SUMMIT COUNTY DISTRICT COURT, STATE OF COLORADO 501 North Park Avenue / P.O. Box 269 Breckenridge, CO 80424 (970) 453-2272	DATE FILED: December 11, 2020 11:20 AM CASE NUMBER: 2020CV30100
Plaintiff(s): MATT ROANE; v. **Defendant(s):** MOLLY SPEER, Custodian of Records for the Summit School District Board of Education; and SUMMIT SCHOOL DISTRICT BOARD OF EDUCATION.	**▲COURT USE ONLY▲**
	Case Number: 2020CV30100 Division: K
ORDER TO DISCLOSE RECORDING	

THIS MATTER is before the Court on Plaintiff's Matt Roane ("Roane") and Defendants' Molly Speer and Summit School District Board of Education (collectively, the "Board") Joint Motion For Order To Show Cause pursuant to C.R.S. § 24-72-204(5) on Count One of Plaintiff's Complaint for review pursuant to C.R.C.P. 106(a)(4) filed September 14, 2020. Roane filed a hearing brief on October 18, 2020 and the Board filed their hearing brief on October 21, 2020. Roane and the Board filed a joint statement of stipulated facts on October 26, 2020 and the show cause hearing took place on October 28, 2020. The Court, having reviewed the parties' briefs, exhibits, the hearing, and relevant legal authority, is fully advised on the matter and hereby rules as follows:

I. Factual Background

Roane is a Colorado attorney who filed this suit, *pro se*, to obtain a recording of the Board's non-public deliberations regarding candidates for the position of school district superintendent.

On May 1, 2020, the Board held a public meeting ("Meeting") using an on-line internet platform. During the Meeting, a member of the Board made a motion to hold an executive session and a different member of the Board provided a 'second' to that motion.

After the motion was approved, individual Board members transitioned to a separate virtual meeting room that excluded public access. Before entering the confidential and private (executive) session, no members of the Board objected.

Approximately two months after the Meeting, Roane requested a recording and transcript of the executive session. Defendant Molly Speer, the custodian of records for the Summit School District Board of Education, declined Roane's request. Roane filed this suit to obtain that transcript and recording.

Under the Colorado Open Meetings Law (C.R.S. § 24-6-401, et seq) ("COML"), public bodies are required to open or broadcast their meetings to the public unless a public body fulfills the statutory prerequisites to hold an executive session described in Part 4 of that statute. The parties to this case ask the Court to answer the following two questions: 1.) Under the COML, what are the requirements to hold an executive session, and 2.) Did the Board satisfy those requirements when it held an executive session on May 1, 2020? First, this Court will discuss the COML and interpret the relevant statutory provision before applying that provision to the facts at hand.

II. Analysis

The COML is intended to "afford the public access to a broad range of meetings at which public business is considered." Colorado Off-Highway Vehicle Coal. v. Colorado Bd. of Parks & Outdoor Recreation, 292 P.3d 1132, 1136 (Colo. App. 2012) (citing Bd. of Cnty. Comm'rs v. Costilla Cnty. Conservancy Dist,. 88 P.3d 1188, 1193 (Colo. 2004)). Thus, courts broadly construe the COML's provisions to give citizens the greatest ability to access and meaningfully participate in decision making processes that inevitably affect their lives. Id. This type of broad construction is congruent with the General assembly's intent. Id.

The default rule is that, "[a]ll meetings of two or more members of any state public body… [and] [a]ll meeting of a quorum of three or more members of any local public body, whichever is fewer, at which any public business is discussed or at which any formal action may

be taken are declared to be public meetings open to the public at all times." C.R.S. § 24-6-402(2)(a)-(b). However, there are a few exceptions this sweeping rule granting public access.

The exception at the heart of this case allows a local public body, such as a school board, to insulate themselves from public view by holding an executive session so long as certain prerequisites are satisfied. Part 4 of the COML articulates those perquisites:

> The members of a local public body subject to this part 4, upon the announcement by the local public body to the public of the topic for discussion in the executive session, including specific citation to this subsection (4) authorizing the body to meet in an executive session and identification of the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized, and the affirmative vote of two-thirds of the quorum present, after such announcement, may hold an executive session only at a regular or special meeting and for the sole purpose of considering any of the following matters…

C.R.S. § 24-6-402(4).

