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COURT OF APPEALS, STATE OF COLORADO
2 East 14th Avenue
Denver, CO 8020

Appeal from Eagle County District Court
Case No. 2016 CV 30322
The Honorable Russell H. Granger, District Judge

Plaintiff-Appellant:
THEODORE GUY, a Colorado citizen
v.
Defendants-Appellees:
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.

COURT USE ONLY

Case No.: 2019CA000125

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OPENING BRIEF

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with all requirements of C.A.R. 28, 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

☑ It contains 8,290 words.

/s/ Katayoun A. Donnelly
Katayoun A. Donnelly, #38439

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STATEMENT OF THE ISSUES

1. The District Court erred when it determined that the Basalt Town Council fully complied with the Colorado Open Meetings Law's requirement that prior to convening an executive session, a local public body must announce, at a public meeting, the "*the particular matter* to be discussed [in the executive session] in as much detail as possible without compromising the purpose for which the executive session is authorized," where the Town Council failed to publicly announce *any* "*particular matter* to be discussed," but instead recited only the statutory text that identifies the "topic[s] for discussion" for which executive sessions are authorized.
2. The District Court erred when it ruled that (a) compliance with the statute was not required for any executive session convened for attorney-client communications and (b) compliance was excused for personnel matters by contractual commitments or purported employee privacy interests.
3. The District Court erred when it denied Plaintiff's request to order release of the audio recording of the April 26, 2016 closed-door session,

in which "personnel matters" relating to a former Town employee were discussed.

STATEMENT OF THE CASE

This lawsuit was brought by a citizen to challenge a range of practices by his town government that denied the public its statutory rights to transparency under the Colorado Open Records Act (CORA) and the Colorado Open Meetings Law (COML). CF, p. 60.[1]

For months, Basalt resident Theodore Guy observed Basalt Town Council meetings at which executive sessions were *improperly convened* – without any public announcement of *any* "particular matter to be discussed" behind closed doors. Prior to filing this suit, Mr. Guy sent multiple letters, directly and through retained counsel, urging his elected public servants to comply with the State's sunshine laws, but to no avail.[2] CF, pp. 14-16, 32-35, 41-45. Mr. Guy was thus

[1] The certified record is not paginated. The page numbers in record citations refer to the PDF page number.

[2] In addition, for years, the Basalt Town Council routinely conducted public business outside of public view, through meetings of Town Councilors conducted via emails and text messages, even though the Town Council's use of emails to conduct secret meetings had long been acknowledged as a violation of the OML by the town's former Town Manager. *See, e.g.,* Scott Condon, *Basalt Mayor Violated Open Meetings Law While Raising Concerns Over Willits Review*, Aspen Times (Dec. 16, 2015) ("Scanlon said the town recognized an infraction occurred, informed everybody involved, and the mayor was notified that type of communication shouldn't occur again."),

compelled to file this lawsuit to make his elected officials comply with the COML and the CORA.

On October 6, 2016, Mr. Guy filed an application for an order to show cause pursuant to § 24-72-204(5), C.R.S., and a complaint for declaratory judgment, seeking relief pursuant to § 24-6-402(8), C.R.S. ("Complaint"). CF, pp. 59-79. The Complaint included various claims pursuant to the CORA, §§ 24-72-200.1, *et seq.*, C.R.S. and the COML, § 24-6-402, C.R.S.

The First through Fourth Claims sought a judicial declaration that the Town of Basalt ("the Town") violated the COML by failing to announce publicly any "particular matter(s)" that were to be discussed behind closed doors on four dates (April 26, May 24, August 9, and August 11, 2016) ("the Improperly-Convened Executive Sessions") and requested all existing recordings of purported executive sessions the Town Council had improperly convened. The Fifth Claim sought a

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https://www.aspentimes.com/news/basalt-mayor-violates-open-meetings-law-while-raising-concerns-over-willits-review/.
The town's Mayor routinely deleted these emails and text messages, in which town business was discussed. *See, e.g.,* Scott Condon, *Retention of Texts Between Mayor, Clerk at Center of Basalt Battle*, Aspen Times (June 4, 2016) ("Town Manager Mike Scanlon said Friday the town government will work on procedures for saving work-related texts 'because it's apparent we need one.'"), https://www.aspentimes.com/news/retention-of-texts-between-mayor-clerk-at-center-of-basalt-battle/.

declaration that the Town violated the COML by having discussed public business, among three or more members of the Town Council, via text messages and e-mails without the necessary public notice and right of the public to contemporaneous attendance at such "public meetings." The Sixth Claim sought access under the CORA to public records: any existing audio recordings of the four Improperly-Convened Executive Sessions. The Seventh Claim sought access under the CORA to certain text messages and e-mails of Town officials that the Mayor had deleted.

At the hearing on the Order to Show Cause, prompted by the Sixth Claim's application to inspect audio minutes of the Improperly-Convened Executive Sessions, the former Town Attorney for Basalt testified that it was the Town's routine practice, throughout his tenure there, to not announce publicly any "particular matter" that was to be discussed in an executive session. TR [12/8/16], 141:12-143:8. Thus, it was established that each time the Town Council convened what it claimed to be an "executive session," the Town would publicly announce *only* (1) the statutory provision that authorized an executive session to discuss a topic, *and* (2) the words of that statutory provision (e.g., "personnel matter," or "matters subject to negotiation"). In other words, as Mr. Guy had observed, the public was *never* provided any information that satisfied the independent statutory

requirement that the Town Council publicly announce "the *particular* matter" that it was going to discuss behind closed doors.

Notwithstanding this undisputed evidence, the District Court found that the Town had fully complied with the COML's procedures for announcing the topics and conducting the Improperly-Convened Executive Sessions regarding the "personnel matters" and "legal advice on specific legal questions." CF, pp. 701-06.

