DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 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 ▲ _____ **Case Number: 2019CV33759** **Division: 275**
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DEFENDANT'S RESPONSE BRIEF

Defendant, the Regents of the University of Colorado ("Board of Regents") responds in opposition to the Opening Brief submitted by Plaintiff Prairie Mountain Publishing Company d/b/a Daily Camera ("Daily Camera").

INTRODUCTION

The University of Colorado ("University") is an institution created by the Colorado Constitution, and pursuant to the Constitution, the Board of Regents is tasked with the general

supervision of the University. The Daily Camera's demand that the Board of Regents release application materials of five candidates for the president of the University not only goes beyond the requirements of the Open Records Act ("CORA") and Open Meetings Law ("COML"), but also unnecessarily impedes the Board of Regents' powers to define the selection and appointment process for the University's president. Neither CORA or COML is intended to substantively dictate how public bodies select their chief executives. The Daily Camera's interpretation of the statutes expands the scope of these statutes beyond the legislature's intent, requiring that the Court—rather than the elected Board of Regents—determine who was and was not a finalist for president of the University. This overbroad interpretation of CORA and COML is contrary to the plain language of the statutes and is contrary to the authority afforded the Regents in the Colorado constitution and statutes. Accordingly, the Court should reject the Daily Camera's interpretation of CORA and COML and deny its request for records.

FACTUAL BACKGROUND

I. The process for selecting and appointing a president of the University is governed by Regent Policy 3E.

Article VIII, Section 5 of the Colorado Constitution tasks the Board of Regents with "the general supervision of [its] respective institutions and the exclusive control and direction of all funds of and appropriations to [its] respective institutions, unless otherwise provided by law." The General Assembly enacted statutes requiring that "the regents of the university shall elect a president of the university," C.R.S. § 23-20-106, and authorized the Board to "enact laws for the government of the university." C.R.S. § 23-20-112(1).

Consistent with this authority, the Board of Regents implemented Regent Policy 3E to govern the hiring of administrators at the University. The policy provides a framework that contemplates a search committee reporting to an appointing authority and supervising authority.

> Appointing authority. The appointing authority is the individual or body who shall approve the appointment. For those employees reporting to the Board of Regents the "appointing authority" means the Board of Regents.
>
> Supervising authority. The supervising authority is the individual or body to whom the employee directly reports. For those employees reporting to the Board of Regents, the "supervising authority" means the Board of Regents. In a presidential search the Board of Regents is both the appointing and supervising authority. In a chancellor or vice presidential search, the president is both the appointing and supervising authority.

Policy 3E(2), Ex. A to Stipulated Facts.

Under Policy 3E, the search committee is tasked with "generat[ing] a strong pool of candidates and advis[ing] the supervising authority of those candidates best qualified to meet the university's needs." *Id.* at § 3(a). Policy 3E further states:

> The search committee emphasis shall be on attracting and selecting qualified candidates. The search committee will recommend to the supervising authority the candidates it determines are best qualified to fill the position.
>
> The supervising authority will determine which of the recommended candidates will be interviewed and in what order. The supervising authority shall also have the authority to interview a highly qualified candidate who has not been recommended by the search committee.

Id. at § 3(h).

After the search committee recommends candidates, "[t]he supervising authority will evaluate the candidates by means of personal interviews and by such other information as may be obtained. Before making a final selection, the supervising authority will meet with the search

committee." *Id.* at § 3(i). The supervising authority may also ask the search committee for additional candidates. *Id.*

The process for identifying and appointing the president of the University is consistent with these general provisions, but Policy 3E provides additional guidance. It requires that the Board of Regents provide a charge to the presidential search committee. *Id.* at § 3(j)(1). Under the policy, the charge shall require the search committee to refer "a minimum of five unranked candidates to the Board of Regents for the Board of Regents to consider interviewing." *Id.* Only after the Board of Regents conducts interviews is it empowered to select finalists. *Id.* The policy explicitly states:

> Following those interviews, the determination of which candidates will be designated as the finalist(s) shall be made by the Board of Regents. Before the Board of Regents identifies any candidate as a finalist, the chair and vice chair of the presidential search committee shall notify the candidate of the Board of Regents' intention and obtain the candidate's permission to advance him or her as a finalist.

