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DISTRICT COURT, COUNTY OF LAKE,
STATE OF COLORADO
Court Address: 505 Harrison Avenue
P.O. Box 55
Leadville, CO 80461

Plaintiffs:
ARKANSAS VALLEY PUBLISHING COMPANY, d/b/a THE *HERALD DEMOCRAT*, and MARCIA MARTINEK,

v.

Defendant:
LAKE COUNTY BOARD OF COUNTY COMMISSIONERS

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Case Number: 13 CV ____

Division:

COMPLAINT
APPLICATION FOR AN ORDER TO SHOW CAUSE
PURSUANT TO COLORADO REVISED STATUTE § 24-72-204(5)

Arkansas Valley Publishing Company, d/b/a the *Herald Democrat*, together with its Editor, Marcia Martinek ("Plaintiffs") through their undersigned attorneys at Levine Sullivan Koch & Schulz, LLP, for their Complaint against Defendant Lake County Board of County Commissioners (the "Board") allege as follows:

INTRODUCTION

This action arises out of two closed-door meetings the Lake County Board of County Commissioners held on February 19 and 20, 2013. The meetings were not only held behind

closed doors, they were held in secret; *the public was given no notice whatsoever that the meetings were taking place*.

Plaintiffs have strong reason to believe that the Board held the meetings to discuss allegations that a high-level county employee, the head of the county's building department Tommy Taylor, was engaged in illegal conduct involving drugs, and that he was harassing building department co-workers in connection with that illegal conduct. Although public bodies are authorized to discuss "personnel matters" behind closed doors, Colorado's Open Meetings Law (the "COML") requires that they strictly comply with certain procedural steps before doing so, including providing advance notice to the public of their intention to discuss the matter privately and a description of the matter in as much detail as possible without compromising the need to hold the meeting privately in the first place. The Board flagrantly ignored the COML by ignoring these important requirements.

When the *Herald Democrat* learned of the unlawfully held secret meetings, its editor, Marcia Martinek ("Martinek"), requested access to the audio recordings of them. Although acknowledging that the meetings were recorded (as is required by COML's provisions governing closed-door "executive sessions"), the Board denied Martinek's request.

Over the past several months, Plaintiffs have persistently pressed the Board to release the audio recordings of these meetings, as it is required to do under both the COML and the Colorado Open Records Act (the "CORA"). Instead of complying with the law, however, the Board has provided shifting, inconsistent, and legally inadequate justifications for its withholding of the audio recordings, including asserting an unspecified "duty to protect employee privacy." The Board has persisted in withholding the recordings on this legally inadequate basis, even though in July, Mr. Taylor was arrested and charged with two crimes: possession with intent to dispense a Schedule II controlled substance (prescription drugs) and criminal solicitation.

None of the Board's proffered justifications for withholding the audio recordings has merit, whether analyzed under the COML or the CORA. Accordingly, Plaintiffs respectfully request that the Court enter an Order to Show Cause requiring the Board to explain why it should not provide the audio recordings to Plaintiffs. Plaintiffs also seek their reasonable attorney's fees and costs to which they are entitled under both the COML and the CORA.

JURISDICTION AND VENUE

1. This Court has jurisdiction under article VI, section 9(1) of the Colorado Constitution; under § 24-6-402(9), C.R.S. of the COML; and under §§ 24-72-204(5) and -204(5.5), C.R.S. of the CORA.

2. With respect to the jurisdictional requirement for providing notice of intent to sue under Section 204(5) of the CORA, Plaintiffs provided notice to counsel for the Board, by U.S.

Mail and email delivery, on October 11, 2013. A true and correct copy of that notice letter is attached hereto as **Exhibit A**.

3. Venue for this civil action is proper in this district under Rules 98(b)(2) and (c)(1) of the Colorado Rules of Civil Procedure; under § 24-6-402(9), C.R.S. of the COML; and under §§ 24-72-204(5) and -204(5.5), C.R.S. of the CORA.

PARTIES

4. Plaintiff Arkansas Valley Publishing Company publishes four print and online newspapers serving readers in the Colorado mountain region: the *Herald Democrat*, *The Mountain Mail*, *The Chaffee County Times*, and *The Flume (Park County Republican & Fairplay Flume*). The company also hosts an online news site, *Peaks News Net*.

