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| DISTRICT COURT, EL PASO COUNTY, COLORADO<br>270 South Tejon Street, Suite W200<br>Colorado Springs, Colorado 80903<br>(719) 452-5000 | |
| **MELANIE KNAPP,**<br>**Plaintiff,**<br><br>**v.**<br><br>**BOARD of EDUCATION, ACADEMY DISTRICT TWENTY,**<br>**Defendant.** | **▲COURT USE ONLY▲** |
| Eric Maxfield, #29485<br>Robert R. Gunning, #26550<br>Maxfield Gunning, LLP<br>1738 Pearl Street, Suite 300<br>Boulder, Colorado 80302<br>(720) 586-8567<br>Eric@maxfieldgunning.com<br>Rob@maxfieldgunning.com | Case No: 2019CV032570<br><br>Division 3 Courtroom 406 |
| **PLAINTIFF'S REPLY BRIEF** | |

Plaintiff, Melanie Knapp, by and through her undersigned counsel, in accordance with the parties' joint briefing schedule, respectfully submits the following Reply in support of her C.R.C.P.

56(h) Motion for Determination of a Question of Law and her Complaint and Application for Order to Show Cause.

## SUMMARY

The School Board for Academy District Twenty ("Board") interviewed 5 individuals for the position of Superintendent, in two consecutive processes, in the Spring of 2019. These interviews followed a consulting firm's months-long vetting process that narrowed the field from 26 qualified applicants to 5. Despite "extensive interviews" with these "five very fine and capable candidates," the Board publicly named Ms. Kimberly Hough as the sole finalist on April 4, 2019. Following Ms. Hough's withdrawal from consideration and another vetting by the consulting firm that again narrowed the competition to "five very fine and capable candidates," the Board publicly named another sole finalist, Mr. Thomas Gregory, on May 9, 2019. Two weeks later, the Board appointed Mr. Gregory to serve as the next Superintendent for Academy District Twenty. In failing to make public the names and application materials of the other 4 finalists (in each round of selection) in response to Ms. Knapp's records requests, the Board violated the Colorado Open Records Act ("CORA"). These CORA violations deprive the public of the right to know who was seriously being considered to lead the Academy District Twenty School District.

In its Response Brief, the Board suggests that the Board alone has the authority to determine the identity of Superintendent finalists for purposes of the state's sunshine laws, and that such a list may include only a single candidate. Even in the case where, as here, multiple

candidates competed in the final round of competition[1], the Board posits that it has the unfettered discretion to publicly announce only one finalist. Resp. Brief, p. 12. In relation to this legal challenge, the Board positions itself as a passive participant in complying with the sunshine laws, expressing concern that it could be subject to absurd outcomes, "a random selection of a point in the process," and left guessing whether the Board was in the "final round of competition." Resp. Brief, pp. 2-3, 12. The Board argues that Ms. Knapp's interpretation could lead to a determination that all 26 qualified candidates assessed by its consulting firm could be deemed "finalists." Resp. Brief, p. 11-12. The Board additionally notes Board President Johnson's statements that there were interviews, tours, and site visits after the pool of candidates had been narrowed down to the five "very fine and capable candidates". Resp. Brief, pp. 11-12. However, the Board is at all times in the driver's seat. It alone decides whether to retain a consulting firm to assist in the process, and it alone decides the person to whom the position is offered. Critically, the Board determines the hiring process, and therefore can easily discern that the "list" of "finalists" is that group that remains in the final round of competition.

Here, the identity of the finalists has at no time been a mystery to the Board, as made clear by Board President Johnson's own public statements on two occasions explaining that the field

[1] Ms. Knapp uses the language, "final round of competition," simply to characterize the meaning of the plain language found in the pertinent CORA and Colorado Open Meetings Law (COML) provisions. As the Denver District Court found, "A finalist is someone who competes in the final round of competition." *Prairie Mountain Publishing Company, LLP d/b/a Daily Camera v. Board of Regents of the University of Colorado,* Denver District Court Case No. 2019CV33759, March 6, 2020 Order. Ex. 17, p. 8. Ms. Knapp has not represented that this phrase is included in the Stipulated Facts or in the text of the statutes, as suggested by the Board. Resp. Brief, p. 10. Rather, the language captures the plain and ordinary meaning of the term "finalist."

had been narrowed. Joint Stip. Facts ¶¶ 8 & 10. Contrary to the Board's contention, this Court has the authority to interpret CORA and the COML and declare that the Board violated CORA in failing to produce the names and application materials of the five individuals interviewed by the Board in two successive searches.

