SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Colorado Court of Appeals No.: 14CA807 Opinion: 2015COA43 (April 9, 2015) Opin. by Chief Judge Loeb, Hon. Plank and Hon. Ney, concurs District Court, Jefferson County, 2014CV30183 Hon. Margie Enquist, Judge	
Petitioner: 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 v. Respondent: RUSSELL WEISFIELD	▲ **COURT USE ONLY** ▲
Attorneys for Petitioner: **Christopher K. Daly, Atty. Reg. # 12227** **Roberto Ramírez, Atty. Reg.# 37203** Arvada City Attorney's Office 8101 Ralston Road Arvada, Colorado 80002 Phone Number: (720) 898-7180 Fax Number: (720) 898-7175 E-Mail: Chris-D@Arvada.org RRamirez@Arvada.org	Sup. Ct. No.:
PETITION FOR WRIT OF CERTIORARI	

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify that this brief complies with all requirements of C.A.R. 28, C.A.R. 32, and C.A.R. 53(a), including all formatting requirements set forth in those rules.

Specifically I certify:

(a) This brief complies with C.A.R. 53(a) and C.A.R. 32 (a)(3) because it contains 3,108 words, as determined using the word processor's word count function in compliance with the rule.

(b) This brief complies with C.A.R. 53(a) because it contains under separate headings all required sections in the order indicated.

Roberto Ramírez, #37203

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The City of Arvada, et al., petition this Honorable Court for a writ of certiorari to review the decision of the Colorado Court of Appeals in this case. (Appx. 1)

I. ISSUES

1. Whether the Court of Appeals' opinion in this case conflicted with *Pueblo School District Number 60 v. Colorado High School Activities Association*, 30 P.3d 752 (Colo. App. 2000), thereby creating a conflict with the decision of another division of Court of Appeals.

2. Whether the Court of Appeals erred in its legal conclusion, that Mr. Weisfield properly alleged an injury in fact to a legally protected interest, and, therefore, had standing to sue based on the Colorado Open Meetings Law, as to how a Home Rule Municipal Corporation fills a city council vacancy.

II. REFERENCE TO REPORT OF DECISION BELOW

Weisfield v. City of Arvada, 2015 COA 43, 2015 Colo. App. LEXIS 545. (Appx. 1.)

III. JURISDICTION

This Court has jurisdiction pursuant to C.A.R. 49(a)(3). The Court of Appeals filed its opinion and entered judgment on April 9, 2015.

IV. STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings.

The City of Arvada had a vacancy on its city council after a councilmember was appointed to the state legislature. (R. CF, p. 4, 71.) After the Arvada City Council selected a new councilmember to fill the vacancy, Mr. Weisfield filed a lawsuit claiming the Arvada City Council had violated the Colorado Open Meetings Law in the method used for the vacancy selection. (R. CF, p. 61.) The City of Arvada filed a motion to dismiss raising several issues, including a jurisdictional challenge (lack of standing) to the lawsuit, arguing that Mr. Weisfield was not a proper plaintiff. (Appx. 2, p. 1.)

The trial judge found in favor of the City of Arvada. (R. CF, pp. 234-243, Appx. 2.) The trial found that the Colorado Court of Appeals had 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*, 30 P.3d 752 (Colo. App. 2000). (Appx. 2, p. 6.) Ultimately, the trial judge "decline[d] 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, [Mr. Weisfield] failed to sufficiently allege that he personally suffered injury to a legally-protected statutory interest." (Appx. 2, p. 9.)

Mr. Weisfield's lawsuit was dismissed. (Appx. 2, p. 10.) Mr. Weisfield then appealed to the Colorado Court of Appeals. (Appx. 1.)

The Court of Appeals "disagree[d] with the district court's conclusion — and defendants' contention on appeal — that, under the circumstances here, [Mr.] Weisfield is required to show some additional injury to satisfy the injury-in-fact requirement." (Appx. 1, pg. 13, ¶ 13.) The Court of Appeals stated that it was "not persuaded that *Pueblo School District Number 60 v. Colorado High School Activities Association*, 30 P.3d 752 (Colo. App. 2000), requires a different result." (Appx. 1, pg. 15, ¶ 30.)

