DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street, Room 256 Denver, Colorado 80202 (720) 865-8301	
PRAIRIE MOUNTAIN PUBLISHING COMPANY, LLP d/b/a/ DAILY CAMERA **Plaintiff,** **v.** **THE REGENTS OF THE UNIVERSITY OF COLORADO** **Defendant.**	**▲COURT USE ONLY▲**
Attorneys for Plaintiff: Robert R. Gunning, #26550 Eric Maxfield, #29485 Maxfield Gunning, LLP 1738 Pearl Street, Suite 300 Boulder, Colorado 80302 (720) 586-8567 Rob@maxfieldgunning.com Eric@maxfieldgunning.com	Case No: 2019CV033759 Division: 275
PLAINTIFF'S OPENING BRIEF	

Plaintiff Prairie Mountain Publishing Company, LLP, d/b/a Daily Camera, ("Daily Camera"), through the undersigned counsel, in accordance with the parties' joint briefing schedule,

respectfully submits the following opening brief in support of its Complaint and Application for Order to Show Cause.

INTRODUCTION

The Regents of the University of Colorado ("Board of Regents") interviewed 6 individuals for the position of University of Colorado President in 2019. These interviews followed a lengthy vetting process that narrowed the field from over 180 applicants. Despite interviewing these final 6 candidates, the Board of Regents publicly named a sole finalist, Mark Kennedy, on April 10, 2019.[1] Several weeks later, the Board of Regents appointed Mr. Kennedy to serve as the next President of the University of Colorado. In failing to make public the names and application materials of the other 5 finalists in response to requests, the Board of Regents violated the Colorado Open Records Act ("CORA"). These CORA violations deprive the public of the right to know who was seriously being considered to lead the University of Colorado.

In an effort to vindicate this right, the Daily Camera served open records act requests on the Board of Regents in the summer of 2019. These requests, which sought the names and application materials of the finalists, were rebuffed by the Board of Regents. Following efforts to resolve the impasse in the 14-day statutory notice period, the Daily Camera filed this action to obtain a Court Order requiring the Board of Regents to comply with CORA.

[1] Once Mr. Kennedy was announced as the only "finalist," he became the de facto successful candidate and ceased being a finalist as that term is commonly understood. In characterizing the Board of Regents' position, the Daily Camera does not concede that Mr. Kennedy was a "finalist" after his public announcement.

As will be set forth in detail below, CORA provides that records submitted by a "finalist" for the University of Colorado President position are subject to public disclosure. The term "finalist" means an applicant "who is a member of the final group of applicants or candidates made public pursuant to section 24-6-402(3.5), C.R.S." § 24-72-204(3)(a)(XI)(A), C.R.S. Section 24-6-402(3.5), C.R.S. in turn provides that the "list of all finalists" for executive positions must be made public at least 14 days before the position is filled.

The Board of Regents' position that there was only one finalist for the latest CU President position vacancy is at variance with the plain and unambiguous provisions of CORA and the Colorado Open Meetings Law ("COML"). The Board of Regents' position is likewise contrary to the spirit of these sunshine laws. Moreover, to the extent the Court determines that the key statutory provisions are ambiguous, the Board of Regents' tortured interpretation conflicts with the General Assembly's intent manifested in the pertinent legislative history.

The Daily Camera therefore requests the Court to enter an Order directing the Board of Regents to disclose the names and application materials of the other five finalists. Further, the Daily Camera seeks recovery of its reasonable attorney fees and costs under § 24-72-204(5)(b), C.R.S.

FACTS

The Board of Regents are the constitutionally created governing board of the University of Colorado, a four-campus system of public higher education. As part of their responsibilities, the Board of Regents elect the University President. (Stipulation of Facts ("SOF") ¶ 2).[2] The

[2] The Stipulation of Facts and Exhibits A-M were jointly filed on November 7, 2019.

University President oversees a system of four campuses, serving more than 60,000 students and more than 30,000 employees. The combined budget of the University of Colorado system is more than $4.5 billion. The University of Colorado is more than an institution of higher education – for more than 150 years, the university has served the people of the State of Colorado. Its President "serves as CU's chief ambassador to the local, regional, national, and international communities." (Exhibit B).

After former University President Bruce Benson announced that he intended to retire in July 2019, the Board of Regents commenced a search for the next University President. (SOF ¶ 3). As an initial part of the search, the Board of Regents formed a search committee. The search committee was tasked with generating "a strong pool of candidates." (Exhibit A). Per the Board of Regents' Policy, the minimum composition of the search committee is two regents, the dean of a college, school, or library, four faculty members (one from each campus), one student, one staff member, two alumni, and four community members. (SOF ¶ 4; Exhibit A).

