COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, CO 80203 Phone: 720-625-5150 Fax: 720-625-5148	
Appealed from: JEFFERSON COUNTY DISTRICT COURT Court Address: 100 Jefferson County Parkway Golden, Co 80401 Judge: Judge Margie L. Enquist District Court Case No.: 2014-CV-30183	
Appellant: RUSSELL WEISFIELD vs. **Appellee:** 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; and MARK McGOFF, in his official capacity as a councilmember and Mayor Pro Tem for the City of Arvada; JERRY MARKS	
Attorney for Appellant: Elliot Fladen, #36784 SCHLUETER, MAHONEY, & ROSS, P.C. 999 18th St #2200 Denver, CO 80202 Telephone: (303) 292-4525 Facsimile: (303) 292-1229 Elliot@smrlaw.net	Case No.: 2014CA000807

OPENING BRIEF OF RUSSELL WEISFIELD

COMES NOW, Russell Weisfield, by and through his attorneys, Schlueter, Mahoney & Ross, P.C., and hereby submits its Opening Brief.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).
Choose one:

❑It contains_____words
☒ It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

☒ For the party raising the issue:
It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

❑ For the party responding to the issue:
It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

☒ I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

Dated: 9/11/14 By: */s/ Elliot Fladen*
Elliot Fladen, #36784

TABLE OF CONTENTS

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW 1

II. STATEMENT OF THE CASE 1

A. COURSE OF PROCEEDINGS 1

B. DISPOSITION IN THE TRIAL COURT AND NATURE OF THE PROCEEDINGS 2

III. FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW 3

IV. SUMMARY OF ARGUMENT 5

V. STATEMENT OF APPLICABLE STANDARD OF APPELLATE REVIEW 5

VI. CITATION TO PRECISE LOCATION IN RECORD WHERE ISSUES ON APPEAL WERE RAISED AND RULED UPON BY TRIAL COURT 6

VII. ARGUMENT ON APPEAL 7

A. THE ACT AND PROHIBITION CREATE LEGALLY PROTECTED INTERESTS IN TRANSPARENCY IN

GOVERNMENT 7

1) CITIZENS MAY BE INJURED-IN-FACT SOLELY THROUGH A VIOLATION OF THE ACT..... 8

I) THE ACT CREATES A RIGHT TO GOVERNMENTAL TRANSPARENCY IN FAVOR OF CITIZENS BRINGING SUIT FOR VIOLATIONS OF IT..... 10

II) THE LEGISLATURES' ACTIONS ACROSS MULTIPLE SESSIONS REPEATEDLY DEMONSTRATE THAT IT INTENDED CITIZENS TO HAVE THE REMEDY OF BEING ABLE TO BRING SUIT AGAINST GOVERNMENT BODIES THAT VIOLATED THE ACT..... 11

III) CITIZENS HAVING THE REMEDY TO BRING SUIT FOR VIOLATIONS OF THE ACT IS CONSISTENT WITH THE ACT'S UNDERLYING LEGISLATIVE SCHEME 16

2) PRIOR APPELLATE CASELAW DOES NOT CONTRADICT THE EXISTENCE OF A STATUTORILY-CREATED RIGHT TO TRANSPARENCY IN

GOVERNMENT FOR ALL COLORADO CITIZENS 17

B. THE TRIAL COURT ERRED BY HOLDING THAT WEISFIELD DID NOT HAVE STANDING 19

VIII. REMEDY SOUGHT 19

IX. CONCLUSION 20

X. ATTORNEY FEES 21

TABLE OF AUTHORITIES

STATUTES

C.R.S. § 24-6-401 .....9, 10, 11, 16

C.R.S. § 24-6-402, also called the "Act" in the Brief.....1, 9, 11, 12, 13, 16

C.R.S. § 24-6-402(2)(d)(IV), also called the "Prohibition" in the Brief.....1, 2, 6, 7, 8, 10, 12

