

# APPENDIX

To

Notice of Appeal

In

Marks v. Koch

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CO Pitkin County District Court 9th JD

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Review Clerk: April Norwood

PITKIN COUNTY, COLORADO :DISTRICT COURT

Court Address: Pitkin County Courthouse  
506 East Main Street  
Aspen, Colorado 81611

Phone Number: 970-925-7635

**Plaintiff(s): MARILYN MARKS**

**vs.**

**Defendant(s): KATHRYN KOCH, Clerk of the City of  
Aspen, Colorado**

Case Number: P09CV294

Div.: 3

**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

<p>DISTRICT COURT, PITKIN COUNTY, COLORADO</p> <p>Pitkin County Courthouse 506 East Main Street, Suite 300 Aspen, Colorado 81611</p>	<p><b>EFILED Document</b> <b>CO Pitkin County District Court 9th JD</b> <b>Filing Date: Mar 24 2010 2:23PM MDT</b> <b>Filing ID: 30226227</b> <b>Review Clerk: Jonna Goldstone</b></p> <p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<p><b>Plaintiff:</b> MARILYN MARKS v. <b>Defendant:</b> KATHRYN KOCH</p>	<p>Case Number: 2009CV294</p> <p>Div.: 3                      Ctrm.:</p>
<p><b>PLAINTIFF'S MOTION FOR AMENDMENT OF JUDGMENT PURSUANT TO C.R.C.P. 59(a)(4)</b></p>	

The Plaintiff, Marilyn Marks, by and through her undersigned counsel, respectfully moves the Court pursuant to C.R.C.P. 59(a)(4), to reconsider its Order on Pending Motions entered on March 10, 2010, and to amend the judgment to vacate the Court's dismissal of the Complaint and to state instead that the Defendant's Motion to Dismiss is denied.

As grounds for this Motion, the Plaintiff states:

1. Pursuant to C.R.C.P. 121(c) § 1-15(8), counsel for Plaintiff hereby certifies that he has in good faith conferred with counsel for the Defendant about this Motion prior to filing it, and he is authorized to notify the Court that the Defendant opposes the relief sought herein.
2. On March 10, 2010, the Court entered its Order on Pending Motions, which granted the Defendant's Motion to Dismiss pursuant to C.R.C.P. 12(b)(5) for failure to state a claim upon which relief can be granted.
3. The Order on Pending Motions held that the Plaintiff's Complaint was inadequate under C.R.C.P. 12(b)(5) because a Colorado Open Records Act (CORA) inspection of 2,544 digital photographs of ballots (TIFF files) would be contrary to state law and that the law therefore offers the Plaintiff no relief under the facts alleged in the Complaint. See Order ¶ 13.

4 Pursuant to C.R.C.P. 59(a), this Motion has been timely filed within 15 days of entry of the Order on Pending Motions on March 10, 2010.

**Article VII, Section 8, of the Colorado Constitution**

5. The Order identifies Article VII, Section 8, of the Colorado Constitution as a state law that is contrary to allowing a CORA inspection of the TIFF files. The Court held that this constitutional provision's requirement for preservation of "secrecy in voting" would be violated if the TIFF files were subject to public inspection under CORA. See Order ¶¶ 8-9, 12.

6. The Plaintiff respectfully submits that the allegations of the Complaint, viewed in the light most favorable to the Plaintiff, are incompatible with the Court's conclusion that constitutional secrecy in voting would be violated as a matter of law by a CORA inspection of the TIFF files.

7. In evaluating the Defendant's Motion to Dismiss for failure to state a claim, the Court must accept all averments of material fact set out in the Complaint as true, and those allegations must be viewed in the light most favorable to the Plaintiff. See *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909 (Colo. 1996). In ruling on the Motion to Dismiss, the Court may consider only matters stated in the complaint and must not go beyond the confines of the pleading. See *Ashton Properties, Ltd. v. Overton*, 107 P.3d 1014 (Colo. App. 2004).