The Board of Regents appointed the search committee members on October 24, 2018. This committee was later supplemented by two additional members. (SOF ¶ 5). The Board of Regents also engaged a national recruiting firm, Wheless Partners, to assist in identifying and recruiting potential candidates. (SOF ¶ 6; Exhibit B). On November 8, 2018, the Board of Regents charged the search committee with identifying candidates for the Board of Regents' "ultimate consideration." (SOF ¶ 7; Exhibit B).

The private search firm received more than 180 referrals or applications. (SOF ¶ 8). From there, the search firm narrowed the field to 27 individuals that the firm believed were appropriate

for the search committee's consideration. These candidates' application materials were sent to the Board of Regents' search committee. (SOF ¶ 9).

On February 26, 2019, the search committee vetted the 27 applicants and unanimously decided to interview 11 candidates. One of these candidates decided to withdraw from the process. (SOF ¶ 10). The search committee, which included 2 of the 7 regents, then interviewed the remaining 10 candidates on March 18 & 19, 2019. (SOF ¶ 11). The search committee was charged with referring a minimum of 5 unranked candidates to the Board of Regents for the Board of Regents to consider interviewing. (Exhibit A). Following the March interviews, the search committee forwarded the names of 6 candidates to the entire Board of Regents. (SOF ¶ 12).

The Board of Regents interviewed these six candidates on April 3 & 4, 2019. Each candidate had one interview. (SOF ¶ 13). Thereafter, the Board of Regents obtained permission from candidate Mark Kennedy to publicly advance him as a finalist. On April 10, 2019, the Board of Regents adopted a public resolution that announced Mr. Kennedy as a finalist for the CU President position. (SOF ¶ 14; Exhibit C). The Board of Regents did not ask the other five candidates interviewed by them about whether they gave permission to be advanced as finalists. (SOF ¶ 14).

Following the April 10, 2019 announcement, Mr. Kennedy's application materials were made publicly available. Mr. Kennedy appeared at open forums on the four campuses, and more than 3,000 people provided feedback. (SOF ¶ 15). A majority of the individuals providing feedback rated Mr. Kennedy as weak in every listed category. (Exhibit D). The Board of Regents did not provide the public with the names or applications of the other five candidates that they

interviewed. (SOF ¶ 16). On May 2, 2019, by a 5-4 vote, the Board of Regents appointed Mr. Kennedy as the next President of the University of Colorado. (SOF ¶ 18, Exhibit G).

Several weeks later, on May 24, 2019, Daily Camera reporter Madeline St. Amour submitted a CORA request to the Board of Regents. This request asked for the "names of CU system presidential candidates who met the minimum qualifications for the position and were one of the 28 interviewed by the search committee." The request also sought the "names of CU system presidential candidates who met the minimum qualifications for the position and were one of the 6 interviewed by the Board of Regents." (SOF ¶ 19; Exhibit H). Having received no response, Ms. St. Amour followed up by email on June 12, 2019. (SOF ¶ 20). The next day, the Board of Regents' custodian of records denied the request. (SOF ¶ 21; Exhibit I).

Ms. St. Amour submitted a second CORA request on behalf of the Camera on July 9, 2019. This request sought "application documents of CU system presidential candidates who met the minimum qualifications for the position and were one of the 28 interviewed by the search committee." It also requested the "application documents of CU system presidential candidates who met the minimum qualifications for the position and were one of the 6 interviewed by the Board of Regents." (SOF ¶ 22; Exhibit J). Two weeks later, on July 23, 2019, the Board of Regents denied this request, with the exception of Mr. Kennedy's application packet, which had previously been disclosed. (SOF ¶ 23; Exhibit K). The Board of Regents' denials to both sets of CORA requests were based solely on their interpretation of §§ 24-72-204(3)(a)(XI)(A) and 24-6-402(3.5), C.R.S.

On August 12, 2019, in accordance with § 24-72-204(5)(a), C.R.S., the Daily Camera's counsel submitted a 14-day written notice to the Board of Regents' custodian of records. This

notice outlined the Daily Camera's legal position and requested a meeting to discuss the potential resolution of the matter without court involvement. (SOF ¶ 24; Exhibit L). Counsel for the Daily Camera and the Board of Regents met in person on August 26, 2019 to discuss potential resolution. The Board of Regents' counsel also expressed the Board of Regents' legal position through correspondence. (SOF ¶ 25; Exhibit M). At the conclusion of the meeting, the Board of Regents' counsel requested time to confer with the Board of Regents. On September 12, 2019, the Board of Regents' counsel communicated that its position remained unchanged, and that no additional documents would be produced. (SOF ¶ 26).

