DATE FILED: February 27, 2014 5:04 PM
FILING ID: 6636AD2130519
CASE NUMBER: 2013CV30015

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

Attorneys for Plaintiffs:
Steven D. Zansberg, #26634
Ashley I. Kissinger, #37739
LEVINE SULLIVAN KOCH & SCHULZ, LLP
1888 Sherman Street, Suite 370
Denver, CO 80203
Tel.: 303-376-2400
Fax: 303-376-2401
szansberg@lskslaw.com
akissinger@lskslaw.com

▲ **COURT USE ONLY** ▲

Case Number: 13 CV 30015

Division: P

PLAINTIFFS' HEARING BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Arkansas Valley Publishing Company, d/b/a the *Herald Democrat*, together with its Editor, Marcia Martinek (collectively, the *Herald Democrat*) through their undersigned attorneys at Levine Sullivan Koch & Schulz, LLP, submit this brief in support of their position at the Show Cause Hearing in this matter, set for March 6, 2013, at 1:00 p.m.

INTRODUCTION

In February 2013, the Lake County Board of County Commissioners (the "Board") twice met privately to discuss a serious personnel matter without giving the county's citizens any notice that they were doing so. The Board went to great lengths to keep the meetings out of the public eye. Although Commissioner Mike Bordogna has said he considered posting advance notice of the first meeting (as he knew the Board was required to do) he affirmatively decided *not* to do so and to wait until the next month to advise the county's citizens that the meetings had occurred—even though the Board held a regular, publicly noticed meeting *that very same night*. In addition, the Board did not advise Patty Berger, the County Clerk, that the meetings were occurring, even though Ms. Berger ordinarily attends the Board's meetings, including its executive sessions, and prepares the minutes for approval pursuant to state statute and the state constitution.

Indeed, Lake County's citizens might *never* have learned of these meetings had the *Herald Democrat* not received a tip about them and asked Commissioner Bordogna about them on March 1, 2013. It was only *after* this inquiry that the Board itself prepared and approved cursory minutes—well over a month after the meetings had occurred—describing the meetings as "emergency executive sessions." Even then, the Board

described the attendees as being only the county commissioners and their attorney, neglecting to mention that an employee was present. And when asked about the meetings, Commissioner Bordogna falsely told the newspaper that the only persons in attendance were the commissioners and their attorney.

This Court should not condone the Board's actions. It should confirm for the citizens of Lake County that Colorado's open government laws do, in fact, ensure that public business will not be conducted behind closed doors.

FACTS

The Board concedes in its Answer that, on February 19 and 20, 2013, it convened two meetings with all three commissioners present. The Board convened the first meeting on February 19 at 3:30 p.m., and the second meeting the next morning at 8:00 a.m. The Board did not provide any notice to the public that these meetings were occurring—even at the Board's regular meeting that was sandwiched between the two meetings on the evening of February 19. The first time it was mentioned to the public at all was on March 4, at the next regular meeting of the Board *after* its February 19 regular meeting. Minutes were not adopted and approved until the next regular meeting after that, on March 18, 2013.

Testimony from the County Clerk, Patty Berger, will show that, by law, Ms. Berger ordinarily attended the Board's meetings and drafted the minutes thereof. *See* COLO. CONST. art. XIV, sec. 8 (providing that county clerk "shall be . . . clerk of the board of county commissioners"); § 30-10-405, C.R.S. ("The county clerk and recorder shall attend the sessions of the board of the county commissioners either in person or by

deputy . . . and keep a record of the proceedings of the board . . . .”). In this instance however, the Board did not notify Ms. Berger that the meetings were taking place. Weeks later, after the *Herald Democrat* inquired about the meetings, the Board drafted its own minutes of the February 19 and 20 meetings. The Board asked Ms. Berger to put the minutes on her letterhead in proper format as was her usual practice. She refused, however, because she felt uncomfortable doing so. She felt that the Board's actions in holding meetings without giving public notice thereof, and in excluding her from those meetings, had violated the law.

The Board's self-crafted minutes describe the meetings as "emergency executive sessions" to discuss "personnel matters," and "conferences with an attorney." They provide no further information about the topic discussed at the meeting, including why the Board felt the situation presented such an emergency that it could not properly convene an executive session during its next regularly scheduled public meeting three and one half hours later. Nor do the minutes cite any local ordinance or other law that authorizes the Board to conduct an "emergency" meeting without any public notice.