8. As the Court notes in Paragraph 2 of the Order, the Complaint alleges the material fact that the TIFF files are "digital photographic image[s]" of original paper ballots.<sup>1</sup> See Compl. ¶¶ 15, 25, 33.

9. Importantly, the Complaint also alleges the material fact that the paper ballots, from which the TIFF files were created, are *anonymous*. See Compl. ¶¶ 1, 33.

10. The allegation that the ballots are anonymous, like all other material allegations in the Complaint, must be regarded as true under *Dorman*, 914 P. 2d at 909. When viewed in the light most favorable to the Plaintiff, the allegation that the paper ballots are anonymous

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<sup>1</sup> The TIFF files now sought by the Plaintiff were created as scans of paper ballots, see Compl. ¶ 15, and are currently in the Defendant's possession on a disk, see Compl. ¶ 32. It bears noting, however, that the particular TIFF files on the disk in the Defendant's custody are not the only TIFF files that were created from the same ballots. Rather, the particular TIFF files sought here are simply *copies* of TIFF files that were created and stored somewhere else (i.e., on a different computer storage medium than the Defendant's disk) during the ballot scanning process. This Court's ruling that TIFF files are *de jure* equivalents of ballots and therefore are subject to all the requirements of Section 31-10-616(1), C.R.S., will have implications not just for the legal status of the particular TIFF files sought by the Plaintiff in this CORA case, but also for *all* of the identical TIFF files ever created and prematurely destroyed or otherwise duplicated and maintained outside of the ballot box after the election.

necessarily implies that the TIFF files, as digital photographic images of those same paper ballots, must also be anonymous.

11. Because secrecy in voting cannot be violated by a CORA inspection of anonymous images of anonymous ballots, Article VII, Section 8, of the Colorado Constitution does not support dismissal of the Complaint pursuant to C.R.C.P. 12(b)(5) under the facts alleged.

**Uniform Photographic Copies of Business and Public Records as Evidence Act**

12. To the extent the Court relies upon the Uniform Photographic Copies of Business and Public Records as Evidence Act (the UPCBPREA), §§ 13-26-101 to -104, C.R.S., to justify subjecting TIFF files to the requirements that Section 31-10-616(1), C.R.S., imposes upon “ballots,” see Order ¶ 11, the Plaintiff respectfully suggests that the Court has misapplied the UPCBPREA.

13. Ballots are properly regarded as instruments that inherently possess independent legal significance, cf. *Board of County Comm'rs v. O'Dell*, 920 P.2d 48, 51 (Colo. 1996), which significance cannot be imparted to a mere copy of the instrument. A ballot’s legal status is inherent in the tangible physical form of the instrument, which is why not only the content and layout but also the required physical characteristics of paper ballots are prescribed with specificity in Sections 31-10-902(1) to -902(3), C.R.S.

14. The UPCBPREA was adopted by Colorado in 1955. Its text was drawn from the text of the model Uniform Photographic Copies of Business and Public Records as Evidence Act drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL).

15. The purpose of the UPCBPREA, like the purpose stated by the NCCUSL for the model act, was limited to providing “legislative sanction for the use of photographic records as evidence.” See American Bar Association, “Uniform Photographic Copies of Business and Public Records as Evidence Act” (Sept. 8, 1949).

16. The UPCBPREA cannot properly be interpreted to transform the TIFF files into the equivalents of paper ballots for any purpose other than the purpose of establishing evidentiary admissibility. UPCBPREA cannot endow copies of ballots with the same independent legal significance that is otherwise inherent in actual ballots themselves.

