

DISTRICT COURT, MORGAN COUNTY,  
 COLORADO  
 Court Address: 400 Warner Street, P.O. Box 130  
 Fort Morgan, CO 80701

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**Plaintiffs-Counterclaim Defendants:**  
 THE CITY OF FORT MORGAN, COLORADO, a  
 municipal corporation; and,

ANDREA STRAND, custodian of records,  
 v.

**Defendant-Counterclaimant:**  
 EASTERN COLORADO PUBLISHING COMPANY,  
 doing business as *The Fort Morgan Times*;

and

**Counterclaimant:**  
 WILLIAM HOLLAND, a citizen of the State of Colorado.

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Case Number: **08 cv 00002**

Division : **C**

**[Proposed] ORDER DENYING  
 CITY OF FORT MORGAN'S MOTION TO DISMISS COUNTERCLAIM**

Before the Court is the City of Fort Morgan's Motion to Dismiss, filed June 20, 2008, and that motion now being fully briefed, and having considered all of the affidavits, evidence and other materials submitted with the parties' briefs and the record as a whole, the Court makes the following findings and conclusions in support of its decision to **DENY** that motion:

- 1) Although styled as a “motion to dismiss,” the motion by Plaintiff-Counterclaim Defendant City of Fort Morgan (herein, “the City”) fails to cite C.R.C.P. 12(b)(5), or indeed any other basis in the Rules of Civil Procedure, for the requested relief of dismissal of all counterclaims by Defendant-Counterclaimants *The Fort Morgan Times* and William Holland (herein, collectively, “the *Times*”).
- 2) The motion by the City relies on materials extrinsic to the parties’ pleadings, including various affidavits from City officials.
- 3) In light of its reliance on extrinsic materials beyond the four corners of the parties’ pleadings, under C.R.C.P. 12(b) and 12(c), the motion shall be deemed to be one seeking summary judgment, not dismissal, under C.R.C.P. 56(b). *See Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1290 (Colo. 1992).
- 4) The fundamental premise of the City’s argument is that the individually completed personnel review forms filled out by each separate member of the Fort Morgan City Council in advance of the City Council’s personnel review session with then Fort Morgan City Manager Michael Nagy were destroyed prior to the City’s receipt of the *Times*’ request for access to those records under the Colorado Open Records Act (“CORA”), §§ 24-72-201, *et seq.*, C.R.S., and further that there is no remedy available under the CORA for spoliation of public records in advance of an anticipated request for access to those records. The City argues that these two premises require “dismissal,” or more accurately summary judgment, in its favor and against the *Times*’ counterclaims.
- 5) The Court concludes, however, based on the authorities presented in the parties’ briefs, that Colorado law recognizes a remedy for spoliation of public records in advance of an anticipated request for access to those records under the CORA. *See Aloi v. Union Pac. R. Corp.*, 129 P.3d 999, 1002-03 (Colo. 2006); *Castillo v. Chief Alternative, LLC*, 140 P.3d 234, 236 (Colo. App. 2006); *Pfantz v. Kmart Corp.*, 85 P.3d 564, 568 (Colo. App. 2003); *cf. Redford v. SC Johnson & Son, Inc.*, 437 F. Supp. 2d 391, 397 (D. Md. 2006) (“Because of their duty to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth, federal district courts have wide latitude in fashioning a sanction to redress prejudice created by a party’s spoliation of evidence.”); *Cedars-Sinai Medical Center v. Super. Ct.*, 954 P.2d 511, 515 (Cal. 1998) (spoliation “can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action . . . [and] can also increase the costs of litigation as parties attempt to

reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both.”); *see also* § 24-72-201, C.R.S.; § 24-72-204(5), C.R.S.; and § 13-51-105, C.R.S.

