

District Court, Eagle County, Colorado 885 Chambers Avenue P.O. Box 597 Eagle, Colorado 81631	DATE FILED: December 2, 2018 9:53 AM CASE NUMBER: 2016CV30322
Plaintiff: THEODORE GUY , a Colorado citizen v. Defendants: JACQUE WHITSITT , in her official capacity as a member of the Town Council and Mayor of the Town of Basalt, Colorado, TOWN COUNCIL OF THE TOWN OF BASALT, COLORADO , a home rule municipality, and PAM SCHILING , in her official capacity as the Town Clerk and the Records Custodian for the Public Records of the Town of Basalt, Colorado	<p style="text-align: center;">▲COURT USE ONLY▲</p> Case No.: 2016 CV 30322 Div.: 3
ORDER GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT ON FIFTH CLAIM FOR RELIEF	

THIS MATTER comes before the Court on *Plaintiff’s Motion for Summary Judgment on Fifth Claim for Relief (Incorporating Points and Authorities)* submitted by Plaintiff Theodore Guy (“Plaintiff”), by and through counsel, on February 21, 2017 (“Plaintiff’s Motion”). On March 6, 2017, Defendants Jacque Whitsitt, Town Council of the Town of Basalt, Colorado, and Pam Schilling (collectively, “Defendants”) submitted, by and through counsel, *Defendants’ Motion for Summary Judgment on Plaintiff’s Fifth Claim for Relief* (“Defendants’ Motion”). Having considered the record and arguments of counsel, the Court hereby finds and orders as follows.

I. INTRODUCTION

This action was initiated by the filing of Plaintiff’s *Application for an Order to Show Cause Pursuant to § 24-72-204(5), C.R.S., and Complaint for Declaratory Judgment, and for*

Relief Under § 24-6-402(8) submitted, by and through counsel, on October 5, 2016. Presently before the Court are Plaintiff's and Defendants' respective Motions requesting summary judgment on the Fifth Claim for Relief – Against Town Council (Violation of COML and Declaratory Judgment Pursuant to §§ 13-51-105 and 24-6-402(8)).

II. STANDARD OF REVIEW

Summary judgment is designed to avoid unnecessary trials and is proper when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56; *Terrell v. Walter E. Heller & Co.*, 439 P.2d 989, 990-91 (Colo. 1968). To merit summary judgment, the facts must be clear and undisputed.¹ *Morlan v. Durland Trust Co.*, 252 P.2d 98, 100 (Colo. 1952). Further, the applicable law must provide relief under the facts available, thus allowing entry of judgment.

A material fact is a fact that will determine the outcome of a case. *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). A genuine issue over a material fact exists when reasonable men could reach different conclusions from the evidence.² *Fin. Assocs., Ltd. v. G.E. Johnson Constr. Co., Inc.*, 723 P.2d 135, 138 (Colo. 1986). A factual issue that is not material will not prevent the entry of summary judgment. *Svanidze v. Kirkendall*, 169 P.3d 262, 264 (Colo. App. 2007).

The ultimate burden of demonstrating entitlement to summary judgment rests with the moving party. *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). The movant

¹ If a record is not sufficient to allow a determination of a lack of genuine issue, summary judgment must be denied. *Kral v. Am. Hardware Mut. Ins. Co.*, 784 P.2d 759, 766 (Colo. 1989).

² This holds true even when the historical facts of the record are not disputed – even in such a situation, if reasonable men could reach different conclusions from the those facts, summary judgment is not appropriate. *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 239 (Colo. 1984).

bears the initial burden of demonstrating the lack of a genuine issue of material fact.³ *Schultz v. Wells*, 13 P.3d 846, 848 (Colo. App. 2000).

Once the movant demonstrates that there is an absence of a genuine issue, the burden shifts to the nonmovant to show that an issue does exist. *McCormick v. Union Pac. Res. Co.*, 14 P.3d 346, 349 (Colo. 2000). If the movant has shown that no issue of fact exists, the nonmovant must affirmatively show, via factual sources, that an issue is present.⁴ *Jones v. City & County of Denver*, 833 P.2d 870, 872 (Colo. App. 1992).