B. FACTS MATERIAL TO THE ISSUES.

1. Facts Regarding the Legal Controversy at the Trial Level. In 2013, Colorado State Senator Evie Hudak, resigned her state senate seat. (R. CF, p. 4.) A month later, Rachel Zenzinger, Arvada City Council Member for District 1, was selected to fill the senate vacancy. (R. CF, p 4.) This caused a vacancy on Arvada's City Council. (R. CF, p 4, 71.) As a Home Rule Municipality, the City of Arvada followed its charter for the appointment of a new councilmember. (R. CF, pp. 2, 55.) After proper notice, at the January 10, 2014 Arvada City Council meeting, the Mayor and City Council voted to fill the Council vacancy. (R. CF, p. 55.) The City Council Meeting was televised and recorded. (R. CF, p. 55.) The

"Motion" by which the City Councilmember was voted was accomplished by open forum, televised, and video recorded. (R. CF, p. 55.) The vote on the "Motion" itself was also accomplished by open forum, televised, and video recorded. (R. CF, p. 55.) After the Arvada City Council selected a new councilmember, Mr. Weisfield filed a lawsuit claiming the Arvada City Council had violated the Colorado Open Meetings Law in the method used for the selection. (R. CF, p. 7.)

2. The District Court's Ruling at Trial. Although the trial judge found there were factual distinctions between the *Pueblo School District* case and this case, she did note that "*Pueblo School District* has significant implications in terms of the legal interpretation of the Open Meetings Law." (Appx. 2, pg. 7.) Acknowledging that in *Pueblo School District* the plaintiffs had actual notice of the meeting in question, the trial judge noted that the Court of Appeals' "interpretation was independent of whether the association's meetings were properly noticed or whether plaintiffs had actual notice of those meetings." (Appx. 2, pg. 7.)

3. The Court of Appeals. The Court of Appeals interpreted *Pueblo School District* as holding that there was no injury in fact sufficient to convey standing because the plaintiff there conceded that it had actual notice of the meetings in question. (Appx. 1, pg. 17, ¶ 30.) The Court of Appeals claimed that

the trial judge acknowledged that the *precise holding* and facts in *Pueblo School District* were distinguishable. (Appx. 1, p. 16, ¶ 32.) The Court of Appeals concluded that the trial judge relied on dicta in *Pueblo School District.* (Appx. 1, pg. 16, ¶ 33.) The Court of Appeals did not review the full language that Mr. Weisfield relied upon. "We need not determine whether the expansive language of section of 24-6-402(9) should be read literally to allow *any* citizen of Colorado to challenge any violation of the Open Meetings Law, even if, for example, the citizen does not reside within the jurisdiction of the public body whose actions are being challenged." (Appx. 1, p. 11, ¶ 24.) (emphasis in original.)

V. ARGUMENT

A. Reasons for Granting Writ of Certiorari. This Court should grant the petition because the Court of Appeals' opinion below has created a conflict with the decision of another division of Court of Appeals, *Pueblo School District Number 60 v. Colorado High School Activities Association*, 30 P.3d 752 (Colo. App. 2000). In both cases, the plaintiffs relied on the same section of the Colorado Open Meetings Law § 24-6-402(9), for jurisdictional standing which states: "The 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." *Pueblo School District*, 30 P.3d at 753, (Appx. 2, pg. 7.) In both cases, the plaintiffs

argued that this legislative declaration grants standing to *all* citizens because the intended protections of the Open Meetings Law are for *all* citizens. *Id*. However, the two cases set different standards for jurisdictional standing.

This case additionally presents an intriguing set of facts and the challenging interplay between the state legislature enacting laws, appellate courts interpreting those laws, and the legislature's reactions to those interpretations. In 2009 and 2010 the City of Fort Morgan used anonymous written ballots to fill two council vacancies and appoint a municipal judge. *Henderson v. City of Fort Morgan*, 277 P.3d 853, 854 (Colo. App. 2011). The Colorado Court of Appeals concluded that Fort Morgan's ballot system was not prohibited by the Colorado Open Meetings Law. *Id.* In 2012, the state legislature, in response to the decision in *Henderson*, 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." (Appx. 2, p. 5.) (brackets in original.) Both *Pueblo School District* and the trial judge in this case found that this language was not sufficient either because as *Pueblo School District* pointed out, "standing is not a requirement that may be abrogated by statute." *Pueblo School District*, 30 at P.3d 753. Then, the state legislature spoke again. "Section 24-6-402(9), C.R.S. 2014,

was amended in 2014, apparently in response to the district court's ruling that Weisfield lacked standing in this case." (Appx. 2, Fn. 7, p. 1.)