17. If UPCBPREA did apply to the TIFF files as the Court has interpreted it to apply, then the televised images of ballots that were shown by Grassroots TV on election night and recorded in digital video (i.e., by “photographic ... or other process which accurately reproduces or forms a durable medium for reproducing the original,” see § 13-26-102, C.R.S.),<sup>2</sup> would also be the legal equivalents of ballots and, like ballots and TIFF files, would have to be preserved in the ballot box and destroyed consistently with the requirements of Section 31-10-616(1), C.R.S.

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<sup>2</sup> See Compl. ¶¶ 26, 29-30.

18. The Plaintiff asks the Court to reconsider and reverse its holding that the UPCBPREA subjects the TIFF files to the requirements of Section 31-10-616(1), C.R.S., as though the TIFF files were themselves “ballots.” The term, “ballots,” and the related requirements of Section 31-10-616(1) should be interpreted to apply only to the original paper ballots themselves. The TIFF files are properly regarded as constituting “other official election records,” which are to be preserved according to the requirements of Section 31-10-616(2), C.R.S., rather than the requirements of Section 31-10-616(1).

**Section 31-10-616(1), C.R.S.**

19. The Order identifies Section 31-10-616(1), C.R.S., as a state law that is contrary to allowing a CORA inspection of the TIFF files. See Order ¶¶ 7, 9, 12-13.

20. Section 31-10-616(1), C.R.S., states in pertinent part that the “ballots,” except for removal during an election contest, “shall remain in the ballot box” until their destruction.

21. Even if the TIFF files are the equivalents of “ballots” for purposes of Section 31-10-616(1), C.R.S., which the Plaintiff disputes for the reasons that include those set out in Paragraphs 12-18, *supra*,<sup>3</sup> the Plaintiff respectfully suggests that the Court has misapplied Section 31-10-616(1) in holding that “contest proceedings” are the *only* circumstance in which ballots may be accessed after an election, see Order ¶ 9.

22. Recounts of Title 31 elections are provided for in Section 31-10-1207, C.R.S.

23. A recount may be triggered automatically, see § 31-10-1207(1), C.R.S., or it may be conducted at the request of any interested party, see § 31-10-1207(2), C.R.S.

24. Recounts are distinct from election contests, which are governed by a separate Part of Title 31. See §§ 31-10-1301 to -1308, C.R.S.

25. Aspen’s election used paper ballots. Under Section 31-10-1207(5), C.R.S., “[i]n precincts using paper or electronic ballots, the recounts shall be *of the ballots cast...*” (emphasis added).

26. Any recount “of the ballots cast” necessarily requires the removal of those ballots from the ballot box, despite the fact that removal for recounts is not stated in Section 31-10-616(1), C.R.S., to be an exception to the non-removal requirement.

27. It is therefore plain from Title 31’s inclusion of provisions regarding recounts that contest proceedings *cannot* be the only exception to the non-removal requirement.

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<sup>3</sup> The Plaintiff also wishes to emphasize here that the Complaint does not allege that the TIFF files are, in fact, accurate representations of the original paper ballots.

28. Just as recounts are permissible without an exception expressly stated in Section 31-10-616(1), C.R.S., so, too, are CORA inspections permissible without an expressly stated exception for CORA. The Plaintiff accordingly asks the Court to reconsider and reverse its holding that Section 31-10-616(1) prohibits CORA inspection of the TIFF files.

**Substantial Compliance Standard**

29. The Plaintiff respectfully suggests that the Court has given Section 31-10-616(1), C.R.S., an overly literal construction, when the correct judicial standard for determining what acts satisfy the requirements of Title 31, Article 10, requires only substantial compliance.

30. The Court is directed by the statute to resolve controversies over Title 31's requirements "with a view to obtaining a *substantial compliance with the provisions of this article...*" See § 31-10-1401, C.R.S. (emphasis added).

31. A determination of whether substantial compliance has been satisfied requires the Court to consider "(1) the extent of the ... noncompliance ..., (2) the purpose of the provision violated and whether that purpose is substantially achieved despite the ... noncompliance, and (3) whether [a good faith effort to comply can be reasonably inferred]." *Cf. Bickel v. City of Boulder*, 885 P.2d 215, 227 (Colo. 1994).