As to attorney-client conferences, there was no evidence that the subject matter of the consultation was intended to be kept confidential or that its disclosure would compromise the privilege in this case. Nonetheless, the District Court ruled that because in *some* cases the subject matter of an attorney consultation *may* be a client secret, disclosure of the subject matter should not be required in *any* case. CF, pp. 701-03.

As to discussions of "personnel matters," the District Court ruled that because of the contractual commitments the Town had made to the former Town Manager and because any announcement of the topic would invade his privacy, no disclosure of the particular matter to be discussed in "personnel matters" executive sessions was required. CF, pp. 703-06.

The District Court, however, found that the purported executive sessions involving property issues which only announced the topic as "purchase,

acquisition, lease, transfer, or sale of property interests" were not properly convened because there were no "specific market concerns or other matters that would reasonably prevent the Town from at least identifying what the property and negotiations were." CF, p. 706. Accordingly, it determined that the transcripts and recordings of the April 26, 2016, May 24, 2016, and August 9, 2016 closed door meetings regarding "the purchase, acquisition, lease, transfer, or sale of any real, personal, or other property interest" were public records that the Town Council must provide to Mr. Guy. CF, p. 711.

Even though the District Court held that the Town Council had violated the COML, it made it abundantly clear that in its view the Town's routine practice of not announcing any "particular matter" it was going to discuss behind closed doors was a mere "hyper-technical" violation and even described the lawsuit as a waste of judicial resources that "will most likely cause more harm to the public than good." CF, pp. 707, 710.

Almost two years later, the District Court resolved Mr. Guy's Fifth Claim by partially granting his motion for summary judgment, holding that the Town Council also had also violated the COML by unlawfully convening "meetings" via electronic communications in which they discussed "public business absent public

notice and without opportunity for the public to observe and participate in the process," in two of the four occasions Mr. Guy had challenged. CF, pp. 821-23.[3]

Thus, Mr. Guy's lawsuit has already resulted in significant reform of the Town Council's practices. The District Court's finding that the Town Council's common practice of convening "public meetings" via emails violated the COML, CF, pp. 706-07, has curtailed that unlawful practice. And the Town Council started announcing some (but– due to the District Court's ruling – not all) "particular matters" that would be discussed in properly convened executive sessions.[4] Thus, Mr. Guy's lawsuit has already achieved *some* of its statutory purpose by compelling the Basalt Town Council to alter its anti-transparency practices and to comply with the law.

Nevertheless, the District Court described Mr. Guy's efforts as a disservice to the public interest, and an effort intended only to "punish" elected officials through imposition of costly attorneys' fees. *See also* TR [12/8/16], 10:19 – 11:8 & 15:6 – 6 (characterizing Mr. Guy's resort to the courts to compel the Basalt Town Council to comply with the COML as his attorneys' attempt to generate

[3] In finding that one of the four email exchanges did not constitute a "meeting" among a quorum of the Town Council, CF, p. 822, the District Court overlooked the affidavit of one Town Councilor in which she testified that she had shared that email with *all members* of the Town Council. *Id.* at 780.

[4] *See, e.g, infra* n. 15 (pointing to Minutes of Town Council meetings).

fees, with nothing "substantive here that we're going to accomplish" and inviting Mr. Guy to take that position "up to the Court of Appeals."). The District Court's language was a clear signal that in its view Mr. Guy should not recover the vast bulk of the attorneys' fees he had incurred in forcing the governing body of his home town to comply with the law – even though, to ensure that government is transparent, open and accountable to all Coloradans, the COML *requires* award of fees every time a governmental body is found to have violated it, as occurred here. *Id.* pp. 707, 710-11.

This timely appeal followed.

SUMMARY OF THE ARGUMENT

As a citizen-plaintiff seeking to enforce open, public decision-making by the town council that represents him, Mr. Guy is the prototypical plaintiff that the COML encourages and enables to act as private attorneys general on behalf of the public to enforce its provisions. *See* § 24–6–402(9); *Weisfield v. City of Arvada*, 2015 COA 43, ¶ 34 (citing *Van Alstyne v. Hous. Auth. of City of Pueblo*, 985 P.2d 97, 100 (Colo. App. 1999) (describing citizen-plaintiffs as "private attorneys general")).

Mr. Guy, acting on behalf of a group of "Concerned Citizens of Basalt," CF, p. 72, challenged the Basalt Town Council's routine and uniform practice of

failing to properly announce what "particular matters" were to be discussed in purported "Executive Session" meetings. Under settled law from this Court, any recordings, or minutes, of such improperly closed discussions are public records that the public is entitled to inspect.[5]

The undisputed facts adduced at the Show Cause hearing established that, before Mr. Guy filed his Complaint, the Basalt Town Council, as a matter of routine practice, failed to publicly identify *any* "particular matter" that was going to be discussed behind closed doors in Improperly-Convened Executive Sessions.[6]

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[5] The testimony of the former Town Attorney established that there are no recordings of any discussions related to legal advice sought or given during the Improperly-Convened Executive Sessions. CF, pp. 4:21-4, 28:6-7, 88:17-9, 89:4-7, 120:23-5.

[6] The former Town Attorney testified that it was his routine practice to have members of the Town Council announce *only* the "topic" that was to be discussed, reciting verbatim the applicable text from § 24-6-402(4)(f), C.R.S., prior to voting to convene a purported "executive session," and they read from a standardized form he'd provided the Town Council. TR [12/8/16], 141:12-143:8. Furthermore, *Mr. Smith testified that the blank on that form for identification of "[t]he particular matter to be discussed is _____" was* ***never*** *filled in or announced to the public*. *Id.* at 144:16-146:7; *see also* Ex. 1 at 3 (form used to announce the closed-door meeting of Apr. 26, 2016); Ex. 4 at 2 (form used to announce the closed-door meeting of Aug. 11, 2016).

