DISTRICT COURT, JEFFERSON COUNTY, COLORADO 1st Judicial District Court Jefferson County Court & Administrative Facility 100 Jefferson County Parkway Golden, CO 80401-6002	DATE FILED: March 30, 2014 12:17 PM CASE NUMBER: 2014CV30183 ▲COURT USE ONLY▲
Plaintiff(s): RUSSELL WEISFIELD, **v.** **Defendant(s): THE CITY OF ARVADA, a municipal corporation and political subdivision of the State of Colorado; MARC WILLIAMS, in his official capacity as Mayor of the City of Arvada; BOB DYER, in his official capacity as a Councilmember for the City of Arvada; BOB FIFER, in his official capacity as a Councilmember for the City of Arvada; DON ALLARD, in his official capacity as a Councilmember for the City of Arvada; JOHN MARRIOT, in his official capacity as a Councilmember for the City of Arvada; MARK MCGOFF, in his official capacity as a Councilmember and Mayor Pro Tem; and JERRY MARKS, in his official capacity as a Councilmember for the City of Arvada.**	Case No. 14CV30183 Division 8, Courtroom 4D
ORDER RE: DEFENDANTS' MOTION TO DISMISS	

THIS MATTER comes before the Court on Defendants'[1] Motion to Dismiss. This Court has reviewed the Motion, Response, Reply, Exhibits, Court's file and applicable law to now FIND and ORDER as follows:

[1] This Order will refer to Defendants Marc Williams, Bob Dyer, Bob Fifer, Don Allard, John Marriot, Mark McGoff, Jerry Marks, and the City of Arvada collectively as "Defendants."

BACKGROUND

Plaintiff Russell Weisfield ("Plaintiff") filed a Complaint alleging that Defendants violated the Colorado Open Meetings Law[2] when they filled a vacant city council seat using secret ballots. Defendants now move to dismiss Plaintiff's Complaint for lack of standing and failure to state a claim. The facts relevant to this motion are as follows:

In December 2013, a sitting Arvada City Councilmember was selected to fill a vacant Colorado senate seat thereby creating a vacancy on the Arvada City Council. Pl.'s Second Am. Compl. ("Compl.") ¶ 11–13. The Mayor and remaining City Council members conducted a special meeting to fill the vacancy on January 10, 2014. *Id.* at ¶ 14; Defs.' Answer ("Answer") ¶ 14. The public was given notice of the time, place and agenda for this special meeting. Pl.'s Am. Compl. Ex. A. At that meeting (which was video recorded and, according to Defendants, televised), the Mayor and City Council determined who among five finalists would be selected to occupy the vacant council seat. Compl. ¶ 15; Answer ¶ 15. The Mayor and Council decided to vote by secret ballot, and employed a process of elimination of any candidate(s) who received an insufficient number of votes in each round (the votes for each round were tallied publicly but the identity of the individuals casting each vote was not disclosed). After multiple rounds of voting by this method, Jerry Marks was determined to be the winner. Compl. ¶ 15–23; Answer ¶ 15–23. Councilmember Dyer then made an open-forum motion for Marks to assume the vacant seat, which Defendants unanimously approved by on the record. Compl. ¶ 24–25; Answer ¶ 24–25.

[2] Colo. Rev. Stat. § 24-6-401, *et seq*.

Plaintiff, a resident of District 1 in the City of Arvada, contends that the process by which Defendants chose Jerry Marks violated the Open Meetings Law. In his Complaint, Plaintiff does not list himself as one of the five finalists being considered to fill the vacancy. Defendants now move to dismiss under C.R.C.P. 12(b)(1) and 12(b)(5), arguing that Plaintiff is without standing and fails to state a claim on which relief can be granted.