Id.

Regent Policy 3E also defines "finalist." A finalist means:

> A candidate who has agreed to be advanced for final consideration and potential appointment for the position of president or chancellor. A person who is named as a finalist shall be named in accordance with the requirements of Colo. Rev. Stat. 24-6-402(3.5) and records pertaining to that person shall be available for public inspection as allowed by Colo. Rev. Stat. 24-72-204(XI)(A-B).

Id. § 2.

II. The selection and appointment of President Mark Kennedy was completed in accordance with Regent Policy 3E.

Consistent with Policy 3E, the Board of Regents appointed a search committee in late 2018 and charged them with "considering candidates for the position of president of the

University of Colorado and recommending qualified candidates for the Board of Regents ultimate consideration." Stipulated Facts ("Facts") 5, 7; Exhibit B to Stipulated Facts. The charge from the Board of Regents contained the qualifications that candidates must demonstrate and specifically requested that the search committee recommend to the Board of Regents a minimum of five unranked candidates. Exhibit B to Stipulated Facts at 2-3. The charge also required that the search committee maintain confidentiality of the candidates. *Id.* at 3.

The Board of Regents engaged a professional search firm to aid in the search. Fact 6. The search firm received over 180 referrals or applications for the position. Fact 8. From this initial pool, the search committee identified candidates that met the qualifications for the position and determined that 27 candidates were appropriate for the search committee's consideration. The search committee vetted the 27 candidates and unanimously decided to interview 11. Fact 10. The search committee interviewed ten candidates (one candidate withdrew), and of these ten, recommended six candidates to the Board of Regents for further consideration. Facts 10, 11 and 12.

The Board of Regents interviewed the six candidates recommended by the search committee. The Board of Regents determined that one person, Mark Kennedy, should proceed as a finalist. Fact 14. Mr. Kennedy was contacted and consented to proceeding as a finalist. *Id.* None of the other five candidates were identified as finalists by the Board of Regents, and none of the other five candidates were asked to consent to proceeding as a finalist. Fact 14.

After receiving Mr. Kennedy's permission to name him as a finalist, the Board of Regents met in public and adopted a resolution naming Mr. Kennedy as the only finalist. Mr. Kennedy's application materials were made publically available. Stipulated Facts 14 and 15.

After publishing Mr. Kennedy's name and releasing his application materials, the Board of Regents did not appoint Mr. Kennedy to the position of president for 22 days. Facts 14, 18. During this time period, Mr. Kennedy appeared at open forums on each of the University's four campuses. Fact 15. The Board of Regents also created a website to solicit feedback on Mr. Kennedy, and through that portal they received feedback from over 3,000 people. Fact 15. After receiving and considering input from stakeholders across the state, the Board of Regents voted in public session to appoint Mr. Kennedy as president of the University.

Subsequently, on two occasions, the Daily Camera submitted CORA requests seeking "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" and "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." Facts 19, 22. Because these candidates, except for Mr. Kennedy, were not finalists, the University denied the request, and only produced Mr. Kennedy's application materials. Fact 21. After conferring on this issue, the parties could not reach agreement, and the Daily Camera filed this lawsuit.

ARGUMENT

I. The University correctly withheld the application materials of the five candidates that were recommended to the Board of Regents because they were not finalists under Regent Policy 3E or the statutes.

Six candidates were referred from the Search Committee to the Board of Regents, but these six candidates were not finalists. Throughout its motion, the Daily Camera refers to these candidates as "finalists," but the Daily Camera's word choice cannot transform candidates into

finalists.[1] Regent Policy 3E provides the process for narrowing the pool of qualified candidates down to a finalist or finalists. First, the search committee must provide at least five qualified candidates to the Board of Regents. Policy 3E(3)(j)(1). After receiving that recommendation, that Board of Regents, as the supervising authority, is obligated to determine which of the candidates are to be interviewed and in what order. *Id.* at § 3(h). The Board of Regents is also tasked with determining if additional candidates should be interviewed. *Id.* at § 3(j)(1). Only after interviewing some or all of the candidates recommended by the search committee is the Board of Regents empowered to select the finalist(s). *Id.* After the Board of Regents has made its selection as to who should be a finalist, the chair and vice chair of the presidential search committee must notify the candidate(s) of the Board of Regents' intention and obtain permission to advance such candidate(s) as finalist(s). *Id.* 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." *Id.* at § 2.