C.R.S. § 24-6-402(9)..... 10, 11, 13, 14, 17, 21

RULES

C.R.C.P. 12(B)(1) 7

CASES

Bd. of County Comm'rs v. City of Black Hawk, 292 P.3d 1172, 1174 (Colo. App. 2012) 6

Cloverleaf Kennel Club, Inc. v. Colorado Racing Commission, 620 P.2d 1051 (Colo. 1980) 8, 9

Cole v. State, 673 P.2d 345, 347 (Colo. 1983) 10

Hanover Sch. Dist. No. 28 v. Barbour, 171 P.3d 223, 227 (Colo. 2007) 10

Henderson v. City of Fort Morgan, 277 P.3d 853 (Colo. App. 2011).....12

Pueblo Sch. Dist. No. 60 v. Colorado High Sch. Activities Ass'n, 30 P.3d 752 (Colo. App. 2000) 17, 18, 19, 20

Van Alstyne v. Housing Authority of the City of Pueblo, 985 P.2d 97, 100 (Colo. App. 1999).....16

Wimberly v. Ettenberg, 570 P.2d 535, 539 (Colo. 1977).....8

OTHER AUTHORITIES

Arvada City Charter § 4.1.....3, 4

Colorado State House Discussion of HB 12-1169 12

Colorado State House Discussion of HB 14-1390 .....13, 14

HB12-1169.....12, 13

HB14-1390.....12, 13, 14, 15

House Journal for the Sixty-Ninth General Assembly's Second Legislative Session.....14, 15

Legislative History of HB14-1390.....14, 15

Senate Journal for the Sixty-Ninth General Assembly's Second Legislative Session.....14, 15

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the Colorado Sunshine Act of 1973, as amended, created a legally protected interest in all citizens to file actions for violations of C.R.S. § 24-6-402(2)(d)(IV) so long as the injury has not otherwise been remedied.

B. Whether the Trial Court improperly dismissed Appellant's action for lack of standing.

II. STATEMENT OF THE CASE

A) Course of Proceedings

This is a case involving the admitted use of secret ballots in filling the District 1, City of Arvada City Council Vacancy on January 10, 2014. On January, 27, 2014, District 1 resident and Citizen of Colorado Russell Weisfield ("Weisfield") filed an original complaint (the "Original Complaint") with the Jefferson County District Court against the City of Arvada and those City Council Members who had voted by using secret ballots (the "Initial Appellees") to select Jerry Marks to fill the District 1 Arvada City Council Vacancy. The Original Complaint alleged, pursuant to C.R.S. § 24-6-402 (the "Act") and specifically subsection (2)(d)(IV) of

the Act (the "Prohibition"), that Marks' selection by secret ballot violated the Act and the Prohibition.

In response to the allegations raised in the Original Complaint, the Initial Appellees filed a Motion to Dismiss (the "MTD") seeking to dismiss in part for lack of standing. The MTD was fully briefed with both a response by Weisfield (the "Response") and a reply by the Initial Appellees (the "Reply"). During the briefing on the MTD, the Original Complaint was amended on February 26, 2014, in order to add Jerry Marks as an additional defendant (collectively, with the Initial Appellees, the "Appellees"). On March 11, 2014, Marks joined in the Initial Appellees' MTD. On March 30, 2014, the Trial Court issued an order (the "Order") granting the Appellee's MTD on the basis of Weisfield's purported lack of standing.

B) Disposition in the Court Below and Nature of the Proceedings

The Order was granted on the basis that Weisfield did not have a protected legal interest in governmental transparency and had not suffered an injury in fact due to use of secret ballots in the Selection Process. Specifically, the Court based its ruling on the notion that in order for a Colorado citizen to bring an action for a violation of the Act, that citizen had to have suffered an injury apart from the Act's

violation since the Act does not "create a legally protected interest for all citizens". (Order at 7, R.240, L.20-22; Order at 9, R.242, L.20-21)

On April 25, 2014, Weisfield timely filed a notice of appeal seeking appellate review of the Court's determination (a) that the Act failed to create a legally protected interest for all citizens to file actions for violating it; and (b) whether the Trial Court improperly dismissed his action for lack of standing.

III. FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

This is an appeal on a case where almost all the pertinent facts are not in dispute. According to the First Amended Complaint (the "Amended Complaint", R.58-63) and Defendants' Answer to the Amended Complaint (the "Answer", R.213-16) filed in this action, a vacancy in the Arvada City Council for Arvada District 1 was created when Rachel Zenzinger resigned her position to take a place in the Colorado State Senate (the "Vacancy"). (Amended Complaint ¶¶ 11-13 (R. 59, L.23-29); Answer ¶¶ 11-13 (R. 214, L.22-24)). To fill the Vacancy, Arvada Mayor Marc Williams, Arvada City Council Member and Mayor Pro Tem Mark McGoff, and Arvada City Council Members Bob Dyer, Bob Fifer, Don Allard, and John Marriott (collectively, the "City Council Appellees" or "City Council" as said council members and the Mayor constituted City Council under Arvada City

Charter § 4.1) conducted a January 10, 2014 special meeting of Arvada City Council (the "Special Meeting"). (Amended Complaint ¶ 14 (R.59, L. 30-31); Answer ¶ 14 (R.214, L.25)). At the Special Meeting, the City Council Appellees originally considered Rebecca Anderson, John Crouse, Kathleen Drulard, Jerry Marks, and Nancy Murray as finalists to fill the Vacancy (collectively the "Finalists") (Amended Complaint ¶¶ 15, 16 (R.60, L.1-7); Answer ¶¶ 15, 16 (R. 214, L.26 - R.15, L.1)). However, over the course of four rounds of voting, intentionally done by secret ballot (the "Four Rounds of Secret Voting"), the City Council Appellees eliminated all of the Finalists except Jerry Marks from consideration. (Amended Complaint ¶¶ 17-23 (R.60, L.8 –R.61, L.6); Answer ¶¶ 17-23 (R.215, L.2-8)). At the Four Rounds of Secret Voting's conclusion, the City Council Appellees ratified their prior decision, made by secret ballot, by approving by unanimous consent, a Motion to Appoint Marks to fill the Vacancy (the "Marks Motion") (the Four Rounds of Secret Voting and the Marks Motion will be collectively referred to as the "Selection Process"). (Amended Complaint ¶¶ 24, 25 (R.61, L.7-12); Answer ¶¶ 24, 25 (R.215, L.9-10)).

Contemporaneous with the filing of the Amended Complaint, Weisfield filed an affidavit with the Court making clear that he did not have any knowledge as to

which City Council members cast which ballots. (R.194, L.6-9). The Appellees have never contended that Weisfield had such knowledge.

IV. SUMMARY OF ARGUMENT

1. Statement of the Applicable Standard of Appellate Review
2. Citation To Precise Location In Record Where Issues On Appeal Were Raised And Ruled Upon By Trial Court
3. Argument
    A. The Act And Prohibition Create Legally Protected Interests In Transparency In Government
        1) Citizens May Be Injured-In-Fact Solely Through A Violation Of The Act
        2) Prior Appellate Case Law Does Not Contradict The Existence Of A Statutorily-Created Right To Transparency In Government For All Colorado Citizens
    B. The Trial Court Erred By Holding That Weisfield Did Not Have Standing
4. Conclusion

V. STATEMENT OF APPLICABLE STANDARD OF APPELLATE REVIEW

In reviewing the Trial Court's Order of dismissal for lack of subject matter jurisdiction pursuant to C.R.C.P. 12(b)(1), this Court is to apply a mixed standard of review. *Bd. of County Comm'rs v. City of Black Hawk*, 292 P. 3d 1172, 1174 (Colo. App. 2012). It reviews the Trial Court's factual findings for clear error and its legal conclusions de novo. *Id.*

