DISTRICT COURT CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: March 6, 2020 3:38 PM CASE NUMBER: 2019CV33759
PRAIRIE MOUNTAIN PUBLISHING COMPANY, LLP d/b/a/ DAILY CAMERA **Plaintiff,** **v.** **THE REGENTS OF THE UNIVERSITY OF COLORADO** **Defendant.**	▲ **COURT USE ONLY** ▲ Case No: 2019CV033759 Division: 275

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case involves a Colorado Open Records Act ("CORA") request served by the Daily Camera on the Regents of the University of Colorado ("Board of Regents" or "Board") seeking the names and application materials for candidates considered in the presidential search that occurred in 2019. The Court hereby incorporates the Stipulated Facts and Supplemental Stipulated Facts submitted by the parties. Those facts are summarized below.

FINDINGS OF FACT

In 2018, University of Colorado president Bruce Benson announced his intention to retire in July 2019, and the Board of Regents began a search process to fill the position. The Board of Regents hired a search firm and appointed a search committee. The search firm identified more

than 100 candidates, of which 27 met the qualifications for the position. The search committee interviewed 10 of the candidates and forwarded six of those candidates to the Board of Regents. After interviewing all six candidates, the Board of Regents voted unanimously to name Mark Kennedy as the "sole finalist." Consistent with Regent Policy 3E, the Board of Regents sought and received Mr. Kennedy's consent before he was named as a finalist. After being announced as the sole finalist, Mr. Kennedy was subjected to a public vetting phase where he appeared on all four campuses. An online portal was developed for the public to comment on Mr. Kennedy's nomination. Following the public vetting period, the Board of Regents voted 5-4 to appoint Mr. Kennedy as president of the University.

Following Mr. Kennedy's appointment, the Daily Camera submitted a CORA request to the University seeking application materials for the 27 candidates determined qualified by the Search Committee and the six individuals interviewed by the Board of Regents. The University disclosed the application materials submitted by Mr. Kennedy, and denied the remainder of the request.

Under CORA, application materials of "finalists" for a chief executive position are subject to disclosure, but application materials for candidates who are not finalists are excepted from disclosure. § 24-72-204(3)(a)(XI)(A), C.R.S. It is undisputed that only Mr. Kennedy was identified as a finalist by the Board of Regents. The Daily Camera asserts that the denial of its request for the application materials for the other five candidates interviewed by the Board of Regents was improper, contending that all six candidates interviewed should be considered finalists. Thus, the issues before this Court are what constitutes a "finalist" under CORA and, to a lesser extent, who may make that determination.

CONCLUSIONS OF LAW

Since this matter is before the Court on stipulated facts and exhibits, the Court is primarily tasked with interpreting and applying two provisions of the state's "sunshine laws" – CORA and the Colorado Open Meetings Law (COML).

The Daily Camera brought this CORA action under § 24-72-204(5), C.R.S., seeking a declaration that the Board of Regents improperly denied the Daily Camera's requests for the list of names and application materials of the finalists for the 2019 University of Colorado President position. Given how the Board of Regents conducted the search for a new President, the Daily Camera contends that there were six finalists for the position. The Board of Regents maintains that there was only one finalist, Mr. Kennedy, who was appointed as President in May 2019. For the reasons set forth herein, the Court concludes that the Board of Regents violated CORA by withholding the names and application materials of the other five individuals interviewed by the Board of Regents in the final round of competition. Under the undisputed facts, and based on the statutory language, the Court concludes that six individuals were "finalists" for the position. In doing so, the Court rejects the argument of the Board of Regents that Mr. Kennedy, and Mr. Kennedy alone, was the sole finalist under CORA.

I. Statutory Interpretation

The overriding goal of statutory construction is to effectuate the legislature's intent. *Dep't of Revenue v. Agilent Technologies, Inc.*, 2019 CO 41, ¶ 16; 441 P.3d 1012, 1016. In doing so, courts look to the entire statutory scheme 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*.

If the statutory language is clear, it is applied as written. *Id.* However, if the statute is susceptible to more than one reasonable interpretation, a court may look to other aids of construction, such as the legislative history of the bills, the object of the statutes, and the consequences of construction. § 2-4-203(1), C.R.S.

II. Plain and Ordinary Meaning of the Statutes

Under the plain and ordinary meaning of the statutes, there were more than one finalist for the 2019 CU President position. The Court reaches this conclusion by reading the statutory text consistently, harmoniously, and sensibly. In contrast, the Board of Regents' interpretation conflicts with the plain and ordinary meaning of several words and phrases in CORA. Frankly, it is difficult for this Court to avoid concluding that the Board's interpretation is designed to justify a pre-determined outcome, rather than to align with the statutes.

