Colorado Supreme Court 2 East 14th Avenue, Denver, CO 80203	
Colorado Court of Appeals, Opinion by J. Webb (J. Bernard concurred and J. Dunn dissented) Petition for Rehearing denied (JJ. Webb and Bernard); J. Dunn would grant, Case No. 12CA2613 – Division IV	
Chaffee County District Court, State of Colorado, The Hon. Charles M. Barton, Case No. 11CV1132	
Petitioner-Appellant: JOYCE RENO IN HER OFFICIAL CAPACITY AS CHAFFEE COUNTY CLERK AND RECORDER v. **Respondent-Appellee:** MARILYN MARKS	
Attorney for Petitioner-Appellant: Jennifer A. Davis, Atty. Reg.# 025072 Chaffee County Attorney's Office 104 Crestone Avenue P.O. Box 699 Salida, CO 81201 Telephone: 719-530-5564 FAX: 719-539-7442 jdavis@chaffeecounty.org	**▲ COURT USE ONLY ▲** Supreme Court Case No: 14SC235

OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with C.A.R. 28(g).

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It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. __, p.__), not to an entire document, where the issue was raised and ruled on.

☒ I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

S/ Jennifer A. Davis
Signature of Attorney

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IV. STATEMENT OF THE CASE

A. Nature of Case

This case was initiated in 2011 by a petition filed by the Chaffee County Clerk and Recorder ("Clerk Reno") pursuant to section 24-72-204(6)(a), C.R.S. (*see infra* add. p. 10) (*"Subsection (6)(a)")* as a result of two requests by Marilyn Marks ("Marks") under the Colorado Open Records Act ("CORA"). The issue before this Court concerns an attempt by Marks to obtain attorney fees even though Marks did not file a corollary action under section 24-72-204(5), C.R.S. (2013)) (*see infra* add. p. 9) ("*Subsection (5)*").

B. Course of Proceedings

Clerk Reno filed her petition under *Subsection (6)(a)* on Oct. 13, 2011, six days after receiving Marks' initial CORA request. R. CF, p. 17. Marks never filed

an answer, counterclaim or other substantive responsive pleading to the petition under either *Subsection (5)* or *Subsection (6)(a)*. R. CF, p. 266 n.5 and p. 268.

A hearing date was set for Dec. 1, 2011. R. CF, p. 33. On Nov. 18, 2011, Marks moved to vacate that hearing date to allow more time to prepare. R. CF, pp. 39-42. Clerk Reno opposed a delay out of concern it would add to the expense, uncertainty and disruption to the Clerk's office. R. CF, p. 85. Nevertheless, the hearing was vacated, and a new hearing was set for Mar. 23, 2012. R. CF, p. 100.

In January 2012, during the pendency of this action, Clerk Reno became aware that there may be a legislative response to her concerns with disclosing voted ballots. R. CF, pp. 394-96; R. Tr. (Sept. 27, 2012), p. 64, l. 15 – p. 66, l. 9. Thus, before there was a hearing on the merits, Clerk Reno initiated discussions with Marks that resulted in a stipulation to stay the action pending the outcome of a proposed law, H.B. 12-1036, 68th Gen. Assem., Second Reg. Sess. (Colo. 2012) (*see infra* add. pp. 4-8), introduced to address requests for public disclosure of ballots. R. CF, pp. 262, 394-96; R. Tr. (Sept. 27, 2012), p. 64, l. 15 – p. 66, l. 9. The *Stipulated Mot. to Hold Issues in Abeyance* specifically states that "[s]everal organizations are working on legislation that, if passed, would provide guidance with respect to the issues involved in this matter and Marks' request. Accordingly,

it would be premature to address the issues if there is a possibility that they would be resolved through legislative action." R. CF, p. 141.