5. Plaintiff Marcia Martinek is a citizen of Leadville, Colorado, and is the Editor of the *Herald Democrat*.

6. Plaintiffs are "citizens" under the COML, § 26-6-402(9), C.R.S., and "persons" under the CORA, § 24-72-202(3), C.R.S., and, as such, have standing to bring a claim for access to public meetings and records under the COML and CORA.

7. Defendant Lake County Board of County Commissioners is the governing body of a political subdivision of the State of Colorado. As such, its 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., and all the records it makes, maintains or keeps for use in the exercise of official functions are open to the public unless an exemption applies, *see* §§ 24-72-202(5)-(6)(a)(1), 24-72-203(1)(a), C.R.S.

APPLICABLE LAW

The Colorado Open Meetings Law (§§ 24-6-401, *et seq.*, C.R.S.)

8. "The purpose of the [C]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) (emphasis and citation omitted). COML was enacted 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. Under the COML, all exceptions 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, 532 (Colo. App. 2004) (the

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 Cnty. Ret. Plan*, 961 P.2d 597, 600 (Colo. App. 1998) (construing COML and CORA in harmony and requiring narrow construction of any exemption limiting public access); *accord Cole v. State*, 673 P.2d 345, 349 (Colo. 1983) ("As a rule, [the COML] should be interpreted most favorably to protect the ultimate beneficiary, the public.").

10. Under the COML, a public body may conduct an "executive session," *i.e.*, a meeting outside of public view, only if the body first "strictly compl[ies]" with the statutory requirements for announcing and conducting such closed meetings. *See Gumina*, 119 P.3d at 530. The statutory requirements for providing notice to the public of an executive session include the following:

- An executive session may only be convened *during a regular or special public meeting* for which the public has received the required *24-hour advance written notice*, including notice of the possibility that the public meeting may include an executive session discussion;

- The public body must announce in public, at the public meeting, the *topic* of any executive session discussion in advance of closing the meeting;

- The public body's announcement of the topic of the closed meeting must include a *specific citation* to the particular provision of the COML that permits that particular topic to be discussed in executive session;

- The public body's announcement of the planned closed-door discussion must "*identif[y] the particular matter to be discussed in as much detail as possible* without compromising the purpose for which the executive session is authorized"; *and*

- The public body must, at the public meeting, *approve a motion to go into executive session* to discuss the announced topics by a vote of two-thirds of the quorum present.

§ 24-6-402(4), C.R.S. (emphasis added).

11. Apart from the sufficiency of a public body's topic announcement and compliance with other notice requirements for conducting an executive session, 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. One such exemption is for "personnel matter[s]." § 24-6-402(4)(f)(I), C.R.S.

12. In addition to confining its discussion during an executive session to the specific topics permitted by the COML, a public body is prohibited from adopting, in a properly convened executive session, "any proposed policy, position, . . . or formal action" during a

closed meeting, other than the approval of minutes of a prior closed meeting. § 24-6-402(4), C.R.S.

13. The public body must make an electronic recording of the executive session unless the attorney representing the public body attests that the unrecorded portion of the executive session constitutes a privileged attorney-client communication. *See* § 24-6-402(2)(d.5)(II)(A)-(B), C.R.S.

14. In addition, a local public body must take and record minutes of any meeting "at which the adoption of any proposed policy, position, . . . or formal action occurs or could occur." § 24-6-402(2)(d)(II), C.R.S.

15. Under the COML, a public body may not deny public access to an audio or electronic recording, or minutes, of an executive session where the public body failed to comply strictly with the notice and other procedural requirements of the statute. The Court of Appeals has unequivocally declared that such records are "public records" subject to public access. *See Gumina*, 119 P.3d at 532 (where a public body "fail[s] strictly to comply with requirements of the [COML] for convening . . . executive sessions, the trial court must open the records of those sessions to public inspection").

16. Under the COML, and its effectuating provisions in the CORA, the burden is on the public body that conducted an executive session to demonstrate that the closed meeting was proper. *See Zubeck*, 961 P.2d at 600 (burden of demonstrating exemption under CORA is that of records custodian).