LEGAL ARGUMENT

The overriding goal of statutory construction is to effectuate the legislature's intent. *Department of Revenue v. Agilent Technologies*, *Inc.*, 2019 CO 41, ¶ 16; 441 P.3d 1012, 1016. In seeking to do so, courts look to the entire statutory scheme in order to give consistent, harmonious, and sensible effect to all of the statute's parts, applying words and phrases in accordance with their plain and ordinary meanings. *Id.* Statutory construction that renders any words or phrases superfluous or that would lead to illogical or absurd results are to be avoided. *Id.* Courts must respect the legislature's choice of language and will not add words to a statute or subtract words from it. *Id.* (citations omitted).

If the statutory language is clear, it is applied as written. *Id.* However, if the statute is susceptible to more than one reasonable interpretation, the court may look to the legislative history of the bills which resulted in the subject language. § 2-4-203(1)(c), C.R.S. Testimony taken before legislative committees is particularly instructive. *Mesa County Land Conservancy, Inc. v. Allen*, 2012 COA 95, ¶ 16, 318 P.3d 46, 51-52.

Over 180 individuals applied for the CU President position. The search firm pared this field down to 27 candidates. From there, the search committee interviewed 10 candidates. The full Board of Regents then interviewed 6 of the 10 candidates. Each of these individuals had 1 interview with the Board of Regents. This was the final round of competition. These 6 individuals were "finalists" as that term is commonly understood.

This interpretation is consistent with the plain and ordinary meaning of the operative statutory language. It is consistent and harmonious with CORA and COML, and gives coherent and harmonious meaning to each of the statutes' terms. The interpretation avoids the absurd result advanced by the Board of Regents. Further, the Daily Camera's interpretation is consonant with the legislative intent and spirit of CORA and COML. These sunshine laws promote public confidence in government through transparent operation and general policy that governmental records are public records.

If the Court finds that the statutory language is ambiguous, the legislative history behind the relevant language supports the interpretation that there were six finalists for this position. The pertinent bills creating, and later amending the relevant portions of CORA and COML were a product of compromise between the press, institutions of higher education, and school boards. They were intended to provide the public with the names of multiple finalists so that the public would have a meaningful opportunity to provide input before final decisions were made.

In contrast, the Board of Regents' interpretation conflicts with the plain and ordinary meaning of the term "finalist" and the operative statutory language. The interpretation advanced by the Board of Regents renders terms such as "list", "group", and "finalists" superfluous. It contravenes the spirit of CORA and COML, and conflicts with the General Assembly's intent as

expressed through the pertinent legislative history. The subsequent failed legislation from 2009, relied on by the Board of Regents in correspondence, sheds no light on the prior legislature's intent in crafting the key provisions.

I. The Daily Camera's Interpretation is Supported by the Plain and Ordinary Meaning of the Statutes.

The public policy of Colorado is that all public records shall be open for inspection by any person at reasonable times. § 24-72-201, C.R.S. Based on the Board of Regents' responses to the CORA requests, there is no dispute that the requested records are "public records" under § 24-72-202(6)(a)(I), C.R.S.[3] More specifically, the Board of Regents based its denial on two statutory exceptions that exclude certain documents from the ambit of "public records." One of the exceptions is found in CORA; the other in COML.

The CORA provision relied on is § 24-72-204(3)(a)(XI)(A), C.R.S. ("subsection XI(A)"). This provision excepts from disclosure "[r]ecords submitted by or on behalf of an applicant or candidate for an executive position[4] . . . who is not a finalist." By negative implication, records submitted by or on behalf of an applicant or candidate for an executive position who is a finalist are subject to disclosure. For purposes of this provision, the term "finalist" means an applicant

[3] "Public records" means "all writings made, maintained, or kept by [a] political subdivision of the state . . . for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds." § 24-72-202(6)(a)(I), C.R.S.

[4] An "executive position" is defined as "any nonelective employment position with a state agency, institution, or political subdivision, except employment positions in the state personnel system or employment positions in a classified system or civil service system of an institution or political subdivision." § 24-72-202(1.3), C.R.S. There is no dispute that the President position is an "executive position" and that the University of Colorado is an "institution." § 24-72-202(1.5), C.R.S.

"who is a *member of the final group of applicants or candidates* made public pursuant to section 24-6-402(3.5), C.R.S." (emphasis added).

Section 24-6-402(3.5), C.R.S. ("subsection 3.5")[5] provides in pertinent part that "[t]he state or local public body shall make public the *list of all finalists* under consideration for the position of chief executive officer no later than fourteen days prior to appointing or employing *one of the finalists* to fill the position. No offer of appointment or employment shall be made prior to this public notice. Records submitted by or on behalf of a finalist for such position shall be subject to the provisions of section 24-72-204(3)(a)(XI). As used in this subsection (3.5), "finalist" shall have the same meaning as in section 24-72-204(3)(a)(XI)." (emphasis added). Aside from cross-referencing subsection (XI)(A), this provision does not expressly define "finalist."

