

<p>DISTRICT COURT, MORGAN COUNTY, COLORADO 400 Warner Ft. Morgan, Colorado 80701</p> <hr/> <p>THE CITY OF FORT MORGAN COLORADO, a municipal corporation,</p> <p>Plaintiff,</p> <p>vs.</p> <p>EASTERN COLORADO PUBLISHING COMPANY, d/b/a , THE FORT MORGAN TIMES</p> <p>Defendant.</p> <p>and</p> <p>Counterclaimant: WILLIAM HOLLAND, a citizen of the State of Colorado.</p> <hr/> <p>Jeffrey A. Wells #34132 <b>THE CITY OF FORT MORGAN, COLORADO</b> 100 Main Street Fort Morgan, CO 80701 Telephone: (970) 542-3972 Facsimile: (970) 542-3976 E-mail: jwells@cityoffortmorgan.com</p>	<p><b>EFILED Document</b> <b>CO Morgan County District Court 13th JD</b> <b>Filing Date: Mar 20 2008 11:13PM MDT</b> <b>Filing ID: 19086136</b> <b>Review Clerk: Jody L Andrews</b></p> <p>ΔCOURT USE ONLYΔ</p> <hr/> <p>Case Number: 08CV2</p> <p>Div.: C</p>
<p align="center"><b>CITY OF FORT MORGAN'S VOLUNTARY MOTION TO DISMISS ITS PETITION FOR DECLARATORY JUDGMENT WITHOUT PREJUDICE PURSUANT TO C.R.C.P. RULE 41</b></p>	

The City of Fort Morgan, Colorado, a municipal corporation, (hereinafter "City"), by and through its attorney, Jeffrey A. Wells, hereby files this motion to dismiss its petition for declaratory judgment, pursuant to C.R.C.P. Rule 41, and in support thereof states as follows:

**RULE 121 CERTIFICATION**

Pursuant to Rule 121 undersigned counsel has conferred with opposing counsel regarding this motion. Opposing counsel has responded by stating, "The newspaper opposes the motion to the extent the City refuses to agree to pay for that

portion of the newspaper's fees associated with preparing its Answer. To the extent you go forward with a Rule 41(a) motion, please reflect this statement of position in your certification of the parties' conference on the matter." Opposing counsel agrees to the dismissal so long as attorney's fees are imposed by the Court.

### **INTRODUCTION**

The City filed an anticipatory declaratory judgment action under C.R.C.P. Rule 57, on January 4, 2008. In its action the City seeks a determination of the status of records related to its personnel evaluation process for appointed officials, which became the subject of an open records request made by the Defendants and Counterclaimants ("*Times*") in this matter. The facts supporting the City's anticipatory declaratory judgment have changed, rendering the City's claim for relief moot. The *Times*' does not object to the Court dismissing the City's petition so long as the Court awards the attorney's fees associated with the answer to that petition. The City does not agree that it should be required to pay attorney's fees as a condition of the dismissal of its petition.

### **STATEMENT OF FACTS**

1. The City filed an anticipatory declaratory judgment action under C.R.C.P. Rule 57, on January 4, 2008. The City did not serve the *Times* with its action and undertook efforts to resolve the controversy. The *Times* responded to the City's efforts by filing an answer and counterclaim.
2. The City's position for requesting anticipatory relief was based upon three significant facts. First, the records the *Times* requested had been legally disposed of prior to its request for the records. Therefore, it was, and remains the City's position that the *Times* lacked standing to assert a claim for relief under the Colorado Open Records Act ("CORA"). Second, the City Manager prepared a memo to City Council (*See* Petition Exhibit E), and made statements to Council members that he intended to do all of his future personnel evaluations in open session. Third, the newspaper made it clear in a November 30, 2007, editorial, that it would require the City to turn over records related to the review process for evaluations conducted in open session (*See* Petition Exhibit D).
3. On March 4, 2008, the City Council voted to accept a severance agreement for the City Manager, which included a provision for his resignation effective February 12, 2008.
4. There are currently no appointed officials at the City who are committed to hold their personnel evaluation in open session.
5. The *Times* Counterclaim is seeking a declaration from the Court that would provide the same relief to the parties that the City has requested in its petition, except that the *Times* is requesting attorney's fees and a reconstruction of the records.