17. There are two exemptions for the public notice requirement for meetings of local public bodies. First, a local public body may hold an "emergency" meeting without providing advance public notice only when a true "emergency" exists and a local municipal ordinance or other law provides for such emergency meetings. *Lewis v. Town of Nederland*, 934 P.2d 848 (Colo. App. 1996) (invoking Nederland Ordinance 377 § 1.3). "An 'emergency' is defined as 'an unforeseen combination of circumstances or the resulting state that calls for immediate action.' Thus, an emergency necessarily presents a situation in which public notice, and likewise, a public forum would be either impractical or impossible." *Id.* at 851 (citations omitted).

18. An emergency meeting does not "reasonably satisf[y]" the "'public' condition of the Open Meetings Law" unless the public body ratifies action taken at the emergency meeting "at either the next regular Board meeting or a special meeting where public notice of the emergency has been given." *Id.* at 851.

19. Second, the COML includes a narrow exemption from the notice requirement for meetings by boards of county commissioners to address the "*day-to-day . . . supervision* of employees." § 24-6-402(2)(f), C.R.S. (emphasis added).

20. In any suit in which the court finds a violation of the COML, regardless of the public body's scienter or good intentions, the court is required to award the reasonable attorney's fees of the citizen who sought the finding of a violation of the statute. § 24-6-402(9), C.R.S.; *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)).

The Colorado Open Records Act (§§ 24-72-201, *et seq.*, C.R.S.)

21. Under the CORA, any person may request access to inspect and obtain a copy of any public record. § 24-72-203(1)(a), C.R.S.

22. A "public record" is defined as any "writing" that is "made, maintained, or kept by . . . any . . . political subdivision of the state . . . for use in the exercise of functions required or authorized by law or administrative rule." § 24-72-202(6)(a)(I), C.R.S.

23. Under the CORA, "'writings' means and includes all . . . tapes, recordings, or other documentary materials, regardless of physical form or characteristics." And, with the express exemption of "computer software," writings "includes digitally stored data" regardless of where such data is stored. § 24-72-202(7), C.R.S.

24. Here, the Board made, maintains, and keeps the audio recordings for use in the exercise of its lawful functions. Moreover, the Board is required by state law, *i.e.*, the COML, to electronically record its executive sessions. § 24-6-402(2)(d.5)(II)(A), C.R.S. As a result, the Board's recordings and minutes of its executive sessions meet the statutory definition of "public records" under the CORA. *See* § 24-72-202(6)(a)(I), C.R.S.; *WorldWest LLC v. Steamboat Springs Sch. Dist. RE-2 Bd. of Educ.*, No. 07CA1104, 2009 WL 783330, 37 Media L. Rep. 1663, 1668-69 (BNA) (Colo. App. Mar. 26, 2009) (unpublished).

25. If a document constitutes a "public record" under the CORA, the custodian may deny access to it only if there is a specific exemption that requires or permits the withholding of that record. § 24-72-203(1)(a), C.R.S.

26. Under the CORA and the COML, the recording of *a properly convened* executive session meeting generally is exempt from disclosure and is not otherwise subject to compelled disclosure (although the public body may waive such confidentiality at its discretion). § 24-6-402(2)(d.5)(II)(D), C.R.S. However, as noted above, this confidentiality does *not* apply if the public body fails to "strictly comply" with the notice requirements of the COML. *See Gumina*, 119 P.3d at 532.

27. Under the CORA, "personnel files," which "means and includes home addresses, telephone numbers, financial information, and other information maintained because of the employer-employee relationship," are exempt from disclosure. § 24-72-202(4.5), C.R.S. This exemption is extremely narrow. First, to qualify for the exemption, documents must actually be

present in an employee's personnel file. *Daniels v. City of Commerce City, Custodian of Records*, 988 P.2d 648, 651 (Colo. App. 1999); *Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874, 878 (Colo. App. 1987). Second, the mere placement of a document in a personnel file does not provide protection from the CORA; the exemption applies *only* to those documents reflecting "home addresses, telephone numbers, financial information" and other information that is "*of the same . . . type of personal, demographic information*." *Daniels*, 988 P.2d at 651 (emphasis added). Thus, a custodian may not withhold, under the "personnel files" exemption, information in a personnel file—even where the custodian believes its disclosure would compromise a legitimate expectation of privacy on the part of the employee—unless the information withheld is "of the same general nature" as the "personal, demographic information listed in the statute." *Id.*

28. *All* exemptions to the statutory mandate of public access under the CORA (and the COML), including the "personnel files" exemption, must be construed narrowly. *See Sargent Sch. Dist. No. RE-33J v. W. Servs. Inc.*, 751 P.2d 56, 59-60 (Colo. 1988).