Under subsection XI(A), a finalist is statutorily defined as "a member of the final group of applicants or candidates." The terms "member" and "group" are not statutorily defined. The Court may therefore look to dictionary definitions of the term. *Oracle Corp. v. Department of Revenue*, 2017 COA 152, ¶ 59, 442 P.3d 947, 957-58, *aff'd*, 2019 CO 42, 441 P.3d 1021 (courts may refer to dictionary definitions to determine the plain and ordinary meaning of undefined statutory terms).

The term "member" means "one of the individuals composing a group." The Merriam-Webster.com Dictionary, Merriam-Webster, Inc., http://www.merriam-webster.com/dictionary/member. Accessed 26 Nov. 2019. Very recently, in interpreting the COML, the Colorado Supreme Court cited the following definition of "member" from Black's Law Dictionary: "the individuals of whom an organization or a deliberative assembly consists, and

[5] Subsection 3.5 is the COML provision relied on by the Board of Regents.

who enjoy[] the full rights of participating in the organization – including the rights of making, debating, and voting on motions." *Doe v. Colorado Department of Public Health and Environment*, 2019 CO 92, ¶ 20 (citing Black's Law Dictionary (11th ed. 2019)). These definitions confirm the common-sense notion that a "member" is one individual in a group of others.

Similarly, the term "group" means "two or more figures forming a complete unit in a composition." The Merriam-Webster.com Dictionary, Merriam-Webster, Inc., http://www.merriam-webster.com/dictionary/group. Accessed 26 Nov. 2019. Put simply, there is no such thing as a "group of one."

COML subsection 3.5, which is expressly linked to subsection (XI)(A), also demonstrates the legislative intent that more than one finalist is to be announced. Subsection 3.5 requires the Board of Regents to "make public the list of all finalists." The term "list" means "a simple series of words or numerals (such as the names of persons or objects)." The Merriam-Webster.com Dictionary, Merriam-Webster, Inc., https://www.merriam-webster.com/dictionary/list. Accessed 1 Dec. 2019. Under its plain and ordinary meaning, a "list" includes multiple items – e.g., a guest list, or a grocery list. Subsection 3.5 goes on to require that the list of "all" finalists be made public at least 14 days prior to appointing or employing "one of the finalists" to fill the position. This language is further evidence of the legislature's intent that multiple individuals be disclosed.

The legislature's use of the terms "member", "group", "list", and "one of" are consistent with the plain and ordinary meaning of the term "finalist." In common parlance, there are finalists that do not win the competition. Finalists compete in the final round of competition – e.g., there are two finalists in the Wimbledon women's tennis competition. The ultimate winner of the competition, or champion, is one of the finalists. But the victor is not the only finalist.

Here, five other individuals competed in the final round of the competition – the interviews before the Board of Regents. Under the plain, ordinary meaning of the term "finalist," there were six finalists for the 2019 CU President position.

The fact that there were multiple finalists was acknowledged by one of the Regents in an unguarded moment. In drafting a response on behalf of the Board of Regents to a Denver Post editorial, Regent Heidi Ganahl referred to the six candidates interviewed by the Board of Regents as "finalists." (Exhibit E). This candid reference was edited out of the final version which was released to the press. (Exhibit F). While not binding on the Board of Regents, this reference is understandable given the plain and ordinary meaning of the term "finalist."

To be sure, in statutory interpretation, the "singular includes the plural, and the plural includes the singular." § 2-4-102, C.R.S. While this provision could support a reading which eliminates the plural form, such a reading renders the terms "member," "group," and "list" and "one of the finalists" superfluous. Statutes should be interpreted to give meaning to every word, rendering no part of the statutory text superfluous. *Agilent*, ¶ 16, 441 P.3d at 1016. They are to be construed as a whole, giving "consistent, harmonious and sensible effect" to all parts. *Board of County Commissioners, Costilla County v. Costilla County Conservancy District*, 88 P.3d 1188, 1192 (Colo. 2004). The terms must be viewed in the context of one another.

The Board of Regents seeks refuge in the fact that subsection (XI)(A) provides that the term "finalist" means those individuals "made public pursuant to [subsection 3.5]." Even though both subsections are written in the plural, the Board of Regents has interpreted these provisions to permit the Board to self-select one of the candidates competing in the final round as the "finalist" that it will announce to the public. As set forth above, this strained interpretation is contrary to the

plain and ordinary of the terms "member," "group," and "list" in the statutes. In practice, this interpretation unduly narrows the meaning of "finalist" and deprives the public of information it is entitled to know.

The Board of Regents has contended that the pertinent statutes do not require a minimum number of finalists. This position conflicts with the final clause of subsection (XI)(A), which provides that in the event "only three or fewer applicants or candidates for the chief executive officer position possess the minimum qualifications for the position, said applicants or candidates shall be considered finalists." § 24-72-204(3)(a)(XI)(A), C.R.S. This provision further expresses the legislative intent that, unless only one applicant meets the minimum qualification for an executive position, there be more than one finalist.