STANDARDS OF REVIEW

Pursuant to C.R.C.P. 12(b)(1), a defendant may move to dismiss for lack of subject matter jurisdiction. Colo. R. Civ. P. 12(b)(1). In deciding this motion, a trial court examines the substance of the claim based on the facts alleged and the relief requested. *City of Aspen v. Kinder Morgan, Inc.*, 143 P.3d 1076, 1078 (Colo. App. 2006). "The plaintiff has the burden of proving jurisdiction, and evidence outside the pleadings may be considered to resolve a jurisdictional challenge." *Id.*

Subsection (b)(5) of C.R.C.P. 12 provides that a defendant may move to dismiss when the plaintiff has failed to state a claim upon which relief can be granted. Colo. R. Civ. P. 12(b)(5). The purpose of a C.R.C.P. 12(b)(5) motion is to test the legal sufficiency of the complaint and the claims for relief therein. *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1259 (Colo. 2000). In evaluating a C.R.C.P. 12(b)(5) motion, a court accepts the complaint's factual averments as true and will dismiss the action only when "it appears beyond a doubt that a plaintiff can prove no set of facts in support of her claim which would entitle her to relief." *Qwest Corp. v. Colo. Div. Prop. Taxation*, 304 P.3d 217 (Colo. 2013).

ANALYSIS

Defendants first argue that Plaintiff lacks standing to bring a claim under the Open Meetings Law and thus this Court lacks subject matter jurisdiction. *See Consumer Crusade, Inc. v. Clarion Mortg. Capital, Inc.*, 197 P.3d 285, 288 (Colo. App. 2008). To establish standing, a party must show that she or he has suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions. *Barber v. Ritter*, 196 P.3d 238, 245 (Colo. 2008). Plaintiff contends that the Open Meetings Law and interests allegedly created therefrom give him standing to pursue his claim for violation of that Law. Thus, a brief overview of Colorado's Open Meetings Law is necessary.

As Colorado courts have recognized, the intention of the Open Meetings Law is "to afford the public access to a broad range of meetings at which public business is considered." *Bd. Cnty Comm'rs v. Costilla Cnty Conservancy Dist.*, 88 P.3d 1188, 1193 (Colo. 2004) (quoting *Benson v. McCormick*, 578 P.2d 651, 652 (Colo. 1978)) (internal quotation marks omitted). The Law declares that formation of public policy is public business and a matter of statewide concern and may not be conducted in secret. Colo. Rev. Stat. § 24-6-401. The Open Meetings Law is broadly interpreted in light of this declaration to allow citizens the opportunity to become fully informed and to have meaningful participation in the decision-making process. *Costilla Cnty Conservancy Dist.*, 88 P.3d at 1193 (citing *Cole v. State*, 673 P.2d 345, 347 (Colo. 1983)). The Open Meetings Law sets forth certain requirements designed to effect its aim, including the mandate that "[a]ll meetings of two or more members of any state public body at which any public business is discussed or at which any formal action may be taken are . . . to be . . . open to the public at all times," and "[a]ny meetings at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or at which a majority or quorum of

the body is in attendance . . . shall be held only after full and timely notice to the public." Colo. Rev. Stat. § 24-6-402(2)(a), (2)(c).

In 2012, the General Assembly, in response to the Colorado Court of Appeals' decision in *Henderson v. City of Fort Morgan, supra,* added a provision prohibiting a state or local public body from "adopt[ing] any proposed policy, position, resolution, rule, or regulation or tak[ing] formal action by secret ballot," subject to certain enumerated exceptions. *Id.* at §402(2)(d)(IV). A secret ballot is defined as one that conceals the identity of the voter from the public. *Id.*

Plaintiff alleges that the process by which the Defendants selected Jerry Marks to fill the vacant councilmember seat violated the Open Meetings Law's proscription on secret ballots. With respect to his standing to assert this claim, Plaintiff relies, in part, on a provision of the Open Meetings Law, which states that "[t]he courts of record of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application *by any citizen* of this state." *Id.* at § 402(9) (emphasis added). Plaintiff further contends that the Open Meetings Law creates, among other interests, "a legally protected interest for citizens to know what is on a ballot concerning a position or a formal action," to which Plaintiff refers generally as "the right to transparency in government." Pl.'s Resp. 5. Thus, resolution of the standing issue requires this Court to interpret and apply the Open Meetings Law to the circumstances presented here.