VI. CITATION TO PRECISE LOCATION IN RECORD WHERE ISSUES ON APPEAL WERE RAISED AND RULED UPON BY TRIAL COURT

Both issues raised on appeal revolve around standing, which was heavily briefed by the Parties prior to the Order. (*See* MTD at 4 (R. 51, L.1-33)); Response at 4-6 (R.73, L.1 - R.75, L.20); Reply at 2-3 (R.199, L.15 - R.200, L.19) With respect to the First Issue on Appeal, the Trial Court ruled that the Open Meetings Law does not "create a legally protected interest for all citizens [and t]herfore Weisfield must show that some other provision of the Open Meetings Law created a legally protected interest to which he suffered an injury in fact." (Order at 7-8 (R.240, L21-R.241, L.2)). As part of this same First Issue, the Trial Court analyzed Appellant's argument that the Act and Prohibition create "in all citizens a legally protected interest in government transparency and/or knowing what is on ballot concerning a position or formal action." (Order at 8 (R.241,

L.13-15)). In its review of that argument, the Trial Court disagreed with Appellant and held that "neither the [Prohibition] nor any other provision of the Open Meetings Law by its terms creates such a broad interest". (Order at 8 (R.241, L.15-17)). The Trial Court subsequently held that the Appellant had not "sufficiently alleged an injury-in-fact" on the basis that citizens wishing to file suit for violations of the Act and Prohibition must articulate a "direct, specific impact [a] voting procedure had on [them] or [their] legally-protected interests" before dismissing the suit for lack of standing under C.R.C.P. 12(b)(1). (Order at 9, (R.242, L.10 – R.242 L.21)).

As to the Second Issue, the Trial Court ruled that Appellant did not "have standing to bring his claim, and thus dismissal of this action is proper under C.R.C.P. 12(b)(1)." (Order at 10, (R.243, L.1-3)).

VII. ARGUMENT ON APPEAL

A) The Act And Prohibition Create Legally Protected Interests In Transparency In Government

The Order ultimately dismissed Weisfield's action for standing on the global basis that, as a mere citizen, Weisfield could not have an injury-in-fact and thus could not have standing. In reaching this result, the Trial Court made two errors which will be described below in greater depth but summarized here. First, it

ignored the argued case authority which demonstrated that violations in the Colorado Open Meetings Act (the "Act") are able to serve as an injury-in-fact for standing purposes. Second, it misinterpreted a Colorado Appellate Court decision to stand for a proposition that said decision never stated: that a violation of the Act cannot cause an injury-in-fact to a mere citizen in the first place. Because a violation of the open meetings serves as an injury-in-fact to a typical citizen of Colorado, absent undisputed existence of facts which eliminate the injury, the Trial Court erred in holding that the Act and Prohibition fail to create legally protected interests in transparency in government.

1) Citizens May Be Injured-In-Fact Solely Through A Violation Of The Act

It is standard black-letter law that for a party to have standing to sue, he or she must have "suffered injury-in-fact to a legally protected interest as contemplated by statutory or constitutional provisions." *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977). In its Order, the Trial Court held that the Act "does not create a legally protected interest for all citizens" and thus that citizens who seek to bring an action under the Act must show some other "injury-in-fact to a legally protected interest." Order at 7 (R.240, L. 22 & L.13-14) This ruling failed to consider *Cloverleaf Kennel Club, Inc. v. Colorado Racing Commission*, 620 P.2d 1051

(Colo. 1980) where the Colorado Supreme Court made clear that violation of a statute is able to cause an injury-in-fact. *Id.* at 1058. An analysis of the factors set forth in *Cloverleaf* demonstrates that the Act provides all citizens of Colorado with a legally protected interest in governmental transparency and a violation of the Act can cause an injury-in-fact to such citizens.