This routine practice is easily confirmed by consulting minutes of prior Town Council meetings at which purported "executive sessions" were announced. *See*, *e.g.*, https://www.basalt.net/AgendaCenter/ViewFile/Minutes/_04262016-283 https://www.basalt.net/AgendaCenter/ViewFile/Minutes/_03082016-272

The District Court, however, concluded that the Town Council's actions did not violate the COML because it found (1) the statutory language is ambiguous, requiring the court's incorporation of a reasonableness element, (2) the Town entered in a contract with a former employee that purportedly prohibited it from complying with the statue, (3) the former employee's (undescribed) privacy interest prohibited the Town Council from complying with the statute, and (4) compliance with the statute by announcing the "particular matter" would violate attorney-client privilege every time the Town Council met with its attorney to discuss legal issues.

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https://www.basalt.net/AgendaCenter/ViewFile/Minutes/_02232016-270; https://www.basalt.net/AgendaCenter/ViewFile/Minutes/_02092016-263; https://www.basalt.net/AgendaCenter/ViewFile/Minutes/_12082015-252; https://www.basalt.net/AgendaCenter/ViewFile/Minutes/_05052015-173; https://www.basalt.net/AgendaCenter/ViewFile/Minutes/_04222014-98; https://www.basalt.net/AgendaCenter/ViewFile/Minutes/_01142014-17; https://www.basalt.net/AgendaCenter/ViewFile/Minutes/_08132013-9; https://www.basalt.net/AgendaCenter/ViewFile/Minutes/_07232013-23; https://www.basalt.net/AgendaCenter/ViewFile/Minutes/_01122010-61. All of these public records are subject to judicial notice. *See Colo. Dep't of Labor & Emp't, Div. of Workers' Comp. v. Dami Hosp*., LLC, 2019 CO 47, ¶ 35 n.6 (taking judicial notice of information available on official government website); *Hanlen v. Gessler*, 333 P.3d 41, 46 n.8 (Colo. 2014) (same); *Shook v. Pitkin Cty. Bd. of Cty. Comm'rs*, 2015 COA 84, ¶ 12 n.4, 411 P.3d 158, 161 n.4 (same).

This appeal arises, in large part, from the District Court's incorrect view of the value of this State's statutes, which bar governmental bodies from formulating public policy outside of public view. The District Court's interpretation of the COML, if it were affirmed by this Court, would eviscerate a specific statutory provision – added to the COML in 2001 – that before a public body may lawfully exclude the public from attending a discussion of public business, the public body is required to announce *in a public meeting*, the "particular matter to be discussed" so the public is not kept in the dark about what public business its elected officials are discussing behind closed doors.

The District Court's interpretation of the plain statutory text cannot be affirmed without rendering a portion of the COML meaningless, substituting the Court's views of the value of transparency in government for that of the legislature, creating a blanket privilege for anything related to attorney-client interactions behind closed doors, and authorizing Appellees (and other public bodies) to rely on a void/voidable contract to carve out a new exemption from the clear and unambiguous mandates of the COML.

ARGUMENT

BECAUSE THE FOUR PURPORTED "EXECUTIVE SESSION" MEETINGS WERE NOT PROPERLY CONVENED, THEY WERE IMPROPERLY CLOSED PUBLIC MEETINGS, AND THE MINUTES THEREOF ARE PUBLIC RECORDS SUBJECT TO THE CORA

Standard of Review/Preservation

This Court reviews the District Court's interpretation of the COML *de novo*. *Colo. Off-Highway Vehicle Coalition v. Colo. Bd. of Parks & Outdoor Rec*., 292 P.3d 1132, 2012 COA 146, ¶ 22; *Wolf Creek Ski Corp. v. Bd. Of County Comm'rs*, 170 P.3d 821, 825 (Colo. App. 2007).

This issue was raised in the Complaint, the Plaintiff's Hearing Brief, Proposed Findings of Fact and Conclusions of Law, and ruled upon the in the District Court's January 10, 2017 Order. CF, pp. 59-79, 541-54, 613-33, 688-712.

Analysis

I. THE DISTRICT COURT'S STATUTORY INTERPRETATION FOCUSES ON AN ISSUE THAT WAS NOT BEFORE THE COURT

In Colorado, "the formation of public policy is public business and may not be conducted in secret." § 24-6-401, C.R.S. "The intent of the Open Meetings Law is that citizens be given the opportunity to obtain information about, and to participate in, the legislative decision-making process." *Gumina v. City of Sterling*, 119 P.3d 527, 530 (Colo. App. 2004) (citing *Cole v. State*, 673 P.2d 345, 349

(Colo. 1983)). Thus, the default rule under the COML is that *all* discussions of public business among a quorum of a local public body are to be conducted following public notice and affording the public the opportunity to observe, in real time, those discussions. Our Supreme Court has explained that the statute protects the "public's right of access to public information," a right that is vitally important to our democratic system of government. *Cole*, 673 P.2d at 350; *see also Benson v. McCormick*, 578 P.2d 651, 653 (Colo. 1978) ("Our Open Meetings Law . . . reflects the considered judgment of the Colorado electorate that democratic government best serves the commonwealth if its decisional processes are open to public scrutiny."). In *Cole*, the Supreme Court described how the statute furthers the democratic process:

> The intent of the Open Meetings Law is that citizens be given the opportunity to obtain information about and to participate in the legislative decision-making process which affects, both directly and indirectly, their personal interests. A citizen does not intelligently participate in the legislative decision-making process merely by witnessing the final tallying of an already predetermined vote.