B. The Court of Appeals Decision Below Incorrectly Read *Pueblo School District* and the Trial Judge's Order. The Court of Appeals read both *Pueblo School District* and the trial judge's order improperly, leading to the wrong result.

First, the Court of Appeals believed that the trial judge relied on *Pueblo School District* despite an acknowledgement by the trial judge that the facts and the holding were distinguishable from this case. (Appx. 1, p. 16, ¶ 32.) This would necessarily mean that the trial judge relied on a case that was inapplicable to the current controversy. This would also necessarily mean that overturning the judge's decision would have been proper. However, this is not the case. The trial judge never acknowledged that the holding in *Pueblo School District* was distinguishable. To the contrary, the trial judge wrote that the facts were distinguishable, but "*Pueblo School District* has significant implications in terms of the legal interpretation of the Open Meetings Law, irrespective of the facts in that case." (Appx. 2, p. 7.) The trial judge continued, "[t]hus, despite the case's factual differences, its legal interpretation of the 'upon application by any citizen' language is valid and applicable here." (Appx. 2, p. 7.) Therefore, the Court of

Appeals analyzed the trial judge's discussion of the issue from an incorrect understanding.

Second, the Court of Appeals dismissal of the language in *Pueblo School District* as "dicta" is misplaced. The Court of Appeals here seems to reject *Pueblo School District* and refused to follow it because it referred to the dispositive language as "dicta." (Appx. 1, pg. 16, ¶ 33.) ("This language does not alter our analysis in this case. As noted, the division's holding in *Pueblo* was based on the undisputed fact that the school district conceded actual notice; thus, this additional language is dicta.") However, the language in *Pueblo School District* that the trial judge relied upon was not dicta, but instead a ruling logically necessary to sustain its conclusion. "The general rule is that conclusions of an appellate court on issues presented to it as well as rulings logically necessary to sustain such conclusions become the law of the case." *Hardesty v. Pino*, 222 P.3d 336, 340 (Colo. App. 2009) (internal citations omitted.) "A holding and its necessary rationale, however, are not dicta." *Id*. "Thus, both an appellate holding and its necessary rationale become law of the case controlling future proceedings." *Id.* *Pueblo School District* was clear on both its holding and its necessary rationale and the trial judge properly relied on it.

C. The Trial Judge was Following Stare Decisis and the Court of Appeals Substituted its Judgment for that of the Trial Judge.

In relying on *Pueblo School District*, the trial judge was merely following stare decisis. She could only rule on the undisputed facts and could only base her decision on the only case interpreting subsection 9 of the Open Meetings Law. See *People v. LaRosa*, 293 P.3d 567, 574, reh'g denied (Feb. 11, 2013). Although the following chart was presented to the Court of Appeals, it is reproduced again as it shows that the trial judge was simply following the law at the time:

Pueblo Sch. Dist. v. Colo. High Sch. Activities Ass'n,	***Weisfield v. City of Arvada, et al.*** **Trial Court Level**
Appellate Court analyzed C.R.S. § 24-6-402(9). "The 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 753.	Trial Court analyzed C.R.S. § 24-6-402(9). "The 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." (R. CF, p. 239.)
The Appellate Court addressed the issue of standing in the context of an alleged Open Meetings Law. *Id.*	The Trial Court recognized that the "Colorado Court of Appeals has previously addressed the issue of standing in the context of an alleged Open Meetings Law violation." (R. CF, p. 239.)
In their attempt to establish standing in that case, the plaintiffs relied on the provision of the statute that confers on courts the jurisdiction "upon application by any citizen of this state." *Id.*	In his attempt to establish standing in this case, the plaintiff relied on the provision of the statute that confers on courts the jurisdiction "upon application by any citizen of this state." (R. CF, p. 240.)

