

<p>DISTRICT COURT, MORGAN COUNTY, COLORADO 400 Warner Ft. Morgan, Colorado 80701</p> <hr/> <p>Plaintiffs: THE CITY OF FORT MORGAN, COLORADO, a municipal Corporation, and ANDREA STRAND, CUSTODIAN OF RECORDS</p> <p>v.</p> <p>Defendants: EASTERN COLORADO PUBLISHING COMPANY d/b/a THE FORT MORGAN TIMES and WILLIAM HOLLAND, a citizen of the State of Colorado</p> <hr/> <p>LIGHT, HARRINGTON & DAWES, P.C. Steven J. Dawes, No. 13193 1512 Larimer Street, Suite 300 Denver, Colorado 80202 Tel.: 303-298-1601 Fax: 303-298-1627 <i>Attorneys for The City of Fort Morgan and Andrea Strand</i></p>	<p style="color: red;">EFILED Document CO Morgan County District Court 13th JD Filing Date: Aug 14 2008 3:53PM MDT Filing ID: 21081209 Review Clerk: Jody L Andrews</p> <p style="text-align: center;">ΔCOURT USE ONLYΔ</p> <hr/> <p>Case Number: 08 CV 2</p> <p>Div.: C</p>
<p>ORDER RE: CITY OF FORT MORGAN'S MOTION TO DISMISS COUNTERCLAIM</p>	

The Court, having reviewed the briefs submitted by the parties in connection with Plaintiffs' Motion to Dismiss, and being fully advised, orders as follows:

Dismissal of a claim under C.R.C.P. 12(b) for failure to state a claim is appropriate where the undisputed facts fail to give rise to a legal claim for relief. If facts outside the Complaint are considered, a motion under C.R.C.P. 12(b) may be treated as one for summary judgment. Summary judgment is appropriate where there are no material issues of fact and the moving

party is entitled to judgment as a matter of law. C.R.C.P. 56.

The Court finds that the material facts are not in dispute. The City delivered to William Holland the City Council meeting agendas with information associated with the noticed agenda items, and Mr. Holland received advance notice that the evaluation of the City Manager, Michael J. Nagy, would be conducted on December 18, 2007. Mr. Holland also received a copy of the Policy and Procedure of Appointed Officials Personnel Reviews on or before November 30, 2007. His November 30, 2007, "Out and About" column indicates that Mr. Holland knew that City Council members would each be preparing a Draft Evaluation.

The facts further establish that in the past all open records requests made by the Defendants (hereinafter the "*Times*") under the Colorado Open Records Act (CORA) have been made in writing. The City's Custodian of Records, Andrea Strand, requires all records requests to be accompanied by a letter or a written form. The *Times* did not make a written request for Council's individual Draft Evaluations until December 28, 2007. There is no dispute that the *Times* did not request the Draft Evaluations from any of the three prior personnel evaluations which had occurred just weeks before Mr. Nagy's evaluation. There is also information in Mr. Nagy's Affidavit which indicates that Mr. Holland was aware of the status of the records before he filed his CORA request. Finally, there is no dispute that on December 20, 2007, the City Attorney disposed of the Draft Evaluations pursuant to the City's records retention policy and that the City's records retention policy provides for the disposal of draft documents when no longer needed.

The *Times* submitted no evidence to contest the foregoing facts. The *Times* primary argument was premised on a theory of spoliation. The City did not dispute facts set forth in the

Times' Response Brief, but it contends that even if the allegations are true no legal remedy exists for an order to recreate evidence.

Colorado Open Records Act and Duty to Preserve Records

CORA provides that each agency may make rules reasonably necessary to protect public records and prevent unnecessary interference with the discharge of the custodian's duties. C.R.S. § 24-72-203(1)(a). The Colorado Courts have recognized the importance of preventing unnecessary interference with the custodian's discharge of her office. *See Pruitt v. Rockwell*, 886 P2d. 315, 317 (Colo. App. 1994).

In this case it is undisputed that Andrea Strand, the City's records custodian, requires a written request for all open records requests, and that the *Times* has always complied with this requirement.¹ Further, the City has adopted the Municipal Records Retention Schedule approved by the Colorado Secretary of State. It is undisputed that the records in this case were individual draft evaluations created by members of City Council and disposed of according to the records retention schedule for draft documents prior to the *Times*' written request made on December 28, 2007.