Clerk Reno specifically testified that it was her intent to comply with Marks' request under the terms of the House Bill, if passed. R. CF, p. 395; R. Tr. (Sept. 27, 2012), p. 65, ll. 18-21. After approval of H.B. 12-1036 on June 7, 2012, the parties agreed that the substantive issues in the case were resolved and the only remaining issue was Marks' request for attorney fees. R. CF, pp. 262-63. On Sept. 20, 2012, the Clerk provided to Marks a single anonymous/untraceable voted ballot pursuant to H.B. 12-1036.[1] *Id*. At no time was there ever a court order to do so nor was the disclosure pursuant to a settlement of the case. There was never a hearing on the merits of Marks' CORA requests. Rather, Clerk Reno voluntarily disclosed the ballot based on the guidance provided by H.B. 12-1036.[2]

C. Disposition in the Courts Below

A hearing was held on the issue of attorney fees on Sept. 27, 2012. R. CF, p. 259. The district court entered its written Findings and Order Re: Attorney Fees on

[1] This was a response to Marks' second CORA request, discussed *infra* p. 7. There were never any disclosures with respect to Marks' first CORA request.

[2] In her *Br. in Opp'n to Petition for Writ of Certiorari*, Marks admits that the record produced by Clerk Reno was produced "voluntarily" as opposed to as a result of the litigation. *Br. in Opp'n* 1, 5.

Nov. 2, 2012. R. CF, p. 273. The district court found that Marks was not an "applicant" since she did not file an action or counterclaim under *Subsection(5)* or *Subsection (6)(a)* and she was not "prevailing" because she did not obtain a favorable order of the court. R. CF, p. 268. The district court found that the ballot was provided pursuant to H.B. 12-1036—not through court order, and there was no stipulation filed that judgment be entered for Marks. *Id.* Thus, the district court concluded Marks was neither a prevailing applicant nor a prevailing party. *Id.*

The district court rejected Marks' argument that attorney fees must be awarded merely because Clerk Reno did not qualify for the "safe harbor" of *Subsection (6)(a).* R. CF, pp. 268-69. The district court observed that neither *Subsection (5)* nor *Subsection (6)(a)* provide for an award of attorney fees in this case, and that Marks failed to meet the elements of the statutes. *Id.*

The court went on to make the following additional factual findings which it described "as additional reasons why an award of attorney fees is not merited." R. CF, p. 269.

- "…[T]he filing of the petition by [Clerk Reno] was apparently reasonable and necessary because she could not, consistent with Colorado law, comply with Ms. Marks' demands." *Id.*

- Marks did not retract her demand to personally go through boxes of voted paper ballots until she found one she believed was anonymous. R. CF, p. 270.
- "[Marks'] unreasonable demands, in contravention of the lawfully adopted policy of the county, forced [Clerk Reno's] hand to file the petition." R. CF, p. 271.

In summary, the district court opined that Marks' demand for direct access to voted ballots was "reasonably delayed" by Clerk Reno first to get the pending election completed and then to get a determination as to whether the demand was lawful and, at least one of her demands was not Marks' right under CORA . R. CF, p. 273.

In a 2-1 decision, a division of the Court of Appeals reversed the order denying Marks' request for attorney fees and held that a trial court does not have discretion to deny attorney fees to a requesting party where the custodian commenced a *Subsection (6)(a)* action but subsequently turned over "one" of the records that the requestor had sought (even when the disclosure was voluntary and not prompted by court order). *Reno v. Marks*, 2014 COA 7. The majority noted that the disclosure was pursuant to the guidelines contained in H.B. 12-1036, but

concluded that absent an order restricting inspection of the requested documents, a records requestor must be awarded attorney fees, even though the records requestor was never an applicant under *Subsection (5)*. *Id.* at ¶16. The majority concluded that a "prevailing applicant" under *Subsection (5)* includes a records requestor defending a *Subsection (6)* action brought by a custodian. *Id.*

D. Statement of Facts

Most of the relevant facts in this case are set out above. However, an understanding of the nature of Marks' CORA requests is also helpful.

On Oct. 7, 2011, six business days after the decision in *Marks v. Koch*, 284 P.3d 118 (Colo. App. 2011)[3], Marks sent her initial CORA request to Clerk Reno seeking to review some voted paper ballots from the 2010 general election. R. CF, pp. 173-74. This was a few days prior to mailing ballots in the November 2011 general election. R. CF, pp. 365-66; R. Tr. (Sept. 27, 2012), p. 35, l. 23 – p. 36, l. 4. Marks stated she wanted "to make it clear to the public and press that voted ballots are public records, so I want to document the review of a small sample of Chaffee County ballots. A member of the press may accompany me to assist…."

