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CASE NUMBER: 2016CV30322

DISTRICT COURT, COUNTY OF EAGLE, STATE OF COLORADO Eagle County Justice Center 885 Chambers Ave. P.O. Box 597 Eagle, CO 81631	
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 SCHILLING, in her official capacity as the Town Clerk and the Records Custodian for the Public Records of the Town of Basalt, Colorado.	▲ COURT USE ONLY ▲
	Case No. 2016CV30322 Div.: 3

ORDER RE PLAINTIFF'S APPLICATION FOR ORDER TO SHOW CAUSE

This matter came to be heard upon the Plaintiff's Application for an Order to Show Cause. A hearing was conducted on December 8, 2016. The Court has reviewed the Application, the parties' written submissions to the Court, the testimony and the exhibits. The issues before the Court are those identified in the Court's October 20, 2016 Order to Show Cause. In this Order, the Court enters its findings of fact and conclusions of law.

During the hearing both parties presented evidence and argument. The Court heard numerous witnesses and has considered the witness' knowledge and means of knowledge,

memory, attachment to one side of the case or the other, their body language, manor and demeanor on the stand and all other aspects of their testimony that may impact the witness' credibility. The Court has also considered the exhibits and the lack of evidence as well as how evidence may be supported or contradicted by other evidence in this case. The Court has considered the reasons advanced for any lack of evidence and when, where and why any evidence that may have been helpful was destroyed.

I. INTRODUCTION: APPLICATION FOR ORDER TO SHOW CAUSE

The Plaintiff's Application for an Order to Show Cause Pursuant to C.R.S. §24-72-204(5) and Complaint for Declaratory Judgment, and for Relief under C.R.S.§24-6-402(8) ("Complaint"), alleges various violations of the Colorado Open Records Act, C.R.S. §§ 24-72-200.1, *et seq*. (CORA), and the Colorado Open Meetings Law (COML), C.R.S. § 24-6-402. The First through Fourth Claims for Relief of the Complaint, seek a declaration that the Town of Basalt (the Town) violated COML and requests all recordings of executive sessions of the Basalt Town Council meetings held on April 26, May 24, August 9, and August 11, 2016.

The Fifth Claim for Relief seeks a declaration the Town violated COML regarding certain text messages and e-mails sent or received by various Town Councilors.

The Sixth and Seventh Claims for Relief seek entitlement to show cause orders. On October 20, 2016, the Court issued an Order to the Defendants stating that they were ordered to show cause why:

1. electronic recordings of the Town Council's executive sessions on April 26, 2016, August 9, 2016 and (if it exists) August 11, 2016, should not be made available to the Plaintiff; and
2. the requested public records - electronic communications exchanged between Defendant Whitsitt, Counselor Jennifer Riffle, Counselor Katie Schwoerer, and/or Town Manager Mike Scanlon, as well as Mayor Whitsitt's text messages in which

she discussed public business between August 1 and August 25, 2016 - should not be reasonably and adequately search for and made available to the Plaintiff.

II. EXECUTIVE SESSIONS

A. APPLICABLE PROVISIONS OF COML AND CORA.

The Town is subject to COML and CORA as a local public body. As such, all meetings of a quorum or three or more members at which any public business is discussed, or at which any formal action may be taken, are public meetings open to the public at all times. C.R.S. § 24-6-402(2)(b). 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 is in attendance, shall be held only after full and timely notice to the public. C.R.S. § 24-6-402(2)(c). The minutes of any meeting at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs shall be taken and promptly recorded and such record shall be open to public inspection. C.R.S. § 24-6-402(2)(d)(II).

The general rule requires meetings to be open to the public. However, the rule has an exception for executive sessions. State law authorizes the Town to discuss specific subjects in a closed meeting pursuant to C.R.S. § 24-6-402(4). However, executive sessions must comply with four legal requirements. First, the Town must announce to the public the topic for discussion. Second, the announcement must include a specific citation to the provision in the statute authorizing the Town Council to meet in executive session. Third, the particular matter to be discussed in executive session must be identified in as much detail as possible without compromising the purpose of the executive session. Fourth, a member of the Town Council must make a motion to go into executive session and it must pass by an affirmative vote of two thirds of the quorum present. Even though the meeting may go into executive session, the

purpose of the executive session is only to discuss certain matters; the Town Council may not adopt any proposed policy, position, resolution, rule, regulation, or take formal action while in an executive session.