The Board argues that Ms. Knapp is adding words to the statute and to the stipulated facts by arguing that finalists are those individuals who compete in the "final round of competition." The General Assembly drew a line in statute to protect the identity of non-finalists, but still promoted transparency, scrutiny, and public input by moving the disclosure from no less than fourteen days prior to the first interview to fourteen days prior to employment. HB 96-1314, Ex. 6; SB 97-059, Ex. 7. After the 1996-2001 amendments, the pertinent provisions still include the plural form of "finalist" and the terms "list," "member," and "group." Describing such line drawing by the legislature as at the "final round of competition" is an accurate characterization for the last meaningful competition occurring for the executive position of Superintendent. Critical here is that such line-drawing, using the plain and ordinary meaning of terms, includes finalists who are members of a list, who form a group, and who are competing with others for the executive position. The plainly intended result is that there must be an opportunity to compare the relative merits of the finalist candidates, to have the opportunity to provide feedback on the candidates' relative merits, and to observe and hold the elected officials accountable for their decision-making.

## LEGAL ARGUMENT

CORA "recognize[s] the compelling public interest in access to information." *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1156 (Colo. App. 1998). In light of that "compelling public interest," it is well settled that CORA establishes "a strong presumption in favor of public disclosure." *Id*.

Ms. Knapp's interpretation is consistent with the plain and ordinary meaning of the operative statutory language. It is consistent and harmonious with CORA and COML, and gives coherent and harmonious meaning to each of the statutes' terms. In contrast, the interpretation advanced by the Board renders terms such as "list", "group", and "finalists" superfluous or stretches them beyond their common usage. It contravenes the spirit of CORA and COML, and conflicts with the General Assembly's intent as expressed through the pertinent legislative history.

### I. Ms. Knapp does not contend that CORA or the COML require the Board to superfluously name a second finalist. The number of finalists is based on the circumstances.

Contrary to the Board's argument in section II of its Response, Ms. Knapp does not contend that there must always be more than one finalist for a chief executive officer position. Resp. Brief, pp. 12-13. 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 14, 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 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 an express numerical requirement when there are more than three qualified applicants does not provide the Board 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 are more than three qualified applicants, there are multiple finalists.

Here, based on the Stipulated Facts, there were five finalists in two successive hiring processes. Although subsection XI(A) includes a definition of "finalist," COML subsection 3.5 does not define the term "finalist." (Resp. Brief, p.6). The Court may therefore refer to dictionary definitions of the term. *See 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 15 April 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, the Board interviewed four other individuals after the field was narrowed. Board President Johnson publicly acknowledged that, "after working closely with our consultants, Hazard, Young, and Attea; and after reviewing the paperwork of twenty-six applicants from across the nation who wish to serve as the leaders of District 20," they had narrowed the field. Under the plain, ordinary meaning of the term "finalist," there were five finalists for the Superintendent position.

This interpretation is supported by the 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 terms 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.

Tellingly, the Board omits any definition of "finalists" in its plain language argument (Resp. Brief, § II). This is important, because the term "finalists" must be read in harmony with the other terms in the statute, and it is beyond dispute that the applicants for the Superintendent position were competitors for the job. Context matters: unlike a list of exhibits or groceries, which could be whittled down to one and still possibly be called a "list," those items were not in any sense competing with one another to be the successful exhibit or grocery item. Further, the Board argues one thing but does another when it acknowledges the standard that the "statute should be applied as written without straining meaning…" Resp. Brief, p. 7. The Board looks to the

definitions of the terms "list," "group," and "member" and chooses the strained or uncommon usage to justify its interpretation.

For instance, the Board suggests that a witness list can have one witness, and a shopping list can have a single item and still be considered a list. However, a witness list is a term of art, and is typically a product of rules of procedure or a court order. In common vernacular, if one asks who witnessed something, and one person is identified, one does not have a "list" of one. Rather, there is a single witness. If there are two witnesses, there are the makings of a list. Likewise, for shopping lists: when a shopper goes to the grocery store with the intention to buy milk and writes "milk" on his or her hand, the shopper has not made a grocery list.

Similarly, the Board suggests a strained meaning to the terms "member" and "group", not the common-sense meaning required in statutory interpretation. If, for example, there are four unqualified applicants, there is a group of applicants who are not qualified. In contrast, if there is only one unqualified applicant, it would strain common sense to say that there was a group of one unqualified applicants. Likewise, if there is one applicant who is qualified but who does not receive an interview, it would be a strained use of the term "group" to say that the qualified applicant is in the "group" who did not receive an interview.