In determining the existence of a genuine issue of material fact, a court is to grant a non-moving party the benefit of all favorable inferences reasonably drawn from the facts and is to resolve all doubts in favor of a non-moving party. *Jenkins v. Panama Canal Ry. Co.*, 208 P.3d 238, 241 (Colo. 2009). This includes accepting all of the non-movant's material allegations in its pleadings as true, unless the evidence in the case indicates a lack of genuine dispute as to those material facts. *See, e.g., Club Telluride Owners Ass'n, Inc. v. Mitchell*, 70 P.3d 502, 503-4 (Colo. App. 2002), *citing Abrahamsen v. Mountain States Tel. & Tel. Co.*, 494 P.2d 1287, 1288-89 (Colo. 1972). Permissible inferences arising from evidence accepted as true can create a genuine issue of material fact. *Fin. Assocs., supra*, 723 P.2d at 138. All doubts must be resolved against the movant. *Ringquist v. Wall Custom Homes, LLC*, 176 P.3d 846, 849 (Colo. App. 2007), *citing Brodeur v. Am. Home. Assurance Co.*, 169 P.3d 139, 146 (Colo. 2007).

A court is not to weigh evidence or test credibility; a court's role on summary judgment is to determine the existence of any genuine issues. *Anderson v. Lindenbaum*, 160 P.3d 237, 239

³ In those situations in which the movant would not bear the burden of persuasion at trial, the movant's initial burden of production may be satisfied by demonstrating an absence of evidence in the record supporting the nonmovant's case. *Cont'l Airlines*, 731 P.2d at 712, *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In other words, if a defendant moves for summary judgment, he may argue that the record contains no evidence on which a plaintiff could prevail.

⁴ Any evidence offered to support or contest a motion for summary judgment must be admissible. C.R.C.P. 56(e); *see also White v. Jungbauer*, 128 P.3d 263, 264 (Colo. App. 2005); *USA Leasing, L.L.C. v. Montelongo, M.D.*, 25 P.3d 1277, 1278 (Colo. App. 2001).

(Colo. 2007). Regardless, though a court is not to weigh credibility of evidence, if the evidence presented is so incredible that a reasonable jury could not believe it, that evidence cannot create a genuine issue or factual dispute. *Id.* at 240, *citing Seshadri v. Kasraian*, 130 F.3d 798, 802 (7th Cir. 1997). Further, “if the evidence opposing summary judgment is merely colorable, or is not significantly probative, summary judgment may be granted.” *Anderson*, 160 P.3d at 239, *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

III. THE COLORADO OPEN MEETINGS LAW

The purpose of the Colorado Open Meetings Law (the “COML”) is to “give citizens a greater opportunity to meaningfully participate in the decision-making process by becoming fully informed on issues of public importance.” *Colo. Off-Highway Veh. Coal. V. Colo. Bd. of Parks and Outdoor Rec.*, 292 P.3d 1132, 1136 (Colo. App. 2012). Further, the COML is intended to give citizens “the opportunity to obtain information about and to participate in the legislative decision-making process which affects, both directly and indirectly, their personal interests.” *Cole v. State*, 673 P.2d 345, 349 (Colo. 1983). Thus, it is safe to say that the purpose of the COML is to enable and facilitate, and ultimately to require, transparency in government.

The COML is codified at C.R.S. § 24-6-401, *et seq.* C.R.S. § 24-6-402(2)(b) and provides:

All meetings of a quorum or three or more members of any local public body, whichever is fewer, at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times.

“Meeting” is broadly defined as “any kind of gathering, convened to discuss public business,” regardless of the form of the gathering. *See* C.R.S. § 24-6-402(1)(b). Electronic communications are specifically included within the definition of “meeting” unless they do not relate to “pending legislation or other public business.” *See* C.R.S. § 24-6-402(2)(d)(III).

To qualify as “public business” under these provisions:

a meeting must be part of the policy-making process to be subject to the requirements of the OML. A meeting is part of the policy-making process if it concerns a matter related to the policymaking function of the local public body holding or attending the meeting.

