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**DISTRICT COURT, BOULDER COUNTY,
COLORADO**

Court Address: 1777 Sixth Street
Boulder, CO 80903

Plaintiffs:

RACHEL CARTER, a Colorado Citizen; and, LEHMAN COMMUNICATIONS CORPORATION, a Colorado corporation, doing business as the *Longmont Daily Times-Call*.

v.

Defendant:

THE CITY COUNCIL OF THE CITY OF LONGMONT, COLORADO

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Case Number:

Division:

**COMPLAINT
and APPLICATION FOR ORDER OF *IN CAMERA* REVIEW**

Plaintiffs Lehman Communications Corporation, doing business as the *Longmont Daily Times-Call*, and its staff writer Rachel Carter, (collectively herein the “*Times-Call*”), through their undersigned counsel at Levine Sullivan Koch & Schulz, L.L.P., for their Complaint against Defendant the City Council for the City of Longmont (the “City Council”), allege as follows:

INTRODUCTION

This civil action also invokes the provisions of the Colorado Open Records Act calling for *in camera* review of records of executive sessions of public bodies when there are sufficient grounds to support a reasonable belief that a closed-door meeting of the public body violated provisions of the Colorado Open Meetings Law. On June 23, 2009, the Longmont City Council met behind closed doors to discuss, with the attorney for the Council, an adverse trial court ruling it had obtained in an annexation case; immediately following that executive session, the City's Mayor announced to reporter Rachel Carter that **in the course of the meeting the Council had decided to appeal** the trial court's ruling. A member of the City Council subsequently has confirmed that a "straw poll" vote was taken during the closed door meeting to reach the decision to file an appeal.

This conduct constitutes the "adoption of a position" by the City Council, an action that the Colorado Open Meetings Law ("COML") expressly prohibits a local public body from doing in the course of an executive session. *See* § 24-6-402(4), C.R.S. (prohibiting a local public body in the course of an executive session from adopting "any proposed policy, position, resolution, rule, regulation or formal action" other than the approval of minutes of a prior closed meeting).

Because the plaintiffs can demonstrate a sufficient factual basis to believe the City Council "adopted a position" during the June 23, 2009 executive session, the Court must review the audio recording ("minutes") of that executive session, and, upon finding that the City Council indeed "adopted a position," order that the portion of the audio recording where that decision was made must be disclosed as a public record. In addition, upon the Court's finding that the City Council violated the COML, the plaintiffs are entitled to an award of their reasonable attorneys fees and costs.

JURISDICTION, VENUE AND PARTIES

1. This Court has jurisdiction over the claims asserted herein under Article VI, § 9(1) of the Colorado Constitution, and under § 24-72-204(5.5), C.R.S. of the CORA, and under § 24-6-402(9), C.R.S., of the COML.
2. Venue for this civil action is proper in this Court under Rules 98(b)(2) and (c)(1) of the Colorado Rules of Civil Procedure and under § 24-72-204(5.5), C.R.S. of the CORA.
3. Plaintiff the *Times-Call* is a newspaper of general circulation, published daily, in Boulder County, covering news and matters of public interest for readers Boulder County and beyond.
4. Plaintiff Rachel Carter is a citizen of the State of Colorado, residing in Larimer County, and employed as a staff writer by Lehman Communications Corporation.

5. Defendant City Council of the City of Longmont is the governing body of a political subdivision of the State of Colorado.

APPLICABLE STATUTORY PROVISIONS

6. This case is controlled by provisions of the COML and the CORA.

A. Colorado Open Meetings Law

7. Under the COML, the City Council is a “local public body” whose meetings are subject to requirements of advance notice and public access. See §§ 24-6-402(1)(a), (2)(b), and (2)(c), C.R.S.

8. The “underlying intent” of the COML is to ensure that the public is not “deprived of the discussions, the motivations, the policy arguments and other considerations which led to the discretion exercised by the [public body].” *Van Alstyne v. Housing Auth.*, 985 P.2d 97, 101 (Colo. App. 1998).

9. “The purpose of the OML, as declared in § 24-6-401, C.R.S. 2006, is to afford the public access to a broad range of meetings at which public business is considered; to give citizens an expanded opportunity to become fully informed on issues of public importance, and to allow citizens to participate in the legislative decision-making process that affects their personal interests.” *Walsenburg Sand & Gravel Co. v. City Council*, 160 P.3d 297, 299 (Colo. App. 2007) (citation omitted) (emphasis in original).