Pueblo Sch. Dist. v. Colo. High Sch. Activities Ass'n	***Weisfield v. City of Arvada, et al.*** **Trial Court Level**
Plaintiffs asserted that this phrase granted standing to all citizens of Colorado. *Id.*	Plaintiff asserted that this phrase granted standing to all citizens of Colorado. (R. CF, p. 239.)
The appellate 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 754.	The trial court followed the appellate court's declination to apply the provision so broadly, acknowledging 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." (R. CF, p. 239.)
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.	"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.' " (R. CF, p. 239.)
The appellate court concluded that the plaintiffs lacked standing because they did not establish any direct injury or constitutional infringement necessary to establish standing. *Id*. at 173.	The trial court concluded that plaintiff lacked standing because he did not establish any direct injury or constitutional infringement necessary to establish standing. (R. CF, p. 239.)
Ultimately, the appellate court concluded that the plaintiffs did not have standing to assert a claim under the Open Meetings Law. *Id*. at 174.	Ultimately, the trial court concluded that the plaintiff did not have standing to assert a claim under the Open Meetings Law. (R. CF, p. 239.)

VI. CONCLUSION

The City of Arvada, et. al, request this Court grant their petition for Writ of Certiorari to resolve the conflict created between two of the divisions of Court of Appeals.

Respectfully submitted on May 20, 2015.

CITY OF ARVADA
OFFICE OF THE CITY ATTORNEY

By:
Christopher K. Daly, #12227
Roberto Ramírez, #37203
8101 Ralston Road
Arvada, Colorado 80002
(720) 898-7180
ATTORNEYS FOR DEFENDANTS

VII. LIST OF APPENDICES

1. Order Reversed and Case Remanded with Directions, April 9, 2015, The Honorable Chief Judge Loeb, Plank* and Ney*, JJ., concur

2. Order Re: Defendants' Motion to Dismiss, March 30, 2014, The Honorable District Court Judge Margie Enquist

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2014.

VIII. CERTIFICATE OF SERVICE

I certify that on May20, 2015, I electronically filed this **PETITION FOR WRIT OF CERTIORARI** with the Clerk of Court using ICCES which will send a true and correct copy to the following:

Elliot Fladen
SCHLUETER, MAHONEY, & ROSS, P.C.
999 18th St. #2200
Denver, Colorado 80202
Email: Elliot@smrlaw.net
Attorneys for Plaintiff, Russell Weisfield

/s/ Toni Riebschlager
Toni Riebschlager
Litigation Paralegal

Appendix 1

COLORADO COURT OF APPEALS **2015COA43**

DATE FILED: April 9, 2015
CASE NUMBER: 2014CA807

Court of Appeals No. 14CA0807
Jefferson County District Court No. 14CV30183
Honorable Margie L. Enquist, Judge

Russell Weisfield,

Plaintiff-Appellant,

v.

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 council member for the City of Arvada; Bob Fifer, in his official capacity as council member for the City of Arvada; Don Allard, in his official capacity as council member for the City of Arvada; John Marriot, in his official capacity as council member for the City of Arvada; Mark McGoff, in his official capacity as council member and Mayor Pro Tem for the City of Arvada; and Jerry Marks,

Defendants-Appellees.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division IV
Opinion by CHIEF JUDGE LOEB
Plank* and Ney*, JJ., concur

Announced April 9, 2015

Schlueter, Mahoney & Ross, P.C., Elliot D. Fladen, Denver, Colorado, for Plaintiff-Appellant

Christopher K. Daly, City Attorney, Roberto Ramirez, Senior Assistant City Attorney, Arvada, Colorado, for Defendants-Appellees

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2014.

¶ 1 Plaintiff, Russell Weisfield, appeals the district court order granting the motion to dismiss for lack of standing filed by defendants, the City of Arvada; Marc Williams, Bob Dyer, Bob Fifer, Don Allard, John Marriot, Mark McGoff, in their official capacities; and Jerry Marks. We reverse and remand with directions.

I. Background

¶ 2 This case concerns the use of secret ballots by Arvada's mayor and city council members to fill a vacancy on the city council for Arvada District 1. Weisfield is a resident of that district. Williams, the mayor of Arvada, and council members Dyer, Fifer, Allard, Marriot, and McGoff participated in the vote. Marks was selected to fill the vacancy and is now the council member representing District 1.

¶ 3 The underlying facts of this case are not in dispute. After giving proper notice to the public, the Arvada City Council held a special meeting on January 10, 2014, to select among five candidates to fill the District 1 vacancy. The meeting was recorded and televised. The city council conducted four rounds of secret ballot voting in which candidates who did not receive a sufficient number of votes were eliminated. The council members reported

the total number of votes each candidate received after each round, but did not report who voted for which candidates. At the end of the four rounds of secret ballot voting, Marks was the only remaining candidate. The council members then held an open vote in which they unanimously elected Marks to fill the vacancy.

