

DISTRICT COURT, MORGAN COUNTY,
COLORADO
400 Warner
Ft. Morgan, Colorado 80701

THE CITY OF FORT MORGAN COLORADO, a
municipal corporation, and ANDREA STRAND
CUSTODIAN OF RECORDS,

Plaintiff,

vs.

EASTERN COLORADO PUBLISHING COMPANY,
d/b/a , THE FORT MORGAN TIMES

Defendant.

and

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

ΔCOURT USE ONLYΔ

Case Number: 08CV2

Div.: C

**ORDER DENYING THE CITY OF FORT MORGAN'S MOTION TO DISMISS
DEFENDANTS' COUNTERCLAIM**

THIS MATTER comes on for consideration of the City of Fort Morgan's Motion to Dismiss, filed June 20, 2008, the Defendant's response thereto, and the City's Reply. The Court has considered the arguments of counsel, the affidavits, and other materials attached to the briefs. The Court FINDS and CONCLUDES:

The City's Motion to Dismiss relies on materials extrinsic to the parties' pleadings, including various affidavits from City officials. The Defendants (herein referred to as "the Times") likewise rely on extrinsic materials. In light of references to extrinsic materials, which extend beyond the four corners of the parties' pleadings, the motion shall be deemed to be a motion for summary judgment, under C.R.C.P. 56(b).

The City's argument makes two points: (1) The 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 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 (2) there is no remedy available under CORA for spoliation of public records in advance of an anticipated request for access to those records. Based on these points, the City contends that the *Times*' counterclaim must be dismissed.

Based on the authorities presented in the parties' briefs, the Court concludes that Colorado law recognizes a variety of possible remedies for spoliation of evidence. The spoliation doctrine is grounded on the inherent power of a court "to enable [it] to perform efficiently its judicial functions, to protect its dignity, independence, and integrity, and to make its lawful actions effective." *Aloi v. Union Pacific Railroad Co.*, 129 P.3d 999, 1002 (Colo. 2006), quoting *Pena v. District Court*, 681 P.2d 953, 956 (Colo. 1984). Furthermore, no persuasive reason has been shown why a remedy for spoliation of evidence cannot be imposed if a municipality destroys public records in advance of an anticipated request for access to those records under CORA. After all, CORA and the spoliation doctrine serve both punitive and remedial functions.

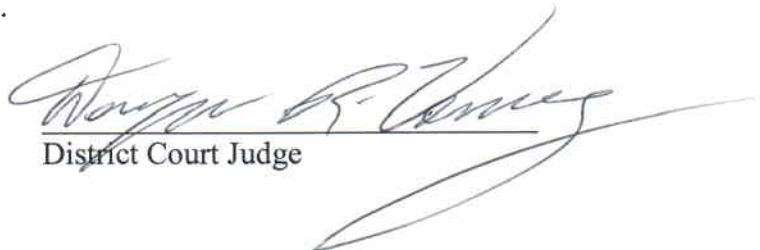
There are genuine issues of material fact concerning whether the City engaged in spoliation of the requested public records in advance of the anticipated request by the *Times* for access to those records. Whether the City Attorney knew or should have known, before destroying the former city manager's personnel review forms, that the *Times* intended to seek access to those records under CORA is an issue of fact that must be determined at trial. Furthermore, assuming such knowledge on the part of the City Attorney, whether he acted with a culpable mental state is also a disputed issue of fact that must be determined at trial. Under the law of spoliation of evidence, the state of mind of a party responsible for the destruction of relevant evidence is material to the question of what remedy, if any, should be applied.

In light of genuine issues of material facts as to knowledge and mental state at the time the City destroyed the records here at issue, summary judgment cannot be issued in favor of the City.

The City's motion does not address the question of whether the performance evaluations were public records or were, instead, exempt from disclosure under CORA as "work product" or pursuant to the "deliberative process privilege." Therefore, I express no opinion on that issue.

THE COURT ORDERS: The City's Motion to Dismiss is DENIED. The Court further directs that this matter shall proceed to trial, currently set to begin on September 15, 2008, on all remaining issues.

Dated: September 2, 2008.


District Court Judge