Although Regent Policy 3E makes clear that the Board of Regents has exclusive authority to determined finalists, the five candidates who the Daily Camera seeks materials from were not selected or identified by the Board of Regents. Instead, the search committee selected this group and provided their names to the Board of Regents for further consideration. From this group, the Regents selected only one finalist. And,

[1] The Daily Camera also relies on a statement by one of the Regents where she referred to the candidates as finalists. This statement, by a single board member, is in no way binding on or indicative of the position of the Board of Regents. Regent Law 2.A.4 makes clear that the authority of the Board of Regents is conferred upon the members as a Board and only the Board can bind the University. *See also Barrett v. University of New Mexico Bd. of Regents,* 562 Fed. App'x 692, 694 (10th Cir. 2014) ("[I]ndividual Board members are not empowered to act individually, but must act as 'a body corporate.'").

of this group, only one candidate, Mr. Kennedy, "agreed to be advanced" as a finalist. Policy 3E(2), Ex. A to Stipulated Facts. Thus, under Policy 3E, Mr. Kennedy was the only finalist.

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. Neither CORA or COML compel this result. CORA defines a finalist as "an applicant or candidate for an executive position as the chief executive officer of a state agency, institution, or political subdivision or agency thereof who is a member of the final group of applicants or candidates made public pursuant to section 24-6-402(3.5), and 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." COML, section 24-6-402(3.5), does not provide additional requirements as to who (or how many) must be included in the group made public. It states only: "the 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 14 days prior to appointing or employing one of the finalists to fill the position."

Thus, while the statutes provide that the final group of candidate(s) under consideration are "finalists," they do not dictate to the Board of Regents any method for how the Board of Regents should arrive at this final group or who the group must include. This is the purpose of Regent Policy 3E. The process defined by Policy 3E does not conflict with CORA or COML. Accordingly, Regent Policy 3E, not CORA or COML, controls who is a finalist in the selection process, and under Policy 3E, only Mr. Kennedy was a finalist.

II. Neither CORA or COML require the Board of Regents to name more than one finalist.

The Daily Camera does not dispute that the Regents followed Policy 3E in selecting Mr. Kennedy as the President of the University. The only basis for the Daily Camera's argument that all six candidates referred to the Board of Regents were finalists, and thereby their materials subject to disclosure, is the assertion that there must be more than one finalist. Neither CORA or COML requires the Board of Regents to identify a minimum number of finalists. The Daily Camera's strained reading of the statutes fails for at least three reasons.

First, the Daily Camera seeks to draw from the statutes a requirement of more than one finalist that does not exist. It is axiomatic that "[c]ourts should not interpret a law to mean what it does not express." *Matter of Adoption of T.K.J.,* 931 P.2d 488, 493 (Colo. App. 1996)). Courts are "not at liberty to read additional terms into, or to modify, the plain language of [a] statute." *Int'l Truck and Engine Corp. v. Colorado Dept. of Revenue,* 155 P.3d 640, 642 (Colo. App. 2007); *Schlessinger v. Schlessinger,* 796 P.2d 1385, 1389 (holding that the court should be careful to avoid judicial legislation by adding to a statute what the legislature did not.). "In addition, [the court] will not construe a statute in a manner that assumes the General Assembly made an omission; rather, the General Assembly's failure to include particular language is a statement of legislative intent." *Specialty Restaurants Corp. v. Nelson*, 231 P.3d 393, 397 (Colo. 2010) (citing *Romer v. Bd. of County Comm'rs*, 956 P.2d 566, 576 (Colo. 1998)).

COML subsection 3.5 provides numerous requirements for the search process for a selection of a chief executive officer of a public agency, authority or institution, but it does not require an institution to identify and disclose more than one finalist. C.R.S. § 24-6-402(3.5). The statute requires that there be a search committee, and that the search committee establish job

search goals including writing a job description, establishing deadlines for applications, establishing requirements for applications, determining selection procedures, and adopting a time frame for the appointment of the chief executive. *Id*. It also requires that all finalists under consideration for the chief executive officer role be disclosed at least 14 days prior to appointing or employing any finalist to fill the position. *Id.* It does not contain any requirement as to the number of finalists that must be disclosed. Similarly, it does not include a definition of finalist, it states only that "finalist" shall have the same meaning as in C.R.S. § 24-72-204(3)(a)(XI).