In *Cloverleaf,* the Colorado Supreme Court stated that "[i]t is now well settled that the injury in fact conferring standing may not only be intangible but "may exist solely by virtue of statutes creating legal rights the invasion of which creates standing." *Id.* at 1058. The conclusion that an injury is actionable "rests on a normative judicial judgment . . . derived from a determination [that] the substantive law invoked creates a personal interest or right in the complainant that has been infringed by the challenged action." *Id.* at 1058 (internal citation omitted). To aid this inquiry, the Colorado Supreme Court adopted three guidelines: "First . . . . does the statute create a . . . right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" *Id.* at 1058.

As demonstrated below, when the Act is analyzed by utilizing the guidelines enunciated in *Cloverleaf,* it is clear that that all citizens have a legally protected

interest in governmental transparency through the Act. Further, where there is no governmental transparency, a citizen, such as Weisfield in the instant case, does suffer an injury-in-fact.

i) The Act Creates A Right To Governmental Transparency In Favor Of Citizens Bringing Suit For Violations Of It

Contrary to the Trial Court's holding, the Legislature has repeatedly made clear that not only is it the policy of the State of Colorado that the formation of public policy be public business and not conducted in secret, C.R.S. § 24-6-401, but also that it intended for every citizen to have a legally protected interest in public access to public business as shown by C.R.S. § 24-6-402(9) ("Subsection 9"). At the time of the Trial Court's ruling, Subsection 9 stated 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.*) Further, the Prohibition specifically forbids the adoption of "any proposed policy . . . or tak[ing] formal action by secret ballot". C.R.S. § 24-6-402(2)(d)(IV). The Colorado Supreme Court has stated that the Act's purpose is to afford public access to a broad range of meetings at which public business is considered. *See Hanover Sch. Dist. No. 28 v. Barbour*, 171 P.3d 223, 227 (Colo. 2007); *see also Cole v. State*, 673 P.2d 345, 347 (Colo. 1983) (stating that the public meetings laws are interpreted "broadly to

further the legislative intent that citizens be given a greater opportunity to become fully informed on issues of public importance so that meaningful participation in the decision-making process may be achieved").

As described above, C.R.S. § 24-6-402 creates not only a right to governmental transparency but also a right not to have adopted any proposed policy, position, resolution, rule, or regulation or take formal action by secret ballot. The reason for this is set forth in C.R.S. § 24-6-401; namely that "[i]t is declared to be a matter of statewide concern and the policy of this state that the formation of public policy is public business and may not be conducted in secret." To defend this policy, "[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." C.R.S. § 24-6-402(9). The only reasonable manner to read these statutes in conjunction is that these statutes have created a right to governmental transparency in favor of any citizen of Colorado that has complained of a violation of the Act.

ii) The Legislatures' Actions Across Multiple Sessions Repeatedly Demonstrate That It Intended Citizens To Have The Remedy Of Being Able To Bring Suit Against Government Bodies That Violated The Act

This Court does not need to turn far to reach the conclusion that the Legislature intended to create a remedy for any citizen of this state to vindicate a right to transparency in government. Not only does Subsection 9 explicitly create such a

remedy, but pursuant to the following, it is more than evident that the Legislature intended that every citizen have such a right: (a) the history behind the Prohibition; and (b) the unanimous passage of HB14-1390 in response to the Order.

The Legislature passed the Prohibition in response to *Henderson v. City of Fort Morgan*, 277 P.3d 853 (Colo. App. 2011). In *Henderson*, a city resident challenged, pursuant to the Act, the use of secret ballots to fill two council vacancies and appoint a municipal judge during public meetings in 2009 and 2010. *Id.* at 854. The Appellate Court, in affirming the Trial Court's dismissal of said challenge, held that "[b]ecause the legislature has not provided for a particular voting procedure in the [Colorado Open Meetings Law], [a court should not] imply one." *Id.* at 856. As the Appellees previously conceded, this ruling led to "the state legislature amend[ing] the Colorado Open Meetings Law **as a response to the Colorado Court of Appeals [sic] decision in Henderson**". (emphasis added) (MTD ¶ 16, (R.53, L.9-11); *see also* annotations to C.R.S. § 24-6-402 (stating "Laws 2012, Ch. 64, § 1, added subpar. (2)(d)(IV)"); February 24, 2012, Colorado State House Floor discussion of HB12-1169, *available* from the Colorado Legislature website via the shortened link at http://bit.ly/1ppKR41 (the "February 24, 2012 Floor Discussion") (last accessed September 3, 2014), from 40:06 to 40:30 (having Representative Bob Gardner state that "[w]hat this bill [HB12-1169]