29. "As to documents which are not present in an employee's personnel file but which involve privacy rights," a custodian may withhold such documents under CORA *only* by bearing the heavy burden of affirmatively establishing "that disclosure [of the documents] would do substantial injury to the public interest by invading the constitutional right to privacy of the individuals involved." *Denver Post Corp.*, 739 P.2d at 878. A court may not find that disclosure of public records would do "substantial injury to the public interest" unless the General Assembly could not have anticipated that such records might be maintained by public bodies—in other words, in situations where the General Assembly could not have conceived of the need to create a mandatory exemption for such documents. *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1156 (Colo. App. 1998) ("This catch-all exemption is to be used only in those extraordinary situations which the General Assembly could not have identified in advance."); *accord, e.g., Zubeck*, 961 P.2d at 601 (citing *Civil Serv. Comm'n v. Pinder*, 812 P.2d 64 (Colo. 1991)).

30. Upon the request of a person to inspect public records under the CORA, the custodian must provide a written statement of the grounds for the denial, including a citation to the law or regulation under which access to the record is denied. § 24-72-204(4), C.R.S.

31. Any person whose request for access to a public record is denied may apply to the district court, in the district in which such record can be found, for an "Order to Show Cause" directing the custodian of the public record to show cause why the record should not be made available for public inspection. § 24-72-204(5), C.R.S. Prior to filing such suit, the applicant must provide the records custodian with three days advance written notice to be eligible to recover his or her attorneys' fees. *Id.*

32. The Court must schedule the hearing on an Order to Show Cause under CORA at the "earliest practical time." *Id.*

33. In a CORA show cause proceeding, once the requester establishes a *prima facie* basis for concluding that the requested record is a "public record" under CORA, the burden shifts to the custodian of the record to demonstrate why the refusal to provide access to the requested record is not "improper"—that is, the custodian bears the burden of proving that the records withheld fit within one of the specific exceptions to disclosure enumerated in the Act. *See Denver Publ'g Co. v. Bd. of Cnty. Comm'rs*, 121 P.3d 190, 199 (Colo. 2005).

34. Following a show cause hearing, if the Court finds that the requested public record should be made available for public inspection, the Court *must* award the applicant his or her reasonable attorney's fees in connection with the effort to obtain access to the public record. *See* § 24-72-204(5), C.R.S.

FACTUAL BACKGROUND

35. In February 2013, the Board convened two meetings that it described in its minutes and to the Plaintiffs as "emergency executive sessions" to discuss "personnel issues." The first meeting convened on February 19 at approximately 3:45 p.m., and the second convened on February 20 at approximately 8:00 a.m. *See* Affidavit of Marcia Martinek ("Martinek Aff."), attached hereto as **Exhibit B**, ¶ 5 & Ex. 1 (Feb. 20, 2013 Minutes – Lake County Commissioners Emergency Executive Session); *id.* ¶ 19 & Ex. 7 (Marcia Martinek, Editorial, *The Real Winners*, HERALD DEMOCRAT, Mar. 6, 2013; Marcia Martinek, *Herald Disputes "Emergency Executive Session,"* HERALD DEMOCRAT, Mar. 13, 2013).

36. The Board did not convene the closed-door meetings during a regular or special public meeting. Indeed, it did not provide *any* advance public announcement of either of the closed-door meetings. *Id.* ¶¶ 3-4, 7-9. Nor did the Board fulfill any of the other prerequisites mandated by the COML for convening a lawful executive session. Although the minutes of the meetings indicate that a commissioner made a motion to go into executive session, they do not reflect that the subject of the session was described in as much detail as possible, and there is no indication that a vote was taken. *Id.* Ex. 1. In any event, all of this occurred outside public view with no public notice of the meeting, so it could not possibly meet the statutory requirements for convening an executive session.

