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 REPLY 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 and the Court-authorized extension of time, respectfully submits the following reply brief in support of its Complaint and Application for Order to Show Cause.

SUMMARY

In its Response Brief, Defendant Regents of the University of Colorado ("Board of Regents") suggests that the Board of Regents alone has the authority to determine the identity of CU President finalists for purposes of the state's sunshine laws. Even in the case where, as here, multiple candidates competed in the final round of competition, the Board of Regents posits that it has the unfettered discretion to publicly announce only one finalist. Contrary to the Board of Regents' contention, this Court has the authority to interpret the Colorado Open Records Act (CORA) and the Colorado Open Meetings Law (COML) and declare that the Board of Regents violated CORA in failing to produce the names and application materials of the six individuals interviewed by the Board of Regents.

The pertinent sunshine law provisions, when read as a comprehensive whole, plainly and unambiguously support the Daily Camera's legal position. Notably, the Daily Camera does not contend CORA or the COML require a minimum number of finalists. For a given executive position, there could be only one qualified applicant, and therefore only one finalist. When, however, the search firm's initial screening pares the initial pool of applicants from 180 to 27, the search committee elects to interview 10 of these remaining candidates and refers 6 candidates to the Board of Regents, and the Board of Regents interviews all 6 candidates in the final round, these 6 candidates are "finalists" under the plain, ordinary and commonsense meaning of the term. Statutory language including "member," "group," and "list" support this interpretation and must not be read out of the statute.

Further, to the extent the statutory provisions are ambiguous, the extensive legislative history of the four bills that enacted the pertinent language supports the transparency sought by

the Daily Camera. The 2009 bill relied on by the Board of Regents is not relevant to discerning the General Assembly's intent in passing legislation from 1994 to 2001. Moreover, the objective of the sunshine laws and the consequences of the parties' competing constructions favor the interpretation advanced by the Daily Camera. Lastly, the Court has the authority to determine that the Board of Regents waived its right to deny the open records act requests when it failed to timely respond to the requests.

REPLY TO BOARD OF REGENTS FACTUAL BACKGROUND

The factual background is not in dispute. In particular, it is undisputed that the presidential selection process was conducted in accordance with Regent Policy 3E. Further, the Daily Camera does not take issue with the fact that the Board of Regents has the constitutional and statutory authority to select the CU President. It should also not be in dispute that the Board of Regents' selection of a President, including Regent Policy 3E, must comply with CORA and the COML. The issue at hand is thus one of sunshine law statutory interpretation; not the authority of the Board of Regents to conduct interviews and to select a President.

LEGAL ARGUMENT

I. The Court has the authority to apply CORA and the COML to this dispute.

In Argument sections I and IV of the Response Brief, the Board of Regents maintains that it alone has the authority to determine the identity of the finalist(s) who will be announced to the public. In its Response, the Board of Regents suggests that Regent Policy 3E controls, and that

the Court lacks the authority to determine who is a finalist under the sunshine laws.[1] Then, in section IV, the Board of Regents asserts that the Daily Camera's interpretation "would require the Court to intrude upon the Board of Regents' supervisory authority and substitute its own judgment for that of the Regents in determining what constitutes a finalist." Response Brief, p. 16. The Daily Camera submits that interpreting Colorado's sunshine laws and ensuring that the Board of Regents complies with its CORA obligations is well within the Court's province.

First, the Court is not bound by Regent Policy 3E. Regent Policy 3E defines a finalist as "A candidate who has agreed to be advanced for final consideration and potential appointment for the position of president or chancellor." Here, the Board of Regents only solicited permission for advancement from one candidate. Stipulation of Fact (SOF) ¶ 14. The Board of Regents cites to no authority providing that a Regent Policy is binding or entitled to deference by a court.