In the face of this clause, the Board of Regents' position that they may disclose only one finalist when there are more than three individuals who meet the minimum qualifications does not make logical sense. If the statute requires that three finalists be named when only three individuals meet the minimum qualifications, it is absurd to read the statute permitting the disclosure of only one finalist when more than three individuals meet the minimum qualifications. Absurd interpretations should be avoided. *Agilent*, ¶ 16, 441 P.3d at 1016; *Doe*, ¶ 20. Reading the statute as a whole, the only time a sole finalist may be named is when only one individual met the minimum qualifications.

Moreover, Regents Policy 3-E dictates that the search committee forward the names of at least five candidates to the Board of Regents for the final round. In the subject search, the search committee sent six candidates to the Board of Regents. Under these undisputed facts, there were six finalists for the 2019 CU President position.

The Daily Camera's interpretation is also consistent with the intent and spirit of the sunshine laws. The General Assembly has declared that the public policy of the state is that all public records are open for inspection by any person at reasonable times, except as otherwise provided. § 24-72-201, C.R.S. CORA provides that public records shall be open to public inspection. § 24-72-203(1)(a), C.R.S. Thus, CORA establishes a presumption that public records are open for inspection unless a provision of CORA or another state law directs otherwise.

Similarly, the COML creates a legally protected interest on behalf of Colorado citizens to have public business conducted openly. § 24-6-401, C.R.S.; *Weisfield v. City of Arvada*, 2015 COA 43, ¶ 13, 361 P.3d 1069, 1071. Colorado appellate courts have emphasized the importance of public policy underlying the COML. The COML protects the "public's right of access to public information" a "right that is vitally important to our democratic system of government." *Id.*; citing *Cole v. State*, 673 P.2d 345, 350 (Colo. 1983). Because of the important public interests advanced, COML "should be interpreted most favorably to protect the ultimate beneficiary, the public". *Id.* These sunshine laws promote public confidence in our government and the decisions made by elected leaders. The statutory provisions at issue should be read in light of this critically important legislative intent behind CORA and COML.

II. The Daily Camera's Interpretation is Consistent with the Legislative History of the Pertinent Bills.

When a statute is ambiguous, a court may look to the legislative history of the bills that enacted the statutory language. § 2-4-203(1)(c), C.R.S. "Although not conclusive proof of legislative intent, statements made during committee hearings reveal the understanding of legislators and thus help identify their intent." *Mesa County Land Conservancy,* ¶16, 318 P.3d at

51-52; *see also Hyland Hills Park & Recreation District, Adams County v. Denver and Rio Grande Western Railroad Co.*, 864 P.2d 569, 574 n. 7 (Colo. 1993) (contemporaneous statements of legislators made in committee hearings are relevant as an indicator of legislative intent). In particular, the testimony of a bill's sponsor concerning its purpose and anticipated effect can be powerful evidence of legislative intent. *Mesa County*, ¶ 16, 318 P.3d at 51-52.

Here, the legislative intent of the following four bills is illuminating:

HB 94-1234 (originally enacted the CORA finalists provision) (attached as Exhibit 1)

HB 96-1314 (comprehensive amendments and strengthening of COML) (attached as Exhibit 2)

SB 97-059 (amending the time period of the COML provision) (attached as Exhibit 3)

HB 01-1359 (amending the CORA finalists provision) (attached as Exhibit 4)

A. House Bill 94-1234

There were no public records exceptions relating to the records of executive position applicants before 1994. The names of all applicants, and their application materials, were public records. According to the testimony of the State Colleges representative, individuals who applied for these positions were often unwilling to keep their names in the running if they were not yet finalists, as there would be a stigma that they were "second-rate" if they were not selected as a finalist. (Exhibit 5 – Hearings on HB 94-1234 before the House State Affairs Committee, 59th General Assembly, 2nd Sess. (February 15, 1994), pp. 4-5). This public disclosure of all candidates, even those candidates not chosen for an initial interview, prompted HB 94-1234.

HB 94-1234 added subsection (XI)(A), which provided that records submitted by non-finalists for executive positions could be kept confidential. This initial provision required

applicants or candidates who were not finalists to make a written request for their records to be kept confidential. The term "finalist" was defined as "an applicant or candidate for an executive position who is chosen for an interview or who is still being considered for the position twenty-one days prior to making the appointment, whichever comes first; except that, if six or fewer applicants or candidates are competing for the executive position, 'finalist' means all applicants or candidates." (Exhibit 1 - Ch. 168, sec. 2, § 24-72-204(3)(a)(XI)(A), 1994 Colo. Sess. Laws 937).