10. Under the COML, all exemptions from the default rule that a public body’s meetings must be open to the public must be narrowly construed, ensuring as much public access as possible. See *Gumina v. City of Sterling*, 119 P.3d 527, 530 (Colo. App. 2004) (“In our view, this rule [of a presumption in favor of public access] applies with equal force to the executive session exception carved out in the Open Meetings Law.”); *Zubeck v. El Paso County Ret. Plan*, 961 P.2d 597, 600 (Colo. App. 1998) (construing both the COML and the CORA in harmony and requiring narrow construction of any exemption limiting public access); see also *Cole v. State*, 673 P.2d 345, 349 (Colo. 1983) (“As a rule, [the Open Meetings Law] should be interpreted most favorably to protect the ultimate beneficiary, the public.”).

11. Under the COML, a public body may conduct an “executive session,” only if the body “strictly complies” with the procedural requirements for announcing and conducting such closed meetings, which include limiting its discussion during such meetings to the narrow topics permitted by the statute and taking no action or adoption of any position during the closed meeting. See § 24-6-402(3), C.R.S.; see also *Gumina v. City of Sterling*, 119 P.3d 527, 532 (Colo. App. 2004).

12. The COML permits a local public body to close a meeting through the use of an “executive session” *only* with respect to the specifically enumerated exemptions listed in the statute. *See* § 24-6-402(4)(a)-(h), C.R.S.

13. The COML’s narrow exemption for a local public body’s “conferences with an attorney” allows for a closed-door discussion only “for purposes of receiving legal advice on specific legal questions.” *See* § 24-6-402(4)(b), C.R.S. This provision, however, may not be invoked to bar public access to deliberations by members of a local public body on matters that do not narrowly constitute the receipt of legal advice on a specific legal question. *See id.* Moreover, a local public body may not use the “mere presence or participation” of the body’s attorney at a closed-door meeting as the basis for excluding the public from observing the discussion. *See id.*

14. If a public body properly and publicly announces the topic to be discussed in an executive session that is authorized by the COML, and thereafter votes in public to convene an executive session, the public body can meet behind closed doors for purposes of discussing only the subject matter that it had announced and voted on. Under the COML, the burden is on the public body that conducted an executive session to demonstrate that the closed meeting was proper. *Cf. Zubeck v. El Paso County Retirement Plan*, 961 P.2d 597, 600 (Colo. App. 1998).

15. Moreover, a public body may not adopt “any proposed policy, position, resolution, rule, regulation or formal action” during an executive session, other than the approval of minutes of a prior closed meeting. *See* § 24-6-402(4), C.R.S.

16. The Colorado Supreme Court has held that the prohibition against the closed-door adoption of a proposed position includes a ban on informal decision-making, even when the informal closed-door decision is subsequently approved in a public vote. *See Hanover Sch. Dist. No. 28 v. Barbour*, 171 P.3d 223, 228 (Colo. 2007) (noting prior holding that “important policy decisions cannot be made informally”) (citation omitted); *see also WorldWest LLC v. Steamboat Springs Sch. Dist. RE-2 Bd. of Educ.*, Case No. 07-CA-1104, 37 Media L. Rep. (BNA) 1663, slip op. at 27 (Colo. App. Mar. 26, 2009) (concluding that a school board violated the COML by “adopting a position in a closed session”) (copy attached hereto in Appendix of Additional Case Authority); *Walsenburg Sand & Gravel v. City Council*, 160 P.3d 297, 299-300 (Colo. 2007) (holding that an allegation that the mayor and the city council accepted a bid for purchase of real estate during an executive session adequately stated a violation of the Open Meetings Law); *Van Alstyne v. Housing Auth.*, 985 P.2d 97, 101 (Colo. App. 1999) (“[A] public body’s meeting is not in compliance with the Open Meetings Law if it is held merely to ‘rubber stamp’ previously decided issues.”).

17. Finally, in any suit in which the Court finds a violation of the COML, the Court must – without discretion – award the reasonable attorney’s fees of the citizen who sought the finding of a violation of the statute. *See* § 24-6-402(9), C.R.S.; *see also Van Alstyne*, 985 P.2d at 99-100 (finding reversible error in the failure to award attorney’s fees to a citizen who prevailed in establishing a violation of the COML because “the trial court overlooked the General

Assembly’s establishment of *mandatory* consequences for a violation of the statute”) (emphasis added).

