

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Gerald Pinsker, Objector,

vs.

Jon Caldara and Timothy Geitner, Proponents.

MOTION FOR REHEARING ON INITIATIVE 2021-2022 #94

Pursuant to C.R.S. § 1-40-107, Gerald Pinsker, a registered elector of the State of Colorado, through undersigned counsel, objects to the Title Board’s (the “Board”) title and ballot title and submission clause set for Initiative 2021-2022 #94, and states:

The Board set a title for Initiative 2021-2022 #94 on April 6, 2022. The Board erroneously designated and fixed the following ballot title and submission clause:

Shall there be a change to the Colorado Revised Statutes concerning expanding the Colorado Open Records Act to require disclosure of materials made, maintained, or kept by a local public education provider, and, in connection therewith, expanding the definition of public records to include educational materials used by an educator?

- I. The Board lacks jurisdiction over Initiative #94, as it violates the Constitution’s single subject requirement by both extending CORA to various educational materials and, also, subjecting “volunteers” to record disclosure requirements even though they are persons who are not employed by a school or a district and whose records are not otherwise subject to CORA.**

The Colorado Open Records Act (“CORA”) was adopted and is applied to increase transparency of government functions, conducted by government employees and elected officials based on records held by a governmental unit. Initiative #94 adds “educational materials” to the list of public records subject to CORA and also, as is relevant for this motion, defines “educator” as a person subject to CORA:

“Educator” means a classroom teacher, a person employed by the local education provider to provide professional services to students in support of the educational instructional program, and ***includes a*** school administrator, contractor, or ***volunteer***.

Proposed Section 24-72-302(9)(a) (emphasis added.)

Initiative #94 thus directs with specificity the public institutions that must comply with CORA (school-related government institutions) but also expands disclosure to include individuals who are not government employees—in other words, ordinary private citizens—who volunteer at a school.

This new category of persons made subject to CORA is especially hidden because of the way Initiative #94 defines the documents that would need to be produced. CORA, as voters know and use it today, applies to records that are “made, maintained, or kept” by government and those documents that are “held... for use” by a governmentally financed entity exercising functions provided by law or expending public funds. C.R.S. § 24-72-202(6)(a)(I).

Initiative #94 does not limit the documents to which a member of the public can gain access to only those that are “kept” or “held for use” by the school or the district. Instead, Initiative #94 defines “education materials” to include those that a covered person “*uses* in teaching... including but not limited to... supplemental... texts... or recommended reading materials... or other resources.” Proposed Section 24-72-302(9)(b) (emphasis added). In fact, Initiative #94 changes the existing definition of “public record” by separately including “education materials” in the definition of “public records,” employing a distinct “and includes” clause in Proposed Section 24-72-302(6)(a)(I). The new test under #94 is whether a volunteer has a document that he or she refers to, distributes, or in any way “uses” in his or her volunteer activities. *See Mook v. Bd. of Cty Comm’rs of Summit Cty.*, 2020 CO 12, ¶51, 457 P.3d 568, 579 (an object is “used” if it is “employed in accomplishing something,” citing *Merriam-Webster Dictionary*).

This expansion violates the single subject requirement. In 2014, the Supreme Court ruled that changing certain requirements of recall laws as to elected public officials and then also broadening the right of recall to include non-elected government officials was a violation of the single subject requirement. “Voters would be surprised to learn that, in voting for the new article XXI’s revamped procedures for recall petitions and elections, they are also authorizing the recall firing, at any time, of—for example—the appointed heads of Colorado’s state executive departments, their appointed city or county manager, or the appointed head of their local library.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶33, 333 P.3d 76, 85.

Initiative #94 changes certain disclosure parameters for school employees but also expands CORA’s reach to persons who have no job-related role with a school at all. Just as voters had no reason to think that an expansion of the recall process included the recall to public library officials, they would be surprised that a volunteer at their school library who offers “recommended reading materials” to students to advance a student’s competence at school will be subject to CORA under this measure. *See* Proposed Section 24-72-302(9)(a). The same is true for volunteers who give a classroom presentation about what they do for a living, address a school assembly, assist in an elementary classroom’s math group, read books to students, or help coach an academic team connected with a course taught at that school.

Moreover, the broad realm of documents to be covered by this provision (“or other resources”) include those that are used by the volunteer, whether or not they are physically transferred or even brought to the school or the district. The library volunteer’s reading list or a speaker’s background notes come to mind. They are “open records” even though they are solely in the possession of the volunteer. Thus, it is the individual volunteer, not the public entity or its custodian of records, who would be required to produce the documents from those materials that he or she possesses and referred to for “use” at a school.

How concealed is the issue of CORA application to school volunteers? The word “volunteer” wasn’t raised in the legislative staff’s review and comment memo.¹ The proponents didn’t mention the word “volunteer” during that hearing either.² Instead, they represented that the purpose of their measure was just “to clarify that educational materials are subject to the Colorado Open Records Act.”³ At the Title Board meeting, one of the designated representatives stated that the single subject was “clarifying that educational materials are subject to disclosure under CORA.”⁴ And after the Title Board addressed the single subject issue, this same proponent portrayed #94 to be an innocuous, almost unnecessary measure. “It doesn’t actually make educational materials a public record. They really already are. So I think it just clarifies that educational materials are subject to disclosure.”⁵

The Title Board wisely rejected this characterization, noting in the titles that Initiative #94’s purpose is “expanding” CORA to require disclosure by education providers. But the Board needs to extend its analysis beyond this one correction of the proponents’ positioning.

