

**Supreme Court, State of Colorado**

**101 W. Colfax, Suite 800  
Denver, Colorado 80202**

Court of Appeals:  
Case No. 10CA1111 – Division III  
Opinion by Judge Furman, Roy and Lichtenstein

Pitkin County District Court:  
Case No.: 09CV294  
Honorable James B. Boyd, Judge

**Petitioner:**  
**KATHRYN KOCH**  
v.  
**Respondent:**  
**MARILYN MARKS.**

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**▲ COURT USE ONLY ▲**

Case No.:

**PETITION FOR WRIT OF CERTIORARI**

## CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition complies with all the requirements of C.A.R. 32 and 53, including all formatting requirements set forth in these rules. Specifically, I certify that:

- \* The brief complies with C.A.R. 53(a) as it contains 3,791 words.
- \* The brief complies with C.A.R. 53(a) for the party raising the issue. It contains under separate heading, (1) and advisory listing of the issues presented for review; (2) reference to the official or unofficial reports of the opinion or judgment and decree of the court; (3) a concise statement of the grounds on which jurisdiction of the Supreme Court is invoked; (4) a concise statement of the case containing the matters material to consideration of the issues presented; (5) a direct and concise argument amplifying the reasons relied on for the allowance of the writ; and (6) an appendix containing (a) copies of the opinions in the lower courts; and, (b) the text of any pertinent statutes or ordinances.

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John P. Worcester

**TABLE OF CONTENTS**

**INTRODUCTION ..... 1**  
**ADVISORY LISTING OF ISSUES PRESENTED FOR REVIEW ..... 2**  
**OPINION OF THE COURT OF APPEALS ..... 3**  
**SUPREME COURT JURISDICTION ..... 3**  
**STATEMENT OF THE CASE ..... 3**  
**REASONS FOR GRANTING THIS PETITION ..... 5**  
**CONCLUSION ..... 15**

**APPENDIX**

**TABLE OF AUTHORITIES**

**Cases:**

*City of Westminster v Dogan Construction Co.*, 930 P.2d 585 (Colo. 1997).....12  
*Gray v Huntley*, 238 P. 53 (Colo. 1925) .....9  
*Kellogg v Hickman*, 21 P. 325 (Colo. 1889) ..... 7  
*Kindel v LeBert*, 48 P. 641 (Colo. 1897) .....9  
*Mahaffey v Barnhill*, 855 P.2d 847, 850 (1993.) .....9  
*McIntyre v Ohio Elections Commission*, 514 U.S. 334 (1995.) ..... 9  
*Pearson v Board of Supervisors of Brunswick County*, 21 S.E. 483 (Va. 2895) ... 7  
*People ex rel. Barton v Londoner*, 22 P.2d 764 (Colo. 1889) .....7  
*Ritter v Jones*, 207 P.3d 954 (Colo. App. 2009).....12  
*State ex rel. Automatic Registering Machine v Green*, 168 N.E. 131 (Oh.1929) ... 7  
*Taylor v Pile*, 391 P.2d 670 (Colo. 1964) ..... 9

*Young v Simpson*, 42 P. 666 (Colo.1985)..... 10

**Constitutional provisions:**

Colo. Const. art. VII, §8 (1876) ..... 6

Colo. Const. art. VII, §8 (1947) ..... passim

Colo. Const. art. VII, §11 ..... 1

**State Statutes:**

Colorado Municipal Election Code, §§31-10-101, *et seq.*, C.R.S.....3

Colorado Open Records Act. §§24-72-200.1, *et seq.*, C.R.S. .... 3

§§13-26-102, C.R.S.....11

§24-72-204, C.R.S.. .....passim

§31-10-616, C.R.S.. ..... passim

**Rules of Civil Procedure:**

C.R.A 39.5 . ..... 13

## INTRODUCTION

In elections, there is a functional conflict between two important values: the ability to verify election results and the right of voters to a secret ballot. All election systems used in the United States since the introduction of the secret ballot in the late nineteenth century have sought to strike a compromise between these two values. In arriving at a compromise, election systems have uniformly given greater weight to secrecy over verifiability. Nonetheless, verifiability was not entirely sacrificed as confidence in elections results is critical to the democratic process. Verifiability was preserved by introducing other mechanisms in the conduct of elections, including post election recounts and audits. The ultimate verification mechanism and safeguard is the court contest. Colorado incorporated article VII, section 8, into its Constitution in 1876 and the Colorado Legislature has since that time enacted numerous “laws to secure the purity of elections, and guard against the abuses of the elective franchise” as commanded by section 11 of the same article of the Constitution.