is about is a recent Colorado Court of Appeals decision concerning a municipality in Colorado which was filling vacancies on the board or the committee, the council by secret ballot and the open meetings law in Colorado was less than clear about whether that could be done by secret ballot").

HB12-1169 is not the only instance where the legislature rebuked a Colorado court for denying the citizens of this state the ability to vindicate violations of their rights to governmental transparency created under the Act. The very Order at issue in this appeal created a nearly immediate and unanimous rebuke of the Trial Court through HB14-1390. Specifically, HB14-1390 further clarified the Act's purpose by creating a new subsection, 9(a) to C.R.S. § 24-6-402, which states:

> ANY PERSON DENIED OR THREATENED WITH DENIAL OF ANY OF THE RIGHTS THAT ARE CONFERRED ON THE PUBLIC BY THIS PART 4 HAS SUFFERED AN INJURY IN FACT, AND THEREFORE, HAS STANDING TO CHALLENGE THE VIOLATION OF THIS PART 4.

See the Final Version of HB14-1390 via the Colorado Legislature's Webpage on the bill, available at the following shortened link: http://bit.ly/1qsKVUr (last accessed September 3, 2014).

The timeline and remarks in support of HB14-1390 in the legislature further support the Legislature's repeated intention that citizens of this state have access to the Courts to remedy violations of the Act. It is more than apparent that the HB14-

1390, which was introduced into the Colorado House on April 23, 2014, and assigned to the Judiciary Committee as one of the last bills of the legislative session, was a direct response and condemnation of the March 30, 2014 Trial Court's Order. *See* the Legislative History for HB14-1390 (the "Legislative History") *available* from the Colorado General Assembly's webpage via the shortened link http://bit.ly/1ArFJWh (last accessed September 3, 2014).

On April 24, 2014, Representative Gardner gave a lengthy explanation to the Colorado House Judiciary Committee which demonstrated that HB14-1390's purpose was to further clarify something the legislature already thought was clear: that the Act gave each citizen the ability to seek Court intervention for violations of the statute. *See* Audio from the April 24, 2014 House Judiciary Committee Meeting, (the "Committee Audio") available from the Colorado General Assembly's webpage via the shortened link of http://bit.ly/1rLRpR9 (last accessed September 3, 2014, at 5:46:04 – 5:46:13 (showing Rep. Gardner speaking on HB14-1390); *Id.* at 5:47:55 – 5:48:45 (showing that HB14-1390 was motivated by the Trial Court's ruling which Rep. Gardner described as "contrary to any reasonable reading of the open meetings law")).

On April 28, 2014, HB14-1390 unanimously passed Third Reading in the Colorado House. (*See* House Journal for the Sixty-Ninth General Assembly's

Second Legislative Session, available from the General Assembly's Webpage via the shortened link http://bit.ly/WKGPx7, at 1240-41) (last accessed September 3, 2014). On May 5, 2014, HB14-1390 similarly passed third reading unanimously in the Colorado Senate. (*See* Senate Journal for the Sixty-Ninth General Assembly's Second Legislative Session, available from the General Assembly's Webpage via the shortened link http://bit.ly/1pynyWu, at 1140) (last accessed September 3, 2014) Subsequently, on June 6, 2014 the Governor signed HB14-1390 into law. (*See* the Legislative History)

Together, these two bills, HB 12-1169 and HB 14-1390, and the alacrity for which the Legislature acted, validate the Legislature's deep concern for any attempt by the Judiciary which threatens to curtail the ability of citizens of this state to vindicate their rights to transparency in government. Moreover, from Representative Gardner's remarks, we can see that the Legislature intended that HB14-1390 not be a change in the law, but rather a clarification and further codification of what the Act was widely understood to have already stated.