The *Herald Democrat* believes the meetings were held to discuss allegations that John Thomas "Tommy" Taylor, who was then the Director of Building and Land Use for Lake County, was engaging in criminal activity involving Schedule II controlled substances and was soliciting and harassing his coworkers to assist him in that criminal activity. The Board has conceded that Mr. Taylor was present at the February 19 meeting. *See* Answer ¶ 43. The Affidavit in Support of an Arrest Warrant for Mr. Taylor indicates that Mr. Taylor was interviewed by Lake County Sheriff Rod Fenske on that

same day. And Mr. Taylor was terminated by the County on February 20, shortly after the Board's second "executive session." *See* Compl. ¶ 46; Answer ¶ 46.

Although the Board has described Taylor's termination as a "resignation," there is strong evidence to suggest that the Board improperly reached a *decision* in these "executive sessions" to *demand* Mr. Taylor's resignation—*i.e.*, to offer Mr. Taylor an ultimatum: either he tender his resignation or he will be terminated. The evidence will show that Mr. Taylor's attorney wrote to the Board's attorney that Mr. Taylor "asserts his rights to privacy with regard to any communications he may have had with the Lake County Commissioners and/or you in any way relating to his *termination from Lake County*." The resignation letter Taylor submitted to the Board (which is a public record obtained by the Plaintiffs) begins by stating "*As per your request*, please consider this to be my letter of resignation effective 3:30 p.m. today." (emphasis added). A week later, Taylor posted on his Facebook page "I *had* to resign from the building department." (emphasis added).

The law enforcement investigation of Mr. Taylor's activities began on February 12, 2013, a week before the Board held its two closed-door meetings. Fran Masterson, who at that time was an employee of the Building and Land Use Department under Mr. Taylor's supervision, alleged that she and another Building Department employee had been harassed by Taylor on February 11. In her complaint for a civil protection order, Ms. Masterson contended that she felt so harassed by Mr. Taylor that she went to HR on February 11, 2013, and that HR told her she needed to go home after having her co-worker bring her things to her. Ms. Berger will testify that, during this

time period, and for the ten years prior, she carried out the human resources function for the Board.

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. On December 27, 2013, Taylor pled guilty to criminal attempt to possess a Schedule II controlled substance.

ARGUMENT

The *Herald Democrat* is entitled to access under the Colorado Open Meetings Law, § 24-6-402, *et seq.*, C.R.S. ("COML") and the Colorado Open Records Act, § 24-72-201, *et seq.*, C.R.S ("CORA") to the audiotapes of the unannounced meetings privately held by the Board on February 19 and 20, 2013. The newspaper is entitled to such relief (as well as recovery of its attorney fees) whether this case is analyzed as a request for "executive session" recordings (under the COML, and CORA's provisions effectuating the COML) or as a request for public records (under the CORA).

The evidence is undisputed that the Board did not publicly announce either of these meetings. COML requires that an executive session meeting conducted by the entire Board be convened during (or immediately following) a regular or special meeting of which the public is given advance notice. § 24-6-402(4), C.R.S. (executive session may be held "only at a regular or special meeting"); *id.* § 24-6-402(2)(c) ("Any 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."). Although the Board

contends that it convened a special meeting, and convened the first executive session out of that special meeting, it concedes that it did not provide the public with *any* notice of the special meeting. This fact *alone* requires the Court to order the Board to permit the *Herald Democrat* to inspect the audiotapes. *See Gumina v. City of Sterling*, 119 P.3d 527, 532 (Colo. App. 2004) (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").

The only way the Board can avoid application of the ruling in *Gumina* is to demonstrate that the two unnoticed meetings were exempt from the COML's public notice provisions under (1) the very narrow exception for "emergency meetings" applied in *Lewis v. Town of Nederland*, 934 P.2d 848 (Colo. App. 1996); or (2) the very narrow exception provided in COML for "day-to-day . . . supervision of employees" § 24-6-402(2)(f), C.R.S. As set forth in detail below, the Board cannot establish that either exception applies here. Accordingly, this Court is required to order the Board to provide the *Herald Democrat* with copies of the audiotapes.

The same result obtains for the newspaper's request for public records under CORA. The Board concedes the audiotapes are "public records" under CORA. The Board contends that three CORA exemptions prohibit it from disclosing the audiotapes:

(1) Although no specific statutory exemption applies, disclosure is prohibited because it would do "substantial injury to the public interest" because it would:

    (a) "potentially implicate the constitutional rights of non-board members"—specifically, the "constitutional and other privacy rights . . . for an employee involved in the February 19-20 discussion" (*i.e.*, Tom Taylor); and

(b) "chill county employees from bringing employment-related concerns to the Board's attention";

(2) disclosure is prohibited under state law, purportedly because it would violate the attorney-client privilege; and

(3) disclosure is "potentially" prohibited because the meetings addressed "matters subject to negotiation."[1]

Answer at 9-10, ¶¶ 5-9. As set forth below, the Board's contentions are specious.

