DISTRICT COURT, MORGAN COUNTY, COLORADO Court Address: 400 Warner Street, P.O. Box 130 Fort Morgan, CO 80701 _____ **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. _____ Attorneys for Defendant-Counterclaimants: Thomas B. Kelley, #1971 Christopher P. Beall, #28536 Adam M. Platt, #38046 LEVINE SULLIVAN KOCH & SCHULZ, L.L.P. 1888 Sherman Street, Suite 370 Denver, Colorado 80203 Tel: (303) 376-2400 / Fax: (303) 376-2401 E-mail: cbeall@lskslaw.com	**COURT USE ONLY** ▲ ▲ _____ Case Number: **08 cv 00002** Division : **C**

COUNTERCLAIMANTS' TRIAL BRIEF

Defendant-Counterclaimant Prairie Mountain Publishing Company, L.L.P., formerly known as Eastern Colorado Publishing Company, doing business as *The Fort Morgan Times*, and Counterclaimant William Holland (collectively herein, "the *Times*"), through their attorneys Levine Sullivan Koch & Schulz, L.L.P., submit this Trial Brief in advance of the bench trial in this action scheduled to begin September 15, 2008.

INTRODUCTION

> *A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.*[1]

After being initiated with a now-aborted claim by Plaintiffs City of Fort Morgan and Andrea Strand (herein, "the City") seeking broad declaratory relief, this public records case has now boiled down to a narrow counterclaim from the *Times* seeking declaratory and injunctive relief under the Colorado Open Records Act ("CORA"), §§ 24-72-201, *et seq.*, C.R.S. (as well as under the Colorado Uniform Declaratory Judgments Law, § 13-51-105, C.R.S., and C.R.C.P. 57(a)), concerning the performance ratings[2] assigned by each individual member of the Fort Morgan City Council to Fort Morgan's now-former city administrator in performance evaluations completed individually by the council members in advance of the personnel review session conducted by the City Council on December 18, 2007. In particular, the *Times* seeks a declaration that such individually completed performance ratings are: (1) not excluded from CORA's definition of "public records" by virtue of being "work product"; and, (2) not exempt from CORA's obligations of public access by virtue of CORA's statutory codification (and resulting limitation) of the "deliberative process privilege." In addition, the *Times* also seeks

[1] James Madison, Letter to W.T. Barry (Aug. 4, 1822), *reprinted in The Complete Madison*, 337 (Saul K. Padover ed., 1953), as quoted in *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1225 (10th Cir. 2007).

[2] Throughout the litigation of this case, the City has persistently confused the record by implying that the public records now at issue here are the entire performance evaluation documents completed by each individual council member, rather than the specific performance ratings assigned by each council member as part of those performance evaluations. It is true that the *Times*' initial CORA request to the City sought the full performance evaluations. However, the *Times*' Counterclaim here is abundantly clear that the only information now at issue in this court proceeding is performance ratings. Thus, the *Times* narrowed – as it is permitted to do – the scope of the records being litigated here from the set of records it initially requested. At bottom, this is a case about performance ratings, and nothing else.

declaratory relief finding that the willful destruction by the City Attorney of the council members' individually completed performance ratings constitutes spoliation of evidence and therefore a wrongful withholding of the public records, for which injunctive relief should be entered to remedy the newspaper's, and the public's, loss of access to important public information that otherwise would have been available for inspection at the time of the newspaper's access request.