B. The Colorado Open Records Act’s Provisions for *In Camera* Review of Executive Session Meetings

18. Under the COML, the record of a properly convened executive session meeting is generally considered confidential. With respect to a properly convened executive session (following a legally sufficient announcement and vote) there is no confidentiality with respect to an audio recording if the public body’s closed-door executive session is found to have included discussions of matters not properly the subject of a closed session under the limited exemptions of the COML *or* if the public body “adopted a proposed policy, position, resolution, rule, regulation, or formal action in contravention” of the requirements of the COML. § 24-6-402(2)(d.5)(II)(C), C.R.S.

19. Indeed, the COML expressly declares that the minutes of any meeting “at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs . . . shall be taken and promptly recorded, and *such record shall be open to public inspection.*” § 24-6-402(2)(d)(II), C.R.S. (emphasis added).

20. Thus, the COML and the CORA provide exceptions to the otherwise mandatory confidentiality of executive session recordings. *See* §§ 24-6-402(2)(d.5) and 24-72-204(5.5), C.R.S.

21. Under the CORA, “any person who seeks access” to the record of an executive session of a public body may apply to a District Court for an order directing that the record of the closed session be provided to the court for *in camera* review. *See* § 24-72-204(5.5)(a), C.R.S.

22. In order to obtain such an *in camera* review, the applicant must “show sufficient grounds to support a reasonable belief” that during the executive session the public body engaged in a “substantial discussion of any matters not enumerated in section 24-6-402(3)(a) or (4),” *i.e.*, the provisions listing the limited topics for which an executive session may be called, *or* that during the executive session the public body “adopted a proposed policy, position, resolution, rule, regulation, or formal action.” *See* § 24-72-204(5.5)(a), C.R.S.

23. Upon such a showing of a reasonable basis to believe that the executive session provisions of the COML were violated, the Court must conduct an *in camera* review of the recording of the public body’s closed meeting to determine whether in fact any substantial discussion of a non-exempt topic occurred during the closed discussion *or* whether the public body adopted any proposed policy, position, resolution or formal action during the closed meeting. *See* § 24-72-204(5.5)(b)(I), C.R.S.

24. If the Court concludes that the recording of a public body's closed meeting shows a violation of the COML, then the Court must allow public inspection of those portions of the record. *See* § 24-72-204(5.5)(b)(II), C.R.S.

GENERAL FACTUAL ALLEGATIONS

25. During a Public Meeting of the Longmont City Council on June 23, 2009, the Council announced that it would meet in executive session to receive legal advice on specific legal questions regarding "Firestone annexation's litigation." Following the posted notice of the meeting, the City Council voted in public to convene an executive session to discuss that announced topic.

26. Immediately following the conclusion of the executive session convened on June 23, 2009, Mayor Roger Lange stated to *Times-Call* reporter Rachel Carter that the Council had agreed, in the course of the executive session, to appeal Judge Maus' adverse ruling in the Firestone annexation litigation. *See* Exhibit A attached hereto (Affidavit of Rachel Carter ¶ 4) (testifying that immediately following the executive session meeting, when asked what had occurred in the meeting, Mayor Lange stated "we think it's in the City's interest to appeal [Judge Maus' ruling] at this time.").

27. In a subsequent conversation with a member of the City Council, Ms. Carter was informed that the City Council conducted a "straw poll" vote during the June 23, 2009 executive session and determined that a majority of the Council has indicated their assent to filing an appeal from the adverse judgment in the Firestone annexation litigation. *See id.* ¶ 5 (testifying that Councilwoman Mary Blue stated that the City Council's decision to authorize the appeal was not a "binding vote" but merely a "straw poll to find out if there's a majority opinion about something.").

28. By letter dated July 9, 2009, the *Times-Call*, through its undersigned counsel, requested to inspect the audio recording of the City Council's executive session on June 23, 2009, noting that the COML declares the minutes of any meeting at which any position is adopted by a local public body "*shall be open to public inspection.*" § 24-6-402(2)(d)(II), C.R.S. (emphasis added). *See* Exhibit B attached hereto.

29. By letter dated July 14, 2009, the City Council refused to make the recording of the executive session of its June 23, 2009 executive session available to the *Times-Call*. *See* Exhibit C attached hereto.