¶ 4 Weisfield filed this action in district court, alleging that the city council's use of secret ballots to fill the vacancy violated Colorado's Open Meetings Law. Defendants moved to dismiss pursuant to C.R.C.P. 12(b)(1) and C.R.C.P. 12(b)(5). After briefing, the district court granted the motion to dismiss in a written order. The court ruled that Weisfield failed to allege an injury in fact to a legally protected interest, and, therefore, did not have standing. Because the court granted the motion to dismiss under C.R.C.P. 12(b)(1) based on lack of standing, the court did not address defendants' other asserted grounds for dismissal under C.R.C.P. 12(b)(5).

¶ 5 This appeal followed.

II. Standard of Review

¶ 6 We apply a mixed standard of review to motions to dismiss for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1). *Levine v. Katz*, 192 P.3d 1008, 1012 (Colo. App. 2006). We defer to the

district court's factual findings unless they are clearly erroneous, but we review de novo the district court's legal conclusions. *Id.*

¶ 7 In order for a court to have jurisdiction over a dispute, the plaintiff must have standing to bring the case. *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004). Whether the plaintiff has standing is a question of law that we review de novo. *Id.* at 856.

III. Applicable Law

A. Standing

¶ 8 Colorado courts apply the two-prong test for standing articulated in *Wimberly v. Ettenberg*, 194 Colo. 163, 168, 570 P.2d 535, 539 (1977). To satisfy that test, the plaintiff must establish that (1) he or she suffered an injury in fact and (2) the injury was to a legally protected interest. *Hickenlooper v. Freedom from Religion Found., Inc.*, 2014 CO 77, ¶ 8 (citing *Wimberly*, 194 Colo. at 168, 570 P.2d at 539). This test for standing in Colorado "has traditionally been relatively easy to satisfy." *Ainscough*, 90 P.3d at 856; *see also Freedom from Religion Found.*, ¶ 17 ("Colorado courts provide for broad individual standing.").

¶ 9 The injury-in-fact requirement maintains the separation of powers mandated by article III of the Colorado Constitution.

Freedom from Religion Found., ¶ 9. "Because judicial determination of an issue may result in disapproval of legislative or executive acts, this constitutional basis for standing ensures that judicial 'determination may not be had at the suit of any and all members of the public.'" *Id.* (quoting *Wimberly*, 194 Colo. at 167, 570 P.2d at 538). It also ensures that courts limit their inquiries to actual controversies. *Id.* ("The requirement ensures a 'concrete adverseness' that sharpens the presentation of issues to the court.").

¶ 10 Both tangible and intangible injuries may satisfy the injury-in-fact requirement. *Id.* Thus, "[d]eprivations of many legally created rights, although themselves intangible, are nevertheless injuries-in-fact." *Ainscough*, 90 P.3d at 856. However, an injury that is overly "indirect and incidental" in relation to the defendant's conduct will not convey standing. *Freedom from Religion Found.*, ¶ 9 (internal quotation marks omitted); *Ainscough*, 90 P.3d at 856.

¶ 11 The legally-protected-interest requirement promotes judicial self-restraint. *Freedom from Religion Found.*, ¶ 10. Claims for relief under the constitution, common law, a statute, or a rule or regulation satisfy the legally-protected-interest requirement. *Id.*

B. Colorado's Open Meetings Law

¶ 12 Colorado's Open Meetings Law, enacted by initiative in 1972, declares that it is "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." § 24-6-401, C.R.S. 2014.

¶ 13 Colorado appellate court opinions have emphasized the importance of the public policy underlying the Open Meetings Law. *See Hanover Sch. Dist. No. 28 v. Barbour*, 171 P.3d 223, 227 (Colo. 2007); *Cole v. State*, 673 P.2d 345, 347 (Colo. 1983); *Benson v. McCormick*, 195 Colo. 381, 383, 578 P.2d 651, 653 (1978). Our supreme court has explained that the statute protects the "public's right of access to public information," a right that is vitally important to our democratic system of government. *Cole*, 673 P.2d at 350; *see also Benson*, 195 Colo. at 383, 578 P.2d at 653 ("Our Open Meetings Law . . . reflects the considered judgment of the Colorado electorate that democratic government best serves the commonwealth if its decisional processes are open to public scrutiny."). In *Cole*, the supreme court described how the statute furthers the democratic process:

¶ 14 The intent of the Open Meetings Law is that

> citizens be given the opportunity to obtain information about and to participate in the legislative decision-making process which affects, both directly and indirectly, their personal interests. A citizen does not intelligently participate in the legislative decision-making process merely by witnessing the final tallying of an already predetermined vote.