This Petition requests a review of the Opinion by the Court of Appeals (the Opinion) that essentially abrogates the right to a secret ballot in Colorado and fundamentally disturbs the Constitutional compromise in favor of verifiability over the right to a secret vote. The Opinion reverses a District Court decision that held

that article VII, section 8, of the Colorado Constitution and §31-10-616(1) of the Municipal Election Code protect cast ballots from public disclosure when such ballots are requested pursuant to the Colorado Open Records Act, §§24-72-200.1, *et seq.*, C.R.S. (“CORA”).

### **ADVISORY LISTING OF ISSUES PRESENTED FOR REVIEW**

1. Whether article VII, §8, of the Colorado Constitution prohibits making cast election ballots available for public inspection pursuant to the Colorado Open Records Act, §§24-72-200.1, *et seq.*, C.R.S.

2. Whether §31-10-616 of the Municipal Election Code prohibits making available for public inspection copies of cast election ballots pursuant to the Colorado Open Records Act, §§24-72-200.1, *et seq.*, C.R.S.

3. Whether the Court of Appeals erred in failing to remand the case to the District Court for a hearing in accordance with §§24-72-204(6)(a) and (b), C.R.S., to determine the propriety of the custodian’s refusal to make cast ballots available for public inspection on the grounds that such disclosure “would do substantial injury to the public interest.”

4. Whether the Court of Appeals erred in awarding appellate attorney fees to the Respondent in the absence of a determination by the District Court pursuant to §24-72-204(6)(a), C.R.S., that “the custodian, in good faith, after exercising

reasonable diligence, and after making reasonable inquiry, was unable to determine if disclosure of the public record was prohibited without a ruling by the court.”

### **OPINION OF THE COURT OF APPEALS**

The Opinion of the Court of Appeals is reported at *Marks v Koch*, \_\_\_ P.3d \_\_\_, 2011 W.L. 4487753; 2011 Colo. App. LEXIS 1556 (Case No. 10CA1111) (Colo. App. Sept. 29, 2011). The Opinion is appended as Appendix B.

### **SUPREME COURT JURISDICTION**

The Court of Appeals issued its decision on September 29, 2011, at 8:00 A.M. The mandate was stayed until this Court has had an opportunity to rule on this Petition.

There has been no Order or request for an Order respecting a rehearing or an extension of time within which to file a Petition for a Writ of Certiorari.

### **STATEMENT OF THE CASE**

In May 2009, the City of Aspen conducted a municipal election to select its Mayor and two members of City Council. In accordance with the Aspen City Charter, the election was governed by the Municipal Election Code, §§31-10-101, *et seq.*, C.R.S., amended to employ a new instant runoff voting procedure which used a computerized system that tabulated the results from digitally produced images of each ballot.

Following the election, the Respondent, Marilyn Marks (Marks), filed a Colorado Open Records Act (CORA), §§24-72-200.1, *et seq.*, C.R.S., request to inspect all 2,544 digital copies of the ballots (TIFF files) cast in the election. Marks subsequently amended her request to exclude any image that contained a vote for a write-in candidate or ballot markings that could be used to identify the voter casting the ballot. The Petitioner, Kathryn Koch, the City Clerk of the City of Aspen (the Clerk), denied Marks' request, asserting that (1) article VII, §8, of the Colorado Constitution and §31-10-616(1) of the Municipal Election Code prohibit making cast election ballots available for public inspection; and, (2) that making ballots, or copies of ballots, available for public inspection "would do substantial injury to the public interest."

