

PITKIN COUNTY, COLORADO :DISTRICT COURT Court Address: Pitkin County Courthouse 506 East Main Street Aspen, Colorado 81611 Phone Number: 970-925-7635	
<hr/> Plaintiff(s): MARILYN MARKS vs. Defendant(s): KATHRYN KOCH, Clerk of the City of Aspen, Colorado	
<hr/> <div style="text-align: right;"> Case Number: P09CV294 Div.: 3 </div>	
ORDER on PENDING MOTIONS	

This matter comes before the Court upon the motions pending before the Court. The Court has reviewed the pertinent record and is otherwise fully advised. Therefore, the Court finds, concludes and orders as follows:

1. Motions for leave to file pleadings beyond those authorized by C.R.C.P. 121 are granted. The Court has considered all filed pleadings and supporting records.
2. The right to vote is a fundamental right. The public has an intense interest in the integrity of its elections. Perhaps the information Plaintiff seeks in this case would be pertinent to a discussion about this topic. This case, however, involves a much narrower issue. Under the Colorado Open Records Act (CORA), Plaintiff seeks production of 2,544 digital photographs of ballots called tagged image file format (TIFF) files. As alleged in the Complaint, the TIFF files are "digital photographic image[s]" of the "original paper ballots." Complaint ¶ 15.
3. Plaintiff made a proper CORA request for production of the TIFF files. As custodian of the files, Defendant refused the request. This action has followed for the Court's determination under CORA whether or not the refusal was "proper." § 24-72-204(5), C.R.S.
4. Defendant now moves to dismiss under C.R.C.P. 12(b)(5). Based on the allegations in the Complaint, Defendant argues authorizing inspection would be contrary to state law and would do "substantial injury to the public interest." These are grounds for denying a CORA request. § 24-72-204(1)(a), (6)(a), C.R.S.
5. Motions to dismiss under Rule 12(b)(5) are "viewed with disfavor and are rarely granted under our 'notice pleadings.'" Davidson v. Dill, 80 Colo. 123, 131, 503 P.2d 157, 162. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that

the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. at 131-32, 503 P.2d at 162 (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)). In addition, the allegations of the complaint must be viewed in the light most favorable to the plaintiff. Bell v. Arnold, 175 Colo. 277, 281, 487 P.2d 545, 547 (1971). "A motion to dismiss for failure to state a claim must be decided solely on the basis of the allegations pled in the complaint, . . . and the court must accept all facts pled in the complaint as true." Barnett v. Denver Pub. Co., Inc., 36 P.3d 145, 147 (Colo. App. 2001).

6. Nevertheless, a party is entitled to have the Court "test the formal sufficiency of the complaint" and to dismiss a claim if "it appears beyond doubt that the plaintiff cannot prove facts in support of the claim that would entitle the plaintiff to relief." Dorman v. Petrol Aspen, Inc., 914 P.2d 909, 911 (Colo. 1996). A complaint can be inadequate if the applicable law offers no relief upon the facts alleged. See Nelson v. Nelson, 31 Colo. App. 63, 66, 497 P.2d 1284, 1286 (1972).

7. State statute requires that ballots "remain in the ballot box in the custody of the clerk." The clerk is required to maintain the ballots until expiration of the time for "contest proceedings." Then the clerk must "destroy" the ballots. During times when the ballots must be preserved, the clerk is required to "preserve the ballots in some secure manner" and to keep them "so that no one can ascertain how any voter may have voted." § 31-10-616(1), C.R.S.

8. The Colorado Constitution mandates "secrecy in voting" whether that voting be by paper ballot or by "machine or mechanical contrivance." Co. Const. art. VII, sec. 8.

9. Section 31-10-616(1), C.R.S. and Article VII, section 8 of the State's Constitution make it plain that the clerk is to keep the ballots secret and to preserve them for access only for contest proceedings.

10. This case is not a proceeding to contest the election, and the time for such a contest has passed. § 31-10-1303, C.R.S.

11. Colorado law recognizes copies of public records, including "electronic imaging", as the equivalent of the originals. § 13-26-102, C.R.S.

12. Plaintiff alleges some irregularities in the handling of the ballots on election night, including possible public displays of some ballots. These allegations could raise legitimate public concerns about the election, but the concerns do not alter Defendant's ongoing obligations with respect to ballots and do not alter the provisions of the statute and Constitution requiring secret ballots and limiting the purpose of their use to contest proceedings.

13. The Court concludes a CORA inspection of the TIFF files is contrary to state law, a proper reason for refusing inspection under § 24-72-204(1), C.R.S. Plaintiff's complaint is inadequate because under the facts alleged, the law offers Plaintiff no relief. The motion to dismiss the Complaint is granted, and the Complaint is dismissed.

14. The dismissal renders moot Plaintiff's desire to conduct a deposition. The Court modifies its prior partial order on the motion for protective order. The deposition shall not proceed. The hearing scheduled on Plaintiff's complaint is vacated. The status conference set for March 10, 2009, is vacated.

15. The Court notes that the preliminary injunction remains in force by its own terms for the period of time set forth in the injunction.

Done on March 10, 2010.

BY THE COURT:



JAMES B. BOYD
DISTRICT COURT JUDGE