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The Voice for Open Government in Colorado

July 1, 2016

Mayor Joe Jefferson  
City Council  
City of Englewood  
Englewood Civic Center  
1000 Englewood Parkway  
Englewood, CO 80110

**Re: Legal Opinion on the Council's Selecting a Candidate to Hire as City Attorney  
in an Executive Session**

Dear Mr. Mayor and Members of the City Council:

Thank you, once again, for having invited Jeff Roberts and me to speak to you on May 9th concerning open meetings and open records issues. As a follow-up to that meeting, it is my understanding that you have requested our view on, and response to, the legal opinion provided to Jayleen Schell by Robert C. Widener and Maureen H. Juran, Esqs., dated June 19, 2016.

I have reviewed the aforementioned legal opinion and must respectfully disagree with it.

Widener Juran ("WJ") reach the conclusion that the City Council can meet, as a local public body (with three or more members in attendance), in an executive session and therein can **decide** such which candidate for position of City Attorney it wishes to extend an offer of employment to (subject to negotiating final terms and acceptance of the offer). JW opines that the authority for the Council making such a **decision** in an executive session is found in § 24-6-402(4)(e)(I), C.R.S., which provides for meetings of local public bodies for "determining positions relative to matters that may be subject to negotiations; developing strategy for negotiations; and instructing negotiators."

In WJ's opinion, the above exemption provides for a closed-door meeting of the City Council in which it "determin[es] whether to extend an employment offer to one or more candidates for the position of City Attorney." Letter at 2. On its face, a **decision** made by the City Council to extend an employment offer to an individual is the "adoption of a position" that cannot be performed in an executive session, *see* § 24-6-402(4), C.R.S.; it is also clear that making such a hiring **decision** is not "determining positions relative to matters that may be subject to negotiations."

Lest there be any confusion about that, there is already one Colorado District Court decision that has resolved this very issue. In the attached ruling, Judge Devin Odell, expressly found when the City Council for the City of Loveland had, in an executive session meeting, **decided which individual to nominate** for the position of acting City Manager (which nomination would later vote upon in an open meeting) was a violation of the Open Meetings Law, notwithstanding the fact that the person the Council had "nominated" for the acting City Manager's position, would still need to enter into negotiations with the City concerning the terms of that position. As Judge Odell put it, "[w]hether to nominate an individual to a position is not a matter of negotiation; rather, it is the Council's decision, to make as it pleases."

Judge Odell's ruling is imminently reasonable, and it faithfully abides by the rule that requires all exemptions from the presumption of openness for all meetings local public bodies to be construed narrowly. *See, e.g., Gumina v. City of Sterling*, 119 P.3d 527, 532 (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.").

Judge Odell concluded that "[t]o hold otherwise would be to render the prohibition against the *adoption of positions* in executive session meaningless, as the Court cannot imagine many decisions that, in some way, could not be construed as related in a broad sense to a matter that may be subject to negotiation." Indeed, the WJ letter makes this point quite dramatically: "As with any executive level position, the selection ultimately will be made only if the municipality is able to negotiate and reach mutual agreement with one of the candidates." By the same logic, any **decision** made by a local public body to enter into contractual discussions *with anyone* will "ultimately" depend on whether the contract terms can be negotiated to both parties' mutual satisfaction. But, the **decision** to enter into negotiations with a particular vendor or candidate is a matter entirely separate from the "matters that may be subject to negotiations."

In short, our legal opinion is the same as the written ruling of Judge Devin Odell, that a local public body is prohibited by the Open Meetings Law from *adopting a position* – making a decision which to candidate with whom it authorizes its negotiator(s) to negotiate– in an executive session.

There is no doubt that the "matters subject to negotiation" provision authorizes a local public body to meet behind closed doors to discuss and "adopt positions" with respect to the *negotiation of the terms of employment* and to instruct the public body's *negotiator(s)* [not the City Council itself] which terms of employment *the negotiators* are authorized to discuss with an applicant. The principal purpose of the exemption is to prevent the party with whom the negotiations are being conducted to know the "bottom line" position of the government as it enters into the negotiations. This exemption does not, however, authorize *the members of the local public body themselves* --at least when three or more members are present-- to engage in the negotiations with the opposing party behind closed doors. Such bipartite discussion by a quorum of a local public body with the other negotiating party are quite plainly outside the scope of this exemption. That is why such negotiations are routinely conducted, throughout the state, by either a subset of the local public body (less than a quorum) or by an authorized staff member or other hired negotiator.

Nothing prohibits the City Council from meeting behind closed doors, (i.e., outside the presence of the party with whom negotiations will be conducted), to develop its proposals, including possible salary range and other terms and conditions of employment, and to instruct its negotiator who will then conduct the face-to-face negotiations with the selected candidate. But a discussion among three or more members of the City Council regarding the qualifications and considerations of who the

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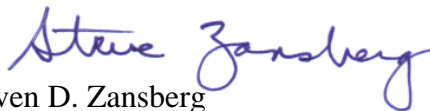
City Council **decides** to “extend an employment offer to . . . for the position of City Attorney” is not a “matter that may be subject to negotiations.” It is a **decision**. For the City Council to make that decision, informally or otherwise, is the adoption of a position which is prohibited in an executive session. Because that decision does not itself address a “matter that may be subject to negotiations,” it is not within the types of discussions that are authorized by the executive session provision, § 24-2-402(4)(e)(I), C.R.S.

The reason for this distinction emanates from the very heart and purpose of the Open Meetings Law. *See Benson v. McCormick*, 578 P.2d 651, 653 (Colo. 1978) (“Our Open Meetings Law . . . reflects the considered judgement of the Colorado electorate that the democratic government best serves the commonwealth if its *decisional processes* are open to public scrutiny.”) (emphasis added); *see also Hanover Sch. Dist. No. 28 v. Barbour*, 171 P.3d 223, 228 (Colo. 2007) (“*important policy decisions cannot be made informally*” (citation omitted) (emphasis added)); *WorldWest LLC v. Steamboat Springs Sch. Dist. RE-2 Bd. of Educ.*, No. 07-CA-1104, 37 Media L. Rep. (BNA) 1663, 1671 (Colo. App. Mar. 26, 2009) (Carparelli, J, concurring) (concluding that the school board violated the COML when it decided in an executive session that all discussions concerning an employee survey would be confidential, and directed the Superintendent to provide the Board with the survey; the board thereby “adopted a position in a closed session”).

As I’m sure you are aware, any decision made in violation of the Open Meetings Law can, thereafter, be declared null and void by a court of competent jurisdiction. *See* §§ 24-6-402(8) & (9(b)), C.R.S.; *see also Gray v. City of Manitou Springs*, 598 P.2d 527, 529 (Colo. App. 1979) (declaring null and void a City Council’s instructions, in an executive session, to the acting city manager to fire the police chief); *Hanover School District No. 28*, 171 P.3d at 228 (school board’s instructing the superintendent, in an executive session, to send a probationary teacher a “letter of intent” not to renew the teacher’s contract declared null and void). Also, should any member of the public challenge the City Council’s conduct in an executive session and the Court find that such challenged conduct was in violation of the Open Meetings Law, the court shall award the citizen his or her reasonable attorneys’ fees and costs. *See* § 24-6-402(9)(b), C.R.S.

Please let me know if you have any questions concerning the above.

Sincerely,



Steven D. Zansberg  
President  
Colorado Freedom of Information Coalition

SDZ/cdh  
Enclosure