[3] That case included a statement in *dictum* that a paper ballot is subject to disclosure when the identity of the voter cannot be discerned from the *face* of the ballot. *Marks*, 284 P.3d at 122 (emphasis added).

R. CF, p. 173. She acknowledged that because some vote centers report only a single voter in certain precincts, that voter may be identifiable and traceable, but if she were to accidentally come across such knowledge, she would not determine or disclose how any individual voter voted. *Id.*

Clerk Reno advised Marks that her request to "cooperatively" select an undetermined number of ballots for review was unduly broad. R. CF, p. 172. Further, given that the November coordinated election was to commence in four days, pursuant to the County's public record policy, she would not respond to the request until after the election. *Id.*

On Oct., 11, 2011, Marks then sent a second request asking to "inspect and copy the first anonymous/untraceable ballot in the mail-in ballot group first in the stack in the first box of mail ballots stored in the November 2010 election." R. CF, p. 171. Through her attorney, Clerk Reno advised Marks that given the staffing requirement to access secured ballot boxes, the timing of the request (during the election) and "the uncertainty of whether disclosure of the requested record is permitted, the County has decided to ask the District Court to make a determination pursuant to C.R.S. § 24-72-204(6)(a)." R. CF, p. 170.

During the trial level proceedings, Marks specifically acknowledged that her two CORA requests were two separate requests and the second did not supersede the first. R. CF, p. 133. The district court specifically found that both CORA requests were before the district court, and Marks did not retract her demand to personally review voted ballots and document that review. R. CF, p. 270. That finding has not been appealed. Clerk Reno did *not* provide the "sample" of voted ballots requested in Marks' first CORA request.

V. SUMMARY OF THE ARGUMENT

Attorney fees may not be awarded in an action filed under *Subsection (6)(a)*. The law is well-established that Colorado follows the "American Rule" which requires that each party in a lawsuit bear its own legal expenses. One exception is if a statute specifically provides for an award of attorney fees. This case was filed under *Subsection (6)(a)* which does *not* provide for an award of attorney fees. Although *Subsection (6)(a)* does mention that, under certain circumstances, records custodians can be shielded from attorney fees in cases filed under *Subsection (5)*, the language in *Subsection (6)(a)* does *not* provide for an award of attorney fees in cases filed under *Subsection (6)(a)*. To hold otherwise would result in a significant erosion of the American Rule.

The language in the recent case of *Benefield v. Colo. Republican Party*, 2014 CO 57 supports the conclusion that in order to be entitled to a mandated award of attorney fees, a person must apply for and receive an order from the court requiring a custodian to permit inspection of a public record. *Id.* at ¶2. No such order exists here. Rather, the trial court specifically found the custodian's actions in filing a petition under *Subsection (6)(a)* were reasonable and necessary. Mandating attorney fees in such a situation would unreasonably dissuade custodians from bringing *Subsection (6)(a)* petitions or attempting to reach a just and reasonable settlement with a records requestor in a manner intended to advance the public interest, and thus thwart the purpose behind the enactment of *Subsection (6)(a)*. Further, mandating attorney fees under *Subsection (6)(a)* would essentially force custodians to carry on with protracted litigation of petitions made moot by intervening law since custodians would be forced to obtain a ruling on the merits in order to avoid attorney fees.

VI. ARGUMENT

A. The Court of Appeals Erred by Mandating an Award of Attorney Fees Under Section 24-72-204(6)(a), C.R.S. (2013), Even Though That Section Does Not Expressly Provide for an Award of Fees.

1. Standard of Review.

Statutory interpretation of CORA is a question of law reviewed de novo. *Denver Publ'g Co. v. Bd. of Cnty. Comm'rs of Arapahoe*, 121 P.3d 190, 195 (Colo. 2005); *City of Fort Morgan v. E. Colo. Publ'g Co.*, 240 P.3d 481, 485 (Colo. App. 2010). However, "a trial court's findings of fact will be set aside on appeal only if they are clearly erroneous and not supported by the record." *City of Fort Morgan*, 240 P.3d at 485 (citing *McIntyre v. Jones*, 194 P.3d 519, 528 (Colo. App. 2008)).