- 6) The Court further finds that there are genuine issues as to material facts concerning whether the City engaged in spoliation of the requested public records in advance of the anticipated request by the *Times* for access to those records. In particular, the Court notes that the City itself pleaded in its original complaint in this action, in which it sought to invoke the Court’s jurisdiction, that it knew as early as November 30, 2007, based on an opinion commentary published by the *Times* under the byline of the newspaper’s publisher William Holland, that the newspaper intended to seek access to the records at issue here. Indeed, the various evidentiary materials submitted by the *Times* with its briefing on this motion support the inference that the City acted with knowledge of the likely relevance of the documents at issue here when it destroyed them in advance of the anticipated CORA request from the City. Furthermore, those evidentiary materials presented by the *Times* also demonstrate that there is a genuine issue as to the scienter, or state of mind, of the City’s officials involved in the destruction of the records at issue here. Under the law of spoliation, the state of mind of a party responsible for the destruction of relevant evidence is directly material to the question of what remedy should be applied to ameliorate the willful destruction of relevant evidence. *See Cache la Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 621 (D. Colo. 2007).
- 7) In light of the genuine issues of material facts as to the knowledge and intention of the City at the time it destroyed the records at issue here, summary judgment cannot be issued in favor of the City. *See Wolther v. Schaarschmidt*, 738 P.2d 25, 28 (Colo. App. 1986) (“Generally, the issue of a party’s intent is a question of fact and is not an appropriate issue for summary disposition.”).
- 8) Because the City’s motion does not address the substantive bases under the CORA for the City’s formal denial of access, in its January 7, 2008 denial letter, with respect to the performance ratings assigned by each individual Fort Morgan City Council member to then City Manager Nagy – *i.e.*, that these individually assigned performance ratings were “work product” under the CORA, and that they were otherwise exempt from disclosure under the “deliberative process privilege” – the Court does not have occasion here to address whether summary judgment should, or should not, issue on these issues.

Based on the foregoing findings and conclusions, the Court **DENIES** the City's putative motion for summary judgment.

The Court further directs that this matter should proceed to trial, currently set to begin on September 15, 2008, on the following issues:

(a) whether the City engaged in willful spoliation of evidence when it destroyed the public records that it anticipated would be sought by the *Times*;

(b) whether the individually completed performance ratings assigned to Mr. Nagy by each individual City Council member in advance of the Council's personnel evaluation session on December 18, 2007 constitute non-public "work product" under § 24-72-202(6.5), C.R.S., of the CORA; and,

(c) whether those performance ratings by the City Council members are exempt from disclosure under the CORA based on the statute's codification of the "deliberative process privilege" at § 24-72-204(3)(a)(XIII), C.R.S.

Dated: August \_\_, 2008

IT IS SO ORDERED.

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The Hon. Douglas R. Vannoy  
District Judge

Tendered to this 12th of August, 2008, pursuant to Court's prior Order Directing Submission of Proposed Orders, dated August 7, 2008,

By /s Christopher P. Beall

Thomas B. Kelley

Christopher P. Beall

Adam M. Platt

LEVINE, SULLIVAN, KOCH & SCHULZ, LLP

Attorneys for Counterclaimants

**Eastern Colorado Publishing Co. d/b/a, *The Fort Morgan Times* and William Holland**

THIS PROPOSED ORDER WAS FILED WITH THE COURT AND SERVED UPON THE PARTIES THROUGH THE LEXISNEXIS FILE & SERVE ELECTRONIC FILING PROCEDURES, UNDER C.R.C.P. 121(C), § 1-26. AS REQUIRED BY THOSE RULES, THE ORIGINAL SIGNED COPY OF THIS PLEADING IS ON FILE WITH LEVINE, SULLIVAN, KOCH & SCHULZ, LLP.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 12th day of August, 2008, a true and correct copy of the foregoing [**Proposed**] **ORDER DENYING CITY OF FORT MORGAN'S MOTION TO DISMISS COUNTERCLAIM** was served on the following counsel by email delivery to:

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*/s Christopher P. Beall* \_\_\_\_\_