The statute goes on to list permissible and impermissible topics that a school board may discuss or actions a board may take while in executive session. C.R.S. § 24-6-402(4)(a)-(h). Simply put, a school board may only enter an executive session to take a limited number of actions regarding a specific list of topics if the following four preconditions are satisfied: (1) The board must make an announcement, "to the public of the topic for discussion…"; (2) The board must announce the, "specific citation to this subsection…"; (3) The board must identify, "the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized…"; and most relevant to the case at bar (4) The board must obtain, "the affirmative vote of two-thirds of the quorum present." C.R.S. § 24-6-402(4).

In the present dispute, Roane and the Board disagree about what an 'affirmative vote' requires and whether the Board engaged in one before entering an executive session on May 1, 2020. Thus, the Court must first interpret the term "affirmative vote" as it is used in this statutory section before deciding whether the Board satisfied this requirement.

a. Interpretation of "Affirmative Vote" Under C.R.S. § 24-6-402(4)

It is well known that Colorado courts construe statutes by ascertaining and giving effect to the intent of the General Assembly. See State v. Nieto, 993 P.2d 493, 500 (Colo. 2000). In so

doing, courts must refrain from rendering judgments that are inconsistent with that intent. See Farmers Ins. Exch. v. Bill Boom Inc., 961 P.2d 465, 469 (Colo. 1998).

The first step in discerning the legislature's intent is to look to the plain language of the statute. City of Westminster v. Dogan Const. Co., 930 P.2d 585, 590 (Colo. 1997). "Words and phrases should be given effect according to their plain and ordinary meaning, and 'we must choose a construction that serves the purpose of the legislative scheme, and must not strain to give language other than its plain meaning, unless the result is absurd.'" Farmers Group Inc. v. Williams, 805 P.2d 419, 422 (Colo. 1991) (quoting Colorado Dep't of Social Servs. v. Board of County Comm'rs, 697 P.2d 1, 18 (Colo.1985)).

A statute should be applied as written if the statute is plain and the meaning is clear. People v. Gurule, 924 P.2d 1164, 1166 (Colo. App. 1996). In such a situation, a court will not engage in further analysis. People v. Diaz, 347 P.3d 621, 624 (Colo. 2015); Cowen v. People, 431 P.3d 215, 218 (Colo. 2018) (commanding that when the text is clear, "[t]he first canon is also the last") (internal quotation and citations omitted)). On the other hand, a court must apply other rules of interpretation if the statutory language is susceptible to more than one reasonable interpretation. Vensor v. People, 151 P.3d 1274, 1277 (Colo 2007).

Often, statutes will contain definitions of certain terms. "When a statute does not define a term, [courts] assume the General Assembly intended to give the term its usual and ordinary meaning." Roup v. Com. Research, LLC, 349 P.3d 273, 276 (Colo. 2015). To determine the usual and ordinary meaning in the absence of a statutory definition, courts may look to external sources like a recognized dictionary. Cowen v. People, 431 P.3d 215, 218-19 (Colo. 2018); Mook v. Bd. of County Commissioners of Summit County, 457 P.3d 568, 575 (Colo. 2020).

In the case at hand, the parties disagree about the meaning of the statutory term, 'affirmative vote'. Unfortunately, the statute does not provide a definition. Thus, this Court will look to a dictionary.

The word 'affirmative' means: "1. Supporting the existence of certain facts <affirmative evidence>. 2. Involving or requiring effort <an affirmative duty>. 3. Giving assent <an affirmative vote>." AFFIRMATIVE, Black's Law Dictionary (11th ed. 2019). Helpfully, the third definition uses the term 'affirmative vote' as an example. Therefore, the word 'affirmative' means voting 'yes' or 'in favor' of a given proposal as that word is used in C.R.S. § 24-6-402(4).

