

DISTRICT COURT, PITKIN COUNTY, STATE OF COLORADO Pitkin County Courthouse 506 East Main Street, Suite E Aspen, Colorado 81611	▲ COURT USE ONLY ▲
Plaintiff: Marilyn Marks, vs Defendant: Kathryn Koch.	Case Number: 09 CV 294
Attorneys for Kathryn Koch: John P. Worcester, City Attorney Jim True, Special Counsel 130 S. Galena St. Aspen, Colorado 81611 Telephone: (970) 920-5055 Facsimile: (970) 920-5119 E-mail: johnw@ci.aspen.co.us	Div.: 3
DEFENDANT' S REPLY MEMORANDUM TO PLAINTIFF' S SURREPLY TO DEFENDANT' S MOTION FOR PROTERCTIVE ORDER	

Bodelson v Denver Publishing Co., 5 P.3d 373 (Colo.App.2000), provides guidance on the appropriate balancing test to be used in determining whether the denial of public access to public records is proper when the custodian believes the public release would cause substantial injury to the public interest. However, the holding in *Bodelson* does not contradict anything that Defendant has stated in previous memoranda in support of her motion for a protection order. Indeed, the case supports much of what the Defendant has argued in her memoranda.

Bodelson reaffirms the holding in *Denver Publishing Co. v Dreyfus*, 520 P.2d 104 (Colo.1974) that it is “the public policy of this state, with certain exceptions, that all public records shall be open for inspection by any person at reasonable times.” *Bodelson*, 5 P.3d at 376. And, more importantly, that “[t]his declaration has eliminated any requirements that a person seeking access to public records show a special interest in those records in order to be permitted access to them.” *Id.*


Defendant has previously suggested that any benefit that inures to the public by the public release of the public record should be considered by the court, but only if the benefits result directly from the release of the public records. This suggested test is exactly what the court in *Bodelson* offered. The correct balance is between the “public policy of this state, with certain exceptions, that all public records shall be open for inspection at all reasonable times” (*Bodelson, supra* at 376) versus the substantial injury to the public interest that will be caused by the public release of the records. *See, e.g., Freedom Newspapers, Inc. v Tollefson*, 961 P.2d 1150 (Colo.App.1998). In determining the “weight” of the substantial injury, the *Bodelson* court and Defendant have suggested that the benefits to be derived from the release of the ballots should be considered by the court. It is not proper, as Plaintiff suggests, to consider benefits that do not derive directly from the release of the records in question.

Plaintiff maintains that deposing TBI officials will reveal “why the public interest will benefit from disclosure.” Surreply at 2. The question is not why the public benefit will benefit from disclosure but how will the release of the ballot images benefit the public interest. Plaintiff suggests that deposing TBI officials will yield information that will benefit the public interest; to wit: that there were errors and irregularities in the conduct of the election. Whether that is true, or not, is a separate issue than whether there will be any benefit in releasing the ballot images. Plaintiff cannot justify her CORA request under the balancing test set forth above on grounds related to how the ballots were tabulated, which is nothing more than a recount or an election challenge, because those alleged benefits are foreclosed by law. Accepting either as a benefit is contrary to the time limits set forth in C.R.S. Section 31-10-1301, et seq., regarding contests and Section 31-10-1207, regarding recounts. Further, the courts have repeatedly indicated that ballot boxes will not be opened after an election except in the context of an election contest, and then only

upon a showing of fraud or mistake. *Gray v Huntley*, 238 P. 53 (Colo. 1925); *Kindel v LeBert*, 48 P. 641 (Colo. 1897.) Thus, as previously asserted by the Defendant and consistent with *Bodelson*, the only benefits that should be considered by the court are those that derive directly from the release of the ballot images. Deposing TBI officials may reveal all sorts of information beneficial to the public interest, but unless the information can be shown to be derived from the release of the ballot images, the information is simply not relevant to the inquiry.

Plaintiff's true motives for deposing TBI officials are revealed in her recently filed Notice of Deposition Duces Tecum¹ (Exhibit "A", attached hereto) and her counsel's letter to TBI indicating areas of inquiry (Exhibit "B", attached hereto). For example, Plaintiff seeks to obtain a copy of the agreement between TBI and the City of Aspen. How is that agreement relevant to whether the release of the ballot images would be beneficial to the public interest? (See request No. 4 for documents.) Plaintiff intends to spend up to seven hours deposing TBI officials to discover errors and irregularities in the conduct of the City election (Exhibit "C"). Plaintiff should not be permitted to use the forthcoming show cause hearing to contest the election or depose TBI officials on matters not related to the issue before the court. Thus, Defendant respectfully urges this court to limit the deposition of TBI officials as requested in Plaintiff's motion for protective order.

DATED this 26th day of February, 2010


John P. Worcester, #20610
City Attorney

¹ Although the Defendant has not formally addressed this issue to this point, it should be noted that the Court did not authorize the issuance of a subpoena duces tecum, which is in essence a request for production of documents and primarily involves documents previously provided to the Plaintiff pursuant to previous CORA requests or that would circumvent the substance of this lawsuit.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February, 2010, a true and correct copy of the foregoing **DEFENDANT' S REPLY MEMORANDUM TO PLAINTIFF' S SURREPLY TO DEFENDANT' S MOTION FOR PROTERCTIVE ORDER** was filed electronically with Nexis/Lexis to the following person(s):

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Original signature on file
Janet Raczak, Paralegal