These issues are fundamentally important to the citizens of Fort Morgan, as well as to the *Times*. They touch on the central purpose of Colorado's sunshine laws, which is to assure that the public may exercise its power of accountability over its elected representatives by learning the true nature of decisions reached by their elected officials. The City's positions in this case would drive gaping loopholes through the public's right to know what their elected representatives are up to. Under the City's view of the CORA, actual decisions on important issues – such as in this case the performance ratings that each council member individually, and independently, assigned to the man who was in line to assume substantial new powers as a city manager under a revised City Charter – could be hidden from public view through the camouflage of "work product" and "deliberative process" doctrines. The City would further have this case result in a ruling that public officials may, with impunity, destroy the records of these independent decisions by elected representatives even when the municipality knows that members of the public wish to have access to those records. Such holdings would be anathema to public's "right to know." It is in this sense, therefore, that the issues in this case strike at core values of our representative democracy, the values of accountability, transparency and public trust, and those values – as well as the plain text of the CORA – dictate that after hearing all the

evidence to be presented in the forthcoming trial, and after consideration of the applicable law, this Court should enter judgment in favor of the *Times* on its Counterclaim.

BACKGROUND

The basic chronology of this case, which will be established in more detail at trial, is as follows:

On December 18, 2007, during an executive session meeting, the Fort Morgan City Council conducted a six-month performance evaluation of then-City Administrator Michael Nagy. In advance of that meeting, and pursuant to a new evaluation policy that the City Council and the City Attorney developed in response to Mr. Nagy's earlier initial performance evaluation, which Mr. Nagy insisted be conducted in public, each individual council member independently completed an extensive evaluation form reflecting that council member's assessment of Mr. Nagy's job performance. In that form, each council member was required to independently assign performance ratings to Mr. Nagy.

Prior to the actual evaluation session on December 18, 2007, City Attorney Jeffrey Wells compiled the various performance evaluations supplied to him by each council member, collating all the narrative comments from each form and creating a numerical average of the council members' individual, and independent, performance ratings. That average performance rating for the city administrator was subsequently disclosed to be 2.8, on a scale of 0 to 5.

On December 28, 2007, after having published a month earlier an opinion column by Publisher William Holland indicating that the newspaper would seek access to the individual council members' performance evaluations, the *Times* submitted a formal request for access to those evaluations. Unbeknownst to the newspaper, however, Mr. Wells had already destroyed

those individual evaluations by the council members, allegedly on December 20, 2007. (Among the factual issues to be tried in this case is Mr. Wells' state of mind and intent in connection with this destruction of the council members' individual performance evaluations, especially in light of his conceded awareness of the newspaper's desire for access to the records.)

On January 4, 2008, even before the City had delivered its denial letter in response to the *Times*' CORA request, the City initiated this action with the filing of its Petition for Declaratory Judgment, in which it sought declaratory relief in connection with both the *Times*' December 28, 2007 request and various broader issues going beyond the scope of that request.

On January 7, 2008, the City delivered its response to the *Times*' CORA request, contending that the requested evaluations were excluded from the statute's definition of a "public record" because they were "work product," and even if nevertheless a "public record," the evaluations also were exempt from disclosure under the "deliberative process" privilege. The City also then disclosed for the first time that the records sought by the *Times* had previously been destroyed.

On January 18, 2008, the *Times* filed its Answer and Counterclaim in this action, in which the counterclaimants affirmatively sought declaratory and injunctive relief on the issue – which had been narrowed from the newspaper's initial CORA request – of access to the individual numerical performance ratings of Mr. Nagy that each council member independently ascribed in each council member's individual performance evaluation prepared in advance of the personnel evaluation on December 18, 2007.[3]

[3] Because the City later voluntarily dismissed its own affirmative claims for declaratory relief, the only claim remaining in this action is the Counterclaim by the *Times*.

LEGAL ISSUES

I. Burden Of Proof Under The CORA

The CORA establishes a fundamental ***presumption*** that all records of all government entities that relate in any way to the discharge of government authority shall be open for public review. *See* § 24-72-201, C.R.S. The CORA implements this basic public policy by declaring that "all public records shall be open for inspection [and copying] by any person" unless a specific exemption under the CORA applies. *See* § 24-72-203(1)(a), C.R.S.; *Denver Publ'g Co. v. Dreyfus*, 184 Colo. 288, 293, 520 P.2d 104, 107 (1974); *Int'l Bhd. of Elec. Workers Local 68 v. Denver Metro. Major League Baseball Stadium Dist.*, 880 P.2d 160, 165 (Colo. App. 1994) (hereafter *IBEW*) ("The purpose of open records statutes is to assure that the workings of government are not unduly shielded from the public eye.").

