

<p>DISTRICT COURT, PITKIN COUNTY, STATE OF COLORADO</p> <p>Pitkin County Courthouse 506 East Main Street, Suite E Aspen, Colorado 81611</p>	<p>▲ COURT USE ONLY</p>
<p>Plaintiff:</p> <p>Marilyn Marks,</p> <p>Defendant:</p> <p>Kathryn Koch.</p>	<p>Case Number: 09 CV 294</p>
<p>Attorneys for Kathryn Koch:</p> <p>John P. Worcester, City Attorney Jim True, Special Counsel City of Aspen 130 S. Galena St. Aspen, Colorado 81611</p> <p>Telephone: (970) 920-5055 Facsimile: (970) 920-5119 E-mail: johnw@ci.aspen.co.us jimt@ci.aspen.co.us</p>	<p>Div.: 3</p>
<p style="text-align: center;">KATHRYN KOCH'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO AMEND JUDGMENT</p>	

Comes now the Defendant, Kathryn Koch, by and through her undersigned counsel, and hereby submits the following memorandum in opposition to Plaintiff's Rule 59(a)(4), C.R.C.P, motion to amend the court's Order on Pending Motions entered on March 10, 2020.

Plaintiff states five reasons in support of her motion to amend the court's order. For the reasons that follow, none of these stated reasons supports her motion.

1. The ballot images are anonymous only so long as they remain locked up and unavailable to public inspection.

Plaintiff argues that the paper ballots and the ballot images she seeks to inspect are anonymous and thus because they are anonymous "a CORA inspection of" them could not violate the secrecy in voting requirement of Article VII, Section 8, of the Colorado Constitution. While it is true that Plaintiff alleged that the ballot images are anonymous in her Complaint and therefore the court must accept that allegation as true, that fact does not change the court's analysis in the least. The manner in which the paper ballots were marked by voters is secret and will continue to be secret only so long as they remain locked away and are not made available for public inspection.

The original ballots provided to all voters were anonymous; that is to say, each ballot was indistinguishable from all other ballots. Once they were marked by voters and cast, they could no longer be considered to be anonymous. Distinguishing marks placed on the ballots, whether intentionally or unintentionally made, render the ballots no longer anonymous. However, even if no longer anonymous, they remain secret so long as they are not made available for public inspection. Plaintiff's argument in this regard makes no sense.

Even if Plaintiff is correct in stating that the public release of the ballot images would not be contrary to Article VII, Section 8, of the Colorado Constitution, she ignores the fact that it

would still be contrary to Section 31-10-616(1), C.R.S.

2. *Copies of ballots, or ballot images, should be treated no differently than the original ballots.*

Plaintiff argues that the court was in error to hold 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’.” Plaintiff’s Motion, ¶18. In essence, Plaintiff continues to argue that copies of ballots or images of the original ballots are somehow different than the original ballots and therefore are not subject to §31-10-616(1), C.R.S. The only mention in the court’s Order to this evidentiary rule is paragraph 11 of the Order which states: “Colorado law recognizes copies of public records, including electronic imaging”, as the equivalent of the originals. §13-26-102, C.R.S.” This statement is, of course, an accurate statement of the law in Colorado. The court obviously noted this provision of evidentiary law to point out that the courts and administrative agencies in Colorado may admit into evidence copies of documents as if they were originals. In other words, the Colorado rules of evidence recognize the general rule that a duplicate is admissible to the same extent as an original. Thus, a copy of a cast ballot deserves the same protection from public inspection as original ballots. The court’s statement in this regard hardly deserves to be reconsidered.

Although Defendant does not wish to belabor the point, she must emphasize that regardless of the application of the UPCBPREA, what Plaintiff argues is that any protected document becomes unprotected simply by the use of a photocopy machine. As Defendant has previously argued, the position Plaintiff wishes the court to take simply eviscerates the

plain language of Section 31-10-616(1), C.R.S., and would eviscerate all protections outlined throughout CORA and other statutes. Plaintiff's position is simply untenable.

3. Plaintiff misreads Section 31-10-616(1), C.R.S.

Plaintiff refuses to read Section 31-10-616(1), C.R.S. in a logical and rational manner. Instead, she invites the court to interpret the statute so as to lead to an absurd result. Section 31-10-616(1), C.R.S. reads 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 proceeding, 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.