An executive session may occur for the sole purpose of considering any of the following matters:

(a) The purchase, acquisition, lease, transfer, or sale of any real, personal, or other property interest…
(b) Conferences with attorney for the local public body for the purposes of receiving legal advice on specific legal questions….
(c) Matters required to be kept confidential by federal or state law or rules and regulations….
(d) Specialized details of security arrangements or investigations…
(e) Determining positions regarding matters that may be subject to negotiation; developing strategy for negotiation; and instructing negotiators.
(f) Personnel matters except if the employee who is the subject of the session has requested on open meeting….
(g) Consideration of any documents protected by the mandatory nondisclosure provisions of CORA…
(h) Discussion of individual students….

Generally, discussions that occur in an executive session must be recorded electronically. However, if the attorney who is representing the public body and who is in attendance at a properly announced executive session determines that all or a portion of the discussion constitutes a privileged attorney-client communication, no record or electronic recording is required. See C.R.S. § 24-6-402(2)(d.5)(II)(B).

Even if an executive session has been properly convened as discussed above, CORA, at C.R.S. § 24-72-204 (5.5), states that any individual who seeks access to the record of an executive session must apply to the district court and show grounds sufficient to support a reasonable belief that the local public body either (1) engaged in a substantial discussion of any

matters not enumerated in COML, § 24-6-402(4), or (2) that the local public body adopted a proposed policy, position, resolution, rule, regulation, or formal action in the executive session in violation of § 24-6-402(4). In order to make the required determination, the statute directs the court to conduct an *in camera* review of the record of the executive session. If the record of the executive session reflects substantial discussion of matters not properly announced for the executive session, that portion of the record shall be made public. Similarly, if the Town adopted a policy, position, resolution, rule, regulation, or formal action it shall be open to public inspection pursuant to § 24-72-204(5.5). *See* C.R.S. § 24-6-402(2)(d.5)(II)(C). Lastly, an error does not invalidate the entire executive session or require disclosure of the entire record.

Thus, in the present case the Court analyze two issues. First, was the executive session properly convened, and second, was the substance and subject matter actually discussed in the executive session proper.

B. FINDINGS OF FACT

The Court finds the following facts with respect to the executive sessions:

On August 25, 2016, the Plaintiff, Theodore Guy, requested records pursuant to CORA. Plaintiff requested audio recordings of executive sessions convened during meetings of the Town of Basalt Town Council on April 26, May 24, August 9, and August 11, 2016. The Town responded to the request and informed the Plaintiff that the Town had had an audio recording of the April 26, 2016 executive session and a portion of the August 9, 2016 executive session. The Town also informed Mr. Guy that there were no recordings of the executive sessions of May 24 of August 11.

The Town declined to produce the recordings of the April 26 and August 9 meetings and stated that the recordings are confidential, privileged, not a public record, and not subject to disclosure under CORA and COML.

Mr. Guy's CORA request did not request minutes or notes made of the executive sessions, and no evidence was presented that any minutes or notes exist.

The Town Council Meeting Agenda (Exhibit 1), for April 26, 2016 announced that an executive session was scheduled for the purposes of:

1. The purchase, acquisition, lease, transfer or sale of property interests in accordance with C.R.S. 24-6-402(4)(a).
2. A conference with the Town's attorney for the purpose of receiving legal advice on specific legal questions in accordance with C.R.S. 24-6-402(4)(b);
3. Determining positions relative to matters that are or may become subject to negotiations in accordance with C.R.S. 24-6-402(4)(e).
4. Personnel matters in accordance with C.R.S. 24-6-402(4)(f).

The Court finds, based upon the Minutes, recording, and transcript of the meeting that a motion was made and passed by a vote of 6-0 for the Town Council to go into executive session for the above-stated reasons. No other identification of the particular matters to be discussed was made. The executive session was recorded, and the Court has reviewed the recording and transcript and finds that the executive session consisted of a discussion of matters involving the negotiation for the purchase or acquisition of real property; advice from the Town Attorney regarding pending litigation; and a discussion about personnel matters with former Town Manager Michael Scanlon.

The Town Council Meeting Agenda (Exhibit 2), for May 24, 2016 announced that an executive session was scheduled for the purposes of:

1. Determining positions relative to matters that are or may become subject to negotiations in accordance with C.R.S. 24-6-402(4)(e); and

2. A conference with the Town's attorney for the purpose of receiving legal advice on specific legal questions in accordance with C.R.S. 24-6-402(4)(b);

The Court finds, based upon the Minutes, recording, and transcript of the meeting that a motion to go into executive session for the above-stated reasons was made and was passed 7-0. No other identification of the particular matters to be discussed was made. In the open session, the Town Attorney stated that it was his opinion that the discussion in executive session would constitute a privileged attorney-client communication, and he recommended that the executive session not be recorded. The executive session was not recorded. The Court finds that the executive session was for the purpose of receiving confidential attorney-client advice and determining positions relative to matters that were the subject of negotiations.