I. *Gumina v. City of Sterling* Requires This Court to Order Disclosure of the Audiotapes

The Court of Appeals' unequivocal holding in *Gumina* is dispositive of this case:

> [I]f a local public body fails *strictly to comply* with the requirements set forth to convene an executive session, it may not avail itself of the protections afforded by the executive session exception. Therefore, if an executive session is not properly convened, it is an open meeting subject to the public disclosure requirements of the Open Meetings Law.

119 P.3d at 532 (emphasis added). In *Gumina*, as in this case, the purported executive sessions were convened to discuss an employee of the local public body (there, a city council). The court held that the city council's public announcement that its executive sessions were being held to discuss "personnel matters" did not provide the employee with sufficient notice that she would be a topic of discussion, thereby impairing her statutory right to request that the meeting concerning her be held in public. *Id.* at 530. The court ordered disclosure of the audiotapes of the executive session. *Id.* at 532; *accord Zubeck v. El Paso Cnty. Ret. Plan*, 961 P.2d 597, 601 (Colo. App. 1998) (ordering full disclosure of executive session meeting minutes where public body "did not follow statutory requirements for calling an executive session").

[1] This brief does not address the last of these contentions because "matters subject to negotiation" is plainly *not* an exception to disclosure recognized by the CORA.

Importantly, in *Gumina*, the appellate court expressly rejected the argument, adopted by the trial court (and likely to be asserted by the Board here), that in order to obtain the tapes the plaintiff had to show "good cause"—*i.e.*, that the city council discussed matters not authorized under COML's executive session provisions or adopted a proposed policy, position or formal action in the meetings. Instead, it held that failure to properly convene an executive session is *itself* sufficient derogation from the Open Meetings Law to require disclosure of the audiotapes of the executive session. *Id.* at 532 ("Nothing in this statutory scheme suggests that one who seeks records of an executive session may not inspect those records unless and until they show good cause to do so.").

A. The Audiotapes Must Be Disclosed Because the Board Failed to Provide Notice of Its "Special Meeting"

The same analysis applies here. Indeed, it applies with even more force here because the Board did not make any effort to comply with the COML as did the city council in *Gumina*. In this case, the Board did not publicly announce the "special meeting" at which it went into executive session *at all*. Nor did it wait to convene its so-called "executive session" at the regular meeting that was already scheduled—and publicly noticed—for that same night.[2]

On December 23, 2013, the Board submitted to the Court a copy of the decision in *Board of County Commissioners v. Marks*, 13CA0112, 2013 WL 6683691 (Colo. App. Dec. 19, 2013) (unpublished) that distinguished *Gumina*. The Board does not explain

[2] The Board's insistence that it announced its intention to go into executive session once the commissioners had all gathered, in a room where, not surprisingly, nobody else was present, is beside the point. The commissioners did not announce their intention to meet *in the first place*.

how this unpublished decision purportedly supports its position, and it does not. There, an electoral canvass board, which was appointed *ad hoc* and was not a regularly functioning public body like a board of county commissioners, conducted a private meeting with its attorney that was not electronically recorded and for which it did not give public notice. *Id.*, slip op. at 1. Marilyn Marks, the person designated to observe the canvass board's recount, requested to see the attorney's notes of the meeting. *Id.*, slip op. at 1-2. The court assumed without deciding that the canvass board was a "local public body" under COML but held that *Gumina*'s automatic disclosure rule did not apply because the attorney's notes, which the court reviewed *in camera*, were apparently *not* sufficiently related to the canvass board's policy-making function. *Id.*, slip op. at 6-7 (citing *Bd. of Cnty. Commr's v. Costilla Cnty. Conservancy Dist.*, 88 P.3d 1188, 1194 (Colo. 2004); *Intermountain Rural Elec. Ass'n v. Colo. Pub. Util. Comm'n*, 298 P.3d 1027 (Colo. App. 2012)).

In this case, however, the Board's meeting was plainly related to its policy-making function, as the Board was concededly discussing personnel matters under its purview. The distinction is easily understood by examining the two cases cited by the court in the *Marks* case. In *Costilla County Conservancy District*, the Colorado Supreme Court held that, for COML's notice provisions to apply, the meeting must "concern[] matters that are related to the policy-making function *of that body*." 88 P.3d at 1195-96 (emphasis added). Thus, where a quorum of a board of county commissioners merely attended a meeting held by two state agencies and a private mine to report on the mine's efforts to comply with an environmental cease and desist order issued by one of the state

agencies, the board was not required to provide public notice of that meeting. *Id.* at 1189-90, 1195 ("at the time the meeting was held, the Board was not considering any policy-making decisions or actions regarding the mine").