Private individuals (and the records they create that are not in the possession of a government agency) are not covered by or subject to CORA. Even a government official’s personal papers aren’t typically treated as public records. *See Wicks Comm. Co. v. Montrose Bd. of Cty. Comm’rs*, 81 P.3d 360, 366 (Colo. 2003) (“The inclusion of [work-related] thoughts does not render a personal paper a public record for the purposes of CORA”). Initiative #94 amends CORA to apply to non-government employees and book lists or notes or other materials they access or develop—and thus “use”—to conduct their volunteer activities. Such an expansion is truly an aspect that is “hidden in the folds” of Initiative #94. It has escaped

¹ Initiative #94 was filed with the Title Board after a waiver letter was issued by staff, given the hearing on #94’s precursor, Initiative 2021-2022 #81. The memo on #81 is the only Review and Comment document generated on this concept and is entirely silent on this issue. *See* <http://leg.colorado.gov/sites/default/files/initiatives/2021-2022%2520%252381.002.pdf>.

² *See* <https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20220410/72/12987>

³ *Id.* at 10:04:20-35.

⁴ https://csos.granicus.com/player/clip/301?view_id=1&redirect=true at 6:47:35-45.

⁵ *Id.* at 6:48:25-50.

notice so far in this process, a development that underscores just how much of a surprise voters will experience if #94 is adopted in light of this additional subject and why it is a second subject, warranting reversal of the Board’s April 6 decision.

To understand the materiality of including “volunteers” in this measure, the Board should take note of the recent legislative history of this concept. One of the two designated representatives is a member of the Colorado House of Representatives and introduced a bill, HB22-1066,⁶ to require disclosure of education-related materials. Its defeat in committee led to the introduction of Initiative #94.⁷ HB22-1066 defined “educator” to include many of the same people identified in Initiative #94’s definition, but it did *not* include “volunteers” in that definition.⁸ That proposal was consistent with what is commonly understood, including by voters, to be an “educator.”⁹

Initiative #94 conceals its reach to include volunteers as educators. The inclusion of “volunteers,” then, is not a mere detail element of this initiative. Subjecting private parties who have no appointed or elected position in government to CORA’s disclosure mandate for materials they “use” when they volunteer is a hidden, second subject.

II. Even if the Title Board had jurisdiction, the titles set are misleading because they fail to inform voters of certain central elements of the measure.

The titles are misleading and must be corrected in order to accurately and fairly describe this initiative. The titles also omit central features of the measure. The issues that must be addressed include:

⁶ See https://leg.colorado.gov/sites/default/files/documents/2022A/bills/2022a_1066_01.pdf

⁷ https://www.gjsentinel.com/news/colorado/ballot-initiative-would-expand-colorados-open-records-law-to-include-school-curriculum/article_8b90d2cb-172e-59f3-86a0-16de3047bbd7.html

⁸ See fn. 6, *supra*, at 2-3. HB22-1106 did not, as Initiative #94 does include “contractors” as “educators.” Even though “contractors” is overbroad, at least a “contractor” could be employed for the purpose of teaching students for the school or school district.

⁹ The statutory definition of “educator” excludes volunteers: “**a teacher employed by a school district or charter school or an employee of a school district or charter school.**” C.R.S. § 22-55.5-102(3) (emphasis added). This definition reflects a voter’s context for this term. As generally understood, “educator” is defined to mean “**a person whose work is teaching others**, or one who is an authority on methods or theories of teaching” or, to the same end, “**a person whose job is to teach or educate people.**” www.dictionary.cambridge.org/dictionary/english/educator; www.oxfordlearnersdictionaries.com/us/definition/english/educator (last viewed April 12, 2022) (emphasis added).

- A. Specifying that the measure requires disclosure of records by any “volunteer” at a school who uses educational materials in teaching students because this element represents “a new or controversial legal standard which would be of concern to all concerned with the issue,” see *In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990) (requiring ballot title to include an initiative’s definition that meets this standard);
- B. Clarifying that records need not be “made, kept, or maintained” so long as they are “used” by a person qualifying as an educator, including any resources used by a volunteer, *id.*; and
- C. Identifying the expanse of records that must be disclosed under the definition of “educational materials” including any “other resources” that an educator uses. *Id.*

WHEREFORE, the titles set April 6, 2022 should be reversed, due to the single subject violations addressed herein or, alternatively, corrected to address the central features of Initiative #94 about which the titles should inform voters.

RESPECTFULLY SUBMITTED this 13th day of April, 2022.

RECHT KORNFELD, P.C.

s/ Mark G. Grueskin

Mark G. Grueskin
1600 Stout Street, Suite 1400
Denver, CO 80202
Phone: 303-573-1900
Email: mark@rklawpc.com

Objector’s Address:
865 Waite Drive
Boulder CO 80303

CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2021-2022 #94** was sent this day, April 13, 2022, via email to the proponents by means of their counsel of record, at:

Shayne Madsen
shayne@i2i.org

s/ Erin Holweger
Erin Holweger