The Plaintiff argued at the hearing that the agenda and the May 24, 2016 meeting was fatally flawed because of a contradiction in the times noted on the agenda. In the upper right corner of the agenda the time of 6:00 is stated yet in the body of the agenda it lists the starting time for the first item as 5:00. The Court finds that in fact, the meeting began at 5:00 as stated on the agenda for the first item to be discussed.

The Court does not find the Plaintiff's argument persuasive. The Court finds that any reasonable person reading the agenda and applying common sense would note that the time to discuss the executive session is clearly stated as 5:00. The time noted at the top of the agenda of 6:00 is clearly a typographical error. The agenda does not list any discussion or event to occur at 6:00, the time is simply stated without any further explanation. The Plaintiff's argument would have more significance if the agenda did not list the time for each discussion item. The Court finds that the May 24, 2016 meeting was noticed to begin at 5:00 and in fact, it did begin at 5:00.

The Town Council Meeting Agenda (Exhibit 3), for August 9, 2016 announced that an executive session was scheduled for the purposes of:

1. A conference with the Town's attorney for the purpose of receiving legal advice on specific legal questions in accordance with C.R.S. 24-6-402(4)(b);
2. The purchase, acquisition, lease, transfer or sale of property interests in accordance with C.R.S. 24-6-402(4)(a).
3. Personnel matters in accordance with C.R.S. 24-6-402(4)(f).

The Court finds, based upon the Minutes, recording, and transcript of the meeting that a motion to go into executive session was made and was passed 6-0 and referenced the three items listed above. The Town Attorney, who was present at the meeting, gave an unrecorded opinion that the discussion in executive session constituted a privileged attorney-client communication and need not be recorded.

Although the portion of the executive session regarding attorney client privilege was not recorded, most of the executive session was recorded. During the recorded portions the Town Council discussed personnel issues with the former Town Manager Michael Scanlon.

The Town Council Meeting Agenda (Exhibit 4), for August 11, 2016 announced that an executive session was scheduled for the purposes of:

1. A conference with the Town's attorney for the purpose of receiving legal advice on specific legal questions in accordance with C.R.S. 24-6-402(4)(b);
2. Personnel matters in accordance with C.R.S. 24-6-402(4)(f).

The Court finds, based upon the Minutes, recording, and transcript of the meeting that a motion to go into executive session was made and was passed 6-0 and referenced the three items listed above. The minutes of this meeting are not as detailed as other meetings and do not specifically state the vote count. However, the written motion and transcript (Exhibit 18) leads this Court to find that the vote passed 6-0.

No other identification of the matters to be discussed was made. Again, the Court finds that the Town Attorney, who was present at the meeting, gave an unrecorded opinion that the discussion in executive session constituted a privileged attorney-client communication that need not be recorded. This executive session was not recorded. The Court finds that this executive session involved confidential attorney-client advice and a discussion of personnel matters involving Mr. Scanlon.

The Court has conducted an *in-camera* review of the record of the April 26 and August 9 executive sessions. The Court finds that there are no substantial discussions of matters not enumerated in C.R.S. § 24-6-402(4), and the Town Council did not adopt any proposed policy, position, resolution, rule, regulation, or take formal action in the executive sessions.

During the period of April 26, 2016 through August 11, 2016, as well as during other times not relevant to this proceeding, the Town Manager was Michael Scanlon. Mr. Scanlon is no longer employed with the Town; however, he had been appointed by the Town Council, and his most recent Employment Agreement is dated February 9, 2016 (Exhibit 7). The Agreement includes a provision stating that Mr. Scanlon may declare the Agreement terminated and be entitled to full severance pay in the event the Town is in breach of the agreement or if his performance or continued employment is discussed in a public meeting. Mr. Scanlon has intervened in this lawsuit, and, according to his Affidavit (Exhibit 5), the executive sessions on April 26, August 9, and August 11, 2016 included personnel discussions about him. He has asserted a privacy interest in the confidential and private information discussed in those executive sessions, and he has not waived that privacy interest. Mr. Scanlon, in his affidavit, also asserts that he does not consent to or authorize a release of any records, data, or recordings

that include discussion or reference to any matters relating to his employment or his performance, including but not limited to employment information, educational information, performance evaluations, and reasons for his separation from employment with the Town.

