

DISTRICT COURT, COUNTY OF MONTROSE, STATE OF COLORADO
Court Address: 1200 N. Grand Ave., Bin A
Montrose, CO 81401

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CASE NUMBER: 2014CV30005

Plaintiffs:

JET CENTER PARTNERS, L.L.C., a Colorado limited liability corporation; and
KEN WATSON, a Colorado citizen

v.

Defendants:

FRANCINE TIPTON-LONG, in her official capacity as the Records Custodian for the Public Records of the County of Montrose, Colorado;

THE COUNTY COMMISSIONERS for the County of Montrose, Colorado, in their official capacities;

GARY ELLIS, in his official capacity as Commissioner for County of Montrose, Colorado;

RON HENDERSON, in his official capacity as Commissioner for County of Montrose, Colorado;

DAVID WHITE, in his official capacity as Commissioner for County of Montrose, Colorado;

RICK ECKERT, in his official capacity as County Manager for County of Montrose, Colorado;

LLOYD ARNOLD, in his official capacity as the Airport Director for County of Montrose, Colorado;

DAVID LAURSEN, in his official capacity as a member of the FBO Review Committee for County of Montrose, Colorado;

LANNY PAULSEN, in his official capacity as a member of the FBO Review Committee for County of Montrose, Colorado

▲ COURT USE ONLY ▲

Case Number: 14CV30005

Division:

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**APPLICATION FOR AN ORDER TO SHOW CAUSE
PURSUANT TO § 24-72-204(5), C.R.S., AND AMENDED COMPLAINT FOR
DECLARATORY JUDGMENT**

Plaintiffs Jet Center Partners, L.L.C. and Ken Watson, by and through their undersigned counsel at Levine Sullivan Koch & Schulz, LLP, for their Amended Complaint and Application for Order to Show Cause, hereby state as follows:

INTRODUCTION

1. This is a civil action under both Colorado's Open Records and Open Meetings Laws ("CORA" and "COML"). The Plaintiff, Jet Center Partners, L.L.C. ("JCP"), is an applicant seeking an Order to Show Cause directed to the custodians of public records, the Clerk and Recorder and various County officers and elected Commissioners for Montrose County, Colorado, to appear and to show cause why public records that JCP has requested to inspect should not be made available for inspection.

2. In addition, Plaintiff Ken Watson, General Manager of JCP, seeks a declaratory judgement that the County Commissioners for Montrose County, Colorado have violated the Open Meetings Law by adopting a position— to engage in negotiations with private parties interested in becoming a second fixed-base operator ("FBO") at Montrose Regional Airport, and to authorize the issuance of an RFP to initiate such negotiations— outside of a meeting properly noticed and open to the public where such decisions were adopted.

JURISDICTION AND PARTIES

3. This Court has jurisdiction over the claims herein under section 204(5) of the Colorado Open Records Act ("CORA"), § 24-72-201, *et seq.*, C.R.S. On information and belief, the public records that are at the center of this action can be found in this judicial district.

4. Plaintiffs are both "person[s]" as defined by the CORA, § 24-72-202(3), C.R.S., and as such, have standing to bring a claim for access to public records under the CORA.

5. Plaintiff Ken Watson is a citizen of the State of Colorado, and therefore has standing to seek relief under section 402(9) of the Colorado Open Meetings Law ("OML"), § 24-6-401, *et seq.*, C.R.S.

6. Defendant Francine Tipton-Long is the Clerk and Recorder of the County of Montrose, Colorado. Ms. Tipton-Long is a "custodian" under the CORA, § 24-72-202, C.R.S., of the record requested by Plaintiff, as more fully described below.

7. Defendant Gary Ellis is one of the three County Commissioners for the County of Montrose, Colorado. Mr. Ellis is a "custodian" under the CORA, § 24-72-202, C.R.S., of the record requested by Plaintiff, as more fully described below.

8. Defendant Ron Henderson is one of the three County Commissioners for the County of Montrose, Colorado. Mr. Henderson is a “custodian” under the CORA, § 24-72-202, C.R.S., of the record requested by Plaintiff, as more fully described below.

9. Defendant David White is one of the three County Commissioners for the County of Montrose, Colorado. Mr. White is a “custodian” under the CORA, § 24-72-202, C.R.S., of the record requested by Plaintiff, as more fully described below.