37. However, remarkably, the Board did convene a regular public meeting on the evening of February 19 which took place immediately *after* the first putative "executive session" and just before the second putative "executive session" commenced the next morning. *Id.* ¶ 4. Minutes of the secret meetings were not adopted and disclosed until the Board's March 18, 2013 meeting. *Id.* ¶ 5 & Ex. 1.

38. The minutes do not identify the particular matter or matters discussed; rather, they simply state that the meetings were held to discuss "personnel matters" and to have discussions with an attorney. *Id.* Ex. 1.

39. The minutes do not describe why the Board deemed the meetings an "emergency," nor do they cite any local ordinance or other law that authorizes the Board to conduct such an emergency meeting without public notice. *Id.*

40. At the Board's regular March 4, 2013 meeting, the Board announced that unnoticed, "emergency" executive sessions were held on February 19 and 20 to discuss "personnel matters" and to have a conference with the Board's attorney, and that no decisions were made during either executive session. The agenda in the public notice for the March 4 meeting did not mention anything concerning the February 19 and 20 meetings or the anticipated adoption of the minutes thereof. *See* Martinek Aff. ¶ 7 & Ex. 2 (Regular Meeting Agenda (Mar. 4, 2013)).

41. When asked about the meetings, Commissioner Mike Bordogna told Martinek that the second meeting was a continuation of the first. *Id.* ¶ 8 & Ex. 7 (Marcia Martinek, *Herald Disputes "Emergency Executive Session," supra*).

42. On information and belief, the meetings were held to discuss allegations of involvement with illegal drugs and related harassment of co-workers by Tommy Taylor, who was then the Director of Building and Land Use for Lake County. *Id.* ¶ 11.

43. Although minutes of the meetings indicate that the only persons present at the meetings were all three county commissioners and the Board's attorney, Lindsey Parlin, Esq., *id.* Ex. 1 (and Commissioner Mike Bordogna verified this in early March, *id.* Ex. 7 (Marcia Martinek, *Herald Disputes "Emergency Executive Session," supra*), on information and belief Taylor was also present during all or some portion of the second meeting. *See id.* ¶ 12.

44. On February 20, 2013, Taylor was sitting in a chair just outside the Board of County Commissioners' meeting room. Affidavit of Andrea Byrne, attached hereto as **Exhibit C**, ¶ 3. A short time later, he stormed out of the Commissioners' meeting room, slamming the door behind him. Affidavit of Patricia Berger, attached hereto as **Exhibit D**, ¶ 3.

45. On information and belief, the Board discussed the allegations about Taylor and his continued employment with Lake County during the meetings, and asked Taylor to resign at the meeting on February 20, 2013. Martinek Aff. ¶ 11.

46. Taylor resigned his position with Lake County on February 20, 2013. *Id.* ¶ 13; *see also id.* ¶ 19 & Ex. 7 (Danny Ramey, *Was Emergency Meeting Tied to Resignation?*, HERALD DEMOCRAT, Mar. 21, 2013 (reporting that, when asked if the February 19-20 meetings were connected to Taylor's resignation, Commissioner Mike Bordogna would not comment)); *id.* Ex. 3 (Tommy Taylor, FACEBOOK (Feb. 27, 2013, 9:15 p.m.) (stating "I had to resign from the building dept.")).

47. On March 1, 2013, Fran Masterson, another employee of the Building and Land Use Department, filed a Verified Complaint for Civil Protection Order against Taylor. The Complaint contends Taylor harassed Masterson and another department employee in incidents

occurring on February 11 and 28, 2013 and possibly other dates. *Id.* ¶ 15 & Ex. 4 (Verified Compl. for Civil Protection Order, *Masterson v. Taylor*, No. 2013 C 62 (Lake Cnty. Ct. Mar. 1, 2013)).

48. On July 29, 2013, Taylor was arrested and charged with possession with intent to dispense a Schedule II controlled substance (prescription drugs) and criminal solicitation. *Id.* ¶ 17 & Ex. 5 (Complaint & Information; Affidavit in Support of an Arrest Warrant, *People v. Taylor*, No. D0332013CR48 (Lake Cnty. Dist. Ct. July 31, 2013)). The affidavit in support of Taylor's arrest warrant makes clear that the Lake County Sheriff's investigation of the matter began on February 12, 2013 (one week before the Board's secret meetings and Taylor's resignation), *id.* ¶ 1, and that the Sheriff interviewed Taylor on February 19, *id.* ¶ 20.