The term "member" is similar to the term "group" in these respects, as illustrated by the Board's same forced comparisons. Resp. Brief, p. 9. The Board additionally argues that there are single member LLC's, and "therefore not in contention with the member definition." Resp. Brief, p. 9. In this context the term "member" is a technical legal term, not its plain and ordinary meaning, and therefore it is a strained comparison. Most critically, these terms must be read harmoniously,

and when the terms "finalists," "list," "group," and "member" are read together such that each has its plain and harmonious application—in the context of a competition—there is only one fair conclusion: unless there is only one qualified applicant, there must be multiple finalists.

The Board's argument that a result of Ms. Knapp's position is that the Board would be required to "superfluously name a second individual so that there are multiple finalists" is revealing, but not for the Board's purposes of supporting a single finalist concept. Resp. Brief, p. 12. Rather, this argument demonstrates that the sole finalists disclosed to the public fourteen days prior to employment was the predetermined outcome. This position contravenes the very purpose of this portion of the sunshine laws—to provide the public with information so that the public may weigh the relative strengths of the candidates and provide feedback to the Board *prior* to a decision.

## II. The "three or fewer" language in subsection XI(A) supports Ms. Knapp'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 its Response, the Board asserts, "the "three or fewer" clause cannot be said to create a blanket standard for all search processes. Resp. Brief, p. 6. This misconstrues Ms. Knapp's argument. While this language does not dictate a minimum number of finalists when more than three 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 boards of education 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 or illogical results are to be avoided).

### III. The pertinent legislative history supports Ms. Knapp's interpretation.

The Board characterizes Ms. Knapp's legislative history argument as failing "to account for language expressly taken out of the statutes." Resp. Brief, p. 13. Contrary to this characterization, the Opening Brief traced the enactment and amendments to the pertinent statutes and cited to no less than 24 portions of the legislative history. Opening Brief, pp. 12-21. The 25-page limit constrained the volume of legislative history that could be cited, and Ms. Knapp encourages the Court to review Opening Brief Exhibits 5-16 in their entirety. Moreover, the transcribed portions comprise only a portion of the complete legislative history of the four bills, and Ms. Knapp 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 school board 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, Exhibit 5. 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 5.

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 6. 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 11, 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 12, p. 2. 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. Critically, 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 13, pp. 7-8, 11-12, 15-17, 24-26.

The remarks of Senator Ben Alexander, the Senate sponsor, acknowledging that there could conceivably be a single finalist named, is evidence that the Senator knew that the exceptions at subsection XI(A) provides for that outcome in limited circumstances. Opening Brief at pp. 7-8,

18-19; Resp. Brief, p. 16. Senator Alexander noted that the specific number of finalists is not addressed in the bill. (Exhibit 14 – Second Reading of SB 97-059 before the Senate, 61st General Assembly, 1st Sess. (January 31, 1997), p. 4). In response to a question, Senator Alexander contrasted the applicant who is hired with the "names of the finalists." According to the Senator, the public body was still required to "release the names of the finalists, then the public has an opportunity for input on those finalists. Then you can appoint the person you select no sooner than 14 days after you release the names." (Exhibit 14, p. 4). The plain distinction here is between the list of names and the person "you select" from that group. The Senator's statement is consistent with the plain language of the statute that where there is more than one qualified candidate, there will be multiple finalists.

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 8, p. 7. It also modified the minimum qualification provision from six applicants to the current "three or fewer applicants" who "possess the minimum qualifications" language. *Id.*, § 24-72-402(3)(a)(XI)(A), C.R.S. 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 16.

Contrary to the Board's argument, Ms. Knapp is not attempting to revive earlier versions of the statutes. Ms. Knapp acknowledges the list of finalists required by COML subsection 3.5 need be made 14 days before appointment, not the first interview. Moreover, the current language

does not automatically require school boards to disclose the identity of every candidate who receives an interview. Rather, the plain meaning of the terms and legislative history both demonstrate that school boards are required to the identity and application materials of the finalists – those individuals competing in the final round. Here, based on the Stipulated Facts, Ms. Knapp submits that this group included the individuals interviewed by the Board.