673 P.2d at 349. Because of the important public interests advanced by this statute, it "should be interpreted most favorably to protect the ultimate beneficiary, the public." *Id.; Weisfield*, 361 P.3d at 1071-72.

Accordingly, all exemptions from the COML's default rule that a public body's meetings be open to the public must be narrowly construed, ensuring as

much public access as possible. *See Gumina*, 119 P.3d at 532 ("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 Cty. 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).[7]

To further the purpose of the statute, the Colorado General Assembly (and past Governors) have put in place a very specific set of "procedural" requirements for public bodies to *properly* convene an "executive session," which is an authorized *exception* to the general requirement that all discussions of public business are to be conducted in public view. Under section 24-6-402(4), a local public body, such as the Town Council, is required to announce, in a public meeting: (1) the topic for discussion in the proposed executive session, (2) include

[7] "[B]ecause open meeting laws 'are remedial,' [courts] apply 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) ("As a rule, [the Open Meetings Law] 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) (same, recognizing that the COML was "designed *precisely* to prevent the abuse of 'secret or 'star chamber' sessions of public bodies'" (citation omitted) (emphasis in original)).

a specific citation to the provision of § 24-6-402(4) authorizing the body to meet in an executive session, **and** (3) identify, in that announcement, *the particular matter to be discussed* in as much detail as possible without compromising the purpose for which the executive session is authorized. § 24-6-402(4) C.R.S.[8]

The three independent statutory requirements for announcing an executive session must be strictly complied with for an executive session to be valid. *Gumina*, 119 P.3d at 530, 532. If a local public body does not follow all of the statutory requirements for convening an executive session, the closed-door discussion that follows is *not* an "executive session" but instead is considered an open meeting (that was unlawfully closed to the public). *Zubeck v. El Paso Cty.*

[8] As explained below, the third statutory requirement, set off by the word "and," was specifically added to the two other statutory announcement requirements by an amendment passed into law in 2001. That additional language was prompted by exactly the type of boilerplate, non-informative "topic only" announcements, such as the one by the Basalt Town Council that gave rise to Mr. Guy's lawsuit. *See, e.g.*, Jennifer Hamilton, Denver Post at B4, *Leaders learn records-law ropes Closed-session minutes now saved*, 2001 WLNR 14216301 (Oct. 29, 2001) (quoting Ed Otte, then Executive Director of the Colorado Press Association: "We heard complaints that leaders gave very vague reasons for going into executive sessions," he said. "It made them suspicious. Were they abusing that method of having privileged conversations?"); John Sanko, Rocky Mtn. News at 17A, *Bill Would Keep A Foot In The Door-- Senate Panel Oks Measure To Record Closed Meetings*, 2001 WLNR 779572 (Apr. 19, 2001) (noting that under the HB-1391, "[p]olicy-making bodies would be required to be specific about the reason for going into executive session" and quoting bill sponsor Senator Run Tupa: "I do think there are abuses of the executive sessions now."). CF, p. 625 (Plaintiff's Proposed Findings at 13 n. 9).

Retirement Plan, 961 P.2d 597, 601 (Colo. App. 1998); *Gumina*, 119 P.3d at 531 (holding that "[i]f an executive session is not convened properly, then the meeting and the recorded minutes are open to the public."); *Bjornsen v. Bd. of Cty. Commr's*, 2019 COA59 ¶ 16 (same).

The *only* question before the District Court was whether the Town Council had complied with the third statutory requirement for properly convening an executive session – that it publicly announced *some* "particular matter" that was to be discussed outside the public view. *See, e.g.*, TR [12/8/16], 9:23 – 10:16 & 36:11-37:1 (Mr. Guy's counsel making clear that Plaintiff was *not* seeking any *in camera* review of the audio recordings to determine whether discussions were unauthorized), CF, p. 699 (noting that "the parties [had] stipulated that . . . there was no substantial discussion of any matter not enumerated in COML").

It is well established that a court should not decide more than is necessary to dispose of the issues before it. *Denver by Bd. of Water Comm'rs v. Consol. Ditches Co. of Dist. No. 2*, 807 P.2d 23, 38 (Colo. 1991) ("It is axiomatic that 'courts exist for the purpose of deciding live disputes involving 'flesh-and-blood' legal problems with data 'relevant and adequate to an informed judgment.'")); *People v. Lybarger*, 700 P.2d 910, 915 (Colo. 1985) ("Requiring a court to restrict its decision to those claims raised by the parties in the specific controversy enhances the prospect that

any final judgment will proceed from a factual and legal analysis of the actual dispute presented to the court."); *see also Smeal v. Oldenettel*, 814 P.2d 904 (Colo. App. 1991) (courts should avoid addressing issues that are unnecessary to disposition of the case); 21 C.J.S. Courts § 179 (2007) ("Under the cardinal principle of judicial restraint, if it is not necessary to decide more, then it is necessary not to decide more.").

Here, it is undisputed that *as a matter of practice* (when publicly announcing that it was going to convene an executive session meeting) the Town Council *only* cited the subsection of 24-6-402(4) authorizing the body to meet in an executive session, and quoted, verbatim, that statutory text (*e.g.*, "personnel matters" or "real estate transactions") – but it ***never*** publicly identified ***any*** "particular matter" to be discussed, much less provided *any* detail.[9] TR [12/8/16] 144:16-146:7. Thus, the undisputed evidence established that the Town Council's announcements, in advance of meetings conducted outside of public view, violated the COML's strict announcement requirements.[10]

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[9] The Town cited four alternative statutory bases for the closed-door meetings under COML: "personnel matters," "legal advice on specific legal questions," "purchase, acquisition, lease, transfer, or sale of property interests," and "Determining positions relative to matters that are or may become subject to negotiations." CF, pp. 693.

