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,** Defendant: **Kathryn Koch.**	Case Number: 09 CV 294 Div.: 3
Attorneys for Kathryn Koch: John P. Worcester, City Attorney Jim True, Special Counsel City of Aspen 130 S. Galena St. Aspen, Colorado 81611 Telephone: (970) 920-5055 Facsimile: (970) 920-5119 E-mail: johnw@ci.aspen.co.us jimt@ci.aspen.co.us	
REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR A PROTECTIVE ORDER	

The following is a Reply in Support of Defendant's Motion for a Protective Order.

I. Introduction.

Plaintiff states that she intends to examine TBI officials on the following five topics of

examination:

1. The creation of the TIFF files on election night in the Aspen election.
2. Post-election handling of the TIFF files and ballots following the Aspen election.
3. The public display of the TIFF files on election night in the Aspen election.
4. TBI's tabulation process used in the Aspen election.
5. TBI's verification/audit processes used in the Aspen election.

Plaintiff's Response Memorandum, pg. 3.

Plaintiff argues that she should be able to examine TBI officials on these topics as they are relevant under Rule 26(b)(1), C.R.C.P., because (a) "how the TIFF files were created and handled is relevant as to whether §31-10-616(1), C.R.S. can be applied to the TIFF files"; and, (b) "the conduct of, and evidence of errors and irregularities in, Aspen's instant run-off election are directly related to the public interest in allowing disclosure of the TIFF files." Plaintiff's Response Memorandum pg. 5 and 7. Plaintiff is wrong on both counts.

II. How the TIFF files were created or handled after the election is not relevant to any of the issues before the court.

As noted by the Plaintiff, Rule 26(b)(1), C.R.C.P., provides that parties may obtain discovery regarding "any matter, not privileged, that is relevant to the claim or defense of any party." (Emphasis added.) The matters that Plaintiff wishes to examine TBI officials are simply not relevant to the issues before the court. How the TIFF files were created or how they were handled on, or after, election night is not material or relevant to any of the issues before the court. Plaintiff's CORA request is for "the complete tiff images, including tiff file names of the ballots from the may, 2009 election." Complaint, ¶39. *See also,* Exhibit 4 appended to the Complaint. What the TIFF files are has been stipulated by the parties. The Joint Trail Management Order filed by the

parties with the court states that "each tagged image file format (TIFF) file is a digital photograph of a voted paper ballot and saved as part of the vote tabulation process conducted on election night by the Defendant and by personnel of TrueBallot, Inc., a Maryland corporation." Stipulated Facts, Paragraph 5. In addition to the above stipulated fact, Plaintiff's Complaint contains a description of the TIFF files that are the subject of Plaintiff's CORA request. She describes the TIFF files as follows:

> 15. The first step of the TBI tabulation process was to scan the original paper ballots cast ion the election and save each resulting digital photographic image as a single computer file in tagged file format (TIFF) under a unique filename that ended in a numbered suffix related to the ballot's sequential position in the scanning order.
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> 25. Approximately 2,544 TIFF files, each containing a digital photographic image of a single ballot, were created by TBI during the tabulation process on election night.

(Emphasis added).

Plaintiff should not now be allowed to "withdraw" her description of the public records she seeks to inspect. The TIFF images that Plaintiff seek to inspect are "digital photographic images" of the original ballots cast in the election. How they were created or used in the tabulation process is simply not relevant to whether their public release would cause substantial injury to the public interest.

III. Evidence of "errors and irregularities" in the conduct of the election are not relevant to any of the issues before the court.

Plaintiff suggests that the proposed examination of the TBI officials will reveal relevant testimony regarding the conduct of the election and reveal evidence of "errors and irregularities" in the instant run-off election. This evidence, the Plaintiff suggests should be balanced against any perceived harm the release of all ballots might have to the public interest. According to the Plaintiff, the determination of substantial injury to the public interest "requires a balancing of the interests

favoring public disclosure against the interests favoring nondisclosure." Plaintiff's Response Memorandum, pg. 7. To the extent Plaintiff suggests that the "interests favoring public disclosure" are the perceived public benefits in disclosing "errors and irregularities in the instant run-off election," Plaintiff is wrong. The correct balancing test is not between the substantial harm to the public interest propounded by the Defendant versus some unrelated public benefit the Plaintiff claims would inure to the public by deposing the City's election consultants, but an individualized balancing of the substantial harm to the public interest versus the Open Records Act's general presumption of public disclosure of public records.