The University of Colorado is an institution created by the Colorado Constitution. Its governing board, the Board of Regents, supervises its respective institutions. Colo. Const. art. VIII, § 5. Because it is administered under Title 23, Article 20, the Board of Regents is not an agency subject to the Title 24 Administrative Procedures Act. *Uberoi v. University of Colorado*, 686 P.2d 785, 789 (dissenting opinion) (Colo. 1984). Deference to an agency's interpretation is appropriate when the agency is employing its special expertise in interpreting and applying the statute. *Huddleston v. Grand County Board of Equalization,* 913 P.2d 15, 17 (Colo.1996). Even

[1] The Board of Regents argue: "Treating the additional five candidates as finalists would require the Court to ignore Regent Policy 3E and instead adopt its own definition as to what constitutes a finalist under the University's hiring procedures. . . Regent Policy 3E, not CORA or COML, controls who is a finalist in the selection process." Response Brief, p. 8.

when deference is appropriate, a court is not bound by an agency interpretation that is inconsistent with the clear language of the statute or legislative intent. *Barnes v. Department of Revenue, Motor Vehicles Division*, 23 P.3d 1235, 1236 (Colo. App. 2000).

Here, the Board of Regents is not an agency, and it is not interpreting a statute that it is tasked with interpreting. CORA and COML are statutes of general application. *Uberoi*, 686 P.2d at 788. It follows that deference to the Board of Regents' legal interpretation is not required. CORA and the COML, and not Regent Policy 3E, control who is a finalist for public disclosure purposes.

Second, the Daily Camera's interpretation does not require an impermissible implied repeal of the Board of Regents' authority to select a president. In support of this notion, the Board of Regents cites to several cases which addressed whether the University was subject to particular state statutes. *Uberoi v. University of Colorado*, 686 P.2d 785 (Colo. 1984) held that a prior version of CORA did not apply to the University of Colorado. The legislature subsequently amended CORA to provide that the University is subject to CORA. In *Regents of the University of Colorado v. Students for Concealed Carry on Campus, LLC*, 271 P.3d 496 (Colo. 2012), the Colorado Supreme Court held that the state legislation was an express repeal of the Board of Regents' authority to ban guns on campus, and that the legislature intended to implement statewide uniform standards. Likewise, in *Ramos v. the Regents of the University of Colorado*, 759 P.2d 726 (Colo. 1988), the Court rejected the Board of Regents' autonomy argument and held that the University was subject to the Colorado Civil Rights Commission's jurisdiction in matters of discriminatory employment practices. In each of these cases, the issue was whether the state legislation applied to the University.

Here, there is no question that the Board of Regents is subject to the pertinent CORA and COML provisions governing the selection of University Presidents. The statutory language expressly covers "chief executive officers" of an "institution." § 24-72-204(3)(a)(XI)(A), C.R.S. "Institution" is statutorily defined as "every state institution of higher education, whether established by the state constitution or by law, and every governing body thereof. In particular, the term includes the university of Colorado, the regents thereof. . ." § 24-72-202(1.5), C.R.S. The authorities cited in section IV of the Response Brief do not require deference to the Board of Regents' statutory interpretation, made through a written policy, where the pertinent statutes expressly apply to the University.

Through its arguments made in section IV, the Board of Regents attempts to transform this issue of statutory interpretation into an issue of the Board of Regents' autonomy and authority to create and implement its own interpretation of state law. The Daily Camera urges the Court to reject this attempt at re-framing the issue, and to exercise its authority to interpret CORA and COML and to apply the statutory provisions to the undisputed facts.

II. The Daily Camera does not contend that CORA or COML require a minimum number of finalists. The number of finalists is based on the circumstances.

Contrary to the Board of Regents' argument in section II of its brief, the Daily Camera does not contend that there must always be more than one finalist for a chief executive officer position. With one exception, neither § 24-72-204(3)(a)(XI)(A), C.R.S. (subsection XI(A)) nor § 24-6-402(3.5), C.R.S. (COML subsection 3.5) sets forth an express, minimum number of finalists. In the event there is only one qualified candidate, there would be only one finalist. *See, e.g.*, Opening Brief, Exhibit 10, pp. 7-8 (response of Senator Alexander to Senator Pascoe that it "could

be one applicant, I suppose, that goes through the whole process too, you know."). The express minimum number of finalists exception provides that if there are three or fewer qualified candidates, all of the qualified candidates (whether it be one, two or three) are deemed to be finalists under subsection XI(A).