In every public records case under the CORA, the party seeking access to a record bears the ultimate burden of persuasion to show that "the public entity in question: (1) improperly; (2) withheld; (3) a public record." *Wick Commc'ns Co. v. Montrose County Bd. of County Comm'rs*, 81 P.3d 360, 363 (Colo. 2003) (adopting the federal Freedom of Information Act's similar standard, as enunciated in *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980)). However, although the ultimate burden of persuasion will always lie with a records requester on all elements of his claim, if a public entity contends that the document being sought is not a "public record" under the CORA, and if the requester meets his prima facie burden of establishing that the requested document was "made, maintained or kept" by the public entity in the discharge of functions authorized by law, *see* § 24-72-202(6)(a)(I), C.R.S., then the burden of proof on this question shifts to the public entity. *See Denver Publ'g Co v. Bd. of*

County Comm'rs, 121 P.3d 190, 199 (Colo. 2005); *Wick* 81 P.3d at 363 ("[E]ven though the plaintiff has the burden of proof to show that CORA applies, when the parties dispute whether a document fits within the definition of a public record, in most cases the burden will fall on the custodian to show that the record is not a public record.").

Similarly, with respect to the element of a public records case involving proof that a denial of access is "improper," when a public entity asserts that its non-disclosure is authorized by one of the exclusively listed exemptions set out in the CORA, *see* § 24-72-204, C.R.S., the burden of showing that the information sought falls within the cited exemption rests squarely with the custodian of the record, and, as with all exemptions from the duty of disclosure in the CORA, the exemption is to be narrowly construed. *City of Westminster v. Dogan Constr. Co.*, 930 P.2d 585, 589 (Colo. 1997); *Gumina v. City of Sterling*, 119 P.3d 527, 532 (Colo. App. 2004); *Zubeck v. El Paso County Ret. Plan*, 961 P.2d 597, 600 (Colo. App. 1998); *Denver Publ'g Co. v. Univ. of Colo.*, 812 P.2d 682, 685 (Colo. App. 1990); *accord Washington Post Co. v. HHS*, 865 F.2d 320, 324 (D.C. Cir. 1989). Indeed, "[e]xceptions to the broad, general policy of the Act are to be narrowly construed." *Sargent Sch. Dist. No. RE-33J v. W. Servs., Inc.*, 751 P.2d 56, 60 (Colo. 1988); *see also Moeller v. Colorado Real Estate Comm'n*, 759 P.2d 697, 701 (Colo. 1988) (statutes with remedial purposes are to be broadly construed and exceptions thereto narrowly construed) (citing 3 Norman J. Singer, *Sutherland Stat. Const.* § 60.01).

This understanding of the CORA and its role in a representative democracy has underscored the courts' long-standing doctrine of generous statutory construction in favor of its over-arching purpose of providing as much access to government information concerning what the government is up to as is possible under the circumstances, and narrow construction of any

provision of the statute that would limit public access to such government information. *See Gumina*, 119 P.3d 527 at 532; *Denver Post Corp. v. Stapleton Dev. Corp.*, 19 P.3d 36, 38 (Colo. App. 2000); *Zubeck*, 961 P.2d at 600; *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1154 (Colo. App. 1998); *IBEW*, 880 P.2d at 168.

II. The Numerical Performance Ratings Are "Public Records"

This first issue in this case is whether the numerical performance ratings ascribed by each individual council member in their independent evaluations of then-City Administrator Michael Nagy fall within the definition of "public records" under the CORA.

The CORA defines "public records" as being:

> [A]ll writings made, maintained, or kept by the state, any agency, institution, . . . or political subdivision of the state . . . for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.