In *Intermountain Rural Electric Association*, the court applied this unremarkable proposition to meetings held by the Public Utilities Commission to discuss language contained in proposed state legislation that would impact the PUC's authority. In holding that the PUC was not obligated to follow COML's requirements for holding those meetings, the court held that "[a] commission does not engage in policy-making by providing input on proposed legislation, because passing legislation falls exclusively under the policy-making functions of the General Assembly and the Governor." 298 P.3d at 1031.

Thus where, as here, "the record supports the conclusion that the meeting is rationally connected to the policy-making responsibilities of the public body holding or attending the meeting, then the meeting is subject to the OML, and the public body holding or attending the meeting must provide notice." *Costilla Cnty. Conservancy Dist.*, 88 P.3d at 1189. Because no such notice of the meetings was given, *Gumina* applies and requires disclosure of the audiotapes.

B. The Audiotapes Must Be Disclosed Because the Board Failed to Particularly Identify the Topics to Be Discussed in Executive Session

All apart from the Board's failure to properly notice its "special meeting," disclosure under *Gumina* is required for the *additional* reason that the Board failed to "strictly comply" with the COML's requirements for convening an executive session at

that meeting.[3] The Board's mere recitation of the statutory provisions authorizing the executive session—"personnel matters" and "conferences with an attorney,"—does not constitute sufficient "identification of the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized." § 24-6-402(4), C.R.S. (requiring *both* "specific citation to the provision of this subsection (4) authorizing the body to meet in an executive session" **and** "identification of the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized" (emphasis added)). To comply with this requirement, the Board should have, at a minimum, stated that it was going into executive session to discuss alleged malfeasance and potential criminal conduct by a county employee. *See WorldWest LLC v. Steamboat Springs Sch. Dist. RE-2 Bd. of Educ.*, No. 07CA1104, 2009 WL 783330, 37 Media L. Rep. (BNA)1663, 1668-69 (Colo. App. Mar. 26, 2009) (unpublished) (courtesy copy submitted with Complaint) (announcement of executive session as "personnel matter involving access to information" held to be insufficient); *Gumina*, 119 P.3d at 529-30 (announcement of executive session as "personnel matters" held to be insufficient).

---

[3] The proper convening of an executive session requires:

> the announcement by the local public body to the public of the topic for discussion in the executive session, including specific citation to the provision . . . authorizing the body to meet in an executive session and identification of 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 affirmative vote of two-thirds of the quorum present . . . at a regular or special meeting.

§ 24-6-402(4), C.R.S.

II. The Board's Failure to Provide Advance Public Notice of the Meetings Is Not Excused Under Either of the Two Theories It Advances

The Board seeks to avoid the holding in *Gumina* by contending that (1) the meetings were held on an "emergency" basis and therefore prior notice was excused pursuant to *Lewis v. Town of Nederland*, 934 P.2d 848 (Colo. App. 1996); and/or (2) prior notice was excused under § 24-6-402(2)(f), C.R.S. which provides that COML's requirement of prior notice for public meetings does not apply "to the day-to-day oversight of property or supervision of employees by county commissioners." Neither contention has merit.

A. The Notice Exception for True Emergencies Does Not Apply

The circumstances presented here demonstrate that the Board's plea of "emergency" is being asserted as a post-hoc pretext for its failure to follow the law.

Lewis is the sole case in Colorado addressing "emergency" meetings under COML, and it is distinguishable from the circumstances presented here in at least three ways. First, the Court of Appeals made clear in *Lewis* that an "emergency" justifying late notice of a meeting arises only in *truly exigent circumstances*:

> 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.

934 P.2d at 851 (emphasis added) (citations omitted). There, the trial court held that a true emergency existed when one of the town trustees advised his fellow trustees, at 6:00 p.m., that he would be out of town and unavailable to conduct town business for the six

weeks beginning the very next morning, thereby leaving an insufficient number of trustees to constitute a quorum and thus to conduct municipal business. *Id.* at 849.

Here, in contrast, the Board has not provided any explanation for what constituted a true "emergency"—a situation that was "unforeseen," required "immediate action," and required action that could not be taken in a public forum with public notice. Nor could it in good faith. Indeed, given that a properly noticed, regular public Board meeting was held only three and one-half hours after the first "emergency" session, and the second unannounced "emergency" meeting was held *the very next morning*, 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. Even if a situation so emergent was present that the Board could not wait the three and one-half hours for the February 19 public meeting to begin, at a minimum, once that public meeting began, the Board could have notified those present of the emergency and the statutory basis for and nature of the executive session, and voted to go into a further executive session the next morning. The fact that none of this occurred demonstrates that the Board's "emergency" excuse is specious and being interposed as a post hoc justification for unlawful conduct.