A fee applicant bears the burden of establishing entitlement to a fee award. *Anderson v. Pursell*, 244 P.3d 1188, 1194 (Colo. 2010). Here, Marks failed to establish such an entitlement.

2. The Court of Appeals Decision is Inconsistent with Established Law.

a. Colorado Follows the "American Rule."

Colorado follows the "American Rule" which requires that each party in a lawsuit bear its own legal expenses. *E.g., City of Wheat Ridge v. Cerveny*, 913 P.2d 1110, 1114 (Colo. 1996).

> The rationale behind the rule is broad-ranging: for example, responsibility for one's own legal expenses is thought to promote settlement; poor litigants may be discouraged from instituting actions to vindicate their rights if the penalty for losing were to include paying their opponent's attorney fees; and the difficulty of ascertaining reasonable attorney fees in every case would pose a substantial burden on judicial administration.

Bernhard v. Farmers Ins. Exch., 915 P.2d 1285, 1287 (Colo. 1996).

An exception to the American rule is when attorney fees are specifically allowed by statute. *Cerveny*, 913 P.2d at 1114. To further advance the American Rule, statutes permitting fee awards are narrowly construed. *Crandall v. City & Cnty. of Denver*, 238 P.3d 659, 662 (Colo. 2010); *Sotelo v. Hutchens Trucking Co.*, 166 P.3d 285, 287 (Colo. App. 2007). Courts "should not construe a fee-shifting provision as mandatory unless the directive is specific and clear on that score." *Cerveny*, 913 P.2d at 1114.

b. Petitions Under Subsection (6)(a).

Subsection (6)(a) provides two circumstances in which a records custodian may apply to the court for an order with respect to a CORA request. The first circumstance is where a custodian, acting in good faith and after reasonable diligence and inquiry, is unable to determine if disclosure of the requested record is prohibited. The trial court in this case referred to this circumstance as the "Reasonable Uncertainty Provision." R. CF, p. 267.

The trial court referred to the second circumstance in which a records custodian may apply to the court for an order as the "Denial Provision." R. CF, p. 267. That circumstance arises if, in the records custodian's opinion, disclosure of the requested record "would do substantial injury to the public interest." *Subsection (6)(a).* In this case, the trial court specifically found that the Petition sought relief under the Denial Provision. R. CF, p. 267. The trial court rejected Clerk Reno's argument that she was also seeking relief under the "Reasonable Uncertainty Provision" and Clerk Reno did not appeal that finding. R. CF, p. 263, n.3; R. CF, p. 267, n.6.

Nowhere does *Subsection (6)(a)* provide for attorney fees in cases brought under either the Denial Provision or the Reasonable Uncertainty Provision. There

is simply no fee-shifting language in *Subsection (6)(a)* which awards fees to a records requestor, let alone specific and clear language. *See Reno*, ¶15 ("Section 24-72-204(6)(a) does not expressly provide for an attorney fees award to an applicant.") The only mention of attorney fees at all in *Subsection (6)(a)* appears at the end of the subsection where it states that a records custodian is *shielded* from attorney fees contemplated under *Subsection (5)* when a custodian brings an action under the "Reasonable Uncertainty Provision" and the court finds the custodian was acting in good faith, after exercising reasonable diligence, and after making reasonable inquiry.[4] *Subsection (6)(a).*

In reviewing CORA (including *Subsection (6)(a)*), the court should strive "to give effect to the General Assembly's intent and chosen legislative scheme." *Denver Publ'g Co.*, 121 P.3d at 195. In interpreting statutes, the court should "employ the traditional rules of statutory construction...." *Crandall v. City & County of Denver*, 238 P.3d at 662. Accordingly, the court must first look to the

[4] The actual language of this portion of Subsection (6)(a) reads as follows:

> 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.

express statutory language at issue, and give words and phrases their commonly accepted, plain and ordinary meaning. *Id.; Town of Telluride v. Lot Thirty–Four Venture, L.L.C.*, 3 P.3d 30, 35 (Colo. 2000). "In assessing the plain language, the court should not read a statute to create an exception that the plain language does not suggest, warrant, or mandate." *Town of Telluride*, 3 P.3d at 35. "If legislative intent is clear from the plain language of the statute, other rules of statutory interpretation need not be applied." *People v. Nance*, 221 P.3d 428, 430 (Colo. App. 2009). A court cannot add words to a statute or subtract words from it. *Turbyne v. People,* 151 P.3d 563, 567 (Colo. 2007).