§ 24-72-202(6)(a)(I), C.R.S.

This statutory definition then continues with an enumeration of what is not included within the meaning of the term "public records":

> "Public records" does not include:
>
> . . .
>
> (II) Work product prepared for elected officials. However, elected officials may release, or authorize the release of, all or any part of work product prepared for them.

§ 24-72-202(6)(b)(II), C.R.S.

In thus carving out from the definition of "public records" any "work product" prepared for elected officials, the CORA next implicates the definition of "work product," which states:

> "Work product" means and includes all intra- or inter-agency advisory or deliberative materials assembled for the benefit of elected officials, which materials express an opinion or are deliberative in nature and are communicated for the purpose of assisting such elected officials in reaching a decision within the scope of their authority.

§ 24-72-202(6.5)(a), C.R.S.

This definition of "work product" goes on to include a further exclusion from the exclusion, stating that:

> "Work product" does not include:
>
> (I) Any final version of a document that expresses a final decision by an elected official.

§ 24-72-202(6.5)(c), C.R.S.

In light of the interrelationship of these various statutory provisions, the CORA should be construed in this case to mean that any performance rating of the city administrator that was independently and individually determined and recorded by a city council member in that council member's individual evaluation form on Mr. Nagy ***is*** a public record. Such performance ratings are obviously "writings" that were made by the city council members for use in the exercise of their legally authorized function of evaluating the city administrator. Such performance ratings also expressed the final decision of each individual council member concerning that council member's rating of Mr. Nagy's performance, especially in light of the fact that will be established as undisputed at trial that all Mr. Wells did with the performance ratings that he collected from the council members was to compile a mathematical average, without any subjective deliberation or modification.

Preliminarily, the "work product" exclusion from "public records" in § 24-72-202(6)(b)(II), C.R.S. is clearly inapplicable to these performance ratings from each individual

council member because that exclusion applies only to the subset of "work product" documents that are "prepared ***for*** elected officials." *See* § 24-72-202(6)(b)(II), C.R.S (emphasis added). In this case, the council members' individual performance ratings were prepared ***by*** elected officials, not "for" elected officials.

In addition, these individual performance ratings plainly fall outside the scope of the definition of "work product" in § 24-72-202(6.5)(a), C.R.S., because these ratings were not "advisory" or "deliberative" in nature. Rather, the council members' performance ratings were individually completed without any input from other council members, nor did any council member take into account any other council member's performance rating before arriving at his or her own ratings for Mr. Nagy, thus negating any implication that the performance ratings were either "advisory" or "deliberative." Moreover, the individual council members' performance ratings of Mr. Nagy also were not "assembled for the benefit of elected officials"; they were instead prepared ***by*** the elected officials, and the only person they "benefited" was Mr. Nagy, who was clearly not an elected official.

Finally, because each individual council member's independent performance rating was never modified by the council member after the council member provided his evaluation form to the City Attorney for compilation, those individual performance ratings reflect the individual "final decision by an elected official," and are thus specifically excluded from the definition of "work product" under the express terms of § 24-72-202(6.5)(c)(I), C.R.S. The fact that the City Council later decided, after deliberations in its closed-door executive session, to round up to 3.0 the mathematical average of the individual performance ratings of 2.8 does not make those individual performance ratings any less "final." To contend otherwise would be to assert that an

initial vote by legislators on a proposed budget is not a final vote just because the legislators later decide to increase the amount of the budget during a subsequent vote. In such a scenario, both votes are final decisions by the elected officials. Both votes express the firm and settled conviction of the legislators at the particular moment in time when the vote is take. The second vote just happens to modify the first vote; it does not make the first vote any less final.