In interpreting a statute, a court's primary responsibility is to give effect to the intent of the General Assembly. *Bd. Cnty Comm'rs v. Costilla Cnty Conservancy Dist.*, 88 P.3d 1188, 1193 (Colo. 2004). To do so, courts begin with the language of the statute, giving words their plain and ordinary meaning. *Id.* If that language is unambiguous, a court need look no further. *Id.* A statute should be construed as a whole to give "consistent, harmonious and sensible effect to all its parts." *Id.* (quoting *People v. Luther*, 58 P.3d 1013, 1015 (Colo.2002)).

As Defendants point out, the Colorado Court of Appeals has previously addressed the issue of standing in the context of an alleged Open Meetings Law violation. In *Pueblo School District No. 60 v. Colorado High School Activities Association* ("Pueblo"), plaintiffs alleged that a high school athletic association did not comply with the Open Meetings Law's notice requirements concerning a meeting at which they determined the athletic classification level for the plaintiff school district. 30 P.3d 752, 753 (Colo. App. 2000). In their attempt to establish standing in that case, the plaintiffs relied on the provision of the statute that confers on courts the jurisdiction to issue injunctions "*upon application by any citizen of this state.*" *Id.* (quoting Colo. Rev. Stat. § 24-6-402(9)) (emphasis in text of opinion). Plaintiffs asserted that this phrase granted standing to all citizens of Colorado. *Id.* (emphasis added). However, the *Pueblo* court declined to apply the provision so broadly, stating that "[w]hile a statute may purport to grant a cause of action to a large group of persons, a plaintiff must, nevertheless, suffer an injury in fact." *Id.* at 174. Absent an injury in fact or constitutional infringement, a court does not have subject matter jurisdiction to hear the claim because "standing is not a requirement that may be abrogated by statute." *Id.* at 173-74. The *Pueblo* court concluded that plaintiff lacked standing because the school had actual notice of the meeting and did not establish any direct injury or constitutional infringement necessary to establish standing. *Id.* at 173. Ultimately, the *Pueblo* court concluded that the plaintiffs did not have standing to assert a claim under the Open Meetings Law. *Id.* at 174.

Defendants argue that *Pueblo School District* is directly on-point and warrants dismissal of Plaintiff's Complaint. However, there are significant factual distinctions between that case and the case at bar. In *Pueblo School District*, the claimants asserted a violation of the Open Meetings Law's notice requirements, but conceded that they did have actual knowledge of the

meetings. Thus, they could not claim that they had suffered an actual injury as a result of the alleged violation. The court stated that this actual notice deprived them of standing to bring their complaint. *Id.* at 753. Here, Plaintiff is asserting a violation of the statute's proscription on secret ballots, a purported infraction which has not been remedied or mitigated by other facts in this case. As such, Plaintiff's posture is distinguishable from that of the claimants in *Pueblo School District*.

However, *Pueblo School District* has significant implications in terms of the legal interpretation of the Open Meetings Law, irrespective of the facts in that case. There, plaintiffs argued that the Open Meetings Law provision giving courts "jurisdiction to issue injunctions … upon application by any citizen of this state," created a legally protected interest in all citizens to bring an action under the Law. The *Pueblo* court rejected that argument, indicating that the cited provision did not create such an interest, nor did it confer standing on all citizens. To establish standing, the court continued, a plaintiff must still show some injury-in-fact to a legally protected interest. This interpretation was independent of whether the association's meetings were properly noticed or whether plaintiffs had actual notice of those meetings. Thus, despite the case's factual differences, its legal interpretation of the "upon application by any citizen" language is valid and applicable here. In the instant case, Plaintiff argues that the Open Meetings Law creates "a legally protected interest for citizens to know what is on a ballot concerning a position or a formal action," and a "right to transparency in government," based in part on the same provision relied on by plaintiffs in *Pueblo School District*. Pl.'s Resp. 4–5. However, as *Pueblo School District* made clear, the Open Meetings Law's "upon application by any citizen" provision does not create a legally protected interest for all citizens. Therefore, Plaintiff must show that that

some other provision of the Open Meetings Law created a legally protected interest to which he suffered an injury in fact.