CORA also does not require more than one finalist. Instead, section 24-72-204(3)(a)(XI)(A) states that application materials for all candidates who are not finalists shall not be subject to public disclosure. CORA defines "finalist" as: "an applicant or candidate for an executive position as the chief executive officer of a state agency, institution, or political subdivision or agency thereof who is a member of the final group of applicants or candidates made public pursuant to section 24-6-402(3.5), and 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." Thus, under CORA, a finalist is limited to the person(s) publically identified as such under COML. Nowhere in either statute is there a requirement of multiple finalists, and the Court cannot create such an additional requirement.

Second, this interpretation is contrary to Colorado's rules of statutory construction. The Colorado Legislature was explicit in stating that within the statutes "the singular includes the plural, and the plural includes the singular." C.R.S. § 2-4-102; *accord Youngs v. Indus. Claim Appeals Office*, 2012 COA 85M, ¶ 23 (the term "issues" as used in a statute includes a single

"issue"). Thus, the use of "finalists" in CORA and COML does not preclude the identification of a single finalist. The use of "finalists" in CORA and COML means finalist or finalists.

Finally, because neither CORA or COML have any language requiring that more than one finalist be named, the Daily Camera relies on the definitions of isolated words in the statutes, "member," "group" and "list," to arrive at the strained meaning that the statutes require a public entity to name more than one finalist. The use of "member," "list" and "group" within the statutes cannot transform the statutes into containing a requirement that they do not have.

The Daily Camera's definitions and interpretation of these words is unreasonably limited and contrary to common usage. When interpreting a statute, courts "read words and phrases in context and construe them according to their common usage." *South Fork Water and Sanitation Dist. v. Town of South Fork,* 228 P.3d 192, 196 (Colo. App. 2009). The Daily Camera argues that member always means "one of many," but this is not the case. For example, single member LLCs, are companies with a single member. The Daily Camera offers a definition of "group" that would suggest that there can be no "group of one," but this is contrary to common experience. For example, if asked to sort blocks into groups by color, and there is only one blue block, the blue group would be a group of one. The Daily Camera's definition of "list" also suffers from the same common sense problem. While lists may contain numerous items, a grocery list is still a list with only one item, a to-do list is still a list if it contains only one task.

Moreover, reading these words in context further undercuts the Daily Camera's arguments. "Member" and "group" are used in CORA to state, "an applicant or candidate for an executive position as the chief executive officer . . . who is a member of the final group of applicants or candidates made public." C.R.S. § 24-72-204(3)(a)(XI) (emphasis added). Under a

plain reading of the statute, "member" and "group" are not used to require that there be multiple finalists. Instead, because the statute permits multiple finalists, the words "member" and "group" allow for that possibility, without foreclosing the possibility of a single member in a group of one. Similarly, list is used to state that under COML, the entity must "make public the list of all finalists." C.R.S. § 24-6-402(3.5) (emphasis added). Again, "list" does not inherently require more than one finalist, instead it leaves room for multiple finalists.

The use of "member," "group" and "list" cannot transform the statutes from their plain meaning and add an unwritten substantive requirement to the search process. The plain language of the statutes does not support the Daily Camera's interpretation of CORA or COML and should be rejected.

III. There is no conflict between the language in CORA related to three or fewer qualified candidates and the process used by the Board of Regents.

CORA provides 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." C.R.S. § 24-72-204(3)(a)(XI). 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. That is not what the statute says. *See Matter of Adoption of T.K.J.,* 931 P.2d at 493 ("Courts should not interpret a law to mean what it does not express."). Instead, this portion of the statute by its plain language is only applicable in circumstances where there are three or fewer qualified candidates. It is undisputed that there were more than three qualified candidates in the search for University president. Fact 9. Accordingly, by its terms, this portion of the statute is inapplicable.