III. The "Deliberative Process" Privilege Is Inapplicable

The second issue raised by the City's non-disclosure of the council members' individual performance ratings is whether such ratings fall within the statutorily codified "deliberative process privilege" set forth in the CORA.[4]

In 1999, in direct response to, and in an effort to limit the impact of, the Colorado Supreme Court's decision in *City of Colorado Springs v. White*, 967 P.2d 1042 (Colo. 1998), the Colorado General Assembly enacted 1999 Colo. Sess. Laws, ch. 72, § 2, p. 207 (codified at § 24-72-204(3)(a)(XIII), C.R.S.), the CORA's "deliberative process privilege" exemption.[5]

Under the CORA's statutory codification of this privilege – which necessarily narrows any common law privilege previously recognized in *White* – public records may be withheld from disclosure as "deliberative process" documents only if they meet the following demanding test: The documents must be "predicisional," "deliberative," and "so candid or personal that public disclosure is likely to stifle honest and frank discussion within the government." *See*

[4] Alhough the City has not asserted it as a basis for non-disclosure and it is therefore not at issue here, the "personnel file" exemption in § 24-72-204(3)(a)(II)(A), C.R.S., is also inapplicable as the definition of "personnel file" in § 24-72-202(4.5), C.R.S., expressly excludes "performance ratings" from inclusion within the meaning of the term "personnel file."

[5] In the interest of full disclosure, the *Times* notes that its counsel served as legal counsel to the Colorado Press Association during the legislature's negotiations and modifications of HB-99-1191, which was proposed by legislators at the request of the Colorado Press Association, and ultimately came to be enacted as the new § 24-72-204(3)(a)(XIII), C.R.S.

§ 24-72-204(3)(a)(XIII), C.R.S.; *White*, 967 P.2d at 1052; *see also Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1227 (10th Cir. 2007); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Moreover, in a direct contradiction of the Colorado Supreme Court's decision in *White*, the General Assembly also required that if a records requester objects to a custodian's assertion of the deliberative process privilege, the custodian must prove to the satisfaction of the Court that disclosure of the requested record would cause substantial injury to the public interest. *See* § 24-72-204(3)(a)(XIII), C.R.S. In making this assessment of potential injury to the public interest, the Court is required to "weigh, based on the circumstances presented in the particular case, the public interest in honest and frank discussion within the government and the beneficial effects of public scrutiny upon the quality of governmental decision-making and public confidence therein." *See id.* Thus, the statutory codification of the deliberative process privilege in Colorado has transformed the privilege into a qualified one, where even legitimate interests in confidential deliberation may be overridden in some circumstances by the benefits of public scrutiny and public confidence in governmental decision-making. *See id.*

In this case, the performance ratings ascribed to Mr. Nagy in the council members' individual performance evaluations meet none of the threshold requirements of "deliberative process" documents: The information is not "predecisional" because it reflects the actual final decision of each individual council member as to that council member's individual assessment of Mr. Nagy's performance rating. *See Trentadue*, 501 F.3d at 1227. The information is also clearly not "deliberative" because no council member ever shared his or her performance rating with other council members in an effort to influence the decisions of those other council

members; rather the performance rating numbers were simply averaged by arithmetic computation by the City Attorney. *See In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (noting that the essence of a deliberative document is its reflection of the give-and-take of the consultative process).

And finally, the individual performance ratings by each council member are not, by any stretch of the imagination, "candid" or "personal" such that their disclosure would stifle honest and frank discussion within the government. *See Coastal States Gas*, 617 F.2d at 866. In this regard, it is important to remember that public officials, especially the chief executive officers of governmental entities, have little to no legitimate expectation of privacy in information relating to their on-the-job performance. *See Denver Publ'g*, 812 P.2d at 685 ("[I]t has been recognized that public employees have a narrower expectation of privacy than other citizens."); *see also Rinsley v. Brandt*, 446 F. Supp. 850, 857-58 (D. Kan. 1977) ("A public official has no right to privacy as to the manner in which he conducts his office.") (citing *Rawlins v. Hutchinson News Publ'g Co.*, 543 P.2d 988, 993 (Kan. 1975)); *cf. Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144, 1155 (10th Cir. 2001) (finding no right of privacy applies to a police officer's on-the-job conduct because "[f]or such information to warrant protection, it must be 'highly personal or intimate,' " and noting that the Tenth Circuit has held "that police internal investigation files [a]re not protected by the right to privacy when the 'documents related simply to the officers' work as police officers' ") (quoting *Flanagan v. Munger*, 890 F.2d 1557, 1570 (10th Cir. 1989)) (additional internal quotations and citations omitted). Thus, as a matter of law, any rating by council members of Mr. Nagy's on-the-job performance can never be considered "personal" or "private."