While the amendments to CORA and COML have shown a modest trajectory towards confidentiality (Resp. Brief, p. 14), the trajectory does not go so far as to permit a school district to have unlimited discretion in publicly disclosing finalists. Resp. Brief, p. 12. The legislative history summarized above does not demonstrate that the General Assembly intended the Board to initiate a search process, to pare down the number of candidates from 26 to the 5 individuals ultimately interviewed by the Board, and then disclose only 1 of the 5 "finalists" to the public. Notably, the Board's interpretation transforms the term "finalist" into the "successful applicant." The COML subsection 3.5 language cited by the Board still includes the language "member," "final group," and "list." Further, the legislative history of HB 01-1359 does not demonstrate an intent to authorize a school board to announce one finalist when multiple candidates are interviewed and considered at the final stage of the process.

**IV. If the Court agrees with Ms. Knapp's position that Colorado sunshine laws require the Board to disclose more than a sole finalist but deems the record insufficient to determine how many finalists exist, discovery should be permitted.**

The Board implies that even if the sunshine laws require more than one finalist to be disclosed, there may not have been five finalists for the Superintendent positions. Resp. Brief, pp. 2, 11-12. The following are public statements of Board President Johnson, which are also

stipulated facts: "after working closely with our consultants, Hazard, Young, and Attea; and after reviewing the paperwork of twenty-six applicants from across the nation who wish to serve as the leaders of District 20; and after extensive interviews with five very fine and capable candidates; and after more interviews and tours with three of those candidates; and after site visits with two [sic] of candidates who are highly honored and respected by their communities, we are so pleased to announce Ms. Kimberly Hough as our finalist to be the next Superintendent of Academy District 20 . . . ." April 4, 2019 statement; Joint Stip. Facts ¶ 8. On May 9, 2019, Board President Johnson stated, "after working closely with our consultants, Hazard, Young, and Attea; and after reviewing the paperwork of twenty-six applicants from across the nation who wish to serve as the leader of District 20; and after extensive interviews with five very fine and capable candidates; and after more interviews and tours with four of those candidates; and after site visits with three of the candidates who were each highly honored and respected by their communities, we are so pleased to announce Mr. Tom Gregory as our finalist to be the next Superintendent of Academy District 20 . . . ." Joint Stip. Facts ¶ 10.

Ms. Knapp acknowledges that the Court may agree with her position that the Board must disclose more than the sole finalist revealed in each of the successive hiring search processes, but disagree that there is enough record information to discern whether the five candidates interviewed by the Board in each process were the "finalists" that must be disclosed. Ms. Knapp's position is that the 5 individuals that were interviewed by the Board fit the commonsense definition of finalists in CORA and the COML. Moreover, there would be no hardship to the Board if it disclosed the five individuals that emerged from the field of 26. It would naturally need to select the winning

candidate from this group, and this process could include additional interviews, tours, site visits, and internal discussions. Nonetheless, there is arguably some ambiguity created by Ms. Johnson's reference to "more interviews," "tours," and "site visits."

If the Court finds that there is ambiguity in identifying which individuals are the finalists, Ms. Knapp requests the opportunity to conduct limited, written discovery in accordance with C.R.C.P. 56(f). From the facts the Board was willing to stipulate to, it is not apparent what direction was provided to the consulting firm, what constituted the Board's "working closely" with the consulting firm, nor whether the individuals who received site visits were subsets of the 5 candidates referred to the Board from the consulting firm or if they were subsets of any smaller group than the 5 candidates, if any, that received second interviews. Additionally, it is not apparent from the stipulated facts whether the site visits were part of the selection process or whether they were merely a matter of convenience or chance. If the Court deems this information relevant to a determination of the number or identity of finalists, Ms. Knapp requests the ability to issue limited, written discovery, and an opportunity to supplement the briefing accordingly. In short, the Board cannot argue that the 5 interviews were not the final round of competition, and at the same time refuse to provide basic information about the selection process.

## CONCLUSION

The Board has not shown cause for keeping the identity of the finalists, or their application materials, closed. Ms. Knapp is therefore entitled to a determination of law in her favor on this issue under C.R.C.P. 56(h). In the event that the Court determines that more than one finalist must be disclosed under the sunshine laws' requirements, but that it is not reasonable to conclude under

the stipulated facts that there were five finalists in each successive hiring process, Ms. Knapp requests that discovery be permitted under C.R.C.P. 56(f).

Respectfully submitted this 15th day of April, 2020.

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**CERTIFICATE OF SERVICE**

This is to certify that I have duly served this **PLAINTIFF'S REPLY BRIEF** upon all parties herein by E-Service at Boulder, Colorado, this 15th day of April, 2020, addressed as follows:

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