Marks filed a Complaint with the District Court to enforce her CORA request. The District Court granted a motion to dismiss for failing to state a claim upon which relief could be granted. The District Court held that (1) the TIFF files were equivalent to ballots; (2) releasing TIFF files was prohibited by the Colorado Constitution; and (3) releasing TIFF files was prohibited by §31-10-616(1), C.R.S. The District Court did not address the Clerk's contention that disclosure of the TIFF files "would do substantial injury to the public interest."

The Court of Appeals reversed the decision of the District Court and remanded



the case with instructions to the District Court to “release the TIFF files to Marks for inspection pursuant to CORA, with the exception of those TIFF files that contain either a write-in candidate or ballot markings that could identify an individual voter. Whether a TIFF file contains ballot markings that could identify an individual voter is a matter within the Clerk’s discretion to determine.” Opinion, pg 15. Despite reversing the District Court’s decision to dismiss the case at a preliminary stage, the Court of Appeals did not remand the case for a determination pursuant to §§24-72-204(6)(a) and (b), C.R.S., that the custodian properly denied the CORA because public disclosure of the TIFF images “would do substantial injury to the public interest.”

Finally, notwithstanding that the Clerk has yet to be given an opportunity, pursuant to §§24-72-204(6)(a) and (b), C.R.S., to show that she “in good faith ... was unable to determine if disclosure of the public record was prohibited without a ruling of the court,” the Court of Appeals granted Marks her appellate attorney fees.

### **REASONS FOR GRANTING THIS PETITION**

This Petition seeks to have the Court review a decision of the Court of Appeals that permits TIFF files - in other words, copies of ballots - cast in a municipal election to be made available for public inspection pursuant to a CORA

request. In arriving at its opinion, the Court of Appeals interpreted Colo. Const. art. VII, §8, and §31-10-616(1) of the Municipal Election Code, to conclude that (a) the “secrecy in voting” phrase of the Constitution does not forbid the public disclosure of the content of a ballot provided that the content cannot be used to discern the identity of an individual voter; and, (b) that since §31-10-616(1), C.R.S., refers specifically to “ballots” and since TIFF files are not “ballots”, the statute does not prevent the public release of TIFF files.

The principle issues presented for review are constitutional issues of first impression before the Court and involve questions of considerable substance relating to the election laws in Colorado. This Court has never had an opportunity to interpret the phrase “secrecy in voting” that is found in article VII, §8 of the Colorado Constitution. Indeed, this Court has only had limited occasions to cite this particular section of the Constitution. Those limited cases, discussed below, are not in accord with the opinion of the Court of Appeals in the instant case. No appellate court, other than the Court of Appeals in the instant case, has ever discussed §31-10-616 of the Municipal Election Code in a published opinion.

***The Colorado Constitution.***

The secret ballot has been a cornerstone of our representative form of government since the adoption of our Constitution upon admission to the Union.

Article VII, §8, of the 1876 Colorado Constitution states as follows:

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. The election officers shall be sworn or affirmed not to enquire or disclose how any elector shall have voted. In all cases of contested elections, the ballots cast may be counted, compared with the list of voters, and examined under such safeguards as may be prescribed by law.

The original Constitution's compromise addressing the conflict between verifiability and secrecy struck a balance that guaranteed voter secrecy by mandating the use of ballots, but also required that those ballots be distinctively marked to permit verification "in all cases of contested elections."

There has never been any doubt that the mandatory use of the ballot was intended to guarantee secrecy in voting. "The right to vote under our constitution is a vested constitutional right, with no condition imposed as to the manner of exercising the right, except that the vote be by ballot." *Kellogg v Hickman*, 21 P. 325, 326 (Colo. 1889). The "leading object of said section 8 was to preserve the purity of the ballot by ensuring its secrecy." *People ex rel. Barton v Londoner*, 22 P.2d 764, 768 (Colo. 1889). *See also State ex rel. Automatic Registering Machine v Green*, 168 N.E.131 (Oh. 1929) ("The term 'ballot' designates a method of conducting elections which will insure secrecy, as distinguished from open or *viva voce* voting"); *Pearson v Board of Supervisors of Brunswick County*, 21 S.E. 483,

485 (Va. 1895) (“The vote by ballot *ex vi termini* implies a secret ballot.”)