[10] These were the topic announcements for the Improperly-Convened Executive Sessions:

The District Court, however, disregarded the issue before it, *i.e.*, whether the Town Council provided *any detail* to allow "identification of the particular matter to be discussed," and converted this issue into something that was not raised, *i.e.*, the *sufficiency* of the *nonexistent details*, concluding:

> 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 [sic] 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.

[CF, p 698 [January 10, 2017 Order].) (emphasis added).

By construing the statutory phrase "in as much detail as possible . . ." as including a "reasonableness" constraint, the District Court addressed an issue that was unnecessary to resolve the dispute before it. The question presented was <u>not</u> *how much detail must be provided* in describing "the particular matter to be

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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).

See, e.g., CF, p. 693.

discussed," but a simple binary question: did the Town Council publicly announce *any* "particular matter to be discussed" or did it announce *none* at all? Because the answer to that threshold question was "no, it did not," it was unnecessary to delve into the hypothetical question of what standard should be applied when the claim is that an announcement of a "particular matter" was not sufficiently "detailed."[11] The only question raised by Mr. Guy was simple: does the Town Council's routine failure to identify *any* "particular matter to be discussed" (whether in detail or not) violate the COML?[12] The plain language of the statue is unambiguous and answers the question before the Court in the positive.[13]

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[11] This was precisely the question this Court addressed in *WorldWest, LLC v. Steamboat Sch. Dist. RE-2 Bd. of Educ.*, No. 07-CA-1104, 37 Media L. Rep. 1663, 1666 (Colo. App. Mar. 26, 2009) (even thought this opinion is unpublished, the trial court had the discretion to consider it), which the District Court distinguished in its Order. CF, pp. 705-06. In that case, this Court held that even announcements that went beyond the bare statutory description of "topics" to be discussed in executive sessions, did not satisfy the statutory requirement of announcing the particular matter to be discussed with the requisite specificity.

[12] "[I]t is the public body that bears the burden to demonstrate that any 'meeting' was properly convened and conducted, including its compliance with the advance notice requirements." *Zubeck*, 961 P.2d at 600.

[13]The District Court also *sua sponte* addressed two issues that were never raised by Mr. Guy: (1) the District Court conducted an *in camera* review of the two audio recordings of April 26 and August 9 meetings, even though *no request for such review was made* in Mr. Guy's complaint, CF, pp. 59-79, and the parties had stipulated that "there was no substantial discussion of any matter not enumerated in COML," CF, p. 699; TR [12/8/16], 9:23-10:16 & 36:11-37:1 (making clear that Mr. Guy was not seeking *in camera* review of the audio recordings); (2) the

II. THE TRIAL COURT'S STATUTORY INTERPRETATION CREATES ADDITIONAL EXCEPTIONS THAT THE PLAIN LANGUAGE OF THE STATUTE DOES NOT SUGGEST OR WARRANT

Under the District Court's statutory interpretation it concluded that requiring Appellees to comply with the "identifying the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized," clause of Section 24-6-402 ("Clause") would violate the Town's attorney-client privilege and a former Town employee's privacy rights and could subject the Town to an (unmeritorious) claim by him for breach of a contract (because the former Town Attorney's employment contract included a provision that purportedly prohibited the Town from disclosing the information required by the clause).[14]

"Statutes should be interpreted to effect the General Assembly's intent, giving the words in the statute their plain and ordinary meaning." *Wolf Creek Ski Corp.*, 170 P.3d at 825. "A statute should be interpreted as a whole, giving effect to

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District Court also *sua sponte* denied a request for injunctive relief (CF, p. 710) despite the fact that Mr. Guy had *never sought any injunctive relief*. CF, pp. 59-70; *see also* TR [12/8/16], 9:22-10:16.

[14] Even if valid, the terms of the former employee's contract do not bar the announcement of the topic of a non-public meeting (it only bars the Town from discussing two topics in public meetings). Supr. Ex. 7 at 3.

all of its parts." *Id.* "If the statutory language unambiguously sets forth the legislative purpose," the appellate court does not need to apply additional rules of statutory construction to determine its meaning. *Allely v. City of Evans*, 124 P.3d 911, 913 (Colo. App. 2005).

"In assessing the plain language, the court should not read a statute to create an exception that the plain language does not suggest, warrant, or mandate." *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 35 (Colo. 2000). The District Court's conclusion that a public body is never required to disclose *any* "particular matter to be discussed" when a public body receives legal advice from its counsel, CF, pp. 701-02, however, impermissibly adds a new exception to the statute. *See Telluride*, 3 P.3d at 35 ("we do not read the statute to create an exception the plain language does not suggest."); *Gumina*, 119 P.3d at 532 (exceptions to the executive session requirements in the Open Meetings Law are to be strictly construed).

Neither of the District Court's above-mentioned arguments – for which it did not cite any legal authority – find support in legal precedent. In addition, there is nothing in the plain language of the COML that would allow any further restriction – or, as the District Court's interpretation suggests, complete elimination – of section 24-6-402(4)'s requirement that to lawfully convene an

"executive session" the local public body, in its announcements regarding "personnel matters" and "legal advice on specific legal questions," must "identify[] the particular matter to be discussed." C.R.S. § 24-6-402(4). The District Court's interpretation would render that separate, independent clause nugatory and would eviscerate one central purpose of the COML: to provide the citizens of every jurisdiction *as much information as possible* about what their elected officials are discussing outside of public view.