Discerning the meaning of 'vote' as used in C.R.S. § 24-6-402(4) is the more contentious issue. 'Vote' means: "1. The expression of one's preference or opinion in a meeting or election by ballot, show of hands, or other type of communication." VOTE, Black's Law Dictionary (11th ed. 2019). The Board admits that there was no roll call, ballot, or show of hands and instead, contends that some 'other type of communication' took place that satisfies the definition of 'vote'.

There are a number of actions that might reasonably be included in the definition of 'vote'. Unfortunately, the dictionary definition fails to specifically articulate these other acts. To help illuminate what actions might reasonably satisfy the COML's voting requirement, this Court may look to an extrinsic aid. Welch v. Colorado State Plumbing Bd., 474 P.3d 236, 241 (Colo. App. 2020) (When a statute is ambiguous, "we may apply a body of accepted intrinsic and extrinsic aids in order to discern legislative intent"). This includes looking to the common law. C.R.S. § 2-4-203 (providing a hierarchy of aids for courts to consider when construing ambiguous statutes).

Legislative bodies, deliberative assemblies, clubs, organizations, and groups of all kinds have used various voting procedures dating back to the ancients. Saul Levmore, Parliamentary Law, Majority Decision Making, and the Voting Paradox, 75 Va. L. Rev. 971, 974 (1989) (describing the earliest references to voting procedures including the Athenian trial of Orestes and the conviction of Socrates). For centuries, parliamentary bodies and deliberative assemblies from the House of Commons and the United States Senate, down to the local school board have used standardized procedures to conduct their business. These procedures are memorialized in a plethora of published works and almost always describe the permissible ways that votes may be cast and collected. See, e.g., Thomas Jefferson, Jefferson's Manual of Parliamentary Practice (Philadelphia, Samuel Smith 1801); Benjamin Mathias, Rules of Order: A Manual for Conducting Business in Town and Ward Meetings, Societies, Boards of Directors and Managers, and Other Deliberative Bodies, Based on Parliamentary, Congressional, and Legislative Practice (Lindsay and Blakiston 7th ed. 1855); Major Henry M. Robert, Robert's Rules of Order (S.C. Griggs & Company 1876).

Beyond doubt, Robert's Rules of Order is the most popular and widely recognized articulation of parliamentary rules in the United States. Jim Slaughter, Gaut Ragsdale & Jon L. Ericson, Notes and Comments on Robert's Rules 160 (Southern University Press, 4th ed. 2012)

(recounting numerous surveys finding that upwards of 90% of parliamentarians consider Robert's Rules their authoritative choice). Robert's Rules clearly distinguishes between the process and procedure for adopting and amending various types of motions and the process and procedure for voting. See generally, Robert's Rules Online: RulesOnline.com (4th ed 1915), http://www.rulesonline.com/index.html (last visited Dec. 7, 2020) ("Robert's Rules").

Article VIII of Robert's Rules deals with voting and proscribes a long list of permissible voting methods including: viva voce (by the voice), show of hands, a division of the assembly (where members physically separate into distinct groups to be counted), written ballot, by yeas and nays (roll call), general consent (the chair verbalizes and assumes unanimity until someone objects), absentee voting, voting by mail, and proxy voting. Id.

At this juncture, the Court notes that Robert's Rules does not purport to articulate an exhaustive list of permissible ways that parliamentary bodies may execute a vote nor does this Court treat that authority's list as exhaustive. Instead, Robert's Rules gives a flavor of what acts or verbiage might reasonably be considered a 'vote' when conducted by parliamentary bodies and deliberative assemblies both national and local. Armed with this knowledge, the Court must now turn to the facts at hand and determine whether the Board held a 'vote' before entering an executive session on May 1, 2020.

b. The Board's Actions and Arguments Regarding the COML

In the case at hand, the Court is tasked with determining whether the Board complied with the COML's voting requirement. To be clear, judicial modesty and restraint weigh against articulating the finer points and outer bounds of what Board actions might satisfy the 'affirmative vote' requirement. Instead, this Court only needs to determine whether the Board took one of many potential actions on May 1, 2020 that could satisfy the minimum requirement.

Undoubtably, the Board failed to take any action that came close to resembling a vote.

