it was widely believed that to be seen voting and having one’s vote noted by all who were present was to be accountable for one’s choice. Secrecy was seen as having something to do with selfishness.

The spirit of vote by ballot – the interpretation likely to be put on it in the mind of an elector - is that suffrage is given to him for himself; for his particular use and benefit, and not as a trust for the public. ... Instead of opening his heart to an exalted patriotism and the obligation of public duty, it awakens and nourishes in him the disposition to use a public function for his own interest, pleasure, or caprice; the same feelings and purposes, on a humbler scale, which actuate a despot and oppressor.

Bertrand, *The Hidden History of the Secret Ballot*, 2006, Indiana University Press, pg. 51.

secured secrecy; and intimidation by employers, party bosses, police officers, saloon-keepers and others has come to an end.' ...” *Id.* at 204.

“In sum, an examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election frauds. After an unsuccessful experimentation with an un-official ballot system, all 50 states, together with numerous Western democracies, settled on the same solution: a secret ballot. ...” *Id.* at 206. (emphasis added.)

5. *The Substantial Injury to the Voters of Aspen.*

Plaintiff has argued repeatedly that the ballot images she wants to inspect are anonymous as they do not contain any information that can be used to reveal the names of the voters who cast the ballots. Complaint, ¶¶ 45-54. Indeed, Plaintiff argues that the law prohibits voters or anyone from marking ballots in any way that can be used to identify the voter. Complaint, ¶51. Plaintiff is correct. Colorado Constitution, Article VII, Section 8, states as follows: “...no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the person casting it.” Section 31-10-1517, C.R.S., states that “[n]o voter shall place any mark upon his ballot by means of which it can be identified as the one voted by him, and no other mark shall be placed upon the ballot to identify it after it has been prepared for voting.” So, the argument continues, since the ballots are required by law to be anonymous, there should be no concern regarding ballot secrecy. The problem with this analysis is that the law makes no such assumption about the anonymity of ballots and our history of past election abuses shows that merely prohibiting an activity does not prevent it from happening. “Intimidation and interference laws fall short of serving a State’s

⁵ It was commonly called the “Australian system” at the time of its adoption because it was first used in that country.

compelling interests because they 'deal with only the most blatant and specific attempts' to impede elections." *Burson, supra* at 207 – 208. (citing *Buckley, supra* at 28 – “the existence of bribery statute does not preclude the need for limits on contributions to political campaigns.”) Plaintiff's argument herein makes as much sense as telling property owners not to bother locking their front doors as there are laws against burglary.

The U.S. Supreme Court has repeatedly addressed the right of the State to adopt prophylactic measures even in the absence of evidence of specific evils sought to be addressed by the legislation at issue. “[B]ecause a government has such a compelling interest in securing the right to vote freely and effectively, this court never has held a State ‘to the burden of demonstrating empirically the objective effects on political stability that [are] produced’ by the voting regulation in question.” *Burson, supra* at 208 -109 (citing *Munro v Socialist Workers Party* 479 U.S. 189, 195 (1986).) “Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than retroactively, provided that the response is reasonable and does not *significantly impinge* on constitutionally protected rights.” *Burson, supra* at 209 (emphasis in original) (quoting from *Munro, supra* at 195-196.) The Colorado State Legislature has concluded that the only way to guarantee that ballots cast in an election will remain anonymous is to insist that the ballots are physically secured and their contents kept secret until destroyed as provided by law. This is evidenced by the adoption of §31-10-616, C.R.S., which requires ballots and other election materials to be held in the custody of the city clerk for six months after the election and then destroyed.

The instant case involves a request for the images of ballots cast in the last municipal

election. If the ballot images are publicly released, however, the injury will be to not only the voters who cast their ballots in the most recent election, but also to all future voters in municipal elections. The precedent will have been set that ballots cast in municipal elections will be made available for public inspection in all subsequent elections. The concerns about publicly revealing secret ballots may be slightly different for voters in the last election than for voters in the future; however, if the ballot images currently in the custody of the city clerk, or any future ballots, are public disclosed, the injury to the public interest will be serious and substantial in each situation.

6. *The substantial injury to voters in the last election.*

The Plaintiff may be correct in assuming that the voters in the last municipal election had no reason to intentionally mark their ballots. There simply was no reason for anyone to intentionally mark their own ballot or someone else's ballot unless the person knew in advance that the ballots, or images of the ballots, would be disclosed to the public after the election. Since the City did not indicate that a century old practice of not making the ballots available for public inspection would be changed, there was no reason for anyone to intentionally mark their ballots in a manner that could be used to identify their ballot.

It is quite possible, however, that voters in the last election did not intentionally mark their ballots in a distinguishing manner, but did so unintentionally. For example, some voters may have used a pencil or a pen instead of a black magic marker provided at the polling booth. Some voters may have unintentionally marked their ballots by filling in the ovals on the ballots in a distinctive manner not realizing that their ballots could be identified following the election. While most voters follow the general instructions given at polling places directing voters to completely fill in the

appropriate ovals on the ballot; many, however, may have marked their ballots with the use of a check mark, a slash, a cross, or simply a small scribble within the oval. Each of these marks may be considered a valid vote as they indicate the clear intent of the voters who cast them, but they can also be used to help identify those same voters.