Even if, however, the council members' individual performance ratings are deemed to meet the threshold requirements under the CORA for "deliberative process" documents, which they should not, the City cannot also meet its additional burden of demonstrating that disclosure would cause substantial injury to the public interest. In this regard, it is crucial to appreciate the benefit to the public from disclosure of the requested performance ratings. At the time the *Times* requested the individual council members' performance ratings of Mr. Nagy, the city administrator was in line to become Fort Morgan's first city manager under a new form of municipal government, an organizational structure that had been opposed during the preceding charter election by some of the very city council members who were engaged in evaluating Mr. Nagy. Indeed, in the months leading up to that transition from a mayoral/city administrator form of a government to one controlled by a professional city manager, Mr. Nagy had become a lightning rod for criticism from council members disenchanted with the impending changes. By hiding each individual council member's performance rating of Mr. Nagy in a compiled average, rather than allowing citizens to know which council member rated Mr. Nagy highly and which rated him poorly, the City deprived the citizens of Fort Morgan of the very benefit of public scrutiny of government decisions that the CORA was intended to protect. *Compare American Soc'y of Pension Actuaries v. IRS*, 746 F. Supp. 188, 192 (D.D.C. 1990) (holding that when the federal government announced a composite figure for the amount of expected revenue enhancements to be generated by the IRS during a certain budget year, the deliberative process privilege did not allow the government to withhold the underlying figures that were the basis of the calculation of that anticipated budget figure).

Moreover, there is no evidence the City can present – beyond conclusory, self-serving assertions from disgruntled council members – that disclosure of the council members' individual performance ratings would have negatively affected the quality of the council's decision-making with respect to its evaluation of Mr. Nagy. *Cf. Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983) (holding that conclusory and generalized allegations of harm are insufficient to meet an agency's burden of proof under the federal FOIA); *Pacific Architects & Eng'rs, Inc. v. Renegotiation Bd.*, 505 F.2d 383, 384-85 (D.C. Cir. 1974) (same). Indeed, the evidence is directly contrary to any argument that disclosure would harm governmental decision-making because, in fact, the City Council had previously engaged in an entirely public evaluation of Mr. Nagy in August 2007, with no ill effects on the council's ability to decide on its evaluation of the city administrator.

IV. Colorado Doctrine Of Spoliation

The Court has ruled in its Order Denying the City of Fort Morgan's Motion to Dismiss Defendants' Counterclaim, filed Sept. 3, 2008, that the *Times*' spoliation theory, in support of its claim for both declaratory and injunctive relief, is valid under Colorado law. *See* Order, at 2. In that Order, the Court noted that the central factual issue to be addressed under Colorado's spoliation doctrine is whether the City Attorney knew or should have known, before destroying the individual council members' evaluations, that those documents would be the subject of a forthcoming CORA request. *See Castillo v. Chief Alternative, LLC*, 140 P.3d 234, 236 (Colo. App. 2006) (holding that where a "party kn[ows] or should [know] that . . . evidence [is] relevant to pending, imminent or reasonably foreseeable litigation," that party has a duty in law to preserve the evidence and may be sanctioned for destroying it) (citing *Turner v. Hudson Transit*

Lines, Inc., 142 F.R.D. 68, 73 (S.D.N.Y. 1991) ("[T]he obligation to preserve evidence arises prior to the filing of a complaint where a party is on notice that litigation is likely to be commenced.")); *see also Aloi v. Union Pac. R. Corp.*, 129 P.3d 999, 1003 (Colo. 2006) (holding that reliance on a document retention policy as a basis for destruction of documents will not save a party from a finding of spoliation when the party is on notice as to the likely relevance of those documents in forthcoming litigation).