Citing to the secret ballot proscription, Plaintiff argues that the 2012 amendment creates in all citizens an interest in "know[ing] what is on a ballot concerning a position or a formal action." Pl.'s Resp. 4–5. As stated, and Plaintiff notes, this amendment was passed in response *Henderson v. City of Fort Morgan*, 277 P.3d 853 (Colo. App. 2011). In that case, the plaintiff alleged that a city council's use of secret ballots to appoint council members and a municipal judge violated the Open Meetings Law. However, that version of the Law did not contain any provision respecting anonymous or secret voting. In interpreting the then-existing Open Meetings Law, the *Henderson* court declined to read into the law a prohibition on secret ballots and held that their use did not run afoul of the Law. After that opinion was issued, the General Assembly amended the statute, adding the current provision. See Colo. Rev. Stat. §402(2)(d)(IV) (2012). Plaintiff argues that new statutory section, when coupled with the Law's purpose, creates in all citizens a legally protected interest in government transparency and/or knowing what is on a ballot concerning a position or formal action. However, neither the amendment nor any other provision of the Open Meetings Law by its terms creates such a broad interest, and no Colorado court has interpreted the amendment or Law as doing so.[3]

While this Court acknowledges that the secret ballot provision by its terms may prohibit the procedure that was employed by the Defendants, the Court finds that had the General Assembly intended to confer standing on every citizen for a violation of that provision—

[3] This court acknowledges that *Henderson v. City of Fort Morgan*, 277 P.3d 853 (Colo. App. 2011) was dismissed for failure to state a claim; the standing issue was not addressed.

something the legislature is deemed to be aware that the prior version of the statute did not do[4]—it could have expressly done so at the time of the amendment. Though the Open Meetings Law is to be liberally construed, this Court will "not interpret a [statute] to mean what it does not express." *In re Adoption of T.K.J.*, 931 P.2d 488, 493 (Colo. App. 1996); *see also Int'l Truck & Engine Corp. v. Colo. Dep't of Revenue,* 155 P.3d 640, 642 (Colo.App.2007) (courts are not at liberty to modify or read additional terms into the plain language of a statute). Thus, this court declines to find that every citizen of Colorado has standing to bring a claim for violation of the Open Meeting Law's prohibition on the use of secret ballots and, as a result, Plaintiff has failed to sufficiently allege that he personally suffered injury to a legally-protected statutory interest.

Moreover, Plaintiff has not sufficiently alleged an injury-in-fact. He does not list himself among the four finalists eliminated by the voting procedure (nor does he contend that he had an individual interest in the outcome of the election). He does not allege that Jerry Marks is failing to adequately represent his interests as a resident of District 1, and does not even assert that he is otherwise disenfranchised by the appointment of Mr. Marks. Plaintiff concedes that he and the other members of the public were given notice of the date, time and agenda of the meeting at which the vote was taken. He acknowledges that the meeting itself was public and that it was video recorded to preserve its proceedings. He agrees that Councilmember Dyer made an open-forum motion for Marks to assume the vacant seat, which Defendants unanimously and publicly approved. *See* Pl.'s Am. Compl. Ex. A; Compl. 14–25. Again, although the voting procedure may have violated the secret ballot provision of the Law, Plaintiff does not articulate any direct, specific impact this voting procedure had on him or his legally-protected interests. He does not otherwise aver a statutory, constitutional, or common law injury apart from the bare violation of

[4] *Pueblo Sch. Dist. No. 60 v. Colo. High Sch. Activities Ass'n*, 30 P.3d 752, 753 (Colo. App. 2000).

the Open Meetings Law's prohibition on secret balloting. Therefore, this Court finds that Plaintiff does not have standing to bring his claim, and thus dismissal of this action is proper under C.R.C.P. 12(b)(1).[5]

WHEREFORE Defendants' Motion to Dismiss is GRANTED.

Done and signed in Golden, Colorado this 30th day of March 2014.

BY THE COURT:

MARGIE ENQUIST
DISTRICT COURT JUDGE

[5] Because this Court finds that Plaintiff lacks standing to bring his claim, this Court declines to address the parties' other arguments.