The *Times* asserts that the duty of preserving evidence, as established in case law involving the doctrine of spoliation, should govern the preservation of documents subject to a records request under CORA. However, the plain language of CORA does not support this assertion. The plain language of the statute clearly provides the custodian with the authority to establish rules reasonably necessary to prevent the unnecessary interference with the discharge of

¹ This practice is consistent with similar standards set by the State. Attorney General Opinion No. 01-1 advises members of the public to make record requests clearly, and in writing to the appropriate agency. Op. Att'y Gen 01-1, question 2 (July 5, 2001).

her duties. Nothing in CORA requires a custodian of records to anticipate what public records someone is going to request and save those records prior to the actual request being made. While the *Times* contends that the custodian of records should have known that the *Times* would be requesting the Draft Evaluations because of an editorial written by Mr. Holland; under CORA a custodian of records is not obligated to make any public records available until request is made. *See Denver Publishing Co. v. Board of County Comm'rs*, 121 P.3d 190, 199 (Colo. 2005).

Notwithstanding editorials or personal conversations between Mr. Holland and the City Attorney, the statutory obligations of a custodian of records under CORA are not invoked until a written request for records is made. The facts are undisputed that the *Times*' request was made after the records were disposed of pursuant to the City's policies and procedures. Accordingly, the Court finds that the City had no duty to preserve the records beyond the time established in the rules adopted by the custodian of records. Further, requiring the custodian to preserve records which have not been requested pursuant to her rules would conflict with the plain language of CORA resulting in an unnecessary interference with the discharge of her duties.

Colorado Open Records Act and Remedies

The remedy provided by CORA to any person who is denied access to public records is limited solely to the right to bring an action in district court seeking an order directing the custodian of such public record to show cause why the custodian should not permit the inspection of the record. *See* C.R.S. § 24-72-204(5). The party requesting records under CORA has the burden of proof to establish that a public entity (1) improperly; (2) withheld; (3) a public record. *Wick Communications Co. v. Montrose County Bd. of County Comm'rs*, 81 P.3d 360 (Colo. 2003). Here, it is undisputed that the *Times* is seeking disclosure of records that are no

longer in existence. It stands to reason that the custodian of records cannot withhold a record that is not in her possession and control. Accordingly, there are no set of facts that can establish that Andrea Strand has improperly withheld a public record. The Court finds that there is no improper withholding of a public record in this case, and that there is no basis for the *Times*' claims under CORA.

Application of the Spoliation Doctrine & Mandatory Injunction

The *Times* Counterclaim asks this Court to issue a Mandatory Injunction, ordering the City to recreate Draft Evaluations which it alleges were destroyed for nefarious reasons constituting spoliation. Mandatory injunctive relief is granted only in rare cases. *See Snyder v. Sullivan*, 705 P.2d 510, 514, n.5 (Colo. 1985). The essential purpose of a mandatory injunction is to preserve the status quo and prevent injury, rather than to redress past wrongs. *Id.* Here, the undisputed facts demonstrate the alleged injury, the disposition of the Draft Evaluations, occurred when the City followed its records retention policy. Therefore, a mandatory injunction would not serve to prevent injury or preserve the status quo,. Accordingly, the Court finds that the *Times*' has failed to establish a basis for it to grant the equitable relief of a mandatory injunction as requested in the Counterclaim.

The *Times* urges this Court to exercise its discretion to require the City to recreate the Draft Documents under the spoliation doctrine. The Court refuses to do so. This Court has found that the City had no duty to preserve records where the *Times* failed to provide the City with a request according to the custodian's rules. Generally, where a party to an action fails to preserve or destroys evidence favorable to the opposing party, the court will instruct the jury to infer that the evidence was favorable to the opposing party. *See Rodriguez v. Schutt*, 896 P.2d

881 (Colo. App. 1994). The *Times* has failed to provide relevant law to support an order to recreate evidence under this doctrine. While there are some references to the Court's broad discretion to remedy spoliation, there is no case that goes so far as to require the recreation of evidence.

The Court finds that the doctrine of spoliation does not apply in this case. The *Times* seeks public records under CORA, therefore its sole remedies are found under that statute. Moreover, the *Times* knew of the timeline for the creation of the Draft Evaluations for Mr. Nagy's Evaluation as set forth in the personnel review policy. The City's records retention policy was available to the public including the *Times*, which provides that draft documents are disposed of when no longer needed. Even before Mr. Holland filed his records request on December 28, 2007, Mr. Nagy indicated to him that it was his impression that the records had been disposed of. With regard to Mr. Nagy's Supplemental Affidavit, it lacks the evidentiary requirements set forth in Rule 56 and cannot be entirely considered by this court. It is undisputed that the disposal of the Draft Evaluations was done according to the City's policies and procedures, and that the *Times* was late in requesting the Draft Evaluations. Based upon the foregoing reasons that Court hereby grants the Plaintiffs' Motion to Dismiss and orders the Defendants' Counterclaim dismissed.

Dated this ___ day of _____, 2008.

BY THE COURT

Judge, Morgan County District Court