Plaintiff would have this court turn a show cause hearing to review the Defendant's reasons for denying public access to certain public records into an election contest. Plaintiff may have perfectly legitimate reasons for desiring to inspect the ballot images created in the May 2009 municipal election, but her motives for wishing to inspect public records are simply not relevant to any issue 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 itself without any requirement that a 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 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.")

The cases cited by Plaintiff do not support Plaintiff's proposed balancing test. The cases consistently state that the proper balancing test in considering an allegation of substantial injury to the public interest is to weigh that possibility versus the Open Records Act's general presumption in favor of public access to public records. Any benefit that inures to the public by the public release

of a public record should be considered by the court, but only if the benefit results directly from the release of the public records. Those benefits should be considered in connection with the alleged injuries to determine if there will be substantial injury to the public interest of sufficient magnitude to overcome the general presumption of disclosure enunciated by the Open Records Act.

In *Civil Service Commission v Pinder*, 812 P.2d 645 (Colo. 1991) the court was required to determine whether the commission's denial of an officer's request to review promotional examination for police sergeant was proper under CORA. The commission denied the request on the grounds that the release of the examination would substantially injure the public interest. In concluding that the public interest would, in fact be harmed by the public release of the examinations, the court stated that:

> The construction and interpretation that will render section 24-72-204(6) effective in accomplishing the purpose for which it was enacted is to allow the district court to restrict access to public records where substantial injury to the public interest would result, notwithstanding the fact that said record might otherwise be available for public inspection by a party in interest or by the general public.

Id. at 649. The court balanced the perceived harm in releasing the examinations against the public interest in public access to public records.

In *Freedom Newspapers, Inc. v Tollefson*, 961 p.2d 1150 (Colo. App. 1998), a newspaper sought the names of public employees who participated in a municipal utility's early retirement program and the amounts each individual received. The court held that the records, if released, would not cause substantial injury to the public interest. The custodian of the records argued that the public release of the records would cause substantial injury to the public interest in three ways: "(1) by unduly interfering with the privacy rights of public employees"; (2) by unduly interfering with their liberty interests; and, (3) by chilling employee participation in [the early retirement

program]." *Id* at 1155. The court considered each defense to the denial of the records. With respect to the privacy argument, the court held that (a) the privacy rights asserted were not that "intimate, personal, or sensitive that disclosure would be offensive and objectionable to reasonable persons" *Id.*; (b) CORA recognizes the compelling public interest in access to information; and, (c) "the release of the names of employees and individual amounts paid does not unduly interfere with the employees' right to privacy." *Id.* With respect to the liberty interest advanced, the court held that although a "public employee has a liberty interest in his or her good name, reputation, honor, and integrity, ... that interest, standing alone, is not entitled to constitutional protection." *Id* at 1156. Finally, with respect to the competitive interest advanced by the custodian of the records, the court held that the "public's right to know is paramount in weighing the custodian's contention that disclosure may chill [the institution's] ability to continue using [the early retirement program]." It should be noted that in the entire analysis used by the court to determine whether a substantial injury to the public interest was a valid defense to denying public access to the records, the court balanced the injury advanced by the custodian and balanced that alleged injury with the Open Records Act's general presumption in favor of public access. The court considered public benefits that countered any alleged injuries to the public interest, but the ultimate balancing test was whether the alleged injuries outweighed the interests advanced by the Open Records Act. The court did not consider any alleged benefits to the public as a result of the public release of the records that were unrelated or extraneous to the alleged injuries.

In *Denver Post Corp. v University of Colorado*, 739 P,2d 874 (Colo.App.1987), the third case cited by Plaintiff, the court was asked to review the denial of certain documents relating to the payment to university personnel from foreign governments. The custodian of the records denied

public access, in part, on the grounds that to do so would cause substantial injury to the public interest. In finding against the custodian, the court ruled that "against the privacy interests at stake must be weighed the general presumption in favor of public access." *id*, at 879. In other words, the balancing test used by the court was simply the weight of the statutory right of newspapers to access public records versus the privacy interest of the university employees. The privacy interests advanced by the custodian can certainly be examined, but other alleged benefits unrelated to the release of the records are not part of the analysis.