In addition, Mr. Taylor's inappropriate conduct cannot be described as "unforeseen." Patty Berger will testify that, after Fran Masterson came to her on February 11, complaining of Mr. Taylor's harassment and intimidation of her, Ms. Berger immediately told Commissioners Semsack and Hix about the situation. That was more than one week prior to the purported "emergency" meeting.

Finally, the fact that the meetings, which the Board has advised addressed the same topic (*i.e.*, the second meeting was a continuation of the first), were interrupted by a regular public meeting and an entire evening thereafter, demonstrates that the situation was not truly emergent—if it was, the Board would have canceled the February 19 regular meeting and worked into the evening to resolve the emergency situation.

Second, in *Lewis*, the public body convened the emergency meeting pursuant to a municipal ordinance *expressly providing* for emergency meetings. 934 P.2d at 850 (discussing Nederland Ordinance 377 § 1.3). The Board has not invoked any such ordinance in this case, and plaintiffs are unaware of the existence of one.

Finally, the Court of Appeals held in *Lewis* that the unnoticed emergency meeting was appropriate in that case because the public body quickly ratified its actions in the public eye, and such conduct "reasonably satisfied" COML's notice provisions. The court affirmed dismissal of the plaintiff's complaint under COML because it concluded that "the procedures detailed in [the ordinance] requiring ratification of action taken at an emergency meeting at either the next regular Board meeting or a special meeting where public notice of the emergency has been given, represent reasonable satisfaction of the 'public' conditions of the Open Meetings Law under emergency circumstances." 934 P.2d at 851. In that case, the emergency meeting was held at 6:00 p.m. and public notices of the next evening's regularly scheduled meeting were amended by 9:00 a.m. the next morning to add consideration of ratification of the action taken at the emergency meeting held the night before. Here, in contrast, the Board did not notify the public of the emergency meeting until the *following month*—two regular public meetings after the first

emergency meeting.[4] In short, *Lewis* does not excuse the Board's failure to properly convene these two closed-door sessions.

B. The Notice Exception for "Day-to-Day Supervision of Employees" Does Not Apply

The "day-to-day supervision of employees" exception for boards of county commissioners, § 24-6-402(2)(f), C.R.S., does not apply here. That provision does *not* excuse county commissioners from following COML's requirements for convening an executive session to discuss "personnel matters." *See* § 24-6-402(4)(f)(I), C.R.S. (executive session may be held to discuss "personnel matters"). Rather, the "day-to-day supervision" exception *only* excuses county commissioners from COML's requirement that meetings held with a majority or quorum of the board "shall be held only after full and timely notice to the public." *See* § 24-6-402(2)(f), C.R.S. ("The provisions of *paragraph (c) of this subsection (2)*"—*i.e.*, the provision that requires public notice of meetings—"shall not be construed to apply to the day-to-day . . . supervision of employees"). Accordingly, if the Board was discussing allegations that the county's Director of Building and Land Use was engaging in criminal conduct related to drugs, and/or that he was harassing other employees under his supervision in connection with that criminal conduct, it was required to properly notice a meeting, and then convene an executive session at that meeting, because those topics are plainly far more significant and extraordinary than the routine "day-to-day supervision of employees." The same is undoubtedly true if, as the evidence will show, the Board was discussing whether to

[4] Even when it finally did so, the Board did not describe the particular matter that was discussed in as much detail as possible without compromising the purpose for holding the meeting in executive session as is required. *See* Section II.A, *supra*.

terminate Mr. Taylor's employment with Lake County or to demand his resignation. Such topics are precisely the kind of serious "personnel matters" that the COML permits public bodies to discuss behind closed doors but *only* if they properly convene an "executive session" under § 24-6-402(4)(f), C.R.S. so that the public knows that the meeting is taking place.

Indeed, the Board's own behavior demonstrates that the topics discussed during the meetings were "personnel matters" requiring public notice rather than mere "day-to-day . . . supervision of employees." During this time period, and for the ten years leading up to it, the Board had delegated its human resource functions to Patty Berger, the County Clerk, and she will so testify at the Show Cause Hearing. The fact that the entire Board chose to meet and discuss the issues concerning Mr. Taylor behind closed doors, rather than delegating the matter to Ms. Berger, as it had done in the past when difficult situations between employees arose, demonstrates that the Board was not merely engaged in the "day-to-day supervision of employees" that the COML permits to occur without the public's knowledge.

Accordingly, the Board was required to publicly notice the "special meeting" out of which it convened its "executive session," and its failure to do so requires disclosure of the audiotapes under *Gumina*.