C. CONCLUSIONS OF LAW

Proper legal conclusions in this case require a careful consideration and interpretation of § 24-6-402(4). First, as with any issue of statutory construction, when interpreting the Open Meetings Law, this Court's task is to give effect to the intent of the legislature. To determine this intent, the Court has examined the statute's plain language within the context of the entire statute, and has given words their plain and ordinary meaning. When the language is clear and unambiguous, the Court will not resort to other rules of statutory construction. *Weisfield v. City of Arvada*, 361 P.3d 1069, 1073 (Colo. App. 2015) (citations omitted), *cert. denied,* No. 15SC431, 2015 WL 7177938 (Colo. Nov. 16, 2015).

In addition, the Court must avoid a statutory construction that would produce illogical or absurd results, *People v. Cross*, 127 P.3d 71, 74 (Colo. 2006), or that would render independent statutory terms meaningless. *See Welby Gardens v. Adams Cty. Bd. of Equalization*, 71 P.3d 992, 995 (Colo. 2003); *see also Jefferson Cty. Bd. of Cty. Comm'rs v. S.T. Spano Greenhouses, Inc*., 155 P.3d 422, 426 (Colo. App. 2006).

Specific to the present case, open meeting laws are remedial and the Court must also consider the precept that '[a] remedial statute is to be liberally construed to accomplish its object.'" *Wisdom Works Counseling Servs., P.C. v. Colo. Dep't of Corr.,* 360 P.3d 262, 267 (Colo. App. 2015) (citations omitted)); *Cole v. State,* 673 P.2d 345, 349 (Colo. 1983). The

object of the Open Meetings Law is to prevent the abuse of power of secret sessions. Thus, COML should be interpreted most favorably to protect the ultimate beneficiary, the public. *Bagby v. School Dist. No. 1, Denver*, 528 P.2d 1299, 1302 (Colo. 1974).

However, COML also has exceptions to the general premise of open and public meetings which is the subject of this pending litigation. Nevertheless, in *City of Westminster v. Dogan Constr. Co.,* 930 P.2d 585 (Colo.1997) and *Gumina v. City of Sterling*, 119 P.3d 527, 532 (Colo.App. 2004) this Court is instructed to strictly construe the exceptions with a presumption in favor of disclosure of public records.

The difficult legal task for this Court in the present case is harmonizing the above law regarding statutory construction with the facts and statutes in this case. Specifically, C.R.S. §24-6-402(4) requires the Town to identify the particular matter to be discussed in an executive session in as much detail as possible without compromising the executive session's purpose. The Plaintiff argues that the Town could have further identified the particular matter to be discussed. However, strict compliance with this statutory provision is impossible. The Court inquired from Plaintiff's counsel how any municipality could ever phrase a motion for an executive session "in as much detail as possible?" Any attorney or plaintiff in court with the benefit of hindsight could always find some "possible" way to further identify the particular matter. Thus, since it would always be possible to find some way to further describe the particular matter, the exception would be rendered meaningless if a strict construction of the plan language is employed. This Court finds that the phrase "in as much detail as possible" is ambiguous. Therefore, this Court rules that a reasonableness standard must also be used when

interpreting C.R.S. §24-6-402(2) provided that the general intent and purpose of the open meetings law is maintained.

The Defendants argued that the doctrine of mootness applies in the present case. This argument is based upon the fact that there are no recordings of the May 24 and August 11, 2016 executive sessions. An issue is moot when the relief sought, if granted, would have no practical effect on an existing controversy. *People in Interest of L.O.L.*, 197 P.3d 291, 293 (Colo. App. 2008). Although a court should resolve disputes on their merits, when an issue is moot a court will ordinarily refrain from addressing it. *Id*.

The Court questioned the Plaintiff regarding the remedy they seek because it was obvious and not reasonably disputed that many of the items they seek do not exist and therefore, the case could be moot. However, in addition to recordings, some of which do not exist, the Plaintiffs also seek a declaration that the Town violated COML. This declaration would entitle them to attorney's fees and may provide injunctive relief. Therefore, the Court rules that the case is not moot.

The parties stipulated that during the foregoing four executive sessions, there was no substantial discussion of any matter not enumerated in COML. The Defendants asserted, and the Court finds that in all of the executive sessions at issue there was not an adoption of any policy, position, resolution, rule, or regulation and no formal action taken. The Court also finds that in all the executive sessions at issue they were called for a proper purpose pursuant to COML and the Town operated in good faith.