The people of Colorado have altered the Constitutional compromise between verifiability and secrecy by adopting amendments that further preserves secrecy in voting. The current version of art. VII, §8, of the Colorado Constitution (last amended in 1947) reads, in relevant part, as follows:

All elections by the people shall be by ballot, and in case paper ballots are required to be used, no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the person casting it. The election officers shall be sworn or affirmed not to enquire or disclose how any elector shall have voted. In all cases of contested elections in which paper ballots are required to be used, the ballots cast may be counted and compared with the list of voters, and examined under such safeguards as may be prescribed by law. Nothing in this section, however, shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election, provided that secrecy in voting is preserved.

...

(Emphasis added.)

The current version of the Constitution requires all ballots to be anonymous and allows the use of “any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election, provided that secrecy in voting is preserved.” Secrecy continues to be of paramount concern over verifiability in the latest compromise. The requirement that ballots be numbered to allow for verification was removed to further assure voters that their ballots would

forever remain a secret.

The right to cast a secret vote is the “right to vote one’s conscience without fear of retaliation.” *McIntyre v Ohio Elections Commission*, 514 U.S. 334, 343 (1995). The right encompasses not only the right to cast one’s vote in private, but also the right to maintain the confidentiality of one’s vote following an election. *Mahaffey v Barnhill*, 855 P.2d 847, 850 (Colo. 1993) (“Secrecy after casting a ballot is as essential as secrecy in the act of voting, and should also be preserved as vigorously.”) Even in an election contest, this Court has not required the opening of a ballot box absent some evidence of fraud or tampering of ballots. “To order the opening of ballot boxes in every election contest, and to order a recount of the ballots in every case merely because it is asked, without a proper basis therefor, would invite a contest after every election, no matter how honestly and efficiently conducted.” *Gray v Huntley*, 238 P. 53, 56 (Colo. 1925). *See also, Kindel v LeBert*, 48 P. 641 (Colo. 1897) (holding that if fraud is alleged in an election contest, courts should not order opening ballot boxes, or a recount, absent some evidence of fraud.) The constitutional right to cast a secret ballot carries with it the accompanying right to refuse to testify as to how or for what the vote was cast. *Taylor v Pile*, 391 P.2d 670, 673 (Colo. 1964).

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

As early as 1895 this Court recognized that the principal object of the laws passed by the Legislature for conducting elections “is to protect the voter in his constitutional right to vote in secret; to prevent fraud in balloting and secure a fair count.” *Young v Simpson*, 42 P. 666 (Colo. 1895).

Section 31-10-616(1), C.R.S., reflects a desire to not only preserve the physical security of ballots, but also to secure, in perpetuity, the secrecy of the information that can be gleaned from cast ballots. This statute specifically prohibits the Clerk from making available for public inspection the TIFF files, absent a court order issued in the course of an election contest. This statute reads, in relevant part, as follows:

**31-10-616. Preservation of ballots and election records.**

- (1) The ballots, when not required to be taken from the ballot box for the purpose of election contests, shall remain in the ballot box in the custody of the clerk until six months after the election at which such ballots were cast or until the time has expired for which the ballots would be needed in any contest proceedings, at which time the ballot box shall be opened by the clerk and the ballots destroyed by fire, shredding, or burial, or by any other method approved by the executive director of the department of personnel. ...
- (2) The clerk shall preserve all other official election records and forms for at least six months following a regular or special election.

(Emphasis added.) This statute is not ambiguous and leaves no room for doubt as to its meaning: the city clerk shall ensure that cast ballots remain secure and secret

for a period of six months after an election and thereafter destroy them. The only exception is in the event they are required in an election contest.