In the case at bar, the Defendant has defended her refusal to release the ballot images on the grounds that to do so would cause substantial injury to the public interest. The Defendant's arguments in this regard are set forth in detail in her memorandum in support of her motion to dismiss. Plaintiff is certainly authorized to challenge those alleged injuries by advancing public benefits that would naturally accrue by virtue of the fact that ballot images are released. She may not allege public benefits derived from interrogating witnesses on the creation of the ballot images, how they were used to tabulate the results of the election, or how the Defendant was responsible for "errors or irregularities" in the conduct of the election. Those matters, however beneficial they might be for the public to acknowledge, have absolutely nothing to do with whether the ballot images are publicly released or not. Deposing TBI official may "develop facts of public interest" (Plaintiff's Response Memorandum, pg 7), but those facts will have nothing to do with any benefits outweighing alleged injuries related to the release of ballot images. The depositions may just as well be about the effects of global warming on Aspen's weather. It might be beneficial to obtain those facts, but those benefits would not be as a result of ballot images being publicly released.

Plaintiff claims to want to examine TBI officials regarding the "public display of the TIFF files

on election night in the Aspen election; TBI's tabulation process used in the Aspen election; and TBI's verification/audit processes used in the Aspen election." Plaintiff's Response Memorandum, pg 7-8. None of these matters are public benefits that relates in any way to the substantial harm to the public interest alleged by the Defendant.

The proposed examination of TBI officials presumably goes to the issue of whether the City of Aspen's instant run-off election was conducted with "errors and irregularities." Assuming that there were, in fact, errors and irregularities in the conduct of the election, how does that fact relate to the whether there is a benefit or injury to the public interest in releasing the ballot images? There is nothing that the TBI officials can offer to the discussion of whether there is any benefit to the public in releasing the ballots. For example, if the court is to assume that all of Plaintiff's proposed facts are found to be true following the examination of TBI officials, the only conclusion to be derived is that the city failed to conduct the election properly. That conclusion would have no bearing on whether the public interest would be substantially injured upon the release of the ballot images.

Plaintiff's Response Memorandum makes clear that her motivation to examine TBI officials is to try to document "errors and irregularities" in the conduct of the May 2009 election. The only reason the Plaintiff can have for inspecting the ballot images is either to recount the ballots, or to use the cast ballots to determine how individual voters voted. There can be no other logical reason for inspecting the ballots[1]. Of course, both of these reasons are inappropriate. There can be no

[1] Granted, pursuant to CORA a party need not establish the reason for the request. As the Defendant stated in a recent newspaper comment, she may just want the ballot images to frame them. In the context of determining whether a public benefit is derived from the release of ballot images, the only logical use of the ballot images is to count them or use them to determine how people voted.

recount as the time for an election contest has long expired; and, using the ballot images to determine how people voted is illegal. The ballot images cannot establish any of the matters Defendant wishes to examine the TBI officials about. In essence, she is trying to contest the election by inspecting the ballots without any evidence of fraud or mistake. This court should not allow Plaintiff to contest the May 2009 election. Not only is the time for an election contest well beyond the statutory limit[2], but contrary to long standing precedent in our state that ballot boxes be opened only in the context of an election contest and then only upon a showing of fraud or mistake. *See, e.g., Gray v Huntley*, 238 P. 53 (Colo. 1925); *Kindel v Lebert*, 48 P. 641 (Colo.1897). The proposed examination of TBI officials is nothing more than a "fishing expedition" to embarrass and harass city officials and their election consultants.

In the alternative to prohibiting any deposition of the TBI officers, Defendant urges the court to issue a protective order that limits any depositions to the issues before the court and not how the ballot images were created, how they were duplicated internally, how the election was conducted, how the tabulation of results were done by the Defendant or TBI, how the pre-election or post-election auditing procedures were performed, or any other questions that do not elicit relevant evidence or which can reasonably be calculated to lead to the discovery of admissible evidence.

DATED this 16th day of February, 2010

Respectfully submitted,

Original signature on file

John P. Worcester, #20610
City Attorney

James R. True, #9528
Special Counsel

[2] Section 31-10-1303, C.R.S.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2010, a true and correct copy of the foregoing REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR A PROTECTIVE ORDER was mailed postage prepaid in the U.S. Mail and filed electronically with Nexis/Lexis to the following person(s):

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Original signature on file
Tara L. Nelson