III. The CORA Independently Requires Disclosure of the Audiotapes as Public Records

Even if the Board were somehow excused for its failure to provide the public with notice of its meetings (which it is not), it is obligated to disclose the audiotapes under the CORA. The Board concedes that it "made and kept the audiotapes as required by the

COML for executive session record-keeping." As such, the audiotapes 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 that must be disclosed absent a statutory exemption permitting the Board to withhold them. *See* § 24-72-202(6)(a)(I), C.R.S. (definition of "public records"); *id.* § 24-72-203(1)(a) ("All public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise provided by law . . . ."). No such exemption applies here.

A. The Exemption for Disclosures That Would "Do Substantial Injury to the Public Interest" Does Not Apply

The CORA provides that, if a public body can bear the heavy burden of demonstrating that disclosure of a public record would "do substantial injury to the public interest, notwithstanding the fact that said record might otherwise be available to public inspection," the record may properly be withheld. § 24-72-204(6), C.R.S. The Board contends this provision applies because (1) "the board received a written assertion of constitutional and other privacy rights from legal counsel for an employee involved in the February 19-20 discussion";[5] (2) "disclosure of the contents of the records requested by plaintiff would chill County employees from bringing employment-related concerns to the Board's attention"; and (3) disclosure would "threaten or damage . . . the Board's attorney-client privilege." Answer at 2; *id.* at 9 ¶ 5. These contentions are without merit.

[5] In response to a discovery request, the Board produced the letter from Tom Taylor's counsel, Pete Cordova, Esq., which will be submitted as an exhibit at the hearing. As will be seen in that letter, Mr. Taylor did not purport to assert any "constitutional privacy rights" notwithstanding the Board's contention otherwise.

The Board cannot bear its heavy burden under this extraordinary exemption for several reasons. First, the Court of Appeals has repeatedly made clear that the "substantial injury to the public interest" exemption "is to be used *only* in those extraordinary situations which the General Assembly could not have identified in advance," *Zubeck*, 961 P.2d at 601 (emphasis added) (citing *Civil Serv. Comm'n v. Pinder*, 812 P.2d 645 (Colo. 1991)); *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1156 (Colo. App. 1998) (same), and "[t]he custodian of the records has the burden to prove an extraordinary situation *and* that the information revealed would do substantial injury to the public interest," *Zubeck*, 961 P.2d at 601 (emphasis added).

When drafting the CORA, the General Assembly certainly could have anticipated that public bodies would internally investigate when one of their employees was alleged to have engaged in unlawful, and even criminal, activity, particularly activity that involved harassment of fellow employees. It also certainly anticipated that public bodies would discuss sensitive personnel matters as it expressly provided that public bodies could discuss such matters in a properly convened executive session. *See* § 24-6-402(4)(f), C.R.S.

The same can be said of the remainder of the "parade of horribles" that the Board sets forth. The General Assembly expressly anticipated that public bodies would discuss attorney-client privileged information, as it provided in the COML that privileged conversations need not even be recorded:

> If, in the opinion of the attorney who is representing the local public body and who is in attendance at an executive session that has been properly announced pursuant to subsection (4) of this section, all or a portion of the discussion during the executive session constitutes a privileged attorney-

> client communication, no record or electronic recording shall be required to be kept of the part of the discussion that constitutes a privileged attorney-client communication.

§ 24-6-402(2)(d.5)(II)(B), C.R.S. (imposing additional requirements before turning off audio recording equipment or, in the alternative, "the attorney representing the local public body may provide a signed statement attesting that the portion of the executive session that was not recorded constituted a privileged attorney-client communication in the opinion of the attorney"). And, had the General Assembly intended to excuse compliance with the CORA where disclosure would reveal discussions concerning employees held in executive session, it would not have codified a requirement that those discussions be disclosed where the local public body failed to comply with the COML. *See* § 24-6-402(2)(d.5)(II)(C), C.R.S. (declaring that all executive session records—including those documenting discussions of "personnel matters"—"shall be open to public inspection [under the CORA]" where the body does not follow COML's requirements for executive sessions).

Second, the Court of Appeal has expressly held, in circumstances remarkably similar to these, that a public body may not withhold records related to an internal investigation concerning whether public employees engaged in unlawful activity. *Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874, 878-79 (Colo. App. 1987) (holding that University could not withhold, on grounds of protecting employee privacy, records of its internal investigation into whether certain of its employees unlawfully received payments from foreign governments); *see also id.* at 879 ("[P]ublic employees have a narrower right and expectation of privacy than other citizens.").