The Court of Appeals held that this section of the Municipal Election Code “does not exempt the TIFF files from release under CORA because TIFF files are not ‘ballots’...” Opinion at 15. In other words, copies of ballots are somehow different than original ballots and therefore are subject to public inspection. This distinction between copies and original ballots is simply not logical. It is akin to arguing that medical records, personnel files, trade secrets, or other public records lose their exempt status from disclosure under CORA upon being xerographically or digitally copied. As noted by the District Court, “Colorado law recognizes copies of public records, including ‘electronic imaging’, as the equivalent of the originals.” Order on Pending Motions, ¶11 (citing §13-26-102, C.R.S.)

The concerns about ballot secrecy is not lessened one iota by releasing TIFF files rather than the ballots themselves. The state law requirement that ballots be destroyed by “fire, shredding or burial” by the city clerk after the period for filing an election contest has past, reveals an overarching concern for preserving the secrecy of the contents of the ballots. Following an election and after the time has expired for an election contest, there is no valid reason to be concerned with the physical security of ballots. The only logical reason the law requires that ballots be

destroyed is to protect the secrecy of the contents of ballots and the privacy of voters for all time. At the end of the six month period, the Clerk is mandated to destroy the ballots and the TIFF files. It would be absurd to allow a city clerk to make copies of the ballots, permit her to only destroy the original ballots and not the images, and then release for public inspection the ballot images. It is not the form of the document (copy or original) that determines whether it should be kept confidential, but the content of the document itself. *City of Westminster v Dogan Construction Co.*, 930 P.2d 585 (Colo. 1997); *Ritter v Jones*, 207 P.3d 954, 959 (Colo. App. 2009) (“Our precedent eschews a strict attention to form and mandates a content-based inquiry into CORA disclosure exceptions.”)

**The case on remand.**

The District Court, in ruling upon the Clerk’s motion to dismiss, did not hold a hearing or make a determination that the Clerk properly withheld the TIFF files because “disclosure of the contents of said records [the TIFF files] would do substantial injury to the public interest” in accordance with §§24-72-204(6)(a) and (b), C.R.S. The District Court dismissed Marks’ Complaint on the grounds that “a CORA inspection of the TIFF files is contrary to state law.” Order on Pending Motions, ¶13. Accordingly, the District Court was not required to make a determination whether disclosure “would do substantial injury to the public



interest.”

Even if the Court of Appeals was correct in holding that state law does not prohibit the disclosure of the TIFF files, it was error for the Court of Appeals not to remand the case with instructions to hold the requisite hearing pursuant to §§24-72-204(6)(a) and (b), C.R.S. The Clerk is entitled to have a hearing and determination by the District Court that disclosure of the contents of the records sought by Marks “would do substantial injury to the public interest” pursuant to §§24-204(6)(a) and (b), C.R.S.

**Attorneys fees.**

The Court of Appeals granted Marks her appellate attorneys fees as she “prevailed on appeal and has stated a proper basis on which fees may be awarded to her.” Opinion at 16. The Opinion cites Rule 39.5, C.R.A. and §24-72-204(5), C.R.S., as the basis for holding that a “prevailing applicant” may receive an award of attorney fees. Rule 39.5 authorizes the award of appellate attorney fees “if attorney fees are otherwise recoverable.” §24-72-204(5), C.R.S., authorizes attorney fees against a custodian upon a determination that a denial of the right of inspection was not proper. However, §24-72-204(6)(a), C.R.S., reads in relevant part, that:

The attorney fees provision of subsection (5) of this section shall not apply in cases brought pursuant to this paragraph (a) by an official

custodian who is unable to determine if disclosure of a public record is prohibited under this part 2...

(Emphasis added.) The Clerk did not bring an action under §24-72-204(6)(a), C.R.S. Nevertheless, §24-72-204(6)(b), C.R.S., states that the custodian of public records need not bring an original action in District Court for a determination that disclosure of the public record “would do substantial injury to the public interest,” but may raise this defense in an application for an order under §24-72-204(5), C.R.S. The Clerk, did, in fact, raise a §24-72-204(6)(b), C.R.S., defense in the District Court, but as shown above, the District Court did not hold a hearing or make a determination that the defense was proper.