The bill was a compromise between the State Colleges of Colorado and the Press Association. In crafting the bill, the General Assembly considered the competing needs for confidentiality and transparency. (Exhibit 5 - p. 2). It was intended to allow applicants and candidates for executive positions to be confidential until the applicants and candidates became finalists for the position. (Exhibit 5 – p. 2). The intent was to have the names of the finalists made available to the press and public before the appointment was made. (Exhibit 5, p. 6). One of the speakers emphasized that "we are not in any way trying to keep the names of all people from being public information. We just want to limit it to only the finalists having their names published in the press." (Exhibit 5, pp. 6-7). Marge Easton, representing the Press Association, was involved in the initial drafting of the bill and testified that "we want to know soon enough so that the press can do its own investigation, can learn who these people are, find out what they are all about before the final appointment is made." (Exhibit 5, p. 7).

Similarly, in the Senate, Senator Tilman Bishop noted that "when you get down to the finalists, we're going to give them a period of time, and those people are going to have their records, their names known and some of the records be available to the public, to the press or

whomever else wants that kind of information." (Exhibit 6 – Hearings on HB 94-1234 before the Senate Affairs Committee, 59th General Assembly, 2nd Sess. (March 7, 1994), p. 3).

In short, HB 94-1234 amended CORA by excepting from public disclosure the names and records of all non-finalists for executive officer positions who requested confidentiality. The term finalists was defined as candidates chosen for an interview or who were still being considered at least 21 days before appointment. Notably, the bill was a product of compromise between the state university system and press association. Although the legislation shielded many candidates' names from public view, the unequivocal intent was for the press and public to learn the identity of all of the finalists, so that the press could investigate and "learn who these people are" before the position was filled.

B. HB 96-1314

This bill significantly broadened and strengthened the COML and is the genesis of the language found in subsection 3.5. (Exhibit 7 – Second Reading of HB 96-1314 before the House, 60th General Assembly, 2nd Sess. (February 26, 1996), pp. 1-2). In the House Second Reading, Representative Peggy Kerns, the bill's sponsor, emphasized that the new COML language tracked the finalist language in CORA. (Exhibit 7, pp. 9 & 11).

HB 96-1314 added subsection 3.5 to the COML. It provided that "a list of all finalists being considered for a position shall be made public by the search committee no less than fourteen days prior to the first interview conducted for the position." The bill confirmed that records submitted by or on behalf of a finalist was subject to subsection (XI)(A). (Exhibit 2 - Ch. 147, sec. 1, § 24-6-402(3.5), 1996 Colo. Sess. Laws 693).

In responding to a question from another Representative, Representative Kerns noted that candidates would maintain confidentiality until they made the "finalist list." (Exhibit 7, pp. 9-10). Representative Kerns then explained that "once a public body starts to spend large amounts of money, meaning bringing finalists in, interviewing them, all that, at that point then it should be public, and that's what this provision would do." (Exhibit 7, p. 10).

Critically, this legislation did not intend to narrow or modify the definition of "finalist" found in CORA. Consistent with the original language in subsection (XI)(A), HB 96-1314 sought to protect the confidentiality of non-finalists. In contrast, public institutions such as the Board of Regents were required to publish the list of finalists at least 14 days before the first interview. As reflected in Representative Kerns' testimony before the full House and the deadline falling before the first interview, the intent was for the public to learn the identity of the finalists - those individuals interviewed by the institution.

C. SB 97-059

Senate Bill 97-059 was an outgrowth of HB 96-1314. (Exhibit 8 – Hearings on SB 97-059 before the House State Affairs Committee, 61st General Assembly, 1st Sess. (February 25, 1997), p. 2). Following the passage of HB 96-1314, rural school districts became concerned about the 14-day waiting period before the first interview could be conducted. SB 97-059 amended COML subsection 3.5 by changing the timeframe from 14 days before the first interview to the current 14 days before appointment or employment. Under the prior law, the state or local institution was required to wait at least 14 days after the announcement of finalists before it could conduct its first interview. (Exhibit 8, p. 3).

SB 97-059 deleted the requirement that the finalist list be made public at least 14 days prior to the first interview. It provided instead that "[t]he state or local public body shall make public the list of all finalists under consideration for the position of chief executive officer no later than fourteen days prior to appointing or employing one of the finalists to fill the position. No offer of appointment or employment shall be made prior to this public notice." (Exhibit 3 - Ch. 86, sec. 1, § 24-6-402(3.5), 1997 Colo. Sess. Laws 320).

According to testimony before House State Affairs Committee by Representative Steve Tool, the House's bill sponsor, the bill was limited to amending the timeframe. Like HB 94-1234 and HB 96-1314, SB 97-059 was a product of compromise between governmental entities and the press association. (Exhibit 8, p. 10). Under the amended COML language, the institutions were still required to publish the list of finalists. (*See, e.g.*, Exhibit 8, p. 5). According to Jane Urschel, representing the Colorado Association of School Boards, "the public and press will have ample time to review the finalists under Senate Bill 59 because some background information will be public for at least 14 days before the decision is made." (Exhibit 8, pp. 11-12). Marge Easton, representing the Press Association, noted that her constituents were concerned about the temporal change. Ironically, Ms. Easton was concerned that under the amendment, the interviews would be conducted, and only then would the names of those interviewed be announced to the public. (Exhibit 8, p. 17). Representative Tool emphasized that the temporal change to the COML created by SB 97-059 did not affect the CORA counterpart. (Exhibit 8, p. 7).