The absence of a general express numerical requirement does not provide the Board of Regents with unlimited discretion, however. Both the statutory language (e.g., "finalists," "member," "group," "list") and the legislative history evince the legislative intent that when there is more than one candidate in the final round, there are multiple finalists.

Here, based on the Stipulated Facts, there were six finalists. As the Board of Regents notes, although CORA subsection XI(A) includes a definition of "finalist," COML subsection 3.5 does not define the term "finalist." Response Brief, p. 10. The Court may refer to dictionary definitions of the undefined 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.

Merriam-Webster defines the term "finalist" as "a contestant in a competition finals." To illuminate the meaning of the term, the on-line Merriam-Webster cites the following two examples:

- "They interviewed all of the finalists before making a decision."
- "A finalist in the tennis tournament."

The Merriam-Webster.com Dictionary, Merriam-Webster, Inc., https://www.merriam-webster.com/dictionary/finalist. Accessed 28 Jan. 2020.

As it is commonly understood, the term "finalist" is not limited to the winner of a competition. The "winner," or here the successful candidate, is one of the finalists who competed

in the final round. 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.[2]

This interpretation is supported by the other terms employed by the legislature in subsection XI(A) and COML subsection 3.5. As set forth more fully in the Opening Brief, the statutory provisions must be read as a whole, based on their plain and ordinary meaning. *Department of Revenue v. Agilent Technologies*, *Inc.*, 2019 CO 41, ¶ 16; 441 P.3d 1012, 1016. Interpretations which render words or phrases superfluous are to be avoided. *Id.* In using the language "member," "group," and "list," along with "finalists," the General Assembly expressed its intent that, customarily, there would be more than one finalist.

III. The "three or fewer" language in subsection XI(A) supports the Daily Camera's interpretation.

Subsection XI(A) includes the following provision: "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." In section III of the Response Brief, the Board of Regents asserts that the Daily Camera "seeks to transform this unambiguous language into a requirement that if there are more than three qualified candidates, there must be three or more finalists." Response Brief, p. 12. This misconstrues the Daily Camera's argument. While this language does not dictate a minimum number of finalists when more than three

[2] This plain and ordinary meaning is also illustrated by Regent Heidi Ganahl's reference to six finalists in the draft editorial. SOF, Exhibit E.

applicants meet the minimum qualifications, it is further evidence of the legislature's intent. If there are only three qualified candidates for an executive position and all three are finalists, it is reasonable to believe the legislature intended that state universities publicly disclose more than one finalist when more than three candidates meet the minimum qualifications. *See Agilent Technologies*, at ¶ 16 (each part of the statute should be considered, and interpretations which lead to absurd results are to be avoided).

IV. The pertinent legislative history supports the Daily Camera's interpretation.

The Board of Regents characterizes the Daily Camera's legislative history argument as based on "isolated remarks" and ignorant of the "overarching legislative history." Response Brief, p. 17. Contrary to this characterization, the Opening Brief traced the enactment and amendments to the pertinent statutes and cited to no less than 27 portions of the legislative history, including 13 quotations from representatives, senators, and witnesses. Opening Brief, pp. 15-22. The 25-page limit constrained the volume of legislative history that could be cited, and the Daily Camera encourages the Court to review Opening Brief Exhibits 1-12 in their entirety. Moreover, the transcribed portions comprise only a portion of the complete legislative history of the four bills, and the Daily Camera can supply the complete audio of the legislative history of the four bills if this information would assist the Court.

Read as a whole, the legislative history of HB 94-1234, HB 96-1314, SB 97-059 and HB 01-1359 demonstrates that the subject legislation was largely a product of compromise between (1) state universities and school districts, and (2) the Colorado Press Association. Prior to 1994, the identity of all applicants for university leadership positions, along with their application materials, were public records.

Considering the competing needs for applicant confidentiality and public transparency, the General Assembly excepted non-finalists from public disclosure in 1994. HB 94-1234, *see* Opening Brief pp. 15-17, Exhibits 1, 5-6. This bill defined finalist 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." Opening Brief, Exhibit 1.

