

Marilyn Marks

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August 16, 2011

Clerk Myers:

This letter is in response to your denial of my CORA request to inspect the voted ballots. I have pasted in the relevant emails below.

I ask that you reconsider your denial of my request to inspect anonymous voted ballots. Please review in more depth the attached order from Judge Gonzales in the Gessler v Myers case. It is quite clear that the court opined that ballots are open public records except in cases where the ballots fail to be anonymous. As you know, legal ballots must be anonymous, and have no markings that would personally identify the voter. However, I have offered to either take an oath of confidentiality or suggest that any identifiable ballots be withheld at the time of inspection, if indeed there are any such identifiable ballots. Therefore, I am only seeking open public records as defined by the court.

Please see page 12 and 13 of the court's opinion as excerpted below, with yellow highlights as mine:

“Voted ballots are not per se privileged. Voted ballots are “election records.” Section 1-1-104 (11), C.R.S. (2010) (“‘Election records’ includes but is not limited to accounting forms, certificates of registration, pollbooks, certificates of election, signature cards, all affidavits, mail-in voter applications, mail-in voter lists and records, mail-in voter return envelopes, voted ballots, unused ballots, spoiled ballots and replacement ballots”)(emphasis added.) This definition is incorporated into the Colorado Open Records Act (CORA). Section 24-72-204(8)(c)(II), C.R.S. (2010).

CORA exempts only certain election records from disclosure. “A designated election official shall not allow a person, other than the person in interest, to inspect election records of any person that contain the original signature, social security number, month of birth, day of the month of birth, or identification of that person, including electronic, digital, or scanned images of a person’s original signature, social security number, month of birth, day of the month of birth or identification.” Section 24-72-204(8)(a), C.R.S. (2010). An election record, including a voted ballot, may be disclosed as long as the identity of the voter is not disclosed.

This interpretation is not inconsistent with Colo. Const. art. VII, § 8. A ballot cannot “be marked in any way whereby the ballot can be identified as the ballot of the person casting it.” Id. An election official cannot “disclose how any elector shall have voted.” Id. This provision does not prohibit disclosure of ballots if the identity of the person who cast the ballot cannot be discerned.

Where the ballots, as voted, by content or structure may disclose the identity of the voter they are not public records and may not be subjected to public inspection.”

I assume that the voted ballots in Saguache are all legal, anonymous ballots, or otherwise, you and other election officials would have separated them for reporting to the District Attorney. Again, I am not asking to inspect any such non-anonymous ballots.

To provide the level of transparency and verifiability which the citizens of Colorado deserve, the anonymous ballots should be inspected and tabulations verified. For you to continue to fight transparency and verifiability of elections is poor public policy and a tremendous squandering of public resources on unnecessary litigation.

I request that you immediately reconsider and rescind your denial of these public records and permit my inspection appointment as required on September 7. Otherwise, I will instruct Mr. McGuire to initiate action in state district court to compel you to allow public inspection of the requested records.

Please let me know if you have questions or comments.

If you continue to deny access to any of the above public records, please provide a written statement of the grounds for the denial, citing the law or regulation under which access is denied as required by C.R.S. § 24-72-204(4).

Please accept this as continued notice of intent to file application under 24-72-204 (5) if you deny the records request.

Marilyn Marks

From: Melinda Myers [mailto:mmyers@saguachecounty-co.gov]
Sent: Tuesday, August 16, 2011 3:52 PM
To: Marilyn Marks
Subject: Re: FW: CORA Request 1.11.11 A--Renewed 8.12.11

Ms. Marks,

Our office see nothing in Judge Gonzolas order that would indicate the ballots are now public records.

Allowing Secretary Gessler access to the voted ballots is not the same as allowing anyone unfettered access to the confidential voted ballots.

We are going to deny your request with the same rational as it was denied the first time you submitted this request.

CRS 24-72-204(6)(a), that it will cause substantial injury to the public interest.

Melinda Myers

On Mon, Aug 15, 2011 at 11:10 PM, Marilyn Marks <marilyn@aspenoffice.com> wrote:

Clerk Myers,

I would like to confirm September 7 as the date for my visit to inspect the ballots.

Please immediately confirm that September 7 for an all-day appointment, and let me know what the estimated cost is for the work.

I plan to bring a high speed copier/scanner to make copies of the ballots. If any ballots are identifiable by voter, I will not copy them.

Unless I hear from you by Wednesday afternoon (8/16), I will make travel arrangements and other scheduling arrangements and assume that the date is confirmed. I will be happy to talk with you about other logistics to provide adequate staff or judges to oversee this inspection.

Marilyn Marks

From: Marilyn Marks

Sent: Friday, August 12, 2011 2:54 PM

To: Melinda Myers

Cc: Benjamin F. Gibbons, P.C.; bennstere@aol.com; 'Lisa Cyriacks'; 'Ed Nielsen'; Carlson Steve; Connie Trujillo; 'Al Kolwicz'

Subject: CORA Request 1.11.11 A--Renewed 8.12.11

Clerk Myers,

This is in reference to my CORA request of 1.11.11 below which you denied.

In light of the court's ruling in the Gessler v Myers case, I wish to renew my request to conduct a review of the anonymous voted ballots as stated below. The court made it clear that anonymous ballots are open public records.

Based on the language of the court's order requiring an "initial review by authorized persons" to review ballots for anonymity, I assume that you would require a sworn official (judge, canvass board member, staff, etc.) to pre-review the ballots to confirm their anonymity before my inspection. I am willing to pay the reasonable cost of that process which would presumably be done almost simultaneously with the inspection.

Of course during my review of the ballots, I am happy to take an oath of confidentiality should any voter's identified ballot be accidentally shown to me. I also understand that the ballots must be handled in ways to preserve their integrity and security.

As noted below, I understand that the inspection will take a bit of logistical coordination and planning. In that regard, I would like to propose that the inspection appointment be set for September 6 or 7, rather than requiring the shorter time frames allowed under CORA.

If the Center Post Dispatch, other media representatives or citizens wish to participate in the inspection, I would be happy to coordinate my inspection with theirs to increase the efficiency and decrease the disruption to your staff's schedule of work.

If you deny access to any of the above public records, please provide a written statement of the grounds for the denial, citing the law or regulation under which access is denied as required by C.R.S. § 24-72-204(4).

Please accept this as a notice of intent to file application under 24-72-204 (5), if you deny the information request.

Please let me know if you have questions.

Marilyn Marks

From: Marilyn R Marks
Sent: Tuesday, January 11, 2011 2:25 AM
To: Melinda Myers
Cc: gibbonslaw@amigo.net; Joe Richey; Harvie Branscomb
Subject: CORA Request 1.11.11 A

This request is made under the Colorado Open Records Act

I wish to visit Saguache County to inspect and copy the voted ballots from the November 2010 election.

I understand that this may require some logistical planning. Therefore, I am requesting your assistance in making those arrangements.

If you would prefer that only election judges or canvass board members handle the ballots, I am willing to either recruit qualified judges as volunteers or pay the judges' fee.

I anticipate that the work may take 1 full business day, and would require two judges if they are to handle ballots.

I anticipate that some representatives of Coloradans for Voting Integrity (<http://www.cfvi.us/>) may be joining me in this request and inspection activity.

Please let me know what the anticipated cost would be for this exercise, excluding copying cost.

Thank you for your assistance.

Marilyn Marks

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