It is simply not fair or appropriate to have attorney fees imposed against the Clerk when a determination has yet to be made by the District Court that she did, or did not, properly deny disclosure of the TIFF files “in good faith, after exercising due diligence, and after making reasonable inquiry, was unable to determine if disclosure of the public record was prohibited without a ruling of the court.” §24-72-204(6)(a), C.R.S.

## **CONCLUSION**

For the above stated reasons, Petitioner requests the Court grant review of the questions presented in this Petition.

Respectfully submitted this 9th day of November, 2011.

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John P. Worcester,  
City Attorney, City of Aspen

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James R. True,  
Special Counsel, City of Aspen

ATTORNEYS FOR PETITIONER

**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of November, 2011, a true and correct copy of the foregoing **Petition for Writ of Certiorari** was served by U.S. Mail, postage prepaid, to the following person:

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## **APPENDIX TO PETITION FOR WRIT OF CERTIORARI**

- A.** *Marks v Koch*, Order on Pending Motions, Pitkin County District Court Case No. P09CV294 (May 10, 2010).
- B.** *Marks v Koch*, Opinion of the Colorado Court of Appeals, Case No. 10CA1111) (Sept. 29, 2011).
- C.** Relevant provisions of the Colorado Constitution and Statutes.

## APPENDIX C

### Relevant provisions of the Colorado Constitution and Statutes.

#### Colorado Constitution:

COLO. CONST. art. VII, sec. 8, (1876):

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. The election officers shall be sworn or affirmed not to enquire or disclose how any elector shall have voted. In all cases of contested elections, the ballots cast may be counted, compared with the list of voters, and examined under such safeguards as may be prescribed by law.

COLO. CONST. art. VII, sec. 8, (1947):

All elections by the people shall be by ballot, and in case paper ballots are required to be used, no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the person casting it. The election officers shall be sworn or affirmed not to enquire or disclose how any elector shall have voted. In all cases of contested elections in which paper ballots are required to be used, the ballots cast may be counted and compared with the list of voters, and examined under such safeguards as may be prescribed by law. Nothing in this section, however, shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election, provided that secrecy in voting is preserved.

When the governing body of any county, city, city and county or town, including the city and county of Denver, and any city, city and county or town which may be governed by the provisions of special charter, shall adopt and purchase a voting machine, or voting machines, such governing body may provide for the payment thereof by the issuance of interest-bearing bonds, certificates of indebtedness or other obligations, which shall be a charge upon such city, city and county, or town; such bonds certificates or other obligations may be made payable at such time or times, not exceeding ten years from the date of issue, as may be determined, but shall not be issued or sold in less than one year.

COLO. CONST. art. VII, sec. 11, (1876):

The general assembly shall pass laws to secure the purity of elections,

and guard against abuses of the elective franchise.

**State Statutes:**

Section 13-26-102, C.R.S.

**Business and public records as evidence.** If any business, institution, or member of a profession or calling or any department or agency of government in the regular course of business or activity keeps or records any memorandum, writing, entry, print, or representation, or combination thereof, of any act, transaction, occurrence, or event and in the regular course of business has caused any of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, optical disk, or other form of mass storage, electronic imaging, electronic data processing, electronically transmitted facsimile, printout, or other reproduction of electronically stored data, or other process which accurately reproduces or forms a durable medium for reproducing the original, the original may be destroyed in the regular course of business unless held in custodial or fiduciary capacity or unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not, and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This shall not be construed to exclude evidence any document or copy thereof which is otherwise admissible under the rules of evidence.

Section 24-72-204, C.R.S.

**Allowance or denial of inspection - grounds - procedure - appeal - definitions.**

(1) The custodian of any public records shall allow any person the right of inspection of such records or any portion thereof except on one or more of the following grounds or as provided in subsection (2) or (3) of this section:

(a) Such inspection would be contrary to any state statute.