Gini Bradley, a member of the Board, made a motion to go into executive session and Chris Alleman seconded that motion. The Board members proceeded to end the public meeting and join a separate, non-public forum without voicing any objections. This was a far cry from

any definition of vote much less the Board's own definition articulated in the School District's policy manual.[1]

The Board argues that an operational vote is different than a procedural vote and that operational matters do not require formal voting mechanisms like voting alphabetically by roll call. The Board argues that its members took two affirmative actions that satisfy the voting requirement: they did not speak up or object and they entered a separate meeting. The Court finds that this is insufficient to constitute a vote and is merely evidence of capitulation or at most, implied consent.

The Board also did not specifically argue that its' members' actions fulfilled the voting requirement by engaging in 'unanimous' or 'general consent'. However, their arguments hint at the Board's use of this procedural process without mentioning this procedural mechanism by name. 'Unanimous' or 'general consent' is often used to expedite parliamentary business for informal matters in lieu of a formal vote. Id. at Art. III, Part 48, Motions requiring more than a Majority Vote ("When there is evidently no opposition, the formality of voting can be avoided by the chair's asking if there is any objection to the proposed action, and if there is none, announcing the result.").

Although 'unanimous' or 'general consent' is a widely acceptable method of dispensing with a formal vote, the Board failed to utilize this mechanism because the chair never invited objections or otherwise announced that the Board was taking action without objection. The fact that Board members recently executed affidavits to show their prior support in favor of entering an executive session does not remedy the fact that on May 1, 2020, chair or president of the Board did not ask whether members objected, or announce that the Board was moving forward without objection. In the absence of such an announcement on the record, there is no evidence to conclude that the Board entered an executive session with unanimous consent.

The Board's alternative set of arguments request leniency and deference in light of the pandemic. For support, the Board cites Colorado Attorney General Phil Weiser's Frequently

[1] The Summit County School District has a policy manual that provides, "[a]ll voting shall be by roll call with each member present voting "Aye" or "No" alphabetically." The Court takes no position on whether the Board must comply with its own voting procedures in order to satisfy the COML. Instead, this Court will hold the Board to a much lower standard and merely inquire whether the Board's actions on May 1, 2020 are congruent with any definition of 'vote'.

Asked Questions on Public Meetings and Public Notice Issues In Light Of the COVID-19 Pandemic. The relevant portion of General Weiser's document says:

> **Q. What is the best practice for setting up electronic-only access for an executive session in conjunction with a meeting of the public body?**
> **A. Use a two-mode system of access for the meeting.**
> If the public body uses a commercial internet-based video conferencing service such as Zoom, the service will allow for the creation of side-bar meetings into which selected participants may join the portion of the meeting that has been closed to the public. This will allow for the public meeting portion of the electronic meeting to remain open while the executive session is conducted. Otherwise, in the absence of a commercial video-conferencing system, the safest way to conduct a closed executive session during a body's meeting is by having a two-mode method for accessing the electronic meeting. That is, if the meeting is conducted by both webinar and a concurrent telephone dial-in conference bridge, the webinar portion of the meeting can be suspended or recessed while the executive session is conducted by telephone. Once the executive session is completed, the body's board members would then rejoin the webinar video conference.

Attorney General Phillip Weiser, Frequently Asked Questions on Public Meetings and Public Notice Issues In Light Of the COVID-19 Pandemic, https://coag.gov/app/uploads/2020/03/FAQs-on-Open-Meetings-Law-and-Virtual-meetings-3.27.20.pdf (last visited Dec. 7, 2020).

The Board seems to argue that this question and answer document allows a public body to transition to an executive session without a formal vote. The Court disagrees. Attorney General Weiser's question and answer document is not an attempt to supersede, preempt, relax, or dispense with the COML's requirements. Instead, it provides practical technologic advice about how to set up and manage executive sessions alongside public meetings using unfamiliar internet-based video conferencing technologies.