49. On September 10, 2013, a group of Lake County's citizens took out a recall petition on Commissioner Bordogna asserting, *inter alia*, that he "fail[ed] to follow procedures in the Colorado Revised Statutes as they relate to executive sessions of a governmental body" and "fail[ed] to see that meetings of the county commissioners are properly posted as required by law." *See* Martinek Aff. ¶ 18 & Ex. 6 (Danny Ramey, *Committee Seeks to Recall Bordogna*, HERALD DEMOCRAT, Sept. 11, 2013 (describing the recall petition)).

PLAINTIFFS' REQUEST FOR, AND DEFENDANT'S DENIAL OF, ACCESS TO PUBLIC RECORDS

50. In early March 2013, Martinek, on behalf of the *Herald Democrat*, questioned the Board about these closed-door sessions. Commissioner Bordogna and the Board's counsel conceded that the two non-public secret meetings of February 19 and 20 had not been publicly announced but asserted that they nevertheless were proper because they were held on an "emergency" basis, and therefore were excused from the COML's notice requirement pursuant to *Lewis*, 934 P.2d 848. *See* ¶¶ 35-41 *supra*; Martinek Aff. ¶¶ 8-10.

51. The *Herald Democrat* asked for minutes of the so-called "emergency executive sessions." Minutes for the meetings were then adopted and published at the Board's March 18 meeting. *See* ¶ 37 *supra*.

52. By letter dated March 18, 2013, undersigned counsel for Plaintiffs wrote to the Board formally demanding access to the audio recordings of the February 19 and 20 meetings. A true and correct copy of this letter, which sets forth why public notice of the meetings could not be excused under the narrow "emergency meeting" exception to the COML's meeting notice requirements, is attached hereto as **Exhibit E**.

53. On March 20, 2013, counsel for the Board responded by letter, a true and correct copy of which is attached hereto as **Exhibit F**. Confronted with the invalidity of the Board's "emergency meeting" justification for failing to properly notice and convene its closed-door meetings, the Board now offered a new (and wholly conflicting) rationale: That the Board was "not obliged" to provide notice of the closed-door meetings because they were allegedly

convened for the sole purpose of "day-to-day oversight of property or supervision of employees." *See* § 24-6-402(2)(f), C.R.S.

54. On April 8, 2013, the undersigned responded to the Board's March 20 letter. A true and correct copy of this response is attached hereto as **Exhibit G**. The letter explained that the Board's newly asserted theory for withholding the audio recordings was also without merit for at least two reasons. First, the discussions concerning Taylor's alleged illegal and harassing conduct were far more significant than the mere "day-to-day supervision of employees" for which public notice is excused. And second, even if the "day-to-day supervision" COML exception properly applied (which it does not), it does not absolve the Board of its statutory duty under *CORA* to disclose the audio recordings; they are "public records" under CORA, *see* § 24-72-202(6)(a)(I), -203(1)(a), C.R.S.; § 24-72-202(7), C.R.S., for which there is no exemption from disclosure.

55. By letter dated April 11, 2013, the Board, through counsel, responded by proffering *yet another* rationale for its withholding of the audio recordings. A true and correct copy of the Board's April 11 letter is attached hereto as **Exhibit H**. The Board now claimed that the closed-door meetings "revolv[ed] around personnel issues and to that extent are not open to the public under CORA." The Board asserted a sweeping "duty to protect [its] employee[s'] privacy" that trumps the public's interest in the workings of its government. The Board also contended that, assuming the meetings had been convened properly as "executive sessions," the recordings "would still not be disclosed," because the Board did not "consider or adopt any proposed policy, resolution, position, rule, regulation, monetary expenditure, or formal action during the course of any of the meetings in question."

56. On June 21, 2013, the undersigned once again wrote to counsel for the Board, explaining why the Board's newly announced explanation for the closed meetings, like their previous explanations, was without merit – *i.e.*, that CORA does not contain a freestanding "employee privacy" exemption that would permit the Board to withhold the recordings. A true and correct copy of this letter is attached hereto as **Exhibit I**.