In light of the fact that the City, in its initial Petition in this case, affirmatively asserted that it was aware as early as November 30, 2007 that the *Times* would likely seek access to council members' evaluations of Mr. Nagy, as well as substantial additional corroborative evidence to be presented at trial concerning the City Attorney's actions, inactions, and state of mind, there can be no question that Mr. Wells actually did know of the likely relevance of the documents he says he shredded on December 20, 2007, and further that he shredded those documents explicitly to prevent this Court from having the opportunity to exercise its power under the CORA to order their disclosure. Such willful conduct is quite clearly sanctionable spoliation, and the Court should so find here. *See Aloi*, 129 P.3d at 1003 (no finding of bad faith required to impose sanctions for willful spoliation); *Pfantz v. Kmart Corp.*, 85 P.3d 564, 568 (Colo. App. 2003) (sanctions may be imposed in absence of finding of intentional spoliation where conduct was reckless or grossly negligent).

ADDITIONAL ISSUE THAT MAY ARISE AT TRIAL

V. Colorado Newsperson Privilege Act Prevent Compelled Testimony Of Unpublished News Information

The City's witness list mysteriously includes as one of its potential witnesses Counterclaimant William Holland, the publisher of *The Fort Morgan Times* and a regular columnist in that newspaper. Mr. Holland's only relevance to this case is his role as the author of the December 28, 2007 CORA request that prompted this litigation. However, the fact of Mr. Holland's authorship of that letter is undisputed in this case. Indeed, Mr. Holland's CORA request letter was pleaded and offered as an exhibit to the City's initial Petition, and it is an exhibit that both sides have listed on their trial exhibit lists. As a result, because the facts surrounding the *Times*' CORA request are not in dispute, there appears to be no probative purpose for any testimony from Mr. Holland.[6]

Moreover, any effort to compel testimony from Mr. Holland concerning news information that the *Times* has gathered or is aware of is protected by the Colorado Newsperson Privilege Act, § 13-90-119(2), C.R.S. Under that statute, the City may not compel Mr. Holland to testify concerning unpublished news information unless it first meets the demanding standards set out for overcoming the shield law privilege:

[6] The *Times* anticipates that the City may attempt to examine Mr. Holland concerning a conversation he had with Mr. Nagy on or about the day when the *Times*' CORA request was delivered to the City. Whatever was said between Mr. Nagy and Mr. Holland at that time, however, is entirely irrelevant in this case, as the Colorado Supreme Court has held that a person's reasons for asking for a public record are not germane under the CORA. *See Dreyfus*, 184 Colo. at 297-98, 520 P.2d at 109 (quoting legislative history of statute for the proposition that a requester need not show a "special interest" in the requested documents); *see also Anderson v. Home Ins. Co.*, 924 P.2d 1123, 1126 (Colo. App. 1996) ("There is no requirement that the party seeking access must demonstrate a special interest in the records requested."); *cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) (holding that under the federal FOIA, disclosure of an agency record "cannot turn on the purposes for which the request for information is made. . . . [T]he identity of the requesting party has no bearing on the merits of his or her FOIA request."). Moreover, because Mr. Nagy is expected to testify at trial, the City can fully examine Mr. Nagy on this entirely irrelevant issue without injury to Mr. Holland's and the newspaper's rights under the Colorado shield law.