Section 24-72-204(3)(a)(XI)(A)("subsection XI(A)") excepts from disclosure "[r]ecords submitted by or on behalf of an applicant or candidate for an executive position[1] . . . who is not a finalist." Records submitted by or on behalf of an applicant or candidate who is a finalist for an executive position are subject to disclosure. § 24-72-204(3)(a)(XI)(B). For purposes of this provision, 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." (emphasis added). Section

[1] There is no dispute that the position of President is an "executive position" and that the University of Colorado is an "institution." § 24-72-202(1.3 & 1.5).

24-6-402(3.5)("subsection 3.5")[2] provides in 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), subsection 3.5 does not expressly define "finalist." Neither statute defines the terms "member," "group," or "list." The Court may therefore look to dictionary definitions of these terms. *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 "finalist" as "a contestant in a competition finals." To illuminate the meaning of the term, Merriam-Webster cites the following example: "They interviewed all of the finalists before making a decision." The Merriam-Webster.com Dictionary, Merriam-Webster, Inc., https://www.merriam-webster.com/dictionary/finalist. Accessed Mar. 5, 2020.

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 Mar. 5, 2020. 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.

[2] Subsection 3.5 is the COML provision relied on by the Board of Regents in its CORA denial.

Accessed Mar. 5, 2020. 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 Mar. 5, 2020.

The Board of Regents' interpretation of both CORA and COML is at odds with the plain and ordinary meaning of these terms. In asserting that the finalist is the person the Board decides to disclose to the public under subsection 3.5, the Board has inverted the meaning of the statutes. Under the statutes, "finalists" are who must be disclosed to the public, and not, as argued by the Board, who the public institution decides to publicly disclose. In other words, CORA and COML dictate the records and information that must be disclosed. The Board of Regents does not have the unfettered authority to self-define the term "finalist" as the person(s) whom the Board, in its sole discretion, determines will be disclosed publicly. Each word in the statutory scheme must be considered. In employing the terms "finalists," "member," "group," "list," and "one of" in the statutes, the legislature plainly expressed its intent that the names and records of more than one "finalist" be disclosed.

The Board of Regents' interpretation renders these terms confusing and superfluous. For example, the Board accurately asserts that a "list," in a variety of statutory and rule contexts, need not always be comprised of more than one person or thing. But the Board of Regents also concedes that a "list of one finalist" is "awkward phrasing." Indeed it is, and therefore the Court is not convinced that the awkward construction of the statutory language is consistent with legislative intent.

Section 2-4-102 does not compel a different result. This provision states that, in interpreting statutes, the "singular includes the plural, and the plural includes the singular."

Section 2-4-102 is a general interpretation clause, intended to be one interpretative aid a Court may employ to determine legislative intent. *See* Sutherland, Statutes and Statutory Construction, § 47:34 (Singer & Singer, 7th ed., 2014). Like similar statutes from other jurisdictions, § 2-4-102 recites a "general principle of interpretation, and judicial opinions need not rely on a statutory directive to enlarge a singular term's coverage, or to apply a plural term to a single object or subject." *Id.* Further, "while these rules give courts some flexibility to interpret singular and plural words, they do not require singular and plural forms to have an interchangeable effect. As is always the case with statutory construction, courts prefer to rely on a word's plain, ordinary meaning where possible, and so give singular meaning to singular words and plural meanings to plural words absent a clear contrary intent." *Id; see also Dakota, Minnesota & Eastern R.R. Corp. v. Schieffer*, 648 F.3d 935, 938 (8th Cir. 2011) (this principle is used only where "necessary to carry out the evident intent of the statute" and holding that use of the language "participants or their beneficiaries" demonstrated congressional intent to require more than one participant).

Applied here, reading the plural term "finalists" as singular is not necessary to carry out the evident intent of the statutes. More importantly, this reading would conflict with the surrounding text. When there is more than one applicant who meets the minimum qualifications, the terms "finalists," "member," "group," "list," and "one of the finalists" demonstrate the legislative intent that multiple finalists must be made public. These terms surrounding the plural form of "finalist" cannot be ignored or interpreted so that multiple references to the plural are construed as the singular. In this context, the General Assembly's use of the plural form of "finalist" reinforces its intent. Common sense, not linguistic gymnastics, must be employed in interpreting statutes.

Moreover, statutes are to be interpreted to avoid absurd or illogical results. The final clause of subsection XI(A) 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." This provision expressly provides that if three applicants meet the minimum qualifications, there are three finalists. The Board of Regents' position that only one finalist may be disclosed, when there are more than three individuals who meet the minimum qualifications, is both illogical and inconsistent with this provision. 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 the records of more than one finalist when more than three candidates meet the minimum qualifications.