6. On March 5, 2008, the attorney for the *Times*' responded to the City's request to voluntarily dismiss its petition, stating in part, "The City's complaint was frivolous from the outset and should never have been filed. The fact that it was indeed filed necessitates an award of fees to the newspaper upon its dismissal."
7. The *Times* claim to have spent a total of \$1047.00 in fees and costs in answering the City's Petition.
8. The *Times* will not be prejudiced or harmed by the dismissal of the City's petition, as it will be able to move forward with its counterclaim.

### **ARGUMENT AND AUTHORITY**

#### **I. An award of attorney's fees as a condition of dismissal is discretionary, and should only occur when the Defendant is prejudiced or the fees will not be useful in continuing litigation.**

The determination of terms and conditions of a voluntary dismissal is within the discretion of the court. *See Aspen Wilderness Workshop, Inc. v. Hines Highlands Limited Partnership*, 929 P.2d 718, 729 (Colo. 1996). The Court may order a plaintiff to pay defendant's attorney fees as a condition of voluntary dismissal, but only when necessary to protect the defendant from prejudice. *See FSDW, LLC v. First Nat. Bank*, 94 P.3d 1260 (Colo. App. 2004) The Court's discretion is further limited to the extent that fees and costs that would be useful in continuing litigation. *See Haystack Ranch, LLC v. Fazzio*, 997 P.2d 548, 556 (Colo. 2000), *See also, FSDW, LLC v. First Nat. Bank*, 94 P.3d 1260, 1265 (Colo. App. 2004) (the court may order the plaintiff to pay only for legal work that would not be useful to the defendant in future litigation). Finally, awarding fees because the Defendant believes the petition is frivolous would be an abuse of discretion. The terms and conditions under Rule 41 are concerned with a remedy for the defendant, not punishment for the plaintiff. *See Haystack Supra*.

In this case the Defendant is not prejudiced by the voluntary dismissal of the City's petition. The *Times*' refusal to stipulate to the City's motion for voluntary dismissal is premised on its contention that the City's Petition was frivolous from the outset. While the City denies this contention its dismissal is now necessary as the factual basis for its petition is undermined by the resignation of the City Manager, Michael Nagy.

#### **II. The City's dismissal is necessary due to the resignation of the City Manager, Michael Nagy and does not prejudice or harm the *Times*.**

The standard for determining whether a party might be harmed or prejudiced by the Plaintiff's voluntary dismissal of claims has been established by the Courts. *See Powers v. Professional Rodeo Cowboys Ass'n.*, 382 P.2d 1099, 1103 (Colo. App. 1992). In *Powers* the Court stated five factors it would consider in determining whether a

dismissal without prejudice would cause harm to a defendant. *Id.*, at 1102 These factors are: (1) the duplicative expense of a second litigation; (2) the extent to which the current suit has progressed, including the effort and expenses incurred by defendant in preparing for trial; (3) the adequacy of plaintiff's explanation for the need to dismiss; (4) the plaintiff's diligence in bringing the motion to dismiss; (5) any "undue vexatiousness" on plaintiff's part. *Id.* In applying these factors to this case, the *Times* will not be harmed by the relief requested in this motion.

**A. The factual and legal basis for re-filing the City's petition will be nearly identical to the basis in its initial petition for which there will be no duplicative expense of a second litigation.**

In the event the City files another petition requesting a declaratory judgment on records related to the City's evaluation policy, the cost of legal analysis and preparation of an answer will be negligible. The dispute that gives rise to this litigation is related to a policy that was adopted by the City for the evaluation of appointed officials. The records that are the subject of this litigation were prepared under the policy, and will likely be subject to another open records request if the evaluation is completed in open session. Accordingly, the allegations in the City's current petition are similar to what they will be in the future.

**B. The current suit is in the earliest stages, and the effort and expenses incurred by the *Times* in preparing for trial is minimal.**

The litigation in this matter is in its beginning stages and the *Times* has not been required to spend any significant time preparing for trial. The case has been at issue since February 26, 2008, and the parties have yet to exchange disclosures under C.R.C.P. Rule 26. Discovery does not commence until April 7, 2008. Trial was recently set for September 15 -17, 2008. Dismissal of the City's petition will not cause any delay in the scheduling of the trial or discovery in this matter.

The costs and fees associated with the *Times'* work in response to the City's petition are minimal. In conferring with the *Times'* attorney, he has worked a total of 3.3 hours on the answer to the City's petition with fees totaling \$957.00 and \$90.00 in costs associated the filing fee. What is most inequitable about the *Times'* request for payment of these fees and costs is that fact that the City never served the *Times'* with its petition. In determining whether the City should pay these fees, the Court should consider the *Times'* actions in moving forward with the litigation absent service. The answer and counterclaim filed by the *Times* was not compelled under C.R.C.P. Rule 12. Any expense that is associated with the *Times* answer and counterclaim was incurred, in part, as the result of its decision to waive service.