No dispute exists that in each executive session an announcement was made to the public by the Town Council in each agenda of the topic for discussion, including a citation to the

provision in COML authorizing the Town Council to meet in executive session. There is also no dispute that for each executive session the Town Council made a motion, including specific citations to statutory authority, and that each motion was passed by an affirmative vote of two thirds of the quorum present of the Town Council.

The April 26 executive session was recorded. The May 24 executive session, the portion of the August 9 executive session involving attorney-client advice, and the August 11 executive session were not recorded because the Town Attorney, who was in attendance at the executive session, determined that the portions of the executive sessions constituting privileged attorney-client communications need not be recorded. The Court agrees, and in these instances no record or electronic recording of the executive session was required to be kept, pursuant to C.R.S. § 24-6-402(d.5)(II)(B).

In each of the announced executive sessions, the agendas identified the topics for discussions. Each referenced the nature of the executive session (e.g., "personnel matters"), and the statutory citation was given. The motions to go into executive session on April 26, May 24, August 9, and August 11 also identified the topics, the nature of the executive session and the statutory authority.

The executive sessions were convened for three separate purposes: 1) attorney consultation, 2) personal matters, and 3) property issues, which for the purpose of this order will also include negotiations. It is beyond question that each of the executive sessions was held for a proper purpose. Thus, the legal substance of the executive sessions was proper, however, the issue presented by the Plaintiffs to this Court does not stress the legal substance of the Town's executive sessions or even the Town's good faith but the form in which the executive session

was convened. As discussed above, for each session the Town was required to "identify the particular matter to be discussed in as much detail as possible without compromising the purpose for which executive session is authorized." *See* C.R.S. § 24-6-402(4). Thus, the issue before this Court is whether the Town sufficiently identified the particular matter to be discussed and not whether the matter to be discussed was proper for an executive session.

Each of these purposes, 1) attorney consultation, 2) personal matters, and 3) property/negotiation issues, have unique issues and must be considered separately. The identification and detail required for the personnel or attorney consultation issue is not the same as the identification and detail required for the property issues.

1. Executive Sessions for Attorney Consultation

The attorney-client privilege has long existed in common law and is codified in Colorado, C.R.S. § 13-90-107(1)(b*). See Losavio v. District Court*, 188 Colo. 127, 533 P.2d 32 (1975). The Colorado General Assembly's adoption of the attorney-client privilege far precedes its adoption of COML. The purpose of this privilege is to protect the confidences of the client and to ensure a candid and open attorney-client discussion without the fear of disclosure. *Id*. The privilege is personal with the client and exists for the personal benefit and protection of the client. *Id*. As such, the attorney-client privilege has long served an important and compelling public interest and is not superseded by COML. The privilege is preserved in the statute, not limited or conditioned by the statute. *See, e.g., City of Colorado Springs v. White*, 967 P.2d 1042, 1055 (Colo. 1998).

This Court finds and rules that in the case at bar, it is inappropriate to disregard the public policy protecting the attorney-client privilege for several reasons: First, with regard to the August

9 meeting, the Agenda included the topics and statutory references for the proposed executive session. Second, the public policy protecting the sanctity of the attorney-client privilege is evident, for example, in CORA, where the custodian of public records shall not allow any person the right of inspection of records where such inspection would be contrary to state statute. *See* C.R.S. § 24-72-204(1)(a). Similarly, COML recognizes that matters required to be kept confidential by state law are a reason for a local public body to go into executive session that is not open to the public. *See* C.R.S. § 24-6-402(4)(c). The attorney-client privilege is also treated differently under COML because application of the privilege is the only instance in which a recording of the executive session is not required, C.R.S. § 24-6-402(2)(d.5)(II)(B).

Third, the Town Council has a reasonable expectation that the advice given by its attorney shall be kept confidential when the Town's attorney, who was present at the meeting, opined at the meeting that the subject matter was a confidential. In addition, providing additional detail about those confidential discussions carried the risk of an assertion that the confidentiality had been waived. Nothing in COML provides, expressly or impliedly, that a lack of detail of the nature of an attorney-client communication means that the confidentiality is waived and the communication should be made a public record. The attorney-client privilege can be waived by voluntary disclosure to a third party. *Denver Post Corp. v. Univ. of Colorado*, 739 P.2d 874, 881 (Colo. App. 1987).

Fourth, this Court finds that Town sufficiently identified the particular matter to be discussed. The attorney client privilege may also extend to the subject matter itself as well as to the details so further identification was not required in this case.