The Board of Regents asserts that, even if multiple finalists were contemplated by CORA, here there was only one, Mr. Kennedy. Therefore, there is no judicial standard that would allow "the Court to hold that all six candidates interviewed by the Board of Regents were finalists." Defendant's Proposed Order at 7. The Court disagrees. To the extent this is a problem, it is one of the Board's making, and not this Court's, by virtue of the Board's failure to comply with CORA and COML. The Board could have further refined or revised the list of six, and still have had a "list of finalists," but it did not do so.

In sum, the statutes provide that the finalists are the members of the final group of applicants or candidates. A finalist is someone who competes in the final round of competition. Here, based on the stipulated facts, the six candidates interviewed by the Board of Regents are the members of the final group of candidates who competed in the final round of competition. Under

the plain and ordinary meaning of the statutes, the "group" and "list" of finalists includes more than the sole applicant that the Board of Regents chose to disclose.

III. Extrinsic and Intrinsic Aids of Construction

A. Extrinsic Aids – Legislative History

Given the analysis above, a review of the legislative history is not necessary. Nevertheless, that history supports the Court's conclusions. When a statute is ambiguous, a court may look to the legislative history of the bills that enacted the statutory language for guidance. § 2-4-203(1)(c). Here, the four bills that resulted in the enactment of the current version of the statutes shed light on legislative intent.

Read as a whole, the legislative history of HB 94-1234, HB 96-1314, SB 97-059 and HB 01-1359 (Daily Camera Opening Brief, Ex. 1-12) demonstrates that the legislation was 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 subject to public disclosure. The breadth of required disclosures has narrowed over subsequent years, but not to the extent argued by the Board of Regents.

1. HB 94-1234

In weighing the competing needs for applicant confidentiality and public transparency, the legislature excepted non-finalists from public disclosure in 1994. This bill defined the term 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." (Ch. 168, sec. 2, § 24-72-204(3)(a)(XI)(A), 1994 Colo. Sess. Laws 937). Tilman Bishop, the Senate sponsor, 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." (Hearings on HB 94-1234 before the Senate State Affairs Committee, 59th General Assembly, 2nd Sess. (March 7, 1994), Ex. 6, p. 3).

2. HB 96-1314

This bill broadened and strengthened COML and is the genesis of the language found in subsection 3.5. (Second Reading of HB 96-1314 before the House, 60th General Assembly, 2nd Sess. (February 26, 1996), Ex. 7, pp. 1-2). The bill 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." (Ch. 147, sec. 1, § 24-6-402(3.5), 1996 Colo. Sess. Laws 693). House sponsor Peggy Kerns 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." (Second Reading, p. 10).

3. SB 97-059

Senate Bill 97-059 was an outgrowth of HB 96-1314. (Hearings on SB 97-059 before the House State Affairs Committee, 61st General Assembly, 1st Sess. (February 25, 1997), Ex. 8, 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 subsection 3.5 by changing the timeframe from 14 days before the first interview to the current 14 days before

appointment or employment. 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. (Hearings on SB 97-059 before the Senate Education Committee, 61st General Assembly, 1st Sess. (January 22, 1997), Ex. 9, p. 6). 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. (*See, e.g.*, Senate Hearing, pp. 7-8, 11-12, 15-17, 24-26).

4. HB 01-1359

HB 01-1359 amended three aspects of subsection XI(A). First, this bill removed the burden from applicants who were not finalists by eliminating the requirement that they make a written request to remain confidential. (Ch. 286, sec. 3, § 24-72-204(3)(a)(XI)(A), 2001 Colo. Sess. Laws 1073). Second, the law amended the definition of finalist by providing 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)". *Id.* 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" and amended the number to "three." *Id.* The fiscal note explains that the bill "specifies that a finalist is a member of the final group from which the appointment is made." (Colorado Legislative Council Staff, Fiscal Note on HB 01-1359 to House Information and Technology Committee, March 24, 2001, p. 2).

5. Legislative history summary

While the amendments to CORA and COML enhanced candidate confidentiality, the amendments do not go so far as to permit a public institution unlimited discretion in disclosing finalists. The legislature has maintained the terms "finalist," "member," "group," "list," and "one

of the finalists" in the statutes. Legislative history, including statements by legislative sponsors and witnesses from both the press and the higher education system, demonstrates that the General Assembly intended for the names and records of the members of the final group of applicants competing for the position (the "finalists") be public information. The legislature drew a line to protect the identity of non-finalists, but still promote public scrutiny and input into this critical process. The Board, through its Policy 3E, has attempted to further re-draw the line, which it is not authorized to do.