Based on the foregoing, this factor weighs heavily in favor of this Appellate Court determining that a violation of the right to transparency in government can constitute an injury-in-fact for any Colorado citizen.

iii) Citizens Having The Remedy To Bring Suit For Violations Of The Act Is Consistent With The Act's Underlying Legislative Scheme

The Open Meetings Act has only two sections. C.R.S. § 24-6-401 is a short statement of policy that the formation of public policy not be conducted in secret. C.R.S. § 24-6-402 spells out not only what it means for public policy to be conducted in secret in Subsections 1 through 7, but also the effect of public policy being conducted in secret in Subsections 8 through 9. Specifically, (a) any "resolution, rule, regulation, ordinance, or formal action of a state or local public body" that occurs in violation of the Act is invalid under Subsection (8); and (b) any citizen of the state can request the court to issue injunctions to enforce the purposes of the Act.

Combined, these sections are evidence that Colorado citizens have standing to initiate litigation based on a violation of the Act. This not only is consistent with the act's underlying legislative scheme but was also explicitly intended by such a scheme as a necessary enforcement provision. *See Van Alstyne v. Housing Authority of the City of Pueblo*, 985 P.2d 97, 100 (Colo. App. 1999) (stating that plaintiffs bringing an action under the Act function as "private attorneys general"). Contrary to the Order the Act does not state that only individuals who are directly impacted by a violation of the Act may bring a lawsuit to vindicate the rights to

governmental transparency created under it. Instead, the Act states that "**any**" citizen of this state can bring such an action. C.R.S. § 24-6-402(9) (emphasis added). If the legislature wanted to create a limitation on the basis of direct injury or even residency within the political entity that was accused of violating the Act's territory, it could have easily had done so. The Legislature's repeated refusal to so limit the identity of people who could bring suit for the Act's violations demonstrates that this factor also strongly weighs in favor of determining that a violation of the Act can constitute an injury-in-fact for any citizen of Colorado.

2) Prior Appellate Case Law Does Not Contradict The Existence Of A Statutorily-Created Right To Transparency In Government For All Colorado Citizens

To reach the contrary conclusion that a violation of the Act cannot constitute an injury-in-fact, the Trial Court misread the conclusion in *Pueblo Sch. Dist. No. 60 v. Colorado High Sch. Activities Ass'n*, 30 P.3d 752 (Colo. App. 2000). In *Pueblo Sch. Dist.*, the Plaintiff Pueblo School District (the "School District") petitioned the Colorado High School Activities Association ("CHSAA") to reconsider its decision to classify the School District as a 4A and not a 5A institution for high school football. When CHSAA failed to grant the petition at a meeting, the School District challenged such failure on the basis that it occurred at a meeting that did not comply with the notice provisions of the Act. The Appellate Court in *Pueblo*

Sch. Dist. rejected this argument, not on the basis that the Act "does not create a legally protected interest for all citizens" as the Trial Court here alleged, **but instead on the basis that the School District had "actual notice" of the meeting in question**.(emphasis added). *Compare* Order at 7 (R.240, L.20-22) (stating that, with emphasis added, "*Pueblo School District* made clear [that] the Open Meetings Law's 'upon application by any citizen' provision does not create a legally protected interest for all citizens") *with Pueblo Sch. Dist.* at 753 (holding that "because plaintiffs had actual notice of the meetings, they lacked standing to bring this complaint"); *Id.* at 754 (stating that for standing "a plaintiff must, nevertheless, suffer an injury in fact").