This Court rules that the executive sessions regarding confidential discussions between the Town and its attorney was properly convened and the confidential communications shall not be disclosed. Also, as a matter of practical application, the Court finds that there are no records of these discussions.

2. Executive Sessions for Personnel Issues

The April 26 and August 9 executive sessions also included a discussion of personnel matters involving Mr. Scanlon. He was present for the April 26 and August 9 executive sessions; he was aware in advance of the executive sessions that there would be a personnel discussion regarding him; and he did not request they be held in open session. The Court finds that Mr. Scanlon has a privacy interest that must also be considered.

Mr. Scanlon has asserted a privacy interest in the confidential and private information discussed about him and executive sessions, and he does not consent to or authorize release of any records regarding him. Personnel discussions may take place in executive session, the record of which is generally not available for public inspection. *Arkansas Valley Publishing Co. v. Lake County Bd. of County Comm'rs*, 369 P.3d 725, 727 (Colo. App. 2015).

COML states that the identification of a particular matter to be discussed should only be made if it doesn't compromise the purpose for which the executive session was authorized. Here, had the Town Council given more detail about the purpose of the discussion of the "personnel matters", i.e., the performance or continued employment of Mr. Scanlon, the Town Council may have violated Mr. Scanlon's privacy rights and breached the terms of the Employment Agreement. Evidence was presented that Mr. Scanlon has asserted a claim of retaliation for a recent announcement of an executive session involving his current employment. Thus, a more

specific identification of the purpose of the executive session to discuss Mr. Scanlon's performance or continued employment would not be reasonable or possible in accordance with the statute because it would have compromised the purpose of the executive session.

With respect to the "personnel matters" exception, the facts in the case at bar are distinguishable from the case relied on by Plaintiff, *Gumina City of Sterling*, 119 P.3d 527 (Colo. App. 2004). In *Gumina*, there were two City Council meetings with executive sessions involving "personnel matters" discussions about city employee Pamela Gumina. At both meetings, the City Council announced its intent to convene in executive session and voted unanimously to convene in executive session, but no topic of discussion was announced in advance of the vote. After the vote at the first meeting, the mayor distributed a written form with a list of topics allowed under the statute for going into executive session. After the vote at the second meeting, the Mayor verbally announced the topic of discussion was going to be, among other things, "personnel matters." However, with respect to both meetings Ms. Gumina had not received any notice that she would be the topic of the discussions in the executive sessions. Important to note is that it was uncontested that the executive session was not convened properly. *See Gumina*, 119 P.3d at 530 and at 531. Thus, the Court of Appeals held that the announcements of the subject of personnel matters to be discussed at the executive sessions were inadequate because the failure to notify Ms. Gumina impaired her statutory right to request an open meeting. *Id.*, 119 P.3d at 530.

The facts in this case, however, are very different. Mr. Scanlon knew in advance of the executive sessions that he would be the subject of the "personal matters" discussions, and he requested that the discussions not be held in open meetings. Thus, he had advance notice of the proposed executive session discussions, and his statutory rights and constitutional right of

privacy were protected. Most importantly, he asserted then and continues to assert now a privacy interest in nondisclosure of the executive session recordings involving the discussion of personal matters about him. Further, unlike in *Gumina*, the Defendants do contest the assertion that the executive sessions were not convened properly.

Another case relied on by Plaintiff, *Zubeck v. El Paso County Retirement Plan*, 961 P.2d 597 (Colo. App. 1998), is also distinguishable. In that case, the court disagreed with the position of the County Retirement Plan that it was not a public agency and did not have to comply with COML. Because it did not regard itself as a public agency, the Plan did not announce, vote on, or conduct an executive session. None of the requirements for voting on an executive session had been met. The court determined it is a public entity and therefore had to comply with COML. Because it had failed to do so, the court concluded that minutes from the Board meeting were public records.

Unlike the facts in *Zubeck*, the Basalt Town Council in all instances announced the executive sessions on their agendas, announced them at the open public meetings, listed the reasons and the statutory citations, made the appropriate motions, and conducted formal votes, resulting in the motions being adopted.