Lastly, SB 09-136—failed legislation relied upon by the Board of Regents—is not relevant in determining legislative intent. *See Ritter v. Jones*, 207 P.3d 954, 962 (Colo. 2009); *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"). It has been said that citing legislative history is akin to looking over a crowd and picking out your friends. If so, trying to discern intent from failed legislation is like looking at the crowd and not being able to tell friend from foe—proposed legislation may fail for many different reasons.

B. Intrinsic Aids

When faced with an ambiguous statute, a court also may consider the object sought to be obtained in determining the statute's meaning. § 2-4-203(1)(a). Likewise, a court may consider the consequences of the competing constructions. § 2-4-203(1)(e).

The object of the sunshine laws is to promote transparency and trust in government institutions. CORA establishes a presumption that public records are open to public inspection. § 24-72-203(1)(a). Likewise, COML protects the "public's right of access to public information,"

a "right that is vitally important to our democratic system of government." *Weisfield v. City of Arvada*, 2015 COA 43, ¶ 13, 361 P.3d 1069, 1071; *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.* at ¶ 14. The interpretation advanced by the Daily Camera complies with the spirit and intent of these laws.

IV. No deference is required.

Finally, the Court addresses the Board of Regents' argument that the Court should defer to Regent Policy 3E and decline to substitute its judgment for that of the Board. At issue is the Board of Regents' decision to withhold names and application materials in response to the Daily Camera's CORA request. In resolving this dispute, the Court must interpret the CORA and COML provisions relied on by the Board of Regents. Interpreting and then applying these statutes to the stipulated facts, are not only well within this Court's province, but are its obligation. § 24-72-204(5).

The Board of Regents is not an agency charged with interpreting CORA and COML, which are statutes of general operation. Therefore, the Court need not defer to the Board's legal interpretation or Regent Policy 3E. *See, e.g., Huddleston v. Grand County Bd. of Equalization*, 913 P.2d 15, 17 (Colo. 1996) (deference to an agency's interpretation is appropriate when the agency is employing its special expertise in interpreting and applying an ambiguous statute).

Likewise, the Board of Regents' reliance on case law pertaining to its authority is misplaced. In the cases cited in section IV of the Response Brief, at issue was whether the statutes in question applied to the Board of Regents. Here, there is no question the Board of Regents is subject to the sunshine law provisions.

Nonetheless, the Board argues that it has a unique position in the State's constitutional and statutory scheme. The Court agrees. Further, citing *Van Alstyne v. Housing Authority of Pueblo*, 985 P.2d 97, 101 (Colo. App. 1999), the Board asserts that COML does not "direct public bodies in the State of Colorado as to how to do their business." Again, the Court agrees. But CORA and COML do direct public bodies, including the Board of Regents, "as to how to" disclose their business to the public. And if the way a public body conducts its business does not comply with its disclosure obligations, that body violates the sunshine laws. *Id.* at 101–02 (citing *Bagby v. School District No. 1*, 528 P.2d 1299, 1302 (Colo. 1974)). Here, as in *Bagby* where public business was not conducted publicly, the intent of COML (and of CORA) was not met when the public was presented with only one finalist. Not only was the public deprived of the opportunity to compare Mr. Kennedy to his competitors, but just as importantly, the public could not evaluate the Board's performance in selecting Mr. Kennedy as the only finalist when information regarding his competition was kept secret. The members of the Board, of course, are elected by the citizens of this State, who should be able to assess Board decisions, particularly one as critical as selecting a President of the State's flagship university.

The forgoing analysis is not this Court making public policy, but enforcing the public policy choices of the State Legislature as reflected in CORA and COML.

Finally, as a result of its conclusions, the Court need not and will not address the Daily Camera's argument regarding the allegedly untimely response of the Board to the CORA requests under § 24-72-203(3).

V. Conclusion

The Board of Regents has failed to show cause that it properly denied the Daily Camera's CORA requests for the names and application materials of the finalists for the University of Colorado President position. The Board of Regents shall therefore produce the list of names and application materials of the six candidates interviewed by the Board of Regents to the Daily Camera within 21 days of this Order. Consistent with § 24-72-204(3)(a)(XI)(B), letters of reference, and any medical, psychological, or sociological information, may be redacted.

In accordance with § 24-72-204(5)(b), the Board of Regents shall pay the Daily Camera's reasonable attorney fees and costs. If the parties are unable to reach agreement on the amount of fees and costs, the procedure in C.R.C.P. 121, § 1-22 shall apply.

DATED: March 6, 2020.

BY THE COURT:

A. Bruce Jones
District Court Judge