(Emphasis added.) Plaintiff suggests that the court misapplied the statute in holding that contest proceedings are the only circumstance in which ballots may be accessed after an election. Plaintiff correctly points out that the ballot box must necessarily be opened in order to conduct a recount of the results. Section 31-10-1207, C.R.S., requires a recount to be taken if the election is close or if "an interested party" agrees to pay for a recount. A recount, when required to be conducted, is part of the election process and not conducted "after an election." An "election" does not end when all the ballots are cast. The Municipal Election Code sets forth multiple steps

that must take place after all the ballots are cast. For example, a critical part of the election process is the tabulation of the ballots cast. For this step in the election process to proceed, the ballot boxes may well need to be opened. This step of the election is not performed “after the election,” but as part of the election itself. Section 31-10-616(1), C.R.S., states that ballots “shall remain in the ballot box in the custody of the clerk until six months after the election...” The statute does not mean that the ballot box may not be opened after the ballots are cast, but rather, that the ballot box is to remain closed after all procedural steps of an election are completed. The only exceptions are stated in the statute: (a) if the ballots are “needed in any contest proceeding;” or, (b) if the “ballot boxes are needed for a special election.” Even in these situations, “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.” The phrase in §31-10-616(1), C.R.S., “after the election” must, necessarily, mean after all the procedural steps necessary to conduct an election are completed.

Plaintiff's request for the court to “reconsider and reverse” its holding is without merit.

4. Substantial Compliance is not the Proper Standard.

Plaintiff argues that the court should adopt a “substantial compliance standard” in determining whether the Defendant may release for public inspection the ballot images. In other words, Plaintiff suggests that if the Defendant made the ballot images available for public inspection, the Defendant would be in substantial compliance with Section 31-10-616(1), C.R.S. Thus, the release of the ballot images would not be contrary to any state law.

Even if substantial compliance is the proper standard to apply to this case, substantial

compliance with Section 31-10-616(1), C.R.S. can only mean that the City Clerk may not take any action that would fail to secure the ballots and ballot images in a manner that provides for their "being kept so that no one can ascertain how any voter may have voted." Anything less could not be considered even close to compliance with the requirements of the statute.

Plaintiff's argument that Defendant can make the ballot images available for public inspection and still be in "substantial compliance" with state law is simply frivolous.

5. *The legislative history of Section 31-10-616(1), C.R.S., is immaterial to the issues before the court.*

Plaintiff finally argues that the court should interpret §31-10-616(1), C.R.S., with reference to its legislative history in order to hold that the statute doesn't mean what it clearly states. If the statute is obsolete, the state Legislature should amend it. It should be noted, however, that §31-10-616, C.R.S., was amended three times since 1946 when Plaintiff believes the statute became obsolete. *See* Source note showing legislative history of §31-10-616(1), C.R.S., (the entire section was repealed and reenacted in 1975, subsection (1) was amended in 1979 and again in 1996.) The weakness of Plaintiff's argument is actually emphasized in examining the most recent amendment to the statute. The 1996 Session Laws, reveal that the legislature approved a change in the sentence which addresses the destruction of the ballots. Prior to 1996, the ballots could be destroyed "by any other method approved by the state archivist." (Emphasis supplied.) The 1996 amendment changed "state archivist" to "Executive Director of the Department of Personnel." *See*, Chapter 273, Section 135, Session Laws of Colorado 1996. If this section of the Code was obsolete, as Plaintiff argues, then the Legislature had the ability, if not the duty, to

address that in the 1996 amendment, in the 1979 amendment, or when it was repealed and reenacted in 1975. It is simply impossible to argue, as Plaintiff attempts, that this statute is obsolete and thus, to be ignored.

CONCLUSION

Plaintiff has failed to explain why the court should exercise its discretionary powers to amend its Order on Pending Motions. The reasons provided by Plaintiff in the instant motion were previously addressed in Defendant's Memorandum in Support of her Motion to Dismiss or should have been presented in Plaintiff's various pleadings filed in this action.

The sum and substance of Plaintiff's arguments for requesting an amendment is the same arguments she has presented throughout her case: (a) that an image of a ballot is not the same as an original ballot; and, (b) that Section 31-10-616(1), C.R.S., does not mean what it clearly states.

Defendant urges the court to summarily deny Plaintiff's motion as there are no grounds to amend the court's previously entered Order on Pending Motions.

DATED this 6th day of April, 2009

Respectfully submitted,

s/ John P. Worcester
John P. Worcester
City Attorney

s/ James R. True
James R. True
Special Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2010, a true and correct copy of the foregoing MEMORANDUM IN IN OPPOSITION TO MOTION TO AMEND was filed electronically with Nexis/Lexis to the following person(s):

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s/ Janet Raczak

Paralegal