673 P.2d at 349. Because of the important public interests advanced by this statute, it "should be interpreted most favorably to protect the ultimate beneficiary, the public." *Id.*

¶ 15 The Open Meetings Law sets out specific requirements for how public business must be conducted in section 24-6-402(2), C.R.S. 2014. As relevant here, the statute explicitly prohibits the use of secret ballots:

> Neither a state nor a local public body may adopt any proposed policy, position, resolution, rule, or regulation or take formal action by secret ballot . . . . For purposes of this subparagraph (IV), 'secret ballot' means a vote cast in such a way that the identity of the person voting or the position taken in such vote is withheld from the public.

§ 24-6-402(2)(d)(IV). The General Assembly added this provision in 2012 in direct response to an opinion by a division of this court, which held that the use of secret ballots to fill vacancies on a city

council did not violate the Open Meetings Law as it existed at the time. *See Henderson v. City of Fort Morgan*, 277 P.3d 853, 854-55 (Colo. App. 2011).

¶ 16 The Open Meetings Law also provides a mechanism for enforcement by private citizens. Section 24-6-402(8) states that "[n]o resolution, rule, regulation, ordinance, or formal action of a state or local public body shall be valid unless taken or made at a meeting that meets the requirements of subsection (2) of this section." Section 24-6-402(9) provides:

> The 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*. In any action in which the court finds a violation of this section, the court shall award the citizen prevailing in such action costs and reasonable attorney fees. In the event the court does not find a violation of this section, it shall award costs and reasonable attorney fees to the prevailing party if the court finds that the action was frivolous, vexatious, or groundless.[1]

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[1] Section 24-6-402(9), C.R.S. 2014, was amended in 2014, apparently in response to the district court's ruling that Weisfield lacked standing in this case. The quoted language is now subsection (9)(b). The General Assembly added the following language as a new subsection (9)(a): "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,

(Emphasis added.) A division of this court has described citizens who brought suit under these provisions as "private attorneys general, who, through the exercise of their public spirit and private resources, caused a public body to comply with the Open Meetings Law." *Van Alstyne v. Hous. Auth. of City of Pueblo*, 985 P.2d 97, 100 (Colo. App. 1999).

¶ 17 With this legal framework in mind, we now turn to whether Weisfield has standing.

IV. Analysis

¶ 18 Weisfield contends that the district court erred in ruling that he did not have standing to bring this action under the Open Meetings Law. We agree.

¶ 19 Applying the *Wimberly* test for standing, we first consider whether Weisfield has a legally protected interest under the Open Meetings Law; we then address whether he has sufficiently alleged an injury in fact to that interest.[2]

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has standing to challenge the violation of this part 4." This amendment became effective June 6, 2014, and neither party contends that the amendment is retroactive. Thus, we do not consider the effect of section 24-6-402(9)(a) in our analysis.

[2] Weisfield contends that we should apply the test articulated in *Cloverleaf Kennel Club, Inc. v. Colorado Racing Commission*, 620

A. Legally Protected Interest

¶ 20 We conclude that, under the circumstances here, the Open Meetings Law gives Weisfield a legally protected interest in having his city council fill its vacancy in an open manner that complies with the statute.

¶ 21 In interpreting the Open Meetings Law, our task is to give effect to the intent of the legislature. *Klinger v. Adams Cnty. Sch. Dist. No. 50*, 130 P.3d 1027, 1031 (Colo. 2006); *see also Huber v. Colo. Mining Ass'n*, 264 P.3d 884, 889 (Colo. 2011) ("We use the general rules of statutory construction in construing citizen-initiated measures."). To do so, we examine the statute's plain language within the context of the statute as a whole, giving words their plain and ordinary meaning. *Triple Crown at Observatory Vill. Ass'n v. Vill. Homes of Colo., Inc.*, 2013 COA 150, ¶ 10. If the language is clear and unambiguous, we do not resort to other rules of statutory construction. *Klinger*, 130 P.3d at 1031.