The District Court's judicially grafted exceptions to the plain language of a statute that hints of no such exceptions violates well-established and dispositive rules of statutory construction.

The use of the word "and" in a statute is ordinarily intended to be conjunctive—that is, "where a statute connects requirements by means of 'and,' [all] requirements must be met for the operative provision to apply." *Krol v. CF & I Steel*, 307 P.3d 1116, 1119–20 (Colo. App. 2013) (citations omitted). 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 one that would render independent statutory terms codified by the General Assembly meaningless or mere surplusage. *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) (holding that a court must avoid a statutory construction that would render meaningless a distinction between two statutory terms).

A. The trial court's interpretation impermissibly creates a blanket privilege for all attorney-client communications and eliminates the statutory clause, rendering it meaningless

The District Court held that "[t]he 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." CF. p. 702. In so holding, the District Court eliminated the statutory requirement of "identifying the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized," whenever any executive session is convened for purposes of receiving specific legal advice from a public body's attorney. The COML authorization for executive sessions for attorney-client communications, as well as the attorney-client privilege itself, does not automatically extend to every exchange between an attorney and her client; it applies only to communications between attorney and client that (1) are intended to be confidential *and* (2) are related to the receipt of legal advice from the attorney. *Wesp v. Everson*, 33 P.3d 191, 197 -98 (Colo. 2001). Moreover, attorney-client privilege does not attach to the subject matter of the communications. *C.J. Calamia Constr. Co. v.*

Ardco/Traverse Lift Co., L.L.C., NO. 97-2770, 1998 U.S. Dist. LEXIS 10580, at *8 (E.D. La. July 13, 1998) ("the attorney-client privilege attaches to the substance of the communications exchanged; mere inquiry into the subject matter of the communications is not precluded.") (*citing Westhemeco Ltd. v. New Hampshire Ins. Co.*, 82 F.R.D. 702, 707 (S.D.N.Y. 1979)).

Even for a litigant to withhold discovery under a claim of privilege, a party must describe the nature of the withheld information in a privilege log "with sufficient detail so that the opposing party and, if necessary, the trial court can assess the claim of privilege as to each withheld communication." *DCP Midstream, LP v. Anadarko Petroleum Corp*., 2013 CO 36, ¶ 44 (citing *Alcon v. Spicer*, 113 P.3d 735, 742 (Colo. 2005)). This usually includes a general description of the subject matter of the communication, *e.g.*, "the Briscoe litigation" or "potential legal claims against X." *See*, *e.g.*, *Friends of Hope Valley v. Frederick Co*., 268 F.R.D. 643, 650–651(E.D. Cal. 2010) (in general, a privilege log should provide the identity and capacity of all individuals who authored, sent, or received each allegedly privileged document, the document's date, *a brief description of the document and its contents or subject matter sufficient* to determine whether the privilege applies).

In addition,

> unlike outside counsel, in-house attorneys can serve multiple functions within the corporation. In-house counsel may be involved intimately in the corporation's day to day business activities and frequently serve as integral players in business decisions or activities. Accordingly, communications involving inhouse counsel might well pertain to business rather than legal matters. The privilege does not protect an attorney's business advice. Corporations may not conduct their business affairs in private simply by staffing a transaction with attorneys.

United States v. ChevronTexaco Corp., 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002) (citations omitted).

The District Court noted that in *some* cases the subject matter of the communication *may be* an attorney-client secret. For a public body, however, such a secret would be a rarity. And in this case, no claim of subject-matter secrecy was made.[15] The District Court's ruling authorizes non-disclosure of subject matter

[15] When the former Town Attorney was asked to explain how announcing the subject matter of the legal advice he provided the Town Council during the April 26, 2016 closed-door meeting would have undermined the purpose for which that closed-door discussion was convened, he was unable to offer any such explanation. *See* Hr. Tr. 169:12 –170:3. And, in fact, following the efforts by Mr. Guy (and other Basalt residents) to bring the Town Council into compliance with the COML, the Town Council demonstrated that announcing the topic of an attorney counseling discussion does *not* undermine the purpose of that provision: *see, e.g.*, Basalt Town Council Minutes of Sept. 6, 2016 (announcing that legal advice would concern "1) An August 25, 2016 Open Records Act request from Ted Guy and others; and 2) Mike Scanlon'[s] employment and his employment agreement"), https://www.basalt.net/AgendaCenter/ViewFile/Minutes/_09062016-322; Basalt Town Council Minutes of Oct. 18, 2016 (announcing that legal advice would concern "the Eagle County District Court Case *Guy v. Whitsitt*"), https://www.basalt.net/AgendaCenter/ViewFile/Minutes/_10182016-334

whether secret or not – and to that extent it achieves judicial repeal of valid legislation. How this applies when the subject of the consultation *is* legitimately secret is a question that should be addressed in a case that presents it, not in the abstract, as here.

B. The District Court's interpretation would impermissibly authorize public bodies to frustrate the purpose of the COML by entering into void/voidable private contracts

The District Court also held 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.

CF, p. 706.