And third, Mr. Taylor has absolutely no cognizable privacy interest in the Board's discussions concerning any of his conduct that has been revealed in the criminal prosecution against him. Mr. Taylor was arrested and charged with possession with intent to dispense a Schedule II controlled substance (prescription drugs) and criminal solicitation. The Affidavit in Support of an Arrest Warrant, publicly available in the court file, painstakingly details the five-month investigation of Taylor's conduct by the Office of the District Attorney, the Lake County Sheriff's Office, and the Leadville Police, including their interviews of several current and former employees of the Building Department. Taylor pled guilty to the crime of criminal attempt to possess four grams or more of a Schedule II controlled substance. Mr. Taylor has no privacy interest in any of the matters disclosed in his criminal proceedings. *See, e.g.*, *United States v. Pickard*, 733 F.3d 1297, 1305 (10th Cir. 2013) (holding that information that has "been disclosed in public . . . court proceedings" is not properly subject to sealing); *Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995) ("[A] validly enacted law places citizens on notice that violations thereof do not fall within the realm of privacy. Criminal activity is thus not protected by the right to privacy." (citation omitted)); *id.* ("Information readily available to the public is not protected by the constitutional right to privacy."); *Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 377 (Colo. 1997) ("The disclosure of facts that are already public will not support a [tort] claim for invasion of privacy."); *Tonnessen v. Denver Publ'g Co.*, 5 P.3d 959, 966 (Colo. App. 2000) (same); *Lincoln v. Denver Post*, 501 P.2d 152, 154 (Colo. App. 1972) (holding that any right of privacy conferred on plaintiff by welfare laws "ceased to exist when she became a criminal defendant charged

with a crime directly connected with that statute and further hold that this right of privacy was lost without regard to the outcome of the charges"); C.J.I.-Civ. 4th 28:8 (2013) (to state claim for invasion of privacy information published cannot be "already known in the community . . . or properly available to the public"); RESTATEMENT (SECOND) TORTS § 652D cmt. b (1977) ("There is no liability [for invasion of privacy] when the defendant merely gives further publicity to information about the plaintiff that is already public.").[6]

B. The Attorney-Client Privilege Presents No Bar to Disclosure

The Board asserts that the entire contents of the audiotapes are protected by the attorney-client privilege and, as such, are exempt from disclosure under the CORA. *See* Answer at 9 ¶¶ 6-8; *id.* at 2. This argument, too, is without merit.

i. The Discussions Are Not Protected by the Attorney-Client Privilege

First, it does not appear that the attorney-client privilege even attaches to the meetings in the first place. The Board has refused to identify, even generally, who specifically attended the meetings,[7] but its allegations suggest that attorneys for several

[6] The Board has refused to state whether any employees other than Mr. Taylor were present at the two meetings. Nonetheless, given the contents of the Affidavit In Support of Arrest Warrant, the same is true of others identified therein who may have been present at the February 19 and 20 meetings. *See, e.g.*, *Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874, 880 (Colo. App. 1987) (privacy rights of employees investigated by employer of unlawful behavior were diminished by fact that they had already been specifically named in newspaper article); *see also Denver Publ'g Co. v. Univ. of Colo.*, 812 P.2d 682, 685 (Colo. App. 1990) (agreements to keep records confidential "are insufficient to transform a public record into a private one").

[7] On February 4, the *Herald Democrat* sought clarification of these facts from the Board. Because the Board's response was less than clear, the *Herald Democrat* asked the Board additional questions to understand the Board's basis for asserting the attorney-

parties were present with their clients, thus destroying any attorney-client privilege the Board might otherwise have enjoyed due to the presence of its own attorney, Lindsey Parlin, Esq. Specifically, the Board states that the meetings were held "between Board members, the County Attorney, *other legal representatives, as well as others*," Answer at 1 (emphasis added). *See also id.* at 2 (on February 19, the Board discussed "an employee-specific personnel matter *with involved persons and their legal representatives*" (emphasis added)); *id.* ("The Board met outside the public's view to investigate and discuss the matter *with involved persons and their legal representative*." (emphasis added)); *id.* ¶ 43 (conceding that Mr. Taylor "attended parts" of the February 19 meeting). The pleadings do not, on their face, reveal any good faith basis for asserting an attorney-client privilege in this case.[8]

The remainder of the Board's assertions concerning the attorney-client privilege appear equally spurious. First, the Board invokes the Governmental Immunity Act, § 24-10-110(1)(a), C.R.S., implying that one of its employees received a legal claim arising from Mr. Taylor's conduct. *See id.* (provision applies only where a claim is made against employee). But that provision requires government bodies to provide government employees with legal counsel only in situations where the employee is sued and "the

---

client privilege. The Board has declined to provide this information to the *Herald Democrat*.