Similarly, in the Senate Education Committee, the testimony confirmed that SB 97-059 was not intended to modify CORA's requirement to make information about finalists public. For instance, Ms. Urquel reminded the Committee that "the Public Records Law make (sic)

information about the finalists public and this does not change that law." (Exhibit 9 – Hearings on SB 97-059 before the Senate Education Committee, 61st General Assembly, 1st Sess. (January 22, 1997), p. 6). The intent of the bill was simply to change the public announcement of the list of finalists from 14 days prior to the first interview to 14 days prior to employment. *Id.* While some senators expressed concern that the later announcement would undermine public input, it was understood that there would be a list of multiple finalists made public at least 14 days before the appointment was made. (*See, e.g.*, Exhibit 9, pp. 7-8, 11-12, 15-17, 24-26). In responding to concerns about the more limited timeframe, Ms. Urschel emphasized that School Boards "want the public to accept the person we're going to hire." The bill would still require the announcement of finalists and did "not change any of the public records that come out on the finalists." (Exhibit 9, p. 12). Marge Easton, testifying on behalf of the Press Association, noted it was terribly important that "one of the good things that's in this is the fact that it says the public body shall make public the list." (Exhibit 9, pp. 15-16). In proposing an amendment, Senator Ken Chlouber summarized that "you make a list public, you make a list of all finalists considered 14 days before appointing or employing anybody to fill that position." (Exhibit 9, p. 26).

In the Senate second reading for the bill, there was some discussion about whether there was a specific number of finalists mandated by the bill. Senator Ben Alexander, the Senate sponsor, noted that the specific number is not addressed in the bill. (Exhibit 10 – Second Reading of SB 97-059 before the Senate, 61st General Assembly, 1st Sess. (January 31, 1997), p. 4). In response to a question, he contrasted the applicant who is hired with the "names of the finalists." According to Senator Alexander, the public body was still required to "release the names of the finalists, then the public has an opportunity for input on those finalists. Then you can appoint the

person you select no sooner than 14 days after you release the names." (Exhibit 10, p. 4). Similarly, Senator Bill Thiebaut, who was concerned about time for public input, observed that the issue was "at what point do we want interviewees to – to be disclosed, if you will, to public scrutiny so that the public can give us input as to who we want to potentially hire." (Exhibit 10, p. 5).

Senator Pat Pascoe raised the prospect of just one finalist being announced and asked whether there was a requirement in the law that a certain number of finalists be named. Senator Alexander responded that he was not aware of a certain number. Senator Pascoe then asked if it could be one person that's announced and then appointed 14 days later. Senator Alexander responded that it "could be one applicant, I suppose, that goes through the whole process too, you know." (Exhibit 10, pp. 7-8). This exchange clarifies that while there is no express minimum number of finalists provided for in the pertinent statutes, the disclosure of one finalist would be appropriate when only one applicant meets the minimum qualifications for the position, an exception to the requirement of a "list" made explicit by subsection 3.5.

D. HB 01-1359

HB 01-1359 amended various provisions of the CORA and COML. Pertinent here, HB 01-1359 amended three aspects of subsection (XI)(A). First, under the prior language, an applicant who was not a finalist had to request that their name not be made public. This bill amended that requirement by taking the burden off the applicants who were not finalists by eliminating the requirement that they make a written request to remain confidential. (Exhibit 4 - HB 01-1359, p. 7). In committee hearing, the sponsor contrasted these individuals with the finalists who are

disclosed. (Exhibit 11 – Hearings on HB 01-1359 before the House Committee on Information & Technology, 63rd General Assembly, 1st Sess. (March 28, 2001), pp. 2-3).

Second, the law tightened the definition of finalist by eliminating the "chosen for an interview or who is still being considered for the position twenty-one days prior to making the appointment" language. This legislation provided that a finalist for a chief executive officer position is "a member of the final group of applicants or candidates made public pursuant to section 24-6-402(3.5)". (Exhibit 4, p. 7).

Third, the bill deleted the provision that "if six or fewer applicants or candidates are competing for the executive position, "finalist" means all applicants or candidates." The bill amended the number to "three," providing that "if only three or fewer applicants or candidates for the chief executive officer position possess the minimum qualifications for the position, said applicants or candidates shall be considered finalists." (Exhibit 4, p. 7).