First Claim for Relief -- Injunction **Violations of Colorado Open Meetings Law**

30. Plaintiffs incorporate by reference each and every allegation contained in the previous paragraphs of this Complaint.

31. The City Council violated the COML in connection with its meeting on June 23, 2009 in the following ways:

- a. The City Council, behind closed doors, adopted the proposed position of authorizing the filing of an appeal from an adverse trial court judgment. Such adoption, even by informal decision-making or “straw poll”, is a clear violation of § 24-6-402(4), C.R.S.
- b. On information and belief, prior to conducting its “straw poll” vote to authorize the filing of an appeal of Judge Maus’ ruling in the Firestone annexation lawsuit, the City Council members discussed the relative merits of making such a decision, and at such time they were not receiving legal advice from their attorney on specific legal questions. All such discussion of a non-exempt topic, exceeded the scope of the statutory exemption invoked to convene the executive session, and therefore violated § 24-6-402(4), C.R.S.

32. Accordingly, the portion of the recording of that executive session described above are, under the precedents discussed above, “public records” subject to inspection under the CORA.

33. Plaintiffs have established a good faith basis for their reasonable belief that the City Council’s closed-door meeting on June 23, 2009 included a substantial discussion of non-exempt topics and also involved the adoption of a proposed position. As a result, pursuant to § 24-72-204(5.5)(b)(I), C.R.S., Plaintiffs are entitled to an order from this Court directing that the Board submit its audio recordings of the closed meeting to the Court for *in camera* review to determine whether any portion of the recording should be released to the public.

Second Claim for Relief – Declaratory Judgment
Violations of Colorado Open Meetings Law

34. Plaintiffs incorporate by reference each and every allegation contained in the previous paragraphs of this Complaint.

35. Plaintiffs also are entitled to a declaratory judgment finding that the City Council’s conduct on June 23, 2009 violated the COML.

Prayer for Relief

WHEREFORE, the Plaintiffs pray for judgment in their favor and against the City Council as follows:

A. The Court immediately should enter an Order of *In Camera* Review as described in the following Application for Order of *In Camera* Review, directing the City Council to

submit its full and complete audio recording of the City Council's executive session discussion on June 23, 2009 for *in camera* review;

C. The Court should conduct, as soon as practical, an *in camera* review of the audio recordings;

D. Upon review of the audio recordings of the executive session at issue here, the Court should enter an Order finding and declaring that:

i. Certain contents of the audio recordings are deemed to be open to public inspection because the closed meetings of the City Council involved substantial discussions of matters not permitted to be discussed in executive session, and because the City Council adopted a proposed position behind closed doors;

ii. Plaintiffs are entitled to inspect and copy certain contents of the audio recordings; and

iii. Plaintiffs are entitled to an award of their reasonable attorney's fees and costs under the Colorado Open Meetings Law; and

iv. Plaintiffs are entitled to such other and further relief as the Court deems proper and just.

Application for Order of *In Camera* Review

AA. In addition to any other relief otherwise available to them, Plaintiffs apply for an Order of *In Camera* Review pursuant to § 24-72-204(5.5)(a), C.R.S..

BB. Plaintiffs have established sufficient grounds to support a reasonable belief that the Board conducted substantial discussions of non-exempt matters and/or adopted a proposed position during a closed meeting.

CC. Pursuant to § 24-72-204(5.5)(a), C.R.S., Plaintiffs are entitled to – and hereby apply for – an Order of *In Camera* Review. Such an order should direct the City Council to submit forthwith to the Court the audio recording of the City Council's executive session meeting on June 23, 2009.

DD. Upon such a submission, pursuant to § 24-72-204(5.5)(b), C.R.S., the Court should determine whether any portion of the tape-recording reflects a substantial discussion of a non-exempt topic and whether any portion reflects the adoption of any proposed position by the City Council. To the extent that the Court finds such violations of the COML, the Court should order that those portions of the audio recordings be made available for public inspection.

EE. A proposed order to this effect is attached.

Respectfully submitted this 5th day of August, 2009.

By s/ Steven D. Zansberg
Steven D. Zansberg
Adam M. Platt
LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

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**Rachel Carter, and Lehman Communications
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THIS COMPLAINT WAS FILED WITH THE COURT THROUGH THE
LEXIS/NEXIS FILE-AND-SERVE ELECTRONIC FILING PROCEDURES,
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AS REQUIRED BY THOSE RULES, THE ORIGINAL SIGNED COPY OF THIS
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