**C. The City's explanation for the need to dismiss is more than adequate.**

The resignation of the City Manager, Michael Nagy, has substantially undermined the factual basis of the City's anticipatory declaratory judgment action. As stated in the petition and the this motion, the necessity for filing the petition rested on the fact that the

City Manager, Michael Nagy, had declared that he would be doing all personnel reviews in open session. The newspaper made it clear that it would “REQUIRE” certain documents related to the evaluation process to be disclosed if any city employee decided to hold an evaluation in open session. Currently, there are only two appointed City Officials, and neither of them has indicated that they have any intention of conducting their evaluations in open session. Accordingly, the City cannot prosecute the claims in its petition at this time.

**D. The City has acted with diligence in bringing the motion to dismiss.**

Shortly after the necessary facts for prosecution changed, the City contacted opposing counsel with various proposals. This motion was prepared shortly after notification from opposing counsel that none of the City’s proposals were acceptable to his clients. There has been no delay in the proceedings of this case, and the City has acted with diligence to dismiss its petition as soon as it was practicable.

**E. There has been no “undue vexatiousness” on the City’s part.**

As is stated in the City’s petition and this motion, the City filed its petition because it does not believe that the *Times*’ has a basis for requesting relief under the Colorado Open Records Act. The records that the *Times*’ requested in its December 28, 2007, open records request were legally disposed of prior to that request. The City’s action was filed to obtain an anticipatory judicial declaration, and the action was filed under C.R.C.P. Rule 57. Until the underlying facts supporting this action changed the City’s petition was supported in fact and in law.

**III. Conclusion**

The City asserts that it is not responsible for the fees and costs associated with the answer filed by the *Times*. The award of fees in this matter would constitute a punishment for the City’s filing of its petition. As indicated in the communication from the *Times*’ attorney, it is seeking attorney’s fees on the basis that the *Times* now believes that the City’s petition is frivolous. However, the *Times* has not filed a motion to dismiss under C.R.C.P. Rule 12, and the word “frivolous” was not used anywhere in its answer and counterclaim. The *Times*’ contention, that the City’s petition is frivolous, is not a basis for requesting attorney’s fees under C.R.C.P. Rule 41. When a court grants a plaintiff’s motion for voluntary dismissal without prejudice, the court may not award attorney fees to sanction the plaintiff for its conduct in litigation. *See FSDW, LLC v. First Nat. Bank*, 94 P.3d 1260 (Colo. App. 2004).

As demonstrated above, the *Times* will not be prejudiced by the dismissal of this action. The City has demonstrated, through the standard established in the *Powers* case, that the defendant will not be harmed or prejudiced by the voluntary dismissal without prejudice. Because the records required by the *Times* are related to the City’s evaluation policy, the work done to prepare the answer in this matter would be useful in the event

the City re-files its petition in the future. Attorney's fees may only be awarded to pay for legal work that would not be useful to the defendant in future litigation. *See FSDW, LLC v. First Nat. Bank*, 94 P.3d 1260, 1265 (Colo. App. 2004). *See also, Haystack Ranch, LLC v. Fazzio*, 997 P.2d 548, 556 (Colo. 2000).

Finally, the Court should consider the *Times'* actions in moving forward with the litigation absent service. The City did not serve the *Times* with its petition, and the answer and counterclaim filed by the *Times* was not compelled under C.R.C.P. Rule 12. The expense that is associated with the *Times'* answer and counterclaim was incurred as a result of its own decision to waive service.

WHEREFORE, the City respectfully requests that this honorable Court dismiss the City's Petition for Declaratory Judgment, and order that the parties are responsible for their own fees and costs associated with that action.

Respectfully Submitted,

/s/ Original Signature on File  
Jeffrey A. Wells, #34132  
Attorney for the Plaintiffs

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20<sup>th</sup> day of March, 2008, a true and correct copy of the foregoing **CITY OF FORT MORGAN'S VOLUNTARY MOTION TO DISMISS ITS PETITION FOR DECLARATORY JUDGMENT WITHOUT PREJUDICE PURSUANT TO C.R.C.P. RULE 41** was served by:

- U.S. Mail, first class postage prepaid (unless otherwise noted)
- Lexis Nexis File and Serve
- Telefax
- †† Hand delivery

on the following:

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/s/ Original Signature on File  
Felicia A. English