(a) That the news information is directly relevant to a substantial issue involved in the proceedings;

(b) That the news information cannot be obtained by any other reasonable means; and

(c) That a strong interest of the party seeking to subpoena the newsperson outweighs the interests under the first amendment to the United States Constitution of such newsperson in not responding to a subpoena and of the general public in receiving news information.

§ 13-90-119(3), C.R.S; *see also Gordon v. Boyles*, 9 P.3d 1106, 1118 (Colo. 2000).

Under the first prong of the City's burden, it must show that "the news information is ***directly relevant*** to a ***substantial*** issue involved in the proceedings." § 13-90-119(3)(a), C.R.S. (emphasis added). However, because there is no disputed issue under the elements of the specific CORA claim in this case – *i.e.*, whether the City "improperly" "withheld" a "public record" – for which Mr. Holland's testimony is relevant, let alone centrally relevant, there is nothing that Mr. Holland can say in this case that would be germane to a "substantial" or "central" issue. *Compare United States v. Lloyd*, 71 F.3d 1256, 1268 (7th Cir. 1995) (quashing subpoena on news reporter called to testify on collateral matter); *United States v. Burke*, 700 F.2d 70, 78 (2d Cir. 1983) (testimony offered only for impeachment purposes cannot be "centrally relevant" or go to the "heart of the matter," as required under the First Amendment privilege); *United States v. Cuthbertson*, 651 F.2d 189, 195 (3d Cir. 1980) (same); *Liberty Lobby, Inc. v. Rees*, 111 F.R.D. 19, 22 n.3 (D.D.C. 1986) (denying effort to compel testimony from a reporter because "[m]ore must be shown than mere potential for impeachment and erosion of credibility."); *Holland v. Centennial Homes, Inc.*, 22 Media L. Rep. 2270, 2275, 1993 WL 755590 (N.D. Tex. Dec. 21, 1993) ("[M]ere speculation of possible impeachment value" is insufficient ground for ordering

journalist to produce tapes of interviews with plaintiffs sought by defendants); *Campbell v. Klevenhagen*, 760 F. Supp. 1206. 1215 (S.D. Tex. 1991) (same); *Redd v. United States Sugar Corp.*, 21 Media L. Rep. 1508, 1993 WL 428667, at *2 (Fla. Cir. Ct. May 27, 1993) ("[T]he possible use of the information for impeachment does not go to the heart of issues before the Court and does not demonstrate a sufficiently compelling need to overcome the reporter's privilege."); *cf. Krase v. Graco Children Prods., Inc. (In re: Application to Quash Subpoena to National Broadcasting Co.)*, 79 F.3d 346, 351-52 (2d Cir. 1996) (holding that impeachment is an insufficient basis for breaching the reporter's privilege under New York's statutory press shield law: "Ordinarily, impeachment material is not critical or necessary to the maintenance or defense of a claim.").

In addition, it is settled law that the qualified reporter's privilege should not be set aside when the news information being sought is merely cumulative to other evidence already in the record. *See Re/Max Int'l, Inc. v. Century 21 Real Estate Corp.*, 846 F. Supp. 910, 912 (D. Colo. 1994); *see also United States v. National Talent Assocs., Inc.*, Case No. 962617, 1997 WL 829176, at *3 (D.N.J. Sept. 4, 1997); *Klevenhagen*, 760 F. Supp. at 1215-16; *United States ex rel. Vuitton et Fils, S.A. v. Karen Bags, Inc.*, 600 F. Supp. 667, 670 (S.D.N.Y. 1985).

In light of Colorado's shield law protections against compelled disclosure of unpublished news information, the Court should be particularly alert to any improper questioning of Mr. Holland.

Respectfully submitted this 5th day of September, 2008.

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I hereby certify that on this 5th day of September, 2008, a true and correct copy of the foregoing **COUNTERCLAIMANTS' TRIAL BRIEF** was served on the following counsel through the Lexis/Nexis File-And-Serve electronic court filing system, pursuant to C.R.C.P. 121(c), § 1-26:

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