Using such rules of statutory interpretation as a guide, nothing in the plain language of *Subsection (6)(a)* mandates an award of attorney fees. *Subsection (6)(a)* is simply devoid of language that addresses the circumstances of this case: An action filed by a records custodian to bar inspection and no action filed by the records requestor under *Subsection (5).* Any interpretation of *Subsection (6)(a)* that imposes attorney fees in this case violates the above recognized rules of statutory interpretation and established case law.

In *Cerveny*, the court interpreted a provision of the Colorado Constitution providing that "successful plaintiffs are *allowed* costs and reasonable attorney

fees." (Emphasis added.) The Court rejected an argument that the fee-shifting language was mandatory. "The word 'allow' is not a specific directive compelling an award of fees." *Cerveny*, 913 P.2d at 1114. Similarly, here, a mere reference to an ability to avoid attorney fees under *Subsection (5)* does not amount to a clear or "specific directive compelling an award of fees." *Id*.

c. Petitions Under Subsection (5).

Subsection (5) provides a mechanism for a records requestor (as opposed to a custodian) to petition the court for an order with respect to a CORA request.[5] *Subsection (5)* is illustrative of the type of language required in order to clearly mandate attorney fees in a given situation. *Subsection (5)* provides "[u]nless 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*

[5] *Subsection (5)* provides:

> Except as provided in subsection (5.5) of this section, any person denied the right to inspect any record covered by [CORA] 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.

attorney fees to the prevailing applicant in an amount to be determined by the court." *Subsection (5)* (emphasis added).

This is not a case filed under *Subsection (5)*, however, and the language of *Subsection (6)(a)* clearly fails to constitute a "directive" to award fees. As further discussed below, records requester Marks had an opportunity to bring an action under *Subsection (5)* but failed to do so. Accordingly, Marks has not met the elements of *Subsection (5)* mandating an award of fees. Because there is nothing in *Subsection (6)(a)* allowing for an award of fees absent a corollary filing by the records requestor under *Subsection (5)*, any award of attorney fees is inconsistent with established law.

Moreover, the fact that fee-shifting language appears in *Subsection (5)* but is missing from *Subsection (6)(a)* indicates an intent *not* to award attorney fees in a petition under *Subsection (6)(a)*. The omission of language from *Subsection (6)(a)* indicates a deliberate decision not to authorize an award of attorney fees in such circumstances. *See Key Tronic Corp. v. United States*, 511 U.S. 809, 818-19 (1994) (attorney fees in a CERCLA case should not be awarded absent explicit statutory authority).

The reference to attorney fees in *Subsection (6)(a)* must be taken at its

face—it simply provides protection to records custodians in situations where a records requestor files her own action under *Subsection (5)* during the pendency of the custodian's action. This does not mean that an award of fees must be made when there is no prevailing applicant, as is the case here. To read more into the reference would unduly erode the American Rule and established precedence on statutory interpretation. Thus, the American Rule should apply and each side be responsible for her own attorney fees.

3. A Reversal of the Court of Appeals Decision is Consistent with the Standard Recently Articulated in Benefield.

The majority in the Court of Appeals below concluded that a "prevailing applicant" under *Subsection (5)* includes a records requestor who defends a *Subsection (6)* action brought by a custodian. *Reno*, ¶16. However, as indicated in *Benefield*, ¶¶2, 21, *Subsection (5)*, "when properly construed," mandates an award of attorney fees to a records requestor when a person applies for and receives an order from the court requiring a custodian to permit inspection of a public record. Neither condition is present in this case.