10. Defendant Rick Eckert is the County Manager for the County of Montrose, Colorado. Mr. Eckert is a “custodian” under the CORA, § 24-72-202, C.R.S., of the record requested by Plaintiff, as more fully described below.

11. Defendant Lloyd Arnold the Airport Director for the County of Montrose, Colorado. Mr. Arnold is a “custodian” under the CORA, § 24-72-202, C.R.S., of the record requested by Plaintiff, as more fully described below.

12. Defendant David Laursen is an employee in the Department of Public Works for the County of Montrose, Colorado, and a member of the County’s airport FBO review committee. Mr. Laursen is a “custodian” under the CORA, § 24-72-202, C.R.S., of the record requested by Plaintiff, as more fully described below.

13. Defendant Lanny Paulsen is an employee in the Finance Dep[artment of the County of Montrose, Colorado, a member of the County’s airport FBO review committee. Mr. Paulsen is a “custodian” under the CORA, § 24-72-202, C.R.S., of the record requested by Plaintiff, as more fully described below.

14. The County Commissioners are the governing body of the County of Montrose, Colorado, pursuant to § 30-10- 301, *et seq.*, C.R.S and article XIV, section 6 of the Colorado Constitution. The County Commissioners constitute a “local public body” subject to the OML, § 24-6-402(1)(a), C.R.S.

APPLICABLE LAW

A. The Colorado Open Records Act (“CORA”)

15. Under the CORA, any person may request to inspect and/or obtain a copy of a public record. *See* § 24-72-203(1)(a), C.R.S. CORA guarantees access to records of public business so that “the workings of government are not unduly shielded from the public eye.” *Int’l Bhd. of Elec. Workers Local Union 68 v. Denver Metro. Major League Baseball Stadium Dist.*, 880 P.2d 160, 165 (Colo. App. 1994).

16. A public record is any “writing” that is “made, maintained or kept by . . . any . . . political subdivision of the state . . . *for use* in the exercise of functions authorized or required by law or administrative rule . . .” *See* § 24-72-202(6)(a)(I), C.R.S. (emphasis added).

17. 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 “include digitally stored data” regardless of where such data is stored. § 24-72-202(7), C.R.S.

18. Under the CORA, the custodian of a public record may not deny access to a public record unless there is a specific exemption that permits the withholding of that record. See § 24-72-203(1)(a), C.R.S. If no such exemption applies, the custodian may nevertheless establish to the Court that, because of unique and extraordinary circumstances the General Assembly could not have foreseen, disclosure of a public record in these circumstances would cause “substantial injury to the public interest.” § 24-72-204(6)(a), C.R.S.

19. Colorado’s courts have recognized that records submitted by private entities seeking to obtain lucrative government contracts are public records subject to disclosure under the CORA. See, e.g., *Int’l Bhd. of Elec. Workers Union* 68 v. *Denver Metro. Major League Baseball Stadium Dist.*, 880 P.2d 160; *Denver Post Corp. v. Stapleton Dev. Corp.*, 19 P.3d 36 (Colo. App. 2000) (affirming trial court’s ruling ordering disclosure of bid information by date certain, even if contract had not yet been awarded). And, Colorado’s courts have also recognized that companies seeking contracts from the government will *not* be discouraged from submitting bid proposals knowing that some or most of the information submitted will be made available to the public, including potential competitors. See *Freedom Newspapers v. Denver & Rio Grande R.R. Co.*, 731 P.2d 740, 743 (Colo. App. 1986) (recognizing that for bidders on government contracts, public disclosure of proposal or bid information “is a cost of doing business with the government and that the benefits associated with disclosure outweigh the costs.” (citation omitted)).

20. Under the CORA, 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. See § 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 in order to be eligible to recover his or her attorneys’ fees. *Id.*

21. Under the CORA, upon the filing of such an Application, the Court must schedule the hearing on an Order to Show Cause at the “earliest time practical.” See *id.*

22. 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).

23. Under the CORA, following the Show Cause Hearing, if the Court finds that denial of access was not proper, it *shall* order that the public record be made available for public

inspection: moreover, in such circumstances, 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 id.*

B. The Open Meetings Law (“OML”)

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

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

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

27. Under the COML, all exemptions from the default rule that a public body’s meetings must be open to the public must be narrowly construed, ensuring as much public access as possible. *See 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.”).