COML subsection 3.5 was added by HB 96-1314, and initially required 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." Opening Brief, Exhibit 2. Representative Kerns, the bill's sponsor, noted that the identity of finalists should be made public once a public body starts spending large amounts of money to bring finalists in to interview them. Opening Brief, Exhibit 7, p. 10.

SB 97-059 was characterized as an "outgrowth" of HB 96-1314 and was brought forward at the request of rural school districts concerned about the need to name all finalists 14 days before the first interviews were conducted. Opening Brief, Exhibit 8, pp. 2-3. This bill changed the 14 day before interview timeframe to the current 14 days before appointment language. *Id.* The amendment was limited to the timeframe modification and was not intended to affect the CORA counterpart. *Id.* at pp. 7 & 10. State senators understood that the intent was to have a list of multiple finalists made available for public scrutiny at least 14 days before appointment was made. Opening Brief, Exhibit 9, pp. 7-8, 11-12, 15-17, 24-26.

Four years later, HB 01-1359 amended several provisions of subsection XI(A). Most pertinent to this dispute, the bill amended the CORA definition of finalist to the current "member of the final group of applicants or candidates made public" pursuant to COML subsection 3.5 language. Opening Brief, Exhibit 4, p. 7. It also modified the minimum qualification provision from six applicants to the current three applicants' language. *Id.* The fiscal note noted that the bill "specifies that a finalist is a member of the final group from which the appointment is made." Opening Brief, Exhibit 12.

While the amendments to CORA and COML have shown a trajectory towards candidate confidentiality (Response Brief, p. 18), the trajectory does not go so far as to permit a state university or school district to have unlimited discretion in publicly disclosing finalists. The legislative history summarized above does not demonstrate that the General Assembly intended the Board of Regents to initiate a presidential search process, to pare down the number of candidates from 180 to the 6 individuals ultimately interviewed by the Board of Regents in the final round, and then disclose only 1 of the 6 "finalists" to the public. Notably, the Board of Regents' interpretation transforms the term "finalist" into the "successful applicant." The COML subsection 3.5 language cited by the Board of Regents still includes the language "list" and "one of the finalists." Further, the legislative history of HB 01-1359 does not demonstrate an intent to authorize a state university to announce one finalist when multiple candidates are interviewed and considered at the final stage of the process.

Lastly, as set forth in the Opening Brief (p. 23), the legislative history of HB 09-1369, a failed bill which did not amend the pertinent statutory language, is irrelevant. An unsuccessful attempt to modify statutory language sheds no light on a prior legislature's intent in adopting the

subject provisions. *Three Bells Ranch Associates v. Cache La Poudre Water Users Association*, 758 P.2d 164, 172 (Colo. 1988); *Colorado Common Cause v. Meyer*, 758 P.2d 153, 159 (Colo. 1988). Further, HB 09-1369 (Response Brief, Exhibit A) contained multiple provisions beyond the finalist language, including a 2/3 vote requirement, and the 2009 legislature's defeat of the bill is in no way probative of the legislative intent behind the subject statutory language enacted between 1994 and 2001.

V. The objective of the statutes favors the Daily Camera's interpretation.

As noted by the Board of Regents, when faced with an ambiguous statute, the Court may consider the object sought to be obtained in determining the statute's meaning. § 2-4-203(1)(a), C.R.S. The Board of Regents' Response Brief acknowledges that COML requires disclosures of the finalist(s) before appointment is made so that the public can consider the applicant(s) and provide feedback. Similarly, CORA supports public input and transparency by providing that finalists' application materials are public. (Response Brief, pp. 19-20). The Board of Regents then asserts that these important interests must be balanced against the desire to obtain high-quality candidates, and that the public interest was furthered here by the public having the ability to provide input about Mr. Kennedy.

The overarching object of the sunshine laws is to promote transparency and trust in government institutions. In particular, the COML protects the public's right of access to public information. Due to this important public interest, COML "should be interpreted most favorably to protect the ultimate beneficiary, the public." *Cole v. State*, 673 P.2d 345, 349 (Colo. 1983).

This important public object was not satisfied through the public being able to research and provide input on only one candidate. Critically, the public had no opportunity to compare Mr.