Benefield goes on to paraphrase the language at issue here in *Subsection (6)(a)* referring to attorney fees[6], indicating that, contrary to the Court of Appeals decision in this case, the language of *Subsection (6)(a)* only applies to attorney fees provisions which may be triggered by applications under *Subsection (5):*

> In the event the official custodian proves and the court finds that he, in good faith, after exercising reasonable diligence and after making reasonable inquiry, was unable to determine if disclosure of the record was prohibited without a ruling by the court, *the attorney fees provisions governing application to the district court by persons denied inspection "shall not apply."*

Benefield, ¶8 (emphasis added). Thus, under *Benefield*, in order to be entitled to attorney fees, a records requestor must apply to the district court under *Subsection (5)* for redress and as a result of that application, succeed in acquiring permission for inspection of that record. *Id.* at ¶10.

a. Marks did not Apply for an Order.

The CORA statutory scheme awards attorney fees to "…any applicant who succeeds in acquiring, *as the result of filing an application with the district court*, access to a record as to which inspection had previously been denied by the custodian." *Benefield*, ¶5 (emphasis added). By holding that attorney fees must be awarded to a records requestor in a *Subsection (6)(a)* petition filed by a custodian,

[6] *See supra* note 5.

the majority in the Court of Appeals below ignores the requirement that a records requestor apply for a court order.

Here, Marks never applied to the district court under *Subsection (5)*. She is technically not even a party to this action since she never filed an answer or a substantive responsive pleading to the original petition. R. CF, p. 266, n.5.

b. Marks did not Receive an Order Requiring Clerk Reno to Permit Inspection of a Public Record.

The *Benefield* decision goes on to quote testimony from the legislative history that indicates an intent to require a court order against the custodian of records in order for fees to be awarded to an applicant under *Subsection (5)*. *Benefield*, ¶10, n.2 (quoting Senate President Stan Matsunaka: "[I]f the court rule[s] against [the custodian of records], then there's this automatic assessment of attorneys' fees."). Accordingly, in order to be entitled to attorney fees, the applicant must have "…achieved a court order requiring the custodian to permit inspection of the record he seeks…" *Id.* at ¶13. A court's silence on the issue does not convert a records requestor to a "prevailing applicant."

Here, there was never a court order requiring Clerk Reno to permit inspection of any requested record. R. CF, p. 268. There was no stipulation filed resulting in judgment being entered for Marks and against Clerk Reno. *Id.* The

district court determined that Marks received a single ballot as a result of the passage of H.B. 12-1036, not as a result of the litigation. *Id.* *See Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 453-54 (1st Cir. 2009) (a party is not a "prevailing party" when the lawsuit is resolved by legislation that renders the case moot before a judgment is entered on the party's behalf); *Halloran v. State*, 115 P.3d 547, 552 (Alaska 2005) (when legislative action renders a case moot, a court should not find a party prevailed absent the very clearest expression of legislative intent); *Houdek v. Mobil Oil Corp.*, 879 P.2d 417, 425 (Colo. App. 1994) (statutorily mandated attorney fees may be avoided by seeking a voluntary dismissal prior to a decision on the merits).

Not only did the district court below fail to rule against Clerk Reno, the district court specifically found that the denial of the inspection *was* proper.

> …[T]he filing of the petition by the Clerk was apparently reasonable and necessary because she could not, consistent with Colorado law, comply with Ms. Marks' demands. Had she done so, she would have...risked public disclosure of how a particular elector had voted....The unrebutted testimony of the Clerk established the fact that many ballots contain markings or are of such a finite number because of ballot style that the identity of the voter could be determined from examining the ballot....There was no law, and there is not now, which permits a member of the public to personally examine a box of voted ballots until she finds what she has asked for.