The Daily Camera's argument that this plain language interpretation of the statute would lead to an absurd result also fails. The Daily Camera argues that if "the statute requires that three finalists be named when only three individuals meet the minimum qualifications, it is absurd to read the statue permitting the disclosure of only one finalist when more than three individuals meet the qualifications." Op. Br. at 13. There is nothing absurd about this result. There are many reasons that the General Assembly may have chosen to include this requirement. For example, the General Assembly could have sought to incentivize public entities to seek out qualified pools of candidates instead of focusing on only one or two potential candidates. If an institution is able to find more than three qualified candidates, that institution has more flexibility in determining how finalists are selected. The General Assembly also could have intended to streamline the process for public bodies. If only three candidates with minimum qualifications come forward, under the statute they are all finalists, so the public body can dispense with the time consuming process of determining who among them should proceed to the finalist stage. In short, it was not absurd for the General Assembly to provide special provisions for when a limited pool of qualified candidates is identified. Per the plain language of the statute, this clause of the statute applies only in circumstances of three or fewer qualified candidates and cannot be expanded to apply in this circumstance.

IV. The Daily Camera's interpretation requires an impermissible implied repeal of the Board of Regents' authority to select a president of the University.

The Daily Camera's interpretation of CORA and COML goes beyond the plain language of the statutes and instead asks the Court to add requirements not contemplated by the General Assembly. This overbroad interpretation should be rejected because it is an unnecessary and

impermissible intrusion into the Board of Regents' constitutional and statutory authority to select a president of the University.

The Board of Regents "are the highest authority in the University of Colorado system and enjoy complete independence to select the president of the University and to dictate the University's policies and programs." *Churchill v. University of Colorado at Boulder,* 285 P.3d 986, 1004 (Colo. 2012). This authority comes from both the Colorado constitution and statutes. The Colorado Constitution grants the Board of Regents with "the general supervision of [its] respective institutions and the exclusive control and direction of all funds of and appropriations to [its] respective institutions, unless otherwise provided by law." Colo. Const. art. VIII, § 5. The General Assembly has authorized the Board to "enact laws for the government of the university," and stated explicitly, "the board of regents has general supervision of the university and control and direction of all funds of and appropriations to the university." C.R.S. § 23-20-112(1), § 23-20-111. Pursuant to statute, "the regents of the university shall elect a president of the university . . . ." C.R.S. § 23-20-106.

Because of the Board of Regents' unique status in both the constitution and statutes, the Board of Regents' supervisory powers can only be limited when done so explicitly. *Regents of the University of Colorado v. Students for Concealed Carry on Campus, LLC,* 271 P.3d 496, 501 (Colo. 2012). For example, in *Uberoi v. University of Colorado,* the Colorado Supreme Court considered how CORA applied to records of the University of Colorado. 686 P.2d 785 (Colo. 1984) (superseded by statute). The court held that the powers of the Board of Regents could not be repealed unless the intent to do so was explicit. *Id.* at 788. Acknowledging that the university had adopted procedures dealing with the production of records, the court explained:

> [I]nvalidation of these procedures by legislative enactment such as the Open Records Act would limit the regents' powers to supervise the operation of the university. The Open Records Act contains no clear expression of legislative intent to impose such a limitation and we will not infer such intent where it is not unmistakably expressed.

Id. at 788.

Thus, the court was clear, the General Assembly could limit the Board of Regents' supervisory authority, but any limitations needed to be explicit. *Id.*; *see also See Students for Concealed Carry,* 271 P.3d at 498 (in holding that the law was an express repeal of the Board of Regents' authority to ban guns on campus, the court relied on legislative intent stating the purpose of the concealed carry was meant to implement statewide uniform standards in all areas of the state."); *Ramos v. The Regents of the University of Colorado,* 759 P.2d 726, 732-33 (Colo. 1988) (holding that "Colorado's comprehensive legislation directed at the elimination of discriminatory employment practices throughout the state . . . manifest[s] a clear and unmistakable intent to subject all governmental and private employers in the state," including the University, to the statutory scheme.). Consistent with this power, following the court's holding in *Uberoi,* the General Assembly modified CORA to explicitly apply to the Board of Regents and the University. *Id.* at 733 (recognizing subsequent legislative history).

In this circumstance, there is no support that the General Assembly sought to limit the Board of Regents' discretion in adopting a process to select a president of the University or to require the Board of Regents to identify multiple finalists. Instead, consistent with its supervisory authority, the Board of Regents has a comprehensive policy for selecting a president of the University that includes a process for arriving at and designating finalist(s). That policy was followed in this case.