Thus, contrary to the Trial Court's decision, the ruling in *Pueblo Sch. Dist.* was not based on the non-existence of a right to transparency in government possessed by all citizens of the State. Instead, the *Pueblo Sch. Dist.* ruling was based on the fact that actual notice of a meeting prevents an injury stemming from non-compliance of the Act's provisions which require proper notice for meetings. In other words, while the Act creates the ability for Colorado citizens to suffer injuries-in-fact where governmental entities fail to comply with the Act's mandates, outside circumstances can serve to function as a complete remedy independent of court action.

B) The Trial Court Erred By Holding That Weisfield Did Not Have Standing

As discussed above, the Act creates a right to transparency in government. Weisfield alleged, and the Appellees either admitted or did not dispute, that (a) he is a citizen of the State of Colorado and of Arvada for whom Marks was to represent; and (b) the Appellees, other than Marks conducted a meeting outside what the Act requires if the Act is applicable. The Trial Court acknowledged these facts in its Order. (*See* Order at 2-3, (R.235, L.5 – R.236, L.1)) Moreover, unlike the Plaintiffs in *Pueblo Sch. Dist.*, Weisfield has been actually injured by the violation of the rights created under the Act because he continues to not have actual knowledge how the Council Members at the Special Meeting voted. On these facts, the Court had ample information to hold both that Weisfield's rights under the Act have been violated and that such violation caused him actual injury. Accordingly, the Trial Court erred in holding that Weisfield must have some additional injury to have standing to bring his action.

VIII. REMEDY SOUGHT

Weisfield contends that his action should not have been dismissed, especially when the facts were undisputed that the Appellees other than Marks voted by Secret Ballot to have Marks fill the Arvada City Council Vacancy for District 1.

To correct this error of law, Weisfield respectfully requests that the Trial Court's order dismissing his action for lack of standing be reversed and remanded to the Trial Court for further proceedings on Weisfield's Amended Complaint.

IX. CONCLUSION

Contrary to the Trial Court's Order, the Act gives every citizen of Colorado a legally protected interest in Colorado. Unless the violation of the rights created under the Act is fully remedied in some manner, such as by actual notice of a meeting where the violation was failure to properly notice said meeting as in *Pueblo Sch. Dist.*, violating the Act creates an actionable injury-in-fact for such citizens. Here, Weisfield's injury was never remedied as he continues to not have knowledge as to how the members of the Arvada City Council voted in selecting Marks to fill the Vacancy due to the secret ballots illegally used in the Selection Process. Accordingly, the Trial Court erred in dismissing Weisfield's action for lack of standing.

X. ATTORNEY FEES

Pursuant to C.R.S. § 24-6-402(9), Weisfield requests that the Appellate Court order that Appellee pay Weisfield's costs and reasonable attorney fees in the event Weisfield is successful in both this appeal and also the underlying action.

WHEREFORE Weisfield requests that this Court reverse the Trial Court's Order dismissing his action for lack of standing and direct that it order payment for his attorney fees in this appeal in the event that he is successful in both it and the underlying litigation. Weisfield further requests that this Court order such other relief as it deems warranted.

RESPECTFULLY SUBMITTED this 11th day of September, 2014.

SCHLUETER, MAHONEY & ROSS, P.C.

Original Signature on File at the Offices of Schlueter, Mahoney & Ross, P.C.

/s/ Elliot Fladen
Elliot Fladen
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of September 2014, a true and correct copy of the foregoing **OPENING BRIEF** was filed with the Colorado Court of Appeals and served via ICCES to the following:

Christopher K. Daly
Roberto Ramírez
Arvada City Attorney's Office
8101 Ralston Road
Arvada, Colorado 80002
Attorneys for Appellees

Original Signature on File at the Offices of Schlueter, Mahoney & Ross, P.C.

/s/ Julianna M. Wade
Julianna M. Wade, Paralegal