R. CF, pp. 269-70. Marks has not challenged this finding.

4. The Court of Appeals Decision is Contrary to Public Policy.

Mandating attorney fees to a records requestor who is not even required to participate in the district court action, let alone not even an applicant to a *Subsection (5)* action, would run counter to the public interest. The current statutory scheme obligates a records requestor to give a records custodian at least three business days' notice prior to filing an application with the district court. *See supra* note 5. The notice is important in that it alerts a records custodian to the fact that her actions may be challenged and she may reconsider her denial before potentially being subjected to attorney fees and the expense of protracted litigation. *Benefield*, ¶8. Because the decision by the Court of Appeals eliminates the requirement that a records requestor actually file an action under *Subsection (5)* in order to be entitled to attorney fees, the decision also eliminates this three business days' notice requirement that is an important part of the statutory scheme.[7]

The Court of Appeals decision would dissuade custodians from even raising the argument that disclosure of the requested record "would do substantial injury to

[7] Admittedly, Marks did provide such notice in this case, although she never ultimately filed under *Subsection (5)*. But since the Court of Appeals decision eliminates the requirement that a records requestor file an application under *Subsection (5)*, the three-day notice requirement would essentially be eliminated as a necessary precursor to an award of attorney fees.

the public interest," since the decision would potentially expose local governments to attorney fees even if a document were disclosed pursuant to an intervening change of law during the pendency of an action or as the result of a settlement or modification of the initial records request so as not to injure the public interest. Rather, the majority opinion in the Court of Appeals decision *mandates* that a custodian continue to pursue litigation and obtain an order restricting inspection of the requested document(s) in order to avoid attorney fees.

In cases like this, when a change in the law during the pendency of an action makes the pending action moot, the parties should not be forced to continue a time-consuming and expensive process that unnecessarily consumes court resources. Custodians and records requestors alike would be forced to continue to work through an unnecessary judicial process simply to obtain a ruling under outdated law in order for the custodian to avoid paying attorney fees. Such a position is contrary to the interests of the courts, custodians, the records requester, and the general public who ultimately must pay the awarded fees.

The majority opinion in the Court of Appeals decision expresses concern about potentially abusive conduct by custodians. However, in cases where there is evidence that a custodian brings a case solely to delay disclosure of a public

record, a person seeking disclosure could always seek attorney fees under section 13-17-102(4), C.R.S. (2013) (*see infra* add. p. 11) or bring an abuse of process claim. *See Trask v. Nozisko*, 134 P.3d 544, 553-54 (Colo. App. 2006) (listing the elements of an abuse of process claim). In addition, C.R.C.P. 11 serves as a deterrent to filing claims for the sole purpose of delaying disclosure of public records or harassing the public. *See infra* add. pp. 12-13. Further, there is simply *nothing* on the record that supports any such history of custodians bringing actions under *Section (6)(a)* for unscrupulous reasons.

Finally, a custodian is precluded from filing under the Denial Provision for the sole purpose of delaying production of the requested record since *Section (6)(a)* requires a hearing "at the earliest practical time."[8] There is simply no record of the abuse about which the Court of Appeals speculates—indeed, the record clearly establishes that this case was the only time Clerk Reno had ever filed under *Section (6)(a)*, and she had previously and subsequently promptly complied with all of

[8] In this case, it was Marks who asked for a delay in the hearing, not Clerk Reno. R. CF, pp. 39-42. Clerk Reno originally opposed delaying the hearing on the merits. R. CF, pp. 83-86. It was only after the introduction of H.B. 12-1036 that Clerk Reno proposed the *Stipulated Mot. to Hold Issues in Abeyance*, discussed *infra* p. 2.

Marks' CORA requests. R. CF, pp. 389-94; R. Tr. (Sept. 27, 2012), p. 59, l. 7 – p. 64, l.11.

VII. CONCLUSION

If left standing, the Court of Appeals decision is a drastic reversal of well-established law regarding attorney fees. For the foregoing reasons, Clerk Reno requests this Court reverse the Court of Appeals decision and hold that an award of attorney fees for the records requester and against the records custodian is not allowed under Section 24-72-204(6)(a), C.R.S. (2013).

Respectfully submitted this 29th day of September, 2014.

CHAFFEE COUNTY ATTORNEY'S OFFICE

By: S/ Jennifer A. Davis
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CERTIFICATE OF SERVICE

I CERTIFY that on September 29, 2014, I served a true and correct copy of the foregoing document (including the Addendum) via ICCES or by hand delivery upon the following:

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via Hand Delivery
The Honorable Charles M. Barton
Chaffee County District Court
142 Crestone Ave.
Salida, CO 81201

S/ Barbara Tidd