Adopting the Daily Camera's interpretation of CORA and COML 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. To order production of the records sought by the Daily Camera, the Court would have to accept the Daily Camera's argument that contrary to the decision by the Board of Regents, the six persons recommended by an unelected search committee are de facto finalists, or develop its own standard for determining finalists. Either way, this would be a drastic reduction in the supervisory powers of the Board of Regents not contemplated by the General Assembly and not supported by the statutory language. Accordingly, the Daily Camera's interpretation of CORA and COML must fail.

V. Additional tools of statutory interpretation do not support the Daily Camera's expansion of CORA or COML.

When the language of a statute is clear and unambiguous, courts do not look beyond the plain language of the statute. *South Fork Water and Sanitation Dist. v. Town of South Fork,* 228 P.3d 192 (Colo. App. 2009). It is only when the language is ambiguous that courts engage in additional statutory analysis such as review of legislative history or the impact of a given construction. *Id.* In this case the statute is unambiguous—there is no requirement that multiple finalists be identified and disclosed. However, even if the Court goes beyond the plain language, the tools of statutory construction also support the Board of Regents' interpretation.

A. The Legislative history does not support the Daily Camera's interpretation of the statutes.

The Daily Camera argues that the legislative history supports a reading of the statutes that requires multiple finalists because the provisions were a "compromise between the State Colleges of Colorado and the Press Association." Op. Br. 16. However, the Daily Camera's

argument regarding legislative history is based on isolated remarks from senators and representatives regarding the various bills and ignores the overarching legislative history of this bill. The amendments to CORA and COML regarding disclosure of candidate materials is illuminating.

Prior to 1994, materials for applicants of executive positions were considered public records and subject to public disclosure. Various institutions in Colorado found this to be unworkable because it discouraged qualified applicants from applying. Pl.'s Ex. 5 at 4. In 1994, House Bill 94-1234 was adopted. Pl.'s Ex. 1. HB 94-1234 created an exception from the disclosure of public records for all candidates, upon request by that candidate, except for finalists. *Id.* The term "finalist" was defined broadly to include all applicants or candidates chosen for an interview, or any candidate still being considered for a position 21 days before the position was filled. *Id.* at 2. H.B. 94-1234 also required that if there were six or fewer candidates competing for a position, all candidates would be considered finalists. *Id.*

When H.B. 94-1234 was adopted, COML did not include section 3.5 or any language regarding publication of the finalists for an executive position. Two years later, H.B. 96-1314 added these provisions to COML. Pl.'s Ex. 2. The bill established certain requirements for a search committee for executive positions and required that a list of all applicants be published 14 days prior to the first interview for a position. *Id.* at 3.

It quickly became clear that these provisions were not workable. In 1997, Senate Bill 97-059 was introduced to amend section 3.5 of COML. Under SB 97-059, instead of requiring disclosure of all names of finalists prior to interviews, finalists only had to be disclosed 14 days prior to appointing a chief executive officer. Pl.'s Ex. 3.

By 2001, the processes in CORA and COML regarding disclosure of candidates were still hampering institutions' ability to hire top-notch candidates. Pl.'s Ex. 11 at 1. Accordingly, the General Assembly again amended CORA to be more protective of applicants and to give hiring bodies greater discretion. Pl.'s Ex. 4. The General Assembly removed the expansive definition of finalist that included all persons selected to interview and all persons still in consideration 21 days before appointment, and instead defined finalist to mean only "a member of the final group of applicants or candidates made public pursuant to section 26-6-402(3.5)." *Id.* at 7. The bill also removed the language that if there were six or fewer applicants, all were considered finalists, and amended the language to read, "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." *Id.* The bill removed the requirement that applicants needed to proactively request their application materials not be made public; instead, all materials of candidates not designated as finalists would automatically be protected from disclosure. *Id.*

Thus, each of the amendments to CORA have shown a clear trajectory of more protection for candidates for executive level positions and greater discretion to hiring bodies as to which candidates must be disclosed as finalists. And, despite revisiting these provisions repeatedly over the years, the General Assembly never added a requirement that an institution must identify more than one finalist.