Ark. Vall. Pub. Co. v. Lake County Bd. of Cnty. Comm’rs, 369 P.3d 725, 726 (Colo. App. 2015), *cert. denied*, citing *Bd. of Cnty. Comm’rs v. Costilla Cnty. Cons. Dist.*, 88 P.3d 1188, 1194 (Colo. 2004) (“a meeting is part of the policy-making process when the meeting is held for the purpose of discussing or undertaking a rule, regulation, ordinance, or formal action”).⁵

The COML requires that if the requisite number of officials is present and the meeting involves matters of policy, it is open to the public. Also, if such meeting involves formal decision-making, it is open to the public. Moreover, even if the meeting does not involve face-to-face or contemporaneous discussion, and is conducted solely by written electronic communication, it is an open meeting if it involves “pending legislation or other public business.”⁶

IV. ANALYSIS⁷

The facts are undisputed. There are four separate chains of electronic communications which the Court shall address separately.

A. *Plaintiff’s Ex. 1 – Emails of July 11-12, 2016*

Defendants describe emails dated July 11-12, 2016 in Defendants’ Motion as follows:

⁵ The Court has included the specific language of *Costilla* because Defendants argue that the policy-making process only includes “taking action with regard to rules, regulations, ordinances, or formal actions.” See *Intermountain Rur. Elec. Ass’n v Colo. Pub. Utils. Comm’n*, 298 P.3d 1027, 1030 (Colo. App. 2012). “Action” is a generic word and many different meanings. The language of *Costilla*, however, makes clear that discussion relating to formal action is sufficient to trigger the COML, as opposed to just the formal action itself. This is in accord with the public policy behind the COML.

⁶ For purposes of this Order, the Court applies the spirit of the *Costilla* decision to “pending legislation or other public business”; that is, if the electronic communications involve matters of policy, they are subject to the COML.

⁷ All references to exhibits, unless otherwise indicated, are to the exhibits attached to Plaintiff’s Complaint.

Exhibit 1, the July 11, 2016 e-mail from Councilor Jennifer Riffle to three other Town Councilors, and the response by Councilor Kittle, had to do with a Resolution about directing Town staff regarding the expansion of zone districts where marijuana could be sold.⁸

The July 11, 2016 email raises the “agenda item 7A Marijuana Resolution” with three other Town Councilors and includes a lengthy discussions of policy matters.

On its face, this meets the requirements set forth above, in particular the requirements of C.R.S. § 24-6-402(2)(d)(III), and is a public meeting pursuant to C.R.S. § 24-6-402(2)(b). The July 11-12, 2016 emails are subject to the COML.

B. Plaintiff's Ex. 2 – Text Messages of July 19-20, 2016

Exhibit 2 is a series of text messages between the Mayor and the Town Manager. This is neither a quorum nor three or more Town Council members. As such, these text messages are not subject to COML.

C. Plaintiff's Ex. 3 – e-mail of July 25, 2016

This exhibit is an email sent by one member of the Town Council to another Councilor. As such, it is neither a quorum nor a meeting of three members, and not subject to the COML.

D. Plaintiff's Ex. 4 – e-mails of August 10, 2016

This exhibit is a series of emails sent by a member of the Town Council to other members, to the Mayor, and to staff as a whole. This email includes the sender's specific thoughts on a variety of matters. For example, these matters include municipal bonds, clarifying definitions, contingency plans if a ballot fails, and questions about the consequences of voting on ballot language.

This e-mail chain clearly involves matters of policy-making, addressed to the entire Town Council. As such, it is subject to COML.

⁸ Defendants' Motion, p. 10.

V. CONCLUSION

For the foregoing reasons and in consideration of the facts presented by Plaintiff and Defendants in their respective Motions and authorities cited therein, the Court grants Plaintiff's Motion.

WHEREFORE it is **ORDERED**:

1. The Court hereby GRANTS Plaintiff's Motion. Pursuant to C.R.S. §§ 13-51-105 and 24-6-402(8), the Court declares that Defendants the Town Council for the Town of Basalt violated the COML by engaging in such electronic discussions of public business absent public notice and without opportunity for the public to observe and participate in the process.
2. The Court hereby DENIES Defendants' Motion.

So Ordered this December 2, 2018.

By the Court:



Russell H. Granger
District Court Judge