The fiscal note to HB 01-1359 is also instructive. According to the Summary of Assessment, HB 01-1359 "specifies that a finalist is a member of the final group from which the appointment is made." (Exhibit 12 - Colorado Legislative Council Staff, Fiscal Note on HB 01-1359 to House Information and Technology Committee, March 24, 2001, p. 2). This is exactly the Daily Camera's position in this case. The finalists were the six members of the final group (those interviewed by the Board of Regents) from which the appointment of Mr. Kennedy was made.

III. The Board of Regents' Position

It is expected that the Board of Regents will heavily lean on failed legislation from 2009 to bolster its statutory interpretation. In correspondence, the Board of Regents' counsel noted that

in 2009, several legislators pushed a bill which would have, among other things, expressly prevented the Board of Regents, as a state institution, from publicly announcing a sole finalist. SB 09-1369; Exhibit M. SB 09-1369 did not pass. The failed legislation came eight years after SB 01-1359, the last bill to materially amend the operative language in §§ 24-72-204(3)(a)(XI)(A) or 24-6-402(3.5), C.R.S.

SB 09-1369 is irrelevant to divining the legislative intent behind the operative statutes. The bills that created these provisions were passed from 1994 through 2001. A later unsuccessful attempt to modify statutory language provides no guidance as to the legislature's intent in adopting that provision. *Three Bells Ranch Associates v. Cache La Poudre Water Users Association*, 758 P.2d 164, 172 (Colo. 1988); *see also Ritter v. Jones*, 207 P.3d 954, 962 (Colo. App. 2009) (courts generally will not infer legislative intent based on the General Assembly's failure to enact proposed legislation); *Colorado Common Cause v. Meyer*, 758 P.2d 153, 159 (Colo. 1988) ("a bill which unsuccessfully attempts to engraft several amendments onto a statute enacted in a previous legislative session sheds no light on the legislative intent underlying the original enactment"). Thus, the Board of Regents' anticipated reliance on this unsuccessful attempt to modify statutory language is unhelpful to this Court's task of statutory interpretation.

IV. The Board of Regents' Responses Were Untimely

Lastly, the Board of Regents' CORA responses were issued beyond the statutory deadlines. The presumptive deadline to respond to a CORA request is three working days. § 24-72-203(3)(b), C.R.S. This period may be extended if extenuating circumstances exist. To invoke the extension, a finding of extenuating circumstances must be made in writing by the records custodian. *Id.* Here, no extension of the presumptive deadline was authorized or taken by the records custodian.

The Board of Regents was thus legally required to respond to each set of requests within three working days.

The Daily Camera served its first set of CORA requests (seeking the names of other candidates) on May 24, 2019. Upon receiving no response, Ms. St. Amour followed up on June 12, 2019. Twenty days after receiving the initial request, the Board of Regents' records custodian issued its response, denying the request on June 13, 2019.

The Daily Camera's second set of CORA requests met with similar delay. This second set, seeking the application materials of certain candidates, was submitted on July 9, 2019. Two weeks later, on July 23, 2019, the Board of Regents issued its response denying the request. Thus, neither response was close to complying with the statutorily imposed deadlines.

CORA does not identify a remedy or penalty for the records custodian's failure to timely respond. Here, the Daily Camera submits that the Board of Regents' wholesale failure to timely respond provides an independent basis for requiring production of the finalists' names and application materials. Failure to comply should result in a waiver of any legal defense the Board of Regents otherwise would have. If no remedy or penalty is imposed in this circumstance, government entities have carte blanche to ignore the statutory deadline. Further, the failure to timely respond evinces the Board of Regents' disregard of its obligations to comply with CORA.

CONCLUSION

In summary, based on the stipulated facts and exhibits, there were six finalists for the recent University of Colorado President vacancy. The six finalists were the six individuals who advanced through the private search firm screening process and the search committee process to be interviewed by the full Board of Regents, the final round of competition. This interpretation is

consistent with the plain and ordinary meaning of the terms used in the pertinent sunshine law statutes. It is fully consonant with canons of statutory construction, including giving meaning to each term used by the General Assembly. The Daily Camera's interpretation is consistent with the purpose of CORA and the COML, which foster public access to public records and transparency in government. Lastly, to the extent the statutory language is ambiguous, the interpretation is consistent with the pertinent legislative history.

In denying the Daily Camera's open records act requests for the names and application materials of the finalists, the Board of Regents violated CORA. The Daily Camera therefore respectfully requests an Order mandating the Board of Regents to produce the names and application materials of the six finalists. Further, the Daily Camera requests recovery of its reasonable attorney fees and costs under § 24-72-204(5)(b), C.R.S.

Respectfully submitted this 6th day of December, 2019.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the **PLAINTIFF'S OPENING BRIEF** upon all parties herein electronically via Colorado Courts E-Filing and email, this 6th day of December, 2019, addressed as follows:

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