28. Not only does the OML guarantee the public’s right to observe the discussions and debates that precede a public body’s decision, it also guarantees the right to observe the actual *making* of the *decision* by the members of the body. Therefore, while public bodies are statutorily authorized, in certain enumerated circumstances, to meet outside of public view in “executive session,” they are prohibited from adopting “any proposed policy, position, resolution, rule, regulation, or formal action” during an executive session, other than the approval of minutes of a prior closed meeting. *See* § 24-6-402(4), C.R.S. (emphasis added).

29. The Colorado Supreme Court has held that the prohibition against the closed-door policy- or decision-making includes a ban on informal decision-making. *See Hanover Sch. Dist. No. 28 v. Barbour*, 171 P.3d 223, 228 (Colo. 2007) (noting prior holding that “important policy decisions cannot be made informally” (citation omitted)); *see also WorldWest LLC v. Steamboat Springs Sch. Dist. RE-2 Bd. of Educ.*, No. 07CA1104, 37 Media L. Rep. (BNA) 1663, 1671 (Colo. App. Mar. 26, 2009) (concluding that a school board violated the COML by “adopting a position in a closed session”) (courtesy copy attached).

30. Finally, in any suit in which the Court finds a violation of the COML, the Court must – without discretion – award the reasonable attorney’s fees of the citizen who sought the

finding of a violation of the statute. *See* § 24-6-402(9), C.R.S.; *see also Van Alstyne*, 985 P.2d at 99-100.

BACKGROUND INFORMATION TO PLAINTIFF'S RECORDS REQUEST AND OML COMPLAINT

31. In 2005, Montrose County undertook an open Request for Proposal process that led to unanimous selection of the JCP as the party with whom it wished to contract to become the FBO at the Montrose Regional Airport. The parties negotiated a mutually acceptable FBO Agreement and JCP began to provide FBO services in January, 2006.

32. JCP has in all respects adhered to the terms of its Agreement with the County, including by investing millions of dollars in construction of a terminal to accommodate general aviation visitors to the Airport, a 27,000 sq. ft. high cube hangar, and improvements to the County fuel farm facility, all of which capital investments are located on Airport property and will be owned by the County at the end of the FBO Agreement.

33. In subsequent antitrust litigation initiated by JetAway Aviation, an unsuccessful participant in the 2005 RFP process, economic experts for both JetAway and the County opined that the current volume of traffic at the Montrose Regional Airport cannot support two FBOs.

34. According to the RFP, the County Commissioners (“BOCC”) received communications from one or more private businesses prior to August 13, 2013 expressing an interest in developing and operating a second FBO at the Montrose Regional Airport.

35. On information and belief, at no time prior to August 13, 2013 did the BOCC discuss at any public meeting, and/or receive any public input at such a public meeting concerning, the feasibility, viability, or relative benefits and costs to the public of establishing a second FBO at the Montrose Regional Airport.

36. At no time prior to August 13, 2013, did the BOCC meet in public to discuss the prospect of, or particulars of, an RFP for establishing a second FBO at the Montrose Regional Airport. The BOCC did not take a public vote to authorize the issuance of the RFP.

37. Notwithstanding the lack of any prior public discussion, deliberation or vote on the issue, on August 13, 2013, the BOCC, by and through the Director of Aviation, formally noticed the issuance of the RFP. *See* <http://www.montrosecounty.net/documentcenter/view/5589>.

38. The RFP expressly and conspicuously notifies all potential responders:

Montrose County is a public entity, and as such, its records may be subject to disclosure to the public under the Colorado Open Records Act. **Accordingly, proposer recognizes that any confidential information given to the County before, with, or after their proposal, either orally or in writing, if not**

outlined as confidential and appropriately designated as confidential, is not given in confidence and may be used or disclosed to others, for any purpose at any time, without obligation for compensation and without liability of any kind whatsoever.