Moreover, in relying on testimony from committee hearings, the Daily Camera fails to cite to any discussion that these amendments would require more than one finalist. Instead, the only testimony on the subject states just the opposite. The bill sponsor of SB 97-059 was

specifically asked: "[O]ne of my concerns is that there might just be one finalist announced, is there somewhere in the law, existing in the law, a requirement that you name a certain number of finalists if there is more than one?" Senator Alexander responded, "Not that I'm aware of." Pl.'s Ex. 10 at 7:17-22.

The General Assembly considered the process the Daily Camera advocates the court adopt and rejected it. In 2009, HB 09-1369 was introduced to require search committees to nominate finalists to a university's governing body, and after that nomination, any candidate the governing body chose to interview would be a finalist and would be publically disclosed. HB 09-1369 at § 23-5.5-104, attached as Exhibit A. At no point in any of the committee hearings did any legislator assert that the bill was unnecessary because this was already the requirement or because there was already a requirement for multiple finalists. After much discussion, the General Assembly did not adopt HB 09-1369.

The legislative history reflects an iterative process in balancing the need for privacy to attract high-quality talent and the public's interest in evaluating candidates for leadership roles in the state. However, contrary to the Daily Camera's assertion, nowhere in this process did the General Assembly determine that disclosure of multiple finalists was necessary to protect the public's interests. Instead, the bill sponsor expressly acknowledged no such requirement existed. Accordingly, the legislative history does not support a finding that CORA or COML require the Board of Regents to identify multiple finalists.

B. The Camera's strained reading is not necessary to accomplish the objective of the statute.

The object sought to be obtained is another statutory tool the Court can consider in determining the meaning of an ambiguous statute. C.R.S. § 2-4-203(1)(a). COML requires

disclosure of the finalist(s) before an appointment is made so that the public can consider the applicant(s) and provide feedback. CORA supports that endeavor by making the finalist(s) application materials public. However, that interest is balanced against the desire to obtain high-quality candidates for top leadership positions in the state. This balance ensures that candidates who are not final contenders are not subject to public scrutiny and the risk of losing their jobs or standing in their communities. In this case, the intent of the statutes was accomplished. After Mr. Kennedy was disclosed and his materials released, Mr. Kennedy attended forums at all four campuses. Fact 15. And, through an online portal, the Board of Regents solicited and received significant input—comments from over 3,000 people. Fact 15. Accordingly, consistent with the intent of the statutes, the public was able to research and provide input about Mr. Kennedy and the Board of Regents was able to consider that feedback prior to appointing Mr. Kennedy. Thus, a different interpretation of the statutes is not needed to effectuate the purpose of the statutes.

C. The consequences of the Daily Camera's construction weigh against its interpretation.

If a statute is ambiguous, in addition to considering legislative history, a court should also consider the consequences of a particular interpretation. C.R.S. § 2-4-203(e). In this case, adopting the Daily Camera's interpretation of CORA and COML would cause a significant intrusion upon the Board of Regents' authority and would invalidate its chosen policy for selecting a president of the University. As discussed above, the General Assembly granted specific authority to elect a president of the University and to adopt such laws as necessary for its supervisory powers over the University. This intrusion into the Board of Regents' authority counsels against adopting the Daily Camera's interpretation.

Moreover, this interpretation would unnecessarily disclose sensitive information about candidates who reasonably believed that their application information would not be publicly disclosed unless they agreed to be finalists. CORA promises these candidates a safeguard—that their identities and application materials would not be made publicly available unless they were identified as finalists. C.R.S. § 24-72-204(3)(a)(XI). This protection was further fortified under Regent Policy 3E which assured the candidates that they would have the opportunity to accept or decline their designation as finalists and the corresponding disclosure of their application materials. But, under the Daily Camera's interpretation of the statute, the assurances of confidentiality made to these candidates would be discarded and their private information made public. The legislative history makes clear that this type of disclosure could threaten the candidates' current circumstances including their employment and standing in their communities. Pl.'s Ex. 5 at 4.