...

(2) (a) The custodian may deny the right of inspection of the

following records, unless otherwise provided by law, on the ground that disclosure to the applicant would be contrary to the public interest:

...

(5) Except as provided in subsection (5.5) of this section, any person denied the right to inspect any record covered by this part 2 may apply to the district court of the district wherein the record is found for an order directing the custodian of such record to show cause why the custodian should not permit the inspection of such record; except that, at least three business days prior to filing an application with the district court, the person who has been denied the right to inspect the record shall file a written notice with the custodian who has denied the right to inspect the record informing said custodian that the person intends to file an application with the district court. Hearing on such application shall be held at the earliest practical time. Unless the court finds that the denial of the right of inspection was proper, it shall order the custodian to permit such inspection and shall award court costs and reasonable attorney fees to the prevailing applicant in an amount to be determined by the court; except that no court costs and attorney fees shall be awarded to a person who has filed a lawsuit against a state public body or local public body and who applies to the court for an order pursuant to this subsection (5) for access to records of the state public body or local public body being sued if the court finds that the records being sought are related to the pending litigation and are discoverable pursuant to chapter 4 of the Colorado rules of civil procedure. In the event the court finds that the denial of the right of inspection was proper, the court shall award court costs and reasonable attorney fees to the custodian if the court finds that the action was frivolous, vexatious, or groundless.

...

(6) (a) If, in the opinion of the official custodian of any public record, disclosure of the contents of said record would do substantial injury to the public interest, notwithstanding the fact that said record might otherwise be available to public inspection or if the official custodian is unable, in good faith, after exercising reasonable diligence, and



after reasonable inquiry, to determine if disclosure of the public record is prohibited pursuant to this part 2, the official custodian may apply to the district court of the district in which such record is located for an order permitting him or her to restrict such disclosure or for the court to determine if disclosure is prohibited. Hearing on such application shall be held at the earliest practical time. In the case of a record that is otherwise available to public inspection pursuant to this part 2, after a hearing, the court may, upon a finding that disclosure would cause substantial injury to the public interest, issue an order authorizing the official custodian to restrict disclosure. In the case of a record that may be prohibited from disclosure pursuant to this part 2, after a hearing, the court may, upon a finding that disclosure of the record is prohibited, issue an order directing the official custodian not to disclose the record to the public. In an action brought pursuant to this paragraph (a), the burden of proof shall be upon the custodian. The person seeking permission to examine the record shall have notice of said hearing served upon him or her in the manner provided for service of process by the Colorado rules of civil procedure and shall have the right to appear and be heard. The attorney fees provision of subsection (5) of this section shall not apply in cases brought pursuant to this paragraph (a) by an official custodian who is unable to determine if disclosure of a public record is prohibited under this part 2 if the official custodian proves and the court finds that the custodian, in good faith, after exercising reasonable diligence, and after making reasonable inquiry, was unable to determine if disclosure of the public record was prohibited without a ruling by the court.

(b) In defense against an application for an order under subsection (5) of this section, the custodian may raise any issue that could have been raised by the custodian in an application under paragraph (a) of this subsection (6).

Section 24-72-204, C.R.S.

**Preservation of ballots and election records.**

(1) The ballots, when not required to be taken from the ballot box for the purpose of election contests, shall remain in the ballot box in the

custody of the clerk until six months after the election at which such ballots were cast or until the time has expired for which the ballots would be needed in any contest proceedings, at which time the ballot box shall be opened by the clerk and the ballots destroyed by fire, shredding, or burial, or by any other method approved by the executive director of the department of personnel. If the ballot boxes are needed for a special election before the legal time for commencing any proceedings in the way of contests has elapsed or in case such clerk, at the time of holding such special election, has knowledge of the pendency of any contest in which the ballots would be needed, the clerk shall preserve the ballots in some secure manner and provide for their being kept so that no one can ascertain how any voter may have voted.

(2) The clerk shall preserve all other official election records and forms for at least six months following a regular or special election.