¶ 22 Based on the plain language of the Open Meetings Law, we

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P.2d 1051 (Colo. 1980). That case employed a three-part test for determining whether a private remedy is implicit in a statute that does not expressly provide for one. *Id.* at 1058. Because the Open Meetings Law expressly provides for a private remedy in section 24-6-402(9), an analysis using the *Cloverleaf* test is unnecessary here.

conclude that that statute creates a legally protected interest on behalf of Colorado citizens to have public business conducted openly in conformity with the statutory provisions. This interest is broadly stated in the statute's declaration of policy, which provides that "the formation of public policy is public business and may not be conducted in secret." § 24-6-401. The statute then sets out specific requirements with which public bodies must comply, including providing notice and public access to meetings where public business is discussed, as well as a specific prohibition on taking formal action by the use of secret ballots. § 24-6-402(2). Finally, the statute provides a legal remedy whereby private citizens may enforce its provisions. § 24-6-402(8) and (9). In sum, the Open Meetings Law articulates an interest in having public business conducted openly and provides a mechanism for private citizens to protect that interest. We, therefore, conclude that the statute creates a legally protected interest on behalf of Colorado citizens in having public bodies conduct public business openly in conformity with its provisions.[3]

[3] Weisfield uses the phrase "governmental transparency" to describe the interest protected under the Open Meetings Law. Defendants

¶ 23 Here, Weisfield challenges the formal action of a public body — the Arvada City Council — in selecting a new council member to represent Arvada's District 1. Weisfield is a citizen of Colorado, as specifically contemplated under the statute. *See* § 24-6-402(9). Moreover, he is a resident of Arvada's District 1, the district where the vacancy arose. Under these circumstances, we conclude that Weisfield has a legally protected interest in having his city council fill the District 1 vacancy in a manner that complies with the Open Meetings Law.

¶ 24 We need not determine whether the expansive language of section of 24-6-402(9) should be read literally to allow *any* citizen of Colorado to challenge any violation of the Open Meetings Law, even if, for example, the citizen does not reside within the jurisdiction of the public body whose actions are being challenged. As a resident of Arvada, Weisfield plainly falls within the sphere of citizens who have a legally protected interest in having the Arvada City Council comply with the Open Meetings Law.

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argue that the word "transparency" does not appear anywhere in the statute. Regardless of semantics, the mandate of the Open Meetings Law is clear: in Colorado, public bodies must conduct public business openly and not in secret.

B. Injury in Fact

¶ 25 We also conclude that Weisfield has sufficiently alleged an injury in fact to this legally protected interest.

¶ 26 To determine whether there is an injury in fact, we accept as true the allegations in the complaint. *Ainscough*, 90 P.3d at 857.

¶ 27 As noted above, Weisfield alleges that he is a citizen of Colorado and a resident of Arvada District 1. He alleges that the Arvada City Council selected a new council member to fill the District 1 vacancy using four rounds of secret ballot voting, in violation of the express statutory prohibition against secret ballots in the Open Meetings Law. The record further shows that as a direct result of this alleged violation, Weisfield does not know how each council member voted during the process for selecting the new council member who now represents him.

¶ 28 We conclude that these allegations are sufficient to demonstrate an injury in fact to Weisfield's legally protected interest under the Open Meetings Law. Weisfield's allegations show that he has been deprived of his legally protected right to have the city council that represents him take action in an open manner rather than by secret ballot. *See* § 24-6-402(2)(d)(IV); § 24-6-402(9). In

affirming the constitutionality of the Open Meetings Law, our supreme court stated, "[a] free self-governing people needs full information concerning the activities of its government not only to shape its views of policy and to vote intelligently in elections, but also to compel the state, the agent of the people, to act responsibly and account for its actions." *Cole*, 673 P.2d at 350. Thus, Weisfield's lack of knowledge about how his council members voted is, in our view, precisely the type of injury contemplated under the Open Meetings Law. Moreover, the injury is neither "indirect" nor "incidental" to defendants' conduct, *Freedom from Religion Found.*, ¶ 9; rather, it is directly related to defendants' alleged violation of the statute. We therefore conclude that Weisfield has demonstrated an injury in fact sufficient to convey standing to pursue this action.

¶ 29 We disagree with the district court's conclusion — and defendants' contention on appeal — that, under the circumstances here, Weisfield is required to show some additional injury to satisfy the injury-in-fact requirement. In its written order, the district court noted that Weisfield

> 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.