The negative implications of disclosure of this information is not merely theoretical. In October 2019, an unauthorized leak led to disclosure of 30 names of candidates to a journalist at *The Colorado Independent.* Supplemental Stipulated Fact 28. In an article published December 31, 2019, the author explained that three of the candidates were not disclosed in the newspaper article because each of those candidates believed that if it was disclosed that they sought the position it would jeopardize their current employment. Exhibit N to Supplemental Stipulated Facts. The journalist explained that consistent with her ethical obligation to minimize harm, she was withholding the identities of these individuals.[2] Thus, more than six months after

[2] One of the three candidates whose identity was withheld by the Colorado Independent is in the group of five candidates the Daily Camera is seeking disclosure of their application materials.

the search was completed, individuals were still concerned that disclosure of their identities as former candidates would compromise their employment. Accordingly, the consequences weigh strongly against construing the statute to require disclosure of the candidates' identities and application materials.

VI. The relief the Daily Camera seeks for supposed untimely responses to its CORA requests is contrary to the statute.

Without citing any case law or statute in support of its argument, the Daily Camera asserts that because the University allegedly failed to timely respond to its CORA request, the protections awarded to candidates under C.R.S. § 24-72-204(3)(a)(XI) should be waived, and the application materials should be produced. This relief is not available.

The Daily Camera concedes that this relief is not included in either CORA or COML. Op. Br. 24. "When deciding whether a statutory scheme allows remedies not expressly set forth in the statute, 'the ultimate issue is one of legislative intent.'" *Capital Securities of America, Inc. v. Griffin,* 278 P.3d 342, 346 (Colo. 2012) (quoting *Bd. of Cnty. Comm'rs v. Moreland*, 764 P.2d 812, 820 (Colo.1988)). In determining legislative intent, the courts put "substantial weight" on the fact that the legislature failed to expressly provide for the remedy sought. *Id.* Moreover, when the General Assembly "imposes statutory duties on governments 'unknown at common law,'" the General Assembly must provide a "clear expression of legislative intent" to impose such remedy. *Id.* (quoting *Moreland,* 764 P.2d at 818).

Under CORA, the General Assembly adopted a clear remedial scheme that does not include the relief sought by the Daily Camera. CORA provides that where a record custodian fails to produce a record that should be produced, the requesting party must notify the entity in writing, and if the parties cannot resolve the dispute, the person seeking the record can file a

district court action 14-days after such notice is filed. C.R.S. § 24-72-204(5)(a). As part of this statutory scheme, the General Assembly also determined that if the District Court determines that the record should have been produced, then the requesting party is entitled to costs and attorneys' fees. C.R.S. § 24-72-204(5)(b).[3]

There is nothing in the statutory scheme that would suggest that protection for candidates' materials should be waived if the record custodian does not timely produce the record. Just the opposite, such remedy would be contrary to the purposes of the legislative scheme. *See All State Ins. Co. v. Parfrey,* 830 P.2d 905, 911 (Colo. 1992) (holding that when no remedy is provided as part of a statutory scheme, the court should consider whether an implied civil remedy would be consistent with the purposes of the legislative scheme). The purpose of the exception in CORA is to protect candidates from disclosure of their private information; to allow disclosure of their application materials because of delay by the records custodian would undermine the policy. Instead, the General Assembly already achieved balance on this issue. It put in place a procedure to obtain documents if their production is delayed or denied, and in seeking to protect those seeking documents, added a fee shifting provision. Because there is no support in the statutory scheme, and reading in such a waiver would be contrary to the legislative intent, the Daily Camera's request for documents under an implied waiver must be denied.

[3] Additional evidence of the General Assembly's intent that the remedial scheme be limited is evidenced by its 2017 repeal of the availability of criminal sanctions for failure to produced documents under CORA. Moreover, the Tenth Circuit has held that there is no private right of action for damages under CORA. *McDonald v. Wise,* 769 F.3d 1202, 1217 (10th Cir. 2014).

CONCLUSION

The only way the Daily Camera can prevail on its arguments that the materials of five additional candidates should be produced is if the Court finds that the Board of Regents was required to identify and disclose more than one finalist and judicially deem the six candidates submitted to the Board of Regents as finalists. The plain language of CORA or COML, the intent of the statute, and the legislative history do not support this interpretation. Accordingly, the Daily Camera's request for disclosure should be denied and judgment should be entered in favor of Defendants.

Respectfully submitted this 10th day of January, 2020.

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CERTIFICATE OF SERVICE

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