It is well established that "public employees have a narrower expectation of privacy than other citizens." *Denver Pub. Co. v. Univ. of Colorado*, 812 P.2d 682, 684–85 (Colo. App. 1990). Appellees cannot frustrate the purpose of the COML by entering into contracts that would, through such undertaking, create new exemptions to that statute. *See generally id*. (citing *Freedom Newspapers, Inc. v. Denver & Rio Grande R.R. Co*., 731 P.2d 740 (Colo. App. 1986) (holding "in light

of the clear intent of the Open Records Act, it is unreasonable for the defendants to have assumed they could restrict access to the terms of employment between a public institution and those it hires merely by placing such documents in a personnel file."); *id.* at 685 ("Drake, the university, and the arbitration group agreed that information concerning the settlement process would remain confidential, but such agreements alone are insufficient to transform a public record into a private one."); *Denver Pub. Co.*, 812 P.2d at 684 (holding that certain documents that had been placed in a personnel file "either did not implicate a privacy right or contained information routinely disclosed to others" and "were not entitled to the blanket nondisclosure exception prescribed by the statute."); *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1155 (Colo. App. 1998) (the prohibition of disclosure of personnel files did not "exempt from disclosure an employee's name simply because it [was] an item of information contained in a personnel file."); *Daniels*, 988 P.2d at 651 ("A public entity may not restrict access to information by merely placing a record in a personnel file; a legitimate expectation of privacy must exist.").

Put simply, a public body cannot, by contractual commitment, absolve itself from complying with the COML. The Town Council could no more legitimately contractually commit not to discuss its budget in a public meeting than it could

commit itself, contractually, to not comply with the public announcement requirement for convening lawful executive sessions. S*ee Rademacher v. Becker*, 2015 COA 133, ¶ 10 ("Colorado courts will not enforce a contract that violates public policy.") (*citing Russell v. Courier Printing & Pub. Co*., 95 P. 936, 938 (Colo. 1908)).

In addition, the District Court did not provide any analysis of the nature of the former Town Manager's speculative privacy interest. As such, it is not clear, and this Court cannot examine, whether such an interest actually exists. *See Jefferson Cty. Educ. Ass'n v. Jefferson Cty. Sch. Dist. R–1*, 2016 COA 10, ¶ 52 ("'unfettered delegation of authority to the custodian' to determine whether 'records belong in personnel files' is contrary to CORA's expressed policy."); *Cowles Publ'g Co. v. State Patrol*, 109 Wash.2d 712, 726, 748 P.2d 597 (1988) (instances of misconduct in the course of the job performance of a public official or employee subject to the public records act are not matters of personal privacy).

Furthermore, regardless of the alleged nature of the former Town Manager's privacy interest, the Colorado Supreme Court has already determined that the express provisions of the CORA, namely, the definition of "public records" set forth in section 24–72–202(6)(a), C.R.S. (2019), protect the privacy interests at issue. *Denver Pub. Co. v. Bd. of Cty. Comm'rs of Cty. of Arapahoe*, 121 P.3d 190,

191–92 (Colo. 2005). This analysis equally applies to the COML as it only requires "identifying the particular matter to be discussed in *as much detail as possible without compromising the purpose for which the executive session is authorized*." C.R.S. § 24-72-204(4) (emphasis added).

In addition, any term in the employment contract between the Town and its former Town Manager that violates the COML is void, voidable, and unenforceable as a matter of public policy. *See e.g., Bailey v. Lincoln Gen. Ins. Co.*, 255 P.3d 1039, 1045 (Colo. 2011) ("[contractual provisions that] violate public policy may be declared void and unenforceable.")); *Rademacher*, 374 P.3d at 50 (same); *Woodward v. Jacobs*, 541 P.2d 691, 692 (Colo. App. 1975) ("Where a transaction is in violation of the plain terms of a statute and where the parties know they are violating the law, the courts will leave the parties where they find them, and will not lend their aid to enforce the contract or grant relief to one of the parties") (citation omitted); *Pierce v. St. Vrain Valley Sch. Dist. RE-1J*, 981 P.2d 600, 604 (Colo. 1999) ("It is well-established that contracts in contravention of public policy are void and unenforceable.") (collecting cases). Even *if* the required disclosure of the public record (the audio recording of the April 26, 2019 closed-door meeting), subject to the Court's order, could give rise to a valid breach of the contract action by the former Town Manager (which is practically unimaginable),

the District Court's duty was to enforce the law as written, not to save the Town from the consequences of its failure to comply with the COML.

Nor is there any evidence in the record to support the District Court's view that the former Town Manager had asserted a valid personal privacy interest, independent of his employment contract, that excused the Town Council from complying with the COML. It cannot be credibly argued that merely announcing publicly that an executive session will be convened to discuss the Town Manager's contract, or even his job performance, breaches a contractual commitment not to *discuss* the substance of those matters "in a public meeting." CF, p. 706.[16] Nor could such an announcement – e.g. "we will discuss public employee John Smith's performance review" – constitute an invasion of any public employee's personal privacy. The public is well aware that public employees at the management level receive performance reviews. Furthermore, their employment contracts and performance reviews are not considered "personnel files" but instead are public

[16] Although the Town Council stated that it did not announce that the former Town Manager, Mike Scanlon, was to be the "particular matter" to be discussed in three closed-door meetings, out of fear that Mr. Scanlon would bring a breach of contract claim against the Town, the evidence at the Show Cause hearing indicated that the former Town Attorney never asked Mr. Scanlon if he would object to such an announcement. *See* TR [12/8/16], 154:16 - 156:24 (former Town Attorney testifying that the issue of what the Town should announce publicly "didn't come up").

records open for public inspection. *See* §§ 24-72-202(4.5) and 204-3(a)(II). *Daniels v. City of Commerce City, Custodian of Records*, 988 P.2d 648, 651 (Colo. App. 1999). Merely announcing publicly that such "public records" would be discussed by the Town Council behind closed doors cannot give rise to a cognizable claim for invasion of privacy. *See, e.g., Doe v. High-Tech Institute*, 972 P.2d 1060, 1065 (Colo. App. 1998) (holding that to state a claim for invasion of privacy by "publication of private facts," the Plaintiff must prove that "the disclosed fact was not of legitimate public concern"); *Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 378-79 (Colo. 1997) (holding that the publication of truthful facts contained in a public record cannot give rise to a claim for invasion of privacy).