The Plaintiff has limited her request to ballot images that do not contain write-in candidates. She has apparently recognized that some voters may have unintentionally "marked" their ballots in a manner that can be used to identify them. It should be noted that the Plaintiff, not the law, has carved out this exception to her CORA request. She has not, however, recognized that many ballots may have other distinguishing features that could be used to identify individual voters. The difficulty with any such revised request, even if it was a permitted exception to the CORA, would be that election officials are in no position to review each and every ballot or ballot image to determine if they contain extraneous marks that can be used to identify individual voters. Moreover, there are no standards for election officials to use to determine which distinguishing features of a ballot can be used to identify an individual voter and which are not. If a ballot contains a stray mark, was it intentionally placed on the ballot or was it simply the result of a voter determining if the magic marker was working? Should that voter's vote be nullified and his or her franchise to vote denied?

7. *The substantial injury to voters in all future elections.*

A more substantial injury would be done to Aspen voters in future elections if ballots, or images of ballots, were made available for public inspection following each election. If ballots were made available for public inspection at the conclusion of all future elections, then there would,

indeed, be an incentive for voters to improperly mark ballots. Poll watchers and other election officials may succumb to the temptation of their own curiosity and mark the ballots of particular voters to determine how they voted after all the ballots or ballot images were made available for public inspection. Voters receiving ballots at home in mail-in elections could mark their spouse's ballots to see at a later date how their spouse's voted. Of even more concern, all of the abuses that the guarantee of a secret ballot seeks to prevent, including intimidation and election fraud, would surely creep back into Aspen's municipal elections.

A person wishing to surreptitiously mark a ballot could simply put an inconspicuous mark anywhere on the ballot; such as a dot over a particular letter in a candidate's name, filling in a letter in a candidate's name, or simply placing a mark in the corner of the ballot. One can hardly expect election officials to "catch" every effort that may be used to improperly identify ballots after the election. Even if election officials could discover such ballots, how would they determine which marks are errant marks innocently placed on the ballot and which are deliberate attempts to corrupt the process? Election officials should not be given unbridled authority to declare such ballots void and disenfranchise a voter for innocently marking his or her ballot. If ballots or ballot images are not publicly disclosed following each election, the dilemma posed by the discovery of extraneous marks on ballots would be significantly minimized. If no one but the voter and a small handful of election officials ever see the ballot, an extraneous mark, however innocently made, cannot play a nefarious role.

The Utah Supreme Court in *Evans v Reiser*, 2 P.2d 615 (Utah 1936), describes in great detail the difficulty election officials and courts may have in determining which markings made by

a voter are “expressly authorized by law” and which require the entire ballot to be disregarded. “[I]t is difficult to perceive how those whose duty it is to count the ballots may ascertain the purpose the voter had in marking a ballot in a manner not authorized by law.” *Id.* at 623-624. That court understood the problem between valid markings to cast a vote and those marks intentionally made for improper purposes. “It should here be noted that a mark upon a ballot which, upon its face, appears insignificant and innocently made, may serve an ulterior purpose as readily as a glaring and suspicious mark.” The State of Colorado has minimized the dilemma of trying to have election officials determine the motive behind a mark that may not perfectly comply with the authorized marks on a ballot. It guarantees that all ballots, and images of ballots, will not be publicly disclosed after an election, thereby precluding the proof needed to consummate an illegal sale of a vote.

There is one additional injury that would be caused to the public in the future if ballots, or ballot images, were made available for public inspection following every election. This particular injury may well be the most critically important to avoid. The citizens of Colorado have come to expect over the last hundred plus years that their ballots would be kept secret and not revealed to anyone. That absolute certainty in the secrecy of their ballot has given voters the confidence to vote their conscience. They have, in the past, properly assumed that they will not be intimidated or retaliated against because of the way they voted. That absolute certainty would be eroded if ballots were open to public inspection following each election. The obvious consequence would be the disenfranchisement of a significant portion of voters in all future elections because of the loss of confidence in the election process for all time.

V. CONCLUSION

After stripping away all of Plaintiff's factual allegations that are immaterial and irrelevant to the case at bar, what is left are two arguments: (a) that an image of a ballot is not the same as an original ballot; and, (b) the public display of a portion of some ballot images somehow makes all ballot images subject to public inspection. These arguments are quintessential examples of elevating form over substance. The Plaintiff has failed to state a claim upon which relief can be granted. Accordingly, Defendant respectfully urges this court to dismiss the Plaintiff's Complaint pursuant to C.R.C.P. Rule 12b(5) and vacate the preliminary injunction so as to allow the city clerk to proceed with her duty to destroy all election materials including the original ballots and the ballot images from the May 2009 municipal election in the City of Aspen.

DATED this 6th day of November, 2009

Respectfully submitted,

Original signature on file

John P. Worcester, #20610
City Attorney

James R. True, #9528
Special Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2009, a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION TO DISMISS mailed postage prepaid in the U.S. Mail and filed electronically with Nexis/Lexis to the following person(s):

Robert A. McGuire, Esq.
1624 market Street, Suite 202
Denver, Colorado 80202

ram@lawram.com

Original signature on file

Tara L. Nelson