32. Here, the extent of noncompliance with Section 31-10-616(1), C.R.S., that would be caused by allowing a CORA inspection of the TIFF files is minimal or non-existent. The disk containing TIFF files may be removed from the ballot box, copied to a new disk and then immediately replaced in the ballot box.

33. To the extent that the purpose of Section 31-10-616(1), C.R.S., may be to protect the physical integrity or security of the TIFF files or of paper ballots, that purpose would not be adversely affected by a CORA inspection of the TIFF files. The temporary removal of the disk containing TIFF files from the ballot box for purposes of copying the TIFF files onto an inspection disk would have no effect on the integrity or security of the ballots or of the disk containing the TIFF files.

34. To the extent that the purpose of Section 31-10-616(1), C.R.S., may be to preserve anonymity of the paper ballots, that purpose would be completely unaffected by a CORA inspection of the TIFF files. As discussed in Paragraphs 9-11, *supra*, the TIFF files are created from ballots that have been alleged to be and therefore, for purposes of resolving the Defendant's Motion to Dismiss, must be accepted by the Court to be anonymous.

35. In its Order, the Court has adopted a loose construction of the term, "ballots," side by side with a literal construction of the non-removal requirement. The Plaintiff respectfully urges that this inconsistent approach to construing terms within a single statutory provision should be reconsidered in favor of applying the substantial compliance standard, and that the Court should therefore hold that allowing a CORA inspection of the TIFF files can and does constitute substantial compliance with the requirements of Section 31-10-616(1), C.R.S.

**Legislative History of Section 31-10-616(1), C.R.S.**

36. The Plaintiff respectfully submits that the Court should consider the legislative history of Section 31-10-616(1), C.R.S., before applying that statute to the TIFF files in this case.

37. Much of the substance of Section 31-10-616(1), C.R.S., antedates modern methods of voting, including the use of the constitutionally required anonymous ballot. See 1879-1885 Colo. Sess. Laws 186-87.

38. The legislative history of Section 31-10-616(1), C.R.S., suggests that the statute was originally intended by the General Assembly to prohibit access to ballots at a time when ballots were required by the Colorado Constitution to be individually identifiable. See Colo. Const. 1877 art. VII, § 8 (“All elections by the people shall be by ballot; every ballot voted shall be numbered in the order in which it shall be received, and the number be recorded by the election officers on the list of voters opposite the name of the voter who presents the ballot.”)

39. The Colorado Constitution was amended in 1946 to prohibit the marking of ballots in any way that made them identifiable, yet Section 31-10-616(1)’s language remained largely unchanged even after this change in voting methods. See § 31-10-616(1), C.R.S.

40. Section 31-10-616(1), C.R.S., is now obsolete to the extent its specific provisions are designed to protect the anonymity of the ballot in connection with voting methods that are no longer in use or constitutionally permitted in Colorado. The Court should interpret the statute with reference to this legislative history and should hold that Section 31-10-616(1) does not properly prohibit a CORA inspection of anonymous TIFF files.

WHEREFORE, the Plaintiff respectfully asks that the Court grant this Motion pursuant to C.R.C.P. 59(a)(4) to reconsider its Order on Pending Motions entered on March 10, 2010, and to amend the judgment to vacate the Court’s dismissal of the Complaint and to state instead that the Defendant’s Motion to Dismiss is denied.

Respectfully submitted this 24th day of March, 2010.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of March, 2010, I served a true and correct copy of the foregoing **PLAINTIFF'S MOTION FOR AMENDMENT OF JUDGMENT PURSUANT TO C.R.C.P. 59(a)(4)** by the method indicated below to each of the following:

<b><u>Attorney</u></b>	<b><u>Firm And/Or Address:</u></b>	<b><u>Method</u></b>
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