

Hall, Hillary

From: Hughes, David
Sent: Friday, November 16, 2012 1:54 PM
To: hiliary.rudy@sos.state.co; suzanne.staiert@sos.state.co
Cc: Hall, Hillary
Subject: Boulder County Canvas Board

Whether the canvass board is a "proper defendant" is a minor and secondary question. It is easy to imagine many scenarios where the CB could be logically sued and have to defend whether or not they were "properly" targeted as a defendant. Who will defend them?

Dear Hilary and Suzanne:

I understand questions have arisen in Boulder and other counties related the role of the canvas board and **whether the canvas board would be a proper defendant** in a lawsuit under Colorado's Open Meetings Law or CORA. Hopefully, this e-mail will serve to clarify Clerk Hall's position on these issues.

one only needs to read this first phrase---they are are board.

Regarding the Open Meeting Law, Clerk Hall does not believe that the canvas board is subject to any statutory open meetings requirements. This is because the canvass board is not a "local public body" as defined by Colo. Rev. Stat. § 24-6-402, and, consequently, is not subject to the requirements of the Open Meetings Law. **A "local public body" is "any board,** committee, commission, authority, or other advisory, policy-making, rule-making, or formally constituted body of any political subdivision of the state and any public or private entity *to which a political subdivision, or an official thereof, has delegated a governmental decision-making function* but does not include persons on the administrative staff of the local public body." Colo. Rev. Stat. § 24-6-402(1)(a) (emphasis added). Neither Clerk Hall nor the Boulder County Board of County Commissioners has delegated any of their governmental decision-making authority to any member of the canvass board.

Neither the County nor Hall had this authority to delegate. The authority is statutory, and granted throughout Title 1 by the General Assembly.

The canvass board is purely a creature of statute with limited and defined functions. The only requirements governing the canvass board are those provided for under the Colorado Election Code. Specifically, the canvass board has three duties during an election: (1) confirm that the number ballots voted does not exceed the number of ballots cast; (2) confirm that the number of ballots cast does not exceed the number of registered electors in the precinct; (3) certify the abstract of votes and transmit it to the secretary of state. Colo. Rev. Stat. § 1-10-101.5. At least two members of the canvass board are also required to *observe* the post-election audit. Colo. Rev. Stat. § 1-7-514(4) (emphasis added). Under the election rules governing the canvass board, the only people who are expressly permitted to observe the board perform its duties are certified watchers. Colo. Code Regs. § 1505-1 Rule 41.13, *see id.* at Rule 8.6.5. Consequently, Clerk Hall strongly believes that the canvass board is not a local public body subject to the requirements of Colo. Rev. Stat. § 24-6-402 and is prepared to defend that position should she be challenged on it. Even assuming a lawsuit were filed alleging that the canvas board is subject to the Open Meetings Law, the only remedy that may be sought in

But defendants must pay
plaintiffs legal fees.

such a lawsuit is an injunction against the appropriate entity for compliance with the law—not a tort claim for damages against individual canvas board members. See Colo. Rev. Stat. § 26-6-402(9). As a result, Clerk Hall does not believe that individual members of the canvass board could or should be held liable for alleged Open Meetings Law violations.

even Douglas County was considering suggesting that their CB members who held private meetings were to be held liable.

With respect to CORA, Clerk Hall intends to take custody of any records produced by her office or provided to her as a result of the canvas board process. Thus, she believes that any CORA requests related to the canvas board's official election-related activities should be directed to her (and possibly the Secretary of State) and she will respond appropriately. Once the canvas board has completed its statutory functions, Clerk Hall believes it is disbanded and therefore can take no further actions in any official capacity—including responding to CORA requests.

Please let me know if you have further questions regarding these issues.

Hall can "believe" what she wishes, but it does not prevent a canvass board member from being sued and facing defense cost and even judgements against them.

Sincerely,

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this memo is almost an invitation to a plaintiff to file against a canvass board and the clerk. There is no real "protection" offered here.

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What happens if you are defending
HH's position and you lose? The
statement needs to be "Whatever
the CB is sued for, the county
pays."