Plaintiff's reliance on a nonpublished Court of Appeals decision from 2009 in *WorldWest Limited Liability Co.*), attached as an Appendix to his Complaint, is misplaced. First, an unpublished decision is not binding precedent and it is a better practice not to use an unpublished decision. *See Bittle v. Brunetti*, 750 P.2d 49, 51, fn. 2, (Colo. 2012). Second, unlike the *WorldWest* case, disclosing Mr. Scanlon's employment or performance of the subject of the executive session exposed the Town to the risk that Mr. Scanlon would contend that his right to

privacy would be compromised and that it would be a violation of his Employment Agreement. Third, in the *WorldWest* case the Board failed to announce at all its intention to confer with its attorney during an executive session; however, in this case the Basalt Town Council announced its intention to obtain confidential attorney-client advice during the executive sessions.

In conclusion, this Court finds and rules that due to the specific facts in this case including the contractual provisions, Mr. Scanlon's objection to any public disclosure of his personnel issues, prior notice to Mr. Scanlon, and the identification that was provided, the provisions of COML were met and the executive sessions regarding Mr. Scanlon were properly convened. The Court also finds that given Mr. Scanlon's particular sensitivity and strong objections to any public disclosure, this Court's ruling would be the same even if there was not a specific contract between the Town and Mr. Scanlon.

3. Executive Sessions for Property Issues and Negotiations

The specific facts of this case regarding attorney-client privilege and personnel issues have weighed in favor of the Defendants. However, the Court does not find special circumstances that prohibited the Town from making a more detailed description of the property issues or negotiations to be discussed in executive session. The Court does not find that there were specific market concerns or other matters that would reasonably prevent the Town from at least identifying what the property and negotiations were. Therefore, the Court finds and rules that the executive sessions involving property issues were not properly convened.

The Court emphases that the substance of the Town's actions was proper. In reality, the topics and actual discussion in executive session were entirely permissible under COML. There was no substantial discussion of any matters not enumerated in COML. The Court also finds that

there was no adoption of any policy, position, resolution, rule, or regulation; nor was any formal action taken. However, the form in which the executive session was convened did not meet the strict compliance standard of C.R.S. §24-6-402 as interpreted above.

There is no evidence that the Town was attempting to conduct secret meetings but just the contrary – the Town was seeking to comply with COML but failed in the technical aspects of the law. The Court finds that the value to the public of the required highly technical application of the law is *de minimis* in this case. This is a hyper-technical ruling that places form over substance but one that is required by Colorado law.

III. E-MAILS AND TEXT MESSAGES

With respect to text messages and e-mails, the Court's Order states that the Defendants were ordered to show cause "why the requested public records - electronic communications exchanged between Defendant Whitsitt, Counselor Jennifer Riffle, Counselor Katie Schwoerer, and/or Town Manager Mike Scanlon, as well as Mayor Whitsitt's text messages in which she discussed public business between August 1 and August 25, 2016 - should not be reasonably and adequately search for and made available to the Plaintiff."

A. Applicable Provisions of CORA

CORA states that all public records shall be open for inspection. The statute does not contain an express statement defining how extensive any search for records requested should be; however, the statute clearly contemplates that the custodian of records must make a good faith effort to search for the records under an objective standard of reasonableness. For example, C.R.S. § 24-72-201 and § 24-72-203(1)(a) state that all public records shall be open for inspection by any person at reasonable times; C.R.S. § 24-72-203(1)(a) states that "the official

custodian of any public records may make such rules with reference to the inspection of such records as are reasonably necessary for the protection of such records;" § 24-72-203(1)(b)(II), provides that the custodian shall take measures to assist the public in locating miniaturized or digitalized records without unreasonable delay or unreasonable cost; § 24-72-203(3)(b), provides that the date and hour for inspection shall be within a reasonable time after the request, which is presumed to be three working days or less; and § 24-72-203(3)(b)(III) states that the extension for extenuating circumstances may be applied where the request is for such a large volume of records that the custodian cannot reasonably prepare or gather the records within the three days.

B. Findings of Fact and Conclusions of Law

The Court finds that the Defendants made reasonable, good faith efforts to search, locate, and produce records responsive to Mr. Guy's August 25, 2016 CORA request. The request asked to inspect the following documents:

1. All writings, electronic or digital form, including text messages, exchanged between Mayor Jacque Whitsitt and Jennifer Riffle, Katie Schwoerer, or Mike Scanlon since July 1, 2016, up to today's date, in which any public business was discussed.

2. All text messages sent or received by Mayor Jacque Whitsitt in which any public business was discussed, regardless of sender or recipient, since August 1, 2016, up to today's date.