[8] It also should be noted that the "[m]ere presence or participation of an attorney at an executive session of the [Board] is not sufficient" to satisfy the requirements for holding an executive session. The conference with the attorney must be held "for purposes of receiving legal advice on specific legal questions" in order to be held in executive session. § 24-6-402(4)(b), C.R.S. Notably, the Board's minutes of its February 19 and 20 meetings state only that the Board had a "conference with an attorney."

claim against the public employee arises out of injuries sustained from an act or omission of such employee occurring during the performance of his duties *and within the scope of his employment*, except where such act or omission is willful and wanton." § 24-10-110(1)(a), C.R.S. (emphasis added). Not surprisingly, the Board has declined to state, in response to a specific request, whether it is providing legal representation to Mr. Taylor or others on the ground that their conduct forming the basis of a legal claim was "within the scope of employment." Because it is presumed that the Board told Taylor he could either tender his resignation or would be terminated, *see supra*, it cannot be claimed that Taylor and the Board shared a common interest extending their attorney-client communication to him.

Second, the fact that the attorney-client privilege is recognized in Colorado's Evidence Code and discovery rules does not mean that disclosure of the audiotapes in *this* case would "be contrary to any state statute" or is "*prohibited* by rules promulgated by the Supreme Court" under § 24-72-204(1)(a) & (c) (emphasis added). *See* Answer at 10 ¶¶ 6 (invoking Evidence Code, § 13-90-107(1)(b), C.R.S.), 7 (invoking C.R.C.P. 26). The records are not sought to be disclosed in connection with any proceeding to which those statutes and rules apply. (Moreover, even if it *did* apply, the attorney-client privilege can be waived, so disclosure is not "prohibited," but discretionary.)

Finally, CORA's exemption for "trade secrets, privileged information, and confidential . . . data," § 24-72-204(3)(a)(IV), C.R.S.; *see* Answer at 10 ¶ 8, does not apply. This subsection of the CORA provides that "the custodian shall deny the right of inspection of [privileged] records, *unless otherwise provided by law*." § 24-72-204(3)(a),

C.R.S. (emphasis added). As set forth above, the Court of Appeals has held *three times*, twice in published decisions, that where an executive session is improperly convened, the recording of that executive session must be disclosed under the COML. *See* Section I *supra* (citing *WorldWest LLC*, 2009 WL 783330, 37 Media L. Rep. (BNA) at 1668-69 (ordering disclosure of executive session convened for purpose of holding conference with an attorney); *Gumina*, 119 P.3d at 532; *Zubeck*, 961 P.2d at 601.[9]

IV. The *Herald Democrat* Is Entitled to Its Attorney Fees

CORA provides that, so long as a party gives a records custodian three-days' notice[10] that it "intends to file an application with the district court" to seek the disclosure of records pursuant to the CORA and "[u]nless the court finds that the denial of the right of inspection was proper, it shall order the custodian to permit such inspection and ***shall*** award court costs and reasonable attorney's fees to the prevailing applicant in an amount to be determined by the court." § 24-72-204(5), C.R.S. (emphasis added). The obvious purpose of the mandatory attorneys' fees provision is to empower citizens to act as private "attorneys general" by bringing suit to vindicate the public's rights, and not have to bear the burden of litigation if they prevail. Thus, if the Court orders the audiotapes, or any portion thereof, to be disclosed as a public record under the CORA, the *Herald Democrat* is statutorily entitled to an award of its reasonable attorneys' fees. *Colo. Republican Party v. Benefield*, --- P.3d ----, 2011 WL 5436483, at *7 (Colo. App. 2011),

[9] The Board's final argument, that "[t]he disclosure of the records is potentially prohibited by C.R.S. § 24-6-402(4)(e)—matters subject to negotiation," Answer ¶ 9, is without merit for the same reason.

[10] There is no dispute that the *Herald Democrat* gave the Board the requisite notice under the CORA. *See* Compl. ¶ 58; Answer ¶ 58.

cert. granted, No. 11SC935 (Colo. Sept. 24, 2012); *see also* § 24-6-402(9), C.R.S. (COML also contains a mandatory fee-shifting provision: "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.").

CONCLUSION

For all the foregoing reasons, this Court should grant plaintiffs the relief sought by their Complaint and issue an order (1) requiring that defendant immediately provide copies of the audio recordings of the February 19 and 20 meeting and transcripts thereof to plaintiffs, and (2) providing that plaintiffs may file an application for attorney fees pursuant to C.R.C.P. 121, § 1-22.

Dated: February 27, 2014

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 HEARING BRIEF 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 HEARING BRIEF IS ON FILE WITH LEVINE SULLIVAN KOCH & SCHULZ LLP

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2014, a true and correct copy of the foregoing **PLAINTIFFS' HEARING BRIEF** was served on the following counsel was served on the following counsel through the ICCES electronic court filing system, pursuant to C.R.C.P. 121(c), § 1-26:

Thomas J. Lyons, Esq.
Keith M. Goman, Esq.
Hall & Evans, L.L.C.
1001 Seventeenth St., Suite 300
Denver, CO 80202

Marla D. Kelley
Marla D. Kelley, Paralegal