This analysis exhibits too restrictive an interpretation of the Open Meetings Law and, indeed, the broad and liberal test for standing in Colorado. As discussed above, the Open Meetings Law protects the "public's right of access to public information." *Cole*, 673 P.2d at 350. The statute's mandate that public business be conducted openly is plainly intended to protect the interests of the public, not just individual candidates. *See id.* at 349 (The Open Meetings Law "should be interpreted most favorably to protect the ultimate beneficiary, the public."). Likewise, the statute does not regulate substantive *outcomes*; rather, it requires the decision-making *process* to be conducted openly and not in secret. Thus, we see no reason why Weisfield should be required to demonstrate that he was one of the candidates being considered for the vacant position or that Marks has somehow acted against his personal interests. Weisfield's allegation that he was deprived of access to information about how the council members voted is sufficient to demonstrate

an injury in fact under the Open Meetings Law.

¶ 30 We are not persuaded that *Pueblo School District Number 60 v. Colorado High School Activities Association*, 30 P.3d 752 (Colo. App. 2000), requires a different result. In that case, a school district brought an action against a high school activities association, alleging that the association failed to comply with the notice provisions of the Open Meetings Law before conducting meetings in which it denied the school district's petition to change its sports classification. *Id.* at 753. A division of this court held that there was no injury in fact sufficient to convey standing because the school district conceded that it had actual notice of the meetings in question. *Id.* at 753-54.

¶ 31 In this case, by contrast, the injury that Weisfield complains of has not been remedied by independent circumstances. He submitted an affidavit to the district court stating that he does not know and has never known which city council members cast which ballots during the four rounds of secret ballot voting. Defendants do not claim that Weisfield has independent knowledge of how each council member voted. Thus, unlike the school district in *Pueblo*, Weisfield alleges an injury under the Open Meetings Law that

remains unresolved.

¶ 32 The district court acknowledged that the precise holding and facts in *Pueblo* are distinguishable from this case and, therefore, that *Pueblo* is not dispositive. Nevertheless, the district court relied on certain language from *Pueblo* in concluding that Weisfield did not have standing under the Open Meetings Law:

> [S]tanding is not a requirement that may be abrogated by statute. A plaintiff may not invoke the power of the judicial branch of government without standing. While 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 753-54 (citations omitted).

¶ 33 This language does not alter our analysis in this case. As noted, the division's holding in *Pueblo* was based on the undisputed fact that the school district conceded actual notice; thus, this additional language is dicta. Moreover, the district court interpreted this language far more broadly than is warranted. As we read *Pueblo*, the opinion merely notes that, in some circumstances, simply referencing a statutory cause of action is insufficient to demonstrate an injury in fact. Because the school district in *Pueblo* had actual notice of the meetings, it was not

injured by the defendant's failure to comply with statutory notice provisions. Under those circumstances, where no injury resulted from the violation, merely referencing a statutory cause of action was insufficient to confer standing.

¶ 34 In this case, however, Weisfield's lack of knowledge about how the council members voted is an injury under the Open Meetings Law that has not been remedied by external circumstances. As a citizen seeking to enforce open, public decision-making by the city council that represents him, Weisfield is precisely the type of plaintiff contemplated under the Open Meetings Law's enforcement provisions. *See* § 24-6-402(9); *Van Alstyne*, 985 P.2d at 100 (describing citizen-plaintiffs as "private attorneys general").

¶ 35 For these reasons, we conclude that Weisfield has alleged an injury in fact to a legally protected interest, and, therefore, has standing to bring this action under the Open Meetings Law.

V. Attorney Fees

¶ 36 Because we have only addressed the issue of standing and not the merits of Weisfield's action, we decline to address his request for attorney fees pursuant to section 24-6-402(9), as premature. On remand, the district court may consider such a request at an

appropriate time.

VI. Conclusion

¶ 37 The order is reversed, and the case is remanded for further proceedings, including the district court's consideration of the alleged grounds for dismissal asserted in defendants' motion to dismiss under C.R.C.P. 12(b)(5).

JUDGE PLANK and JUDGE NEY concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(l), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b) will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 23, 2014

Notice to self-represented parties*: The Colorado Bar Association provides free volunteer attorneys in a small number of appellate cases. If you are representing yourself and meet the CBA low income qualifications, you may apply to the CBA to see if your case may be chosen for a free lawyer. Self-represented parties who are interested should visit the Appellate Pro Bono Program page at http://www.cobar.org/index.cfm/ID/21607.*

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.