Kennedy with the other finalists. Were they leaders of other educational institutions? What was their fundraising experience? Were they Democrats or Republicans? What was their demographic information? How diverse was the field of finalists? Learning the identity of only the successful candidate and providing input on that one person, without knowing who else was seriously considered, inhibits meaningful public participation. Indeed, the 3,000+ comments submitted on the online portal were overwhelmingly negative, with a majority rating Mr. Kennedy as weak in every category. SOF, Exhibit D. Following this limited public vetting, Mr. Kennedy was appointed on a 5-4 vote. SOF, ¶ 18, Exhibit G. Might the result have been different had the public been provided with an opportunity to evaluate all of the finalists interviewed by the Board of Regents?

Conversely, there is no credible evidence that the Daily Camera's interpretation of the pertinent provisions would inhibit the recruitment of high-quality candidates. Through the subject legislation, the legislature sought to balance candidates' confidentiality considerations with the right of the public to know who is being considered to lead the state's public educational institutions. This balance was struck in the current version of the subject statutory provisions. Under subsection XI(A) and COML subsection 3.5, the identity of non-finalists is confidential. There is no data or information in the record to support the Board of Regents' suggestion that qualified applicants may not apply if they believe their identities will be revealed.

VI. The consequences of the Daily Camera's interpretation weigh heavily in favor of its interpretation.

The Daily Camera submits that the consequences of the parties' respective interpretations weigh heavily in favor of the Daily Camera. Anonymous searches for public university presidents

are becoming increasingly common. Supplemental Stipulation of Facts & Exhibits, Exhibit N, Colorado Independent Article, 12/31/19. The shroud of secrecy draped over university president and school district superintendent searches diminishes the public trust in government and thwarts full public participation in decisions affecting state educational institutions.

Conversely, requiring the Board of Regents to publicly disclose the identity of the candidates interviewed in the final round will not intrude on the Board's authority to select a president, unless the Board views public input and transparency as antithetical to its decision-making process. The candidate confidentiality concerns were addressed by the balance struck by the legislature through CORA and COML amendments. Public interest in open government should not take a back seat to unjustified promises of confidentiality provided by the presidential search firm. Likewise, the potential negative implications of an order directing disclosure of all six names and application materials should not outweigh the public's interest in receiving information critical to an informed electorate.

VII. The Court may determine that the Board of Regents waived its objections by twice timely failing to respond to open records act requests.

It is undisputed that the Board of Regents did not timely respond to either of the Daily Camera's open records act requests. The Daily Camera acknowledges that there is no precedent specifying the consequence for a government entity's failure to timely respond to a CORA request. Aside from seeking court intervention, CORA does not specify a remedy for failure to timely respond to an open records act request. The legal authorities cited by the Board of Regents on p. 22 of its Response Brief focus on the availability of a private cause of action and are not controlling on this issue. As set forth in the Opening Brief, the absence of any consequence or penalty for a

records custodian's failure to timely comply with an open records act request incentivizes non-compliance and delay in responding to a request.

In short, while there is no binding precedent on this particular issue, the Court has the inherent authority to determine that the Board of Regents waived its right to withhold the documents requested by the Daily Camera.

CONCLUSION

The Court has the authority to determine whether the Board of Regents properly withheld the list of names and application materials requested by the Daily Camera and need not defer to the Board of Regents' interpretation of the sunshine law statutes. This is particularly so where the interpretation advanced by the Board of Regents is contrary to both the plain language of the statutes and the legislative history. Moreover, the objective sought by the statutes and the consequences of the respective interpretations weigh heavily towards public disclosure. The Daily Camera therefore respectfully requests that the Court determine that the names and application materials of the other five finalists were improperly withheld. Additionally, the Daily Camera seeks recovery of its reasonable attorney fees and costs under § 24-72-204(5)(b), C.R.S.

Respectfully submitted this 31st day of January, 2020.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the **PLAINTIFF'S REPLY BRIEF** upon all parties herein electronically via Colorado Courts E-Filing, this 31ST day of January, 2020, addressed as follows:

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