Proposers must identify each portion of their proposals which they deem confidential. Only those parts of a proposal that contain proprietary, financial, patents, copyrights, trade secrets, or other information not considered to be public record under the Colorado Open Records Act may be held as confidential by the County. Proposers must provide justification of what materials, upon request, should not be disclosed. Montrose County may otherwise use or disclose the data submitted by each proposer for any purpose, unless its use is so identified and restricted by a proposer. The proposer's opinion of what constitutes proprietary information is not necessarily binding on Montrose County.

Id. at 5 (emphasis in original).

39. As a condition of participation in the process, the RFP prohibits interested parties from initiating private communications with County employees; it establishes a fixed written question and answer procedure.

40. Although not provided for in the RFP, a November 22, 2013 press release from the County announced that the RFP would be handled in accordance with the County's Procurement Code. The press release also announced that a staff committee would review proposals submitted in response to the RFP and would deliver its findings to the BOCC.

PLAINTIFF'S RECORDS REQUESTS AND DEFENDANTS' DENIALS

41. On December 5, 2013, Kevin P. Egan, on behalf of JCP, requested to inspect a variety of public records in the possession, custody or control of the County government connected to the RFP and to various communications by government officials and public employees discussing public business (hereinafter "the Public Records"). Attached hereto as **Exhibit 1** is a true and correct copy of Plaintiff's records request under the CORA, which is incorporated herein by reference.

42. Plaintiff's records request included the letter referenced in the RFP as being the catalyst for issuing an RFP. The request also included communications among and between County officials and other public employees concerning the reasons and justifications for issuing the RFP, communications of County personnel with entities who may have submitted proposals (including those who would be disqualified under the terms of the RFP if they had made contact with government employees concerning the RFP), and those portions of the proposals that were not identified by the proposer as "confidential" in the manner described in the RFP.

43. On December 24, 2013, Defendant Francine Tipton-Long, in her capacity as the records custodian for the County of Montrose, denied Plaintiff's request to inspect the vast bulk of the Public Records. In her letter denying access, the representative of Ms. Tipton-Long's Department, acting on behalf of the County, stated that the records requested were "not public records at this time," and/or were not "county records." Notably, Ms. Tipton-Long's representative did not cite any statutory exemptions from disclosure as a basis for the County's withholding "public records." Attached hereto as **Exhibit 2** is a true and correct copy of the response from Ms. Tipton-Long's representative to Mr. Egan denying Plaintiff's records request under the CORA, which is incorporated herein by reference.

44. On January 4, 2014, Steven D. Zansberg, Esq., on behalf of the records requester JCP, provided Ms. Tipton-Long written notice of Plaintiff's intent to file an Application for an Order to Show Cause, pursuant to § 24-72-204(5), C.R.S. Attached hereto as **Exhibit 3** is a true and correct copy of Mr. Zansberg's January 4, 2014 letter, which is incorporated herein by reference.

45. No further Public Records have been made available to Plaintiff by Ms. Tipton-Long since receipt by the County of the aforesaid January 4, 2014 notice letter.

46. On January 6, 2014, JCP sent a second round of letters, in response to the County's suggestion that it did not consider itself to be the custodian of public records created or maintained by its employees on their personal computers or smartphones or in their home offices. The letters requested to inspect public records concerning the RFP for a second FBO at the Montrose Regional Airport to each of the individual defendants, Commissioners Ellis, Henderson and White, County Manager Eckert, Airport Director Arnold, and the other two members of the Airport FBO Review Committee, Laursen and Paulsen. Attached hereto as **Exhibit 4** is a true and correct copy of Plaintiff's records request under the CORA to each of the above records custodians, which are incorporated herein by reference.

47. None of the records custodians responded to the letters JCP sent to the individual Defendants on January 6, 2014. Accordingly, on January 15, 2014, the undersigned counsel, on behalf of records requestor JCP, provided each of the individual records custodian defendants written notice of Plaintiff's intent to file an Application for an Order to Show Cause, pursuant to § 24-72-204(5), C.R.S. Attached hereto as **Exhibit 5** is a true and correct copy of Mr. Zansberg's January 15, 2014 letters, which are incorporated herein by reference.

48. On January 15, 2014 at 6:15 p.m., Montrose County Attorney Teresa Williams sent an email message to Mr. Zansberg, in response to only some of the letters identified above in Exhibit 4 (only on behalf of defendants White, Arnold, Laursen and Paulsen), in which she refused to provide any public records in response to JCP's records request. Notably, Ms. Williams's untimely response did not identify which records were being withheld on which basis or grounds. Attached hereto as **Exhibit 6** is a true and correct copy of Ms. Williams' January 15, 2014 email, which is incorporated herein by reference.