III. IT IS NOT THE FUNCTION OF THE COURTS TO JUDGE THE WISDOM OF STATUTES OR THE WAY THEY ARE WRITTEN. THOSE ARE MATTERS FOR THE DETERMINATION BY THE LEGISLATURE. THE LAW MUST BE ENFORCED AS WRITTEN

The District Court's ruling makes abundantly clear that it disagrees with the balancing of public and private interests that the General Assembly codified in the COML. *See, e.g.*, CF, p. 707 (finding the statute's purpose and the appellate courts' requirement for strict compliance with its terms a "hyper-technical ruling that places form over substance but one that is required by Colorado law."). The

trial court stated that it "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." CF, p. 710. As a result, the District Court concluded that in spite of its findings that Town Council violated the COML, such violations were merely "technical" in nature and did not warrant the expenditure of judicial resources. *Id.*

The impermissibility of a court's rejection of valid legislative judgment is clear enough. *Kallenberger v. Buchanan*, 649 P.2d 314, 318 (Colo. 1982) ("One of the fundamental tenets of our constitutional system is that courts do not approve or disapprove the wisdom . . . or the desirability of legislative acts."); *People v. Hupp*, 123 P. 651, 653 (Colo. 1912) ("It is not for the court to inquire into the wisdom or unwisdom of . . . legislation. Whether the act be wise, reasonable, or expedient is a legislative and not a judicial question. The legislature is as capable of determining the question of the wisdom, reasonableness, and expediency of the statute, and of the necessity for its enactment") (citations omitted); *Colo. Office of Consumer Counsel v. PUC*, 42 P.3d 23, 28-29 (Colo. 2002) ("Our duty is to interpret a statute as written. . . . [I]t is not within the province of . . . this court to assess the desirability or wisdom of the . . . statute").

But Mr. Guy is constrained to observe that when the COML was specifically amended, in 2001, to require public bodies to announce "the particular matter to be discussed" in an executive session, that additional statutory requirement was deemed necessary to exercise the prerogatives of citizens in monitoring the doings of government. The announcement of "the particular matter" under consideration by a public body fulfills this role by alerting observers to which agencies, officials, or public records to watch for changes in policy or enforcement practices. That significant *substantive* change to the COML (though it required additional *procedural* safeguards for transparency) was no mere "technicality" to be ignored or belittled by the courts.

Accordingly, this Court should reverse the District Court's order. Doing so is entirely consistent with this Court's prior rulings that because the Council did not strictly comply with the requirements for convening an executive session, the two sessions were *improperly closed public* meetings (not "executive sessions" at all) and that the minutes of those meetings are subject to the public disclosure under the CORA. *Zubeck v. El Paso County Ret. Plan*, 961 P.2d 597, 601 (Colo. App. 1998) ("If a local public body does not follow all of the statutory requirements for calling an executive session, the meeting will not be considered an executive session, but instead is considered an open meeting"); *Gumina*, 119

P.3d at 531, 532 ("A local public body must comply strictly with statutory requirements to convene an executive session." "[I]f an executive session is not convened properly, then the meeting . . . [is] open to the public."); § 24–6–402(2)(b), C.R.S.

Because the undisputed evidence adduced below demonstrated that the statutorily-mandated announcement requirements for properly convening executive sessions were not satisfied by the Basalt Town Council here, the District Court erred in not finding that the COML had been violated and not ordering that the recordings of the Improperly-Convened Executive Sessions be released to Mr. Guy. *See Gumina*, 119 P.3d at 532; *Zubeck*, 961 P.2d at 601.

REQUEST FOR ATTORNEY FEES

Pursuant to § 24-6-402(9), C.R.S., Mr. Guy is entitled to an award of costs and attorneys' fees on appeal. *Zubeck v. El Paso Cty. Ret. Plan*, 961 P.2d 597, 601–02 (Colo. App. 1998); *Van Alstyne v. Hous. Auth. of City of Pueblo*, Colo., 985 P.2d 97, 99–100 (Colo. App. 1999); *Gumina*, 119 P.3d at 530.

Mr. Guy is also entitled to an award of his costs and reasonable attorneys' fees for having prevailed below (prior to, through this appeal, and for time to be spent collecting those fees). § 24-6-402(9), C.R.S.

The District Court, however, has declared, in no equivocal terms, its disagreement with this Court's binding precedent, and has rejected the public value of efforts by citizens, such as Mr. Guy, who "act as private attorneys general and through the exercise of their public spirit and private resources cause public bodies to comply with COML." *Van Alstyne*, 985 P.2d 100 (same); *see also Weisfield*, 2015 COA ¶ 34 (same).[17] In the District Court's view, " 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." CF, p. 707.

Considering the limited resources of private citizens to enforce COML, Mr. Guy respectfully requests that the Court remand the case to a different District Court Room for determination of his trial and appellate attorneys' fees.

CONCLUSION

The Court should reverse the District Court's dismissal of Mr. Guy's First through Fourth Claims, order the Town to provide him with the public records it improperly withheld, and award him his costs and fees as provided by the COML.

[17] The District Court repeatedly evinced its disdain for citizens, like Mr. Guy, who invoke the courts' authority to compel public bodies to adhere to the law. *See* CF, pp.710-11; *see also* TR [12/8/16], 10:19-11:8 (District Court declaring "as I read the statute, it was not the legislative intent to create an income stream for attorneys"); *Id.* at 12:19-13:9; 15:12-16:11.

Respectfully submitted this 9th day of July 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2019, a true and correct copy of the foregoing was served on the following counsel through the ICCES electronic court filing system, pursuant to C.R.C.P. 121(c), § 1-26,

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