57. By letter dated June 24, 2013, the Board responded by simply repeating its various meritless justifications. The Board did not meaningfully address any of the Plaintiffs' arguments regarding the Board's obligation to disclose the audio recordings. A true and correct copy of this letter is attached hereto as **Exhibit J**.

58. On October 11, 2013, the undersigned provided the Board with the statutorily required notice of Plaintiffs' intent to sue for release of the audio recordings. A true and correct copy of this letter is attached hereto as **Exhibit A**.

59. On October 14, 2013, counsel for the Board confirmed the Board's continuing refusal to provide the audio recordings. A true and correct copy of this letter is attached hereto as **Exhibit K**.

First Claim for Relief
Violation of Colorado Open Meetings Law

60. Plaintiffs incorporate by reference the foregoing allegations as though each were set forth fully herein.

61. The Board's closed-door meetings on February 19 and 20, 2013, which the Board *itself* described as "executive sessions" – both in its minutes and in responding to Plaintiffs' COML request – violated the COML's executive session provisions in several ways:

a. The Board failed to provide any notice to the public regarding the closed-door meetings.

b. The Board failed to meet in public prior to going into its closed-door meetings.

c. The Board failed to identify, at a public meeting, the statutory provision authorizing the executive session.

d. The Board failed to announce, at a public meeting, the particular matters to be discussed in the executive session in as much detail as possible without undermining the purpose for which the executive session was to be held.

e. The Board failed to vote, in public, by two-thirds majority to go into an executive session.

f. On information and belief, the Board adopted a proposed position or formal action behind closed doors.

See §§ 24-6-402(4) & 24-6-402(2)(f), C.R.S.

62. The Board's closed-door meetings do not qualify for the limited notice exception for "emergency" meetings created and applied in *Lewis*, 934 P.2d 848. A properly noticed, regular public Board meeting was held on February 19 *immediately after* the first closed meeting, and the second closed meeting, which was a continuation of the first, was held the *very next morning*. Under these circumstances, the Board cannot plausibly assert that it was "impractical or impossible" for the Board to inform the public of the statutory basis for and nature of the closed meetings before they occurred. Moreover, the fact that the meetings were interrupted by a regular public meeting and an entire evening thereafter demonstrates that the situation was not truly emergent under *Lewis*. At a minimum, once the February 19 public meeting began, the Board could have notified those present of the so-called "emergency" and the statutory basis for and nature of the executive session, and to vote to go into a further executive session the next morning. It did not do so.

63. Because the Board did not comply *at all* – much less "strictly comply" – with the statutory requirements for convening an executive session, the February 19 and 20 meetings are deemed to have been public meetings and are "subject to the public disclosure requirements of the [COML]." *Gumina*, 119 P.3d at 532.

64. Because the Board has denied a valid request for inspection of the requested records of a public meeting, Plaintiffs are entitled to an Order from the Court directing the Board to show cause, at a hearing held "at the earliest practical time," why it should not provide access to the requested public records. *See* § 24-72-204(5), C.R.S.

65. Plaintiffs gave the Board more than three days notice, pursuant to § 24-72-204(5), C.R.S., prior to filing this Complaint.

66. Plaintiffs are entitled to an award of their reasonable attorney's fees and costs in enforcing their right of public access to these public records, pursuant to § 24-72-204(5), C.R.S., because the Board's denial of access to the requested records was not proper.

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67. Plaintiffs incorporate by reference the foregoing allegations as though each were set forth fully herein.

68. Even if the February 19 and 20 meetings were, in fact, simply discussions by the Board constituting "day-to-day supervision of employees" under § 24-6-402(2)(f) (which they plainly were not), Plaintiffs are entitled to inspection of the audio recordings of those meetings under the CORA.

69. The audio recordings requested by Plaintiffs were "made, maintained, or kept" by the Board for use in the exercise of functions authorized by law, and therefore are "public records" under CORA. *See* § 24-72-202(6)(a)(I), C.R.S.