49. On January 21, 2014, the Board of County Commissioners for the County of Montrose, Colorado, met in public meeting. At that meeting, Defendant County Manager Rick Eckert stated to the Commissioners that two proposals had been received in response to the RFP: from Majestic Sky, L.L.C. and from Telski Aviation. Mr. Eckert also announced that only the proposal received from Majestic Sky, L.L.C. was deemed by the Review Committee to meet the requirements of the RFP.

50. As of today's date, no public records have been provided to JCP by any of the individual Custodian Defendants in response to JCP's records request of January 6, 2014.

FIRST CLAIM FOR RELIEF
(Application for Order to Show Cause)

51. Paragraph Nos. 1 through 50 of this Complaint and Application for Order to Show Cause are incorporated herein by reference and made a part hereof with the same force and effect as if fully set forth herein.

52. The Plaintiff JCP has requested to inspect public records from the Custodians of public records.

53. The Defendants have improperly denied most of the Plaintiff's request to inspect public records.

54. Plaintiff, here now an "Applicant," is entitled to have the Court enter an Order to Show Cause directed to the Custodians to show cause why inspection of the public records at issue should not be permitted.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment Pursuant to §§ 13-51-105 and 13-51-106, C.R.S.)

55. Paragraph Nos. 1 through 54 of this Complaint and Application for Order to Show Cause are incorporated herein by reference and made a part hereof with the same force and effect as if fully set forth herein.

56. On information and belief, the BOCC contends (and its actions confirm such contention) that it need not discuss and *make a decision* in an open public meeting to engage in negotiations with private parties interested in being a second FBO at the Montrose Regional Airport and/or to authorize the issuance of an RFP in order to initiate such negotiations.

57. Plaintiff Ken Watson maintains that the substantive nature of the subject actions of the BOCC are such that they constitute the adoption of a position and/or resolution and/or formal action that must under the OML occur at a public meeting.

58. The disagreement between the two parties presents a live case or controversy.

59. The Plaintiff is a person “whose rights . . . are affected by a statute,” namely, the OML.

60. Mr. Watson is entitled to have the Court, pursuant to C.R.C.P. 57 and § 13-51-105, C.R.S., declare the rights and responsibilities of the respective parties and enter a declaratory judgment declaring the BOCC violated the OML by failing to conduct a public discussion and make its decision in public to engage in negotiations with private parties interested in being a second FBO at the Montrose Regional Airport, and/or to authorize the issuance of the RFP to initiate such negotiations.

WHEREFORE, Plaintiffs pray that:

- A. Pursuant to § 24-72-204(5), C.R.S., the Court enter an Order directing the Defendants to show cause why they should not permit inspection and copying of the requested Public Records as described in this Amended Complaint and Application for Order to Show Cause;
- B. The Court conduct a hearing pursuant to such Order “at the earliest practical time” at which the Court may make the Order to Show Cause absolute;
- C. At the conclusion of the hearing on the Order to Show Cause, the Court enter an order directing the Defendants to disclose some or all of the Public Records to JCP;
- D. At the conclusion of the hearing on the Order to Show Cause, the Court enter and order directing the Defendants to pay JCP its reasonable attorneys’ fees and costs incurred in securing access to the Public Records;
- E. Enter a declaratory judgment that the BOCC violated the OML;
- F. Award the Plaintiffs their reasonable attorney’s fees, pursuant to § 24-6-402(9), and § 24-72-204(5), C.R.S.; and
- G. Enter such further and additional relief as the Court deems just and proper.

Dated: January 21, 2014

By _____ /s/ Steven D. Zansberg
Steven D. Zansberg
Michael Beylkin
LEVINE SULLIVAN KOCH & SCHULZ, LLP

Attorneys for Plaintiffs Jet Center Partners, L.L.C. &
Ken Watson

Plaintiffs' Address:

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Montrose, CO 81401

THIS AMENDED COMPLAINT AND APPLICATION FOR AN ORDER TO
SHOW CAUSE WAS FILED WITH THE COURT THROUGH THE ICCES
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.