In response, Town Clerk Schilling notified Mayor Whitsitt and Councilors Riffle and Schwoerer of the records request and the need to respond. In addition, Ms. Schilling searched the Town's records on her computer, which contains in excess of 85,000 e-mails, to locate documents responsive to the request and to produce the documents she found. Many of the e-mails included excessively lengthy attachments. For example, some e-mails from Councilor Riffle had attachments which were hundreds of pages long. Ms. Schilling notified Mr. Guy that

the attachments were available for inspection; however, he did not respond and request the opportunity to inspect any attachments. Mayor Whitsitt and Councilors Riffle and Schwoerer searched their records and their computers for documents responsive to the request and produced any documents that they had kept. The searches included a search of all documents available, including all e-mail addresses, in their computers. In addition, the Town contacted its attorney and received his text messages responsive to the request - and those messages were produced. There is no evidence in this case that the Town did not produce all records in its possession and under its control responsive to the CORA request.

The Plaintiff is critical of Mayor Whitsitt for not saving text messages on her cell phone; whereas, Mr. Scanlon saved certain text messages. The Court finds that the Mayor pays for her own cell phone, however, if the phone is used for business of the Town of Basalt, a text message may be a public record.

The Court notes and rules that there is no claim in this case asserting any violation of records retention laws. Nevertheless, the Court has examined the text messages produced by Mr. Scanlon and the testimony of Mayor Whitsitt, and the Court concludes that her text messages are of Transitory Value. The evidence does not support the assertion that Mayor Whitsitt's deletion of any text messages violated the Town's records retention policy. Although there was additional testimony regarding the Town's retention policy, since is it not properly at issue, the Court makes only minimal rulings regarding this issue.

Plaintiff requested an order, and the Order to Show Cause states, that the Defendants show cause why the electronic communications, including the Mayor's text messages, sought in Mr. Guy's CORA request, "should not be reasonably and adequately searched for and made

available to Plaintiff." The Court finds that the responses by the Town, including the searches of Town Clerk Schilling, Mayor Whitsitt, and Counselors Riffle and Schwoerer, and the obtaining of text messages from Michael Scanlon's attorneys, were reasonable and in good faith and complied with CORA. The Court finds that there is no evidence that the Town and its records custodian did not produce all records in the Town's possession in response to the CORA request.

IV. INJUNCTION

The Plaintiffs have requested this Court to issue an injunction against the Defendants. The Court has jurisdiction to issue an injunction to enforce COML purposes but an injunction is not mandated by law, rather it is within this Court's discretion to issue an injunction. See § 24-6-402, C.R.S. As this Court has found above, the Town operated in good faith and did not attempt to conduct secret meetings. The Court finds that the substance of the Town's actions was proper. It is only after a full day hearing and hours of attorney argument second guessing the Town's motions is this Court able and required to find a technical violation of COML. This is not a proper subject for an injunction. Accordingly, the request for an injunction is denied.

V. ATTORNEY'S FEES AND COSTS

The Court has found that the Town has violated the Colorado Open Meetings Law. Pursuant to Colorado law this requires an award of reasonable attorney's fees. The Plaintiffs stated multiple times that this was not a case about bad faith but rather a case requiring strict compliance with the statute – regardless of the practical value to the public. The Court notes the philosophical public value this case creates, but the Court also notes that in reality, this case will most likely cause more harm to the public than good. Thus, the Court finds that there may be

considerable dispute regarding the reasonable amount of attorney's fees that should be awarded. It is possible, or even likely, that the cost of litigating the reasonableness of the fees will be greater than the fees themselves. Therefore, in the interests of judicial economy, and considering that the Town must expend tax payer dollars that can be used for a greater public purpose than paying attorneys, the Court orders the parties to confer in good faith regarding reasonable attorney's fees in an effort to avoid further litigation.

Notwithstanding the above, reasonable attorney's fees and costs are granted to the Plaintiffs as mandated by law but only for that portion of the case specifically related to the executive sessions regarding property issues and negotiations. The Court will adhere to the applicable statutes and Colorado Rules of Civil Procedure to determine the reasonableness of the attorney's fees.

VI. ORDER

The Court orders that the transcripts and recordings, if any, of the executive sessions conducted on April 26, 2016, May 24, 2016, August 9, 2016 regarding the purchase, acquisition, lease, transfer, or sale of any real, personal, or other property interest as well as those for the purpose of determining positions relative to matters that are or may become subject to negotiations shall be made public and provided to the Plaintiff. The Court orders reasonable attorneys' fees to be paid to the Plaintiff as provided above. All other requests in the Application for Order to Show Cause are denied.

So Ordered this January 6, 2017.

BY THE COURT

Russell Holton Granger,
District Court Judge