

ELECTION LAW WAR GAME

September 11, 2012

Judicial Conference of Colorado
Vail, CO

FACTUAL OVERVIEW¹

A recent amendment to Colorado Open Records Act (CORA) grants access to voted ballots to members of the public after the canvass period ends. The statute denies access during the pendency of a recount. This war game posits a scenario the statute's crafters may not have contemplated: what if a CORA request is made just before a recount petition is filed? Should CORA access be granted or denied?

In recent years, concerned citizens in Colorado have brought a number of suits on the question of public access to voted ballots. In June 2012, the Colorado legislature enacted a statute, CRS 24-72-205.5, affirming ballot transparency. The statute grants public (i.e., non candidate) access to voted ballots, except during the canvass or during a recount.² Colorado election law sets the canvass period from Election Day until 17 days after the election, or November 23rd.³ Assuming no automatic recount is triggered, candidates have until 31 days after the election to file a recount, or until Friday, December 7.⁴ On that basis, imagine this:

Ed Perlmutter, a Democrat, led his opponent Republican Joe Coors, Jr. in the U.S. Congressional race in Colorado's Seventh District. After the initial count, Perlmutter led Coors by 1,268 votes or .9 percent.⁵ This spread was not enough to trigger an automatic recount, which

¹ This hypothetical case was created for the September 11, 2012 Colorado Election Law Program War Game. The scenario derives from teaching and scholarship conducted at William & Mary Law School with the assistance of Edward Foley and Steve Huefner at Moritz College of Law of the Ohio State University. *None of the real-world candidates named in these hypotheticals (or their representatives) were consulted on the content of these hypotheticals or are in any way responsible for it.* The two attorneys arguing each side of the hypothetical cases are doing so as part of the exercise and do not actually represent their hypothetical clients in this hypothetical matter. True to their commitment to professional norms and to the spirit of this exercise, for purposes of this war game, the attorneys will argue zealously as if the named parties were in fact their clients.

² CRS 24-72-205.5(3)(a) states that "...the designated election official shall not fulfill a request under this part 2 for the public inspection of ballots during the period commencing with the forty-fifth day preceding election day and concluding with the date either by which the designated election official is required to certify an official abstract of votes cast... or by which any recount conducted in accordance with article 10.5 of title 1, C.R.S., or section 31-10-1207, C.R.S., is completed, as applicable, whichever date is later." According to CRS 1-10-102(1), the date the official abstract of votes cast is due is the 17th day after the election.

³ As the canvass period includes November 23 and November 24 is a Saturday, Monday November 26 is the first day in this scenario the public may inspect ballots.

⁴ CRS 1-10.5-106.

⁵ Note that this spread is calculated based on the formula set forth in CRS 1-10.5-101 (the statute determining when an automatic recount is triggered). The percentage of the vote spread is based on the highest number of votes cast (the winning candidate's vote total) as opposed to the total votes cast.

requires a difference of one half of a percent or less. An unprecedented number of close races across the country have stretched national party resources, and Mr. Coors remained on the fence about whether to file a recount petition; in Colorado, the cost of a recount falls to the candidate requesting it.⁶

On November 26, the Monday following the close of the canvass period, a local Colorado activists group, “Democracy In Action” (“DIA”), filed a CORA request under CRS 24-72-205.5(3)(a) requesting copies of all ballots cast in the 7th Congressional District (consisting of portions of Adams and Jefferson Counties). Election officials in Adams County agreed to provide copies of ballot images (TIFFs) of all votes cast, including images of mail-in ballots. Election officials in Jefferson County refused access despite what appears clear statutory mandate to do so.

DIA members, working in shifts, sifted through the Adams ballot images over the next several days. Upon finishing their review, DIA posted an account of possible mistaken vote tallies in Colorado’s 7th District on its blog CODemocracyInAction.org at 11:00 pm on December 4. The national news media immediately picked up the story. Throughout the following morning, December 5, national media outlets rushed to court to file their own CORA requests in Adams, and Jefferson Counties. Once again, Adams County agreed to provide access and Jefferson County refused access. Encouraged, Mr. Coors filed a recount petition at 4:30 pm on December 7, the last day he was eligible to do so.

In response to the Jefferson County Clerk’s decision to deny access to the ballots, the national media outlets and Mr. Coors filed a civil claim under CORA, requesting that the Jefferson County district court order the Jefferson County Clerk to grant access to the ballots. The court dismissed the case and refused to grant the requested access until the recount is complete.

In the case being argued today, the national media outlets and Mr. Coors have appealed the district court’s judgment and request CORA access to copies of the ballots and ballot images. Mr. Coors, anxious for as much help as possible in locating irregularities in the certified totals, argues that the statute is clear on its face that access should be awarded to any member of the public who requests access post canvass, pre recount. Mr. Perlmutter supports the Jefferson County Clerk’s decision to deny access, arguing that the CORA request cannot now be honored because the recount phase officially began on December 7 when Mr. Coors filed his petition. Further, Perlmutter asserts that allowing unfettered national media access to ballots will create a circus atmosphere that could corrupt the recount process.

At today’s hearing, the three-judge panel will hear attorneys for Mr. Perlmutter and Mr. Coors argue the case. For purposes of this scenario, attorneys for both the national media outlets and the Jefferson County clerk’s office appear to have vanished in a thin mist.

⁶ Colo. Rev. Stat. Ann. § 1-10.5-106 (“Before conducting the recount, the election official who will conduct the recount shall determine the cost of the recount within one day of receiving the request to recount, notify the interested party that requested the recount of the cost, and collect the costs of conducting the recount.”)