

DISTRICT COURT, PITKIN COUNTY, COLORADO Pitkin County Courthouse 506 East Main Street, Suite 300 Aspen, Colorado 81611	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
Plaintiff: MARILYN MARKS v. Defendant: KATHRYN KOCH	
Attorney for Plaintiff: Robert A. McGuire Robert A. McGuire, Attorney At Law, LLC 1624 Market Street, Suite 202 Denver, Colorado 80202 Phone Number: 303-734-7175 FAX Number: 303-734-7166 E-mail: ram@lawram.com Atty. Reg. #: 37134	Case Number: 2009CV294 Div.: 3 Ctrm.:
PLAINTIFF'S SURREPLY OPPOSING MOTION FOR PROTECTIVE ORDER	

The Plaintiff seeks testimony and documents from the deposition of TrueBallot, Inc. (“TBI”), that bear directly on *why* the public interest will benefit from disclosure of the TIFF files. Under the decision of the Colorado Court of Appeals in *Bodelson v. Denver Publ’g Co.*, 5 P.3d 373 (Colo. App. 2000), such evidence is properly considered by this Court in determining whether disclosure will cause “substantial injury to the public interest.” Because this evidence is relevant under Rule 26(b)(1), the Defendant’s request to restrict the scope of discovery from TBI’s deposition should be denied.

ARGUMENT

The Defendant’s understanding of the balancing test used to determine whether disclosure of public records will do substantial injury to the public interest is flawed. *Bodelson*, which has not yet been raised in motion pleadings, contains two dispositive holdings: First, the

“substantial injury” balancing test does weigh the *particular benefits* of disclosure (not just CORA’s general presumption favoring disclosure) against the harms; and, second, the balancing test properly considers evidence showing *why* the public interest will benefit from disclosure.

In *Bodelson*, the Denver Post sought disclosure of autopsy reports from the Columbine High School shootings. The custodian asserted that disclosure would cause substantial injury to the public interest and produced evidence of harms that would result. See *Bodelson*, 5 P.3d at 378. The Post produced no evidence to show the benefits of disclosure of the autopsies. See id. This failure by the Post to produce evidence favoring disclosure allowed the custodian to prevail in the “substantial injury” balancing test. See id. When the trial court conducted the balancing test, it explicitly weighed “*the good that [was] to be accomplished by release of this information* against the harm to the entire community.” Id. (emphasis added). Having received no evidence of actual benefits of disclosure, the trial court was only able to weigh the custodian’s evidence of harm and accordingly found that disclosure would do substantial injury to the public interest.

The Court of Appeals affirmed the trial court’s interpretation that the “substantial injury” balancing test considers evidence of the actual benefits of disclosure, holding that the trial court acted properly in “weighing the benefits of releasing the autopsy reports against the harm,” id. at 380, and “in attempting to balance competing interests,” id. at 379. Going even further, the Court of Appeals approvingly recited the trial court’s finding that, although the Post had argued “there were lessons that could be learned from review of the autopsies,” id. at 378, such arguments alone were inadequate because they “*did not explain what lessons in particular* might be learned.” Id. (emphasis added). Such a finding admits only one conclusion: Evidence explaining *why* the public interest will benefit from disclosure is directly relevant to, and is properly weighed by, the “substantial injury” balancing test.

In this case, the Plaintiff seeks precisely the kind of evidence from TBI that the Post failed, to its detriment, to produce in *Bodelson*. Specifically, the testimony and documents that the Plaintiff seeks from TBI will show (1) that independent verification of the results produced by Aspen's uncertified election system cannot be performed without the TIFF files; and (2) that the public interest favors such verification (and therefore favors disclosure of the TIFF files) *because of* the errors and irregularities that occurred in Aspen's municipal election, which have raised questions about whether Aspen's new and uncertified election system properly functions.

It would be fundamentally unjust for the Court to limit discovery of this relevant evidence. The Defendant here has asserted – and claims the relevance of – the purely *speculative* harms that disclosure *might cause in theory* by facilitating imaginary vote-buying schemes. Yet she seeks at the same time to suppress, as irrelevant, any and all *real-world* evidence of *non-hypothetical* errors and irregularities that *actually occurred* in Aspen's election. Such election problems explain why the public interest will benefit from disclosure of the only data that allows for independent verification of Aspen's uncertified new election system. The Defendant's double standard for relevance of such evidence is incoherent and must be rejected.

CONCLUSION

For the foregoing reasons, as well as for those set out in the Plaintiff's response, the Plaintiff respectfully requests that the Court deny the Defendant's Motion for Protective Order.

Respectfully submitted this 23rd day of February, 2010.

By: S/ Robert A. McGuire
Robert A. McGuire, Reg. No. 37134
1624 Market Street, Suite 202
Denver, Colorado 80202
Tel.: (303) 734-7175 / Fax: (303) 734-7166
ram@lawram.com
Attorney for Plaintiff Marilyn Marks

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2010, I served a true and correct copy of the foregoing **PLAINTIFF'S SURREPLY OPPOSING MOTION FOR PROTECTIVE ORDER** by the method indicated below to each of the following:

<u>Attorney</u>	<u>Firm And/Or Address:</u>	<u>Method</u>
John Worcester	City Attorney City of Aspen, Colorado 130 S Galena Aspen, Colorado 81611	Lexis Nexis File & Serve
James R. True	Special Counsel City of Aspen, Colorado 130 S Galena Aspen, Colorado 81611	Lexis Nexis File & Serve

S/ Robert A. McGuire
Robert A. McGuire, Reg. No. 37134
1624 Market Street, Suite 202
Denver, Colorado 80202
Tel.: (303) 734-7175 / Fax: (303) 734-7166
ram@lawram.com
Attorney for Plaintiff Marilyn Marks