70. The Board's assertion that it may withhold the audio recordings on the ground that they reflect "personnel matters" is not accurate. The Court of Appeals has unequivocally held that the CORA exemption for "personnel files," § 24-72-204(3)(a)(II)(A), C.R.S., the only CORA provision cited by the Board in support of its argument,[1] exempts from public disclosure *only* that information in a public employee's "personnel file" that is of the same nature as his or her home address, home phone number, or personal financial information – *not* other personnel information such as a public employee's job performance or behavior. *Daniels*, 988 P.2d at 651 (CORA exemption for personnel files applies only to those documents reflecting "home

[1] In its April 11, 2013 letter (Ex. H), the Board cited § 24-72-202, C.R.S., the definitions section of CORA. Plaintiffs presume the Board is intending to reference the "personnel files" definition contained in that section.

addresses, telephone numbers, financial information," and other information that is "*of the same . . . type of personal, demographic information*" (emphasis added).

71. The Board's assertion that it may withhold the audio recordings on the ground that it has a "duty to protect the employee's privacy" is also not accurate. To withhold documents on this basis, the Board would bear the burden of demonstrating that disclosure of the audio recordings would do "substantial injury to the public interest"—an assertion the Board has never made. *See Denver Post Corp.*, 739 P.2d at 878; *see also* § 24-72-204(6), C.R.S.

72. Because the Board has denied a valid request for inspection of public records, Plaintiffs are entitled to an order from the Court directing the Board to show cause, at a hearing held "at the earliest practical time," why it should not provide access to the requested public records. *See* § 24-72-204(5), C.R.S.

73. Plaintiffs gave the Board more than three days notice, pursuant to § 24-72-204(5), C.R.S., prior to filing this Complaint.

74. Plaintiffs are entitled to an award of their reasonable attorney's fees and costs in enforcing its right of public access to these public records, pursuant to § 24-72-204(5), C.R.S., because the Board's denial of access to the requested records was not proper.

APPLICATION FOR ORDER TO SHOW CAUSE AND PRAYER FOR FURTHER RELIEF

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

A. The Court forthwith issue an Order to Show Cause in the form attached hereto and as described in the Application for Order to Show Cause below, directing the Board to demonstrate why it should not provide Plaintiffs with access to the audio recordings of its closed meetings on February 19 and 20, 2013;

B. The Court enter a briefing schedule permitting Plaintiffs to reply to any response submitted by the Board;

C. The Court conduct a hearing pursuant to such Order "at the earliest practical time" at which time the Court may make the Order to Show Cause absolute;

D. At the conclusion of the hearing on the Order to Show Cause, the Court enter an order finding and declaring that the Board unlawfully closed public meetings without fulfilling any of the notice or other statutory requirements for convening a lawful executive session, and directing the Board immediately to disclose the audio recordings to Plaintiffs;

E. In the alternative, at the conclusion of the hearing on the Order to Show Cause, the Court enter an order finding and declaring that the audio recordings are "public

records" under the CORA for which there is no exemption to disclosure, and directing the Board immediately to disclose the audio recordings to Plaintiffs;

F. The Court enter a final declaratory judgment reflecting its findings with respect to the Board's violations of the COML and/or the CORA; and

G. After appropriate submissions pursuant to C.R.C.P. 121(c), § 1-22, the Court award Plaintiffs their reasonable attorney's fees and costs expended in obtaining access to the audio recordings.

H. The Court enter such further and additional relief as it deems just and proper.

Dated: October 18, 2013

LEVINE SULLIVAN KOCH & SCHULZ, LLP

By s/ Ashley I. Kissinger
Steven D. Zansberg
Ashley I. Kissinger

Attorneys for Plaintiffs the *Herald Democrat* and Marcia Martinek

THIS COMPLAINT AND APPLICATION FOR AN ORDER TO SHOW CAUSE PURSUANT TO COLORADO REVISED STATUTE § 24-72-204(5) WAS FILED WITH THE COURT THROUGH THE ICCES FILE-AND-SERVE ELECTRONIC FILING PROCEDURES, UNDER C.R.C.P. 121(C), § 1-26.

AS REQUIRED BY THOSE RULES, THE ORIGINAL SIGNED COPY OF THIS PLEADING IS ON FILE WITH LEVINE SULLIVAN KOCH & SCHULZ LLP.

Plaintiffs' Address:
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Leadville, CO 80461