In summation, the Board failed to hold a vote before entering an executive session on May 1, 2020 as is required under the COML. Therefore, the Court must address the remedy for this statutory infraction.

c. Remedying a COML Violation

Roane cites a number of cases suggesting that failure to strictly comply with the COML's executive session requirements render the resulting session subject to public inspection because the executive session is invalid. In response, the Board attempts to distinguish those cases by arguing that the 'strict adherence rule' only applies to situations when a public body fails to adequately announce the motion, cite the proper part of the COML, or articulate the particular matter to be discussed in as much detail as possible. Here, this Court is tasked with determining whether some of the COML's executive session requirements are more important than others such that violating a less important statutory requirement triggers something less than full disclosure.

There is a small assemblage of cases ordering public disclosure of executive sessions on the grounds that public bodies failed to properly convene those sessions in accordance with the COML. Although these cases do not deal with the specific deficiency at the heart of the present dispute, the language in those cases does not make any distinction between the different perquisites to convening an executive session under the COML for the sake of crafting a remedy. For example, in Gumina v. City of Sterling, the court concluded that, "because the Council failed strictly to comply with the requirements of the statute for convening the two executive sessions, the trial court must open the records of those sessions to public inspection." 119 P.3d 527, 532 (Colo. App. 2004).

Likewise, Zubeck v. El Paso County Ret. Plan involved a board that refused to disclose its minutes because it claimed it was not subject to the COML. 961 P.2d 597, 601 (Colo. App. 1998). In that case, the district court found that the board was subject to the COML but permitted the board to redact portions of its minutes that could have been discussed in an executive session had one been properly convened. Id. The Colorado Court of Appeals disapproved of the lower court's redaction and ordered the board to produce its minutes in full because, "the statutory requirements for calling an executive session…" were not satisfied. Id.

Similarly, the Colorado Court of Appeals held in Gumina v. City of Sterling that, "Under Open Meetings Law, if a public body's executive session is not convened properly, then the meeting and the recorded minutes are open to the public." None of these cases explicitly indicate nor does the underlying reasoning of these cases suggest that some statutory requirements should be more stringently policed than others. Instead, they all recite the blanket

requirement that failure to strictly adhere to the COML's executive session requirements renders the executive session a nullity and triggers disclosure.

Citing Gumina and Guy, the Board asserts that Colorado courts are more concerned with whether a motion was raised with enough specificity for the general public to understand what is about to be discussed behind closed doors rather than whether the public body engaged in a vote. The Board appears to reason that the absence of cases ordering disclosure of an executive session because a public body failed to hold a vote is evidence that this statutory requirement is less important than the others. To bolster this logic, the Board makes the policy argument that the motion providing detail about the nature of the executive session provides the public with valuable information, "that is, functionally, the end of any public detail related to the contents of the executive session.") The voting requirement, by contrast, is merely a "procedural step." This Court disagrees. Members of public bodies are often required to vote on the record in order to promote political accountability. That is, constituents may choose to reward or penalize their public officials at the voting booth for procedural votes that the public official is forced to cast by statute. When public bodies fail to announce the results of a statutorily mandated vote (or fail to announce that they are proceeding with unanimous consent), voters are robbed of the information they need to hold their elected officials accountable. Thus, this Court is not inclined to adopt the Board's policy rationale as a basis to erode what the COML demands.

d. Applicability of the Colorado Open Records Act

In the alternative, the Board argues that even if the executive session was a nullity, disclosure is prohibited by the Colorado Open Records Act ("CORA"). C.R.S. § 24-72-204. Here, the Court is tasked with determining whether CORA prohibits disclosure of potentially protected information if that information was relayed during an invalid executive session. First, this Court will briefly describe the CORA before addressing the Board's specific arguments.

The purpose of the CORA is to "assure that the workings of government are not unduly shielded from the public eye." Intl. Broth. of Elec. Workers Loc. 68 v. Denver Metro. Major League Baseball Stadium Dist., 880 P.2d 160, 165 (Colo. App. 1994). Accordingly, this law carries a presumption in favor of public disclosure. Denver Post Corp. v. U. of Colorado, 739 P.2d 874, 879 (Colo. App. 1987). To effectuate that presumption, the CORA's exceptions

should be narrowly construed. City of Westminster v. Dogan Const. Co., Inc., 930 P.2d 585, 589 (Colo. 1997).

In the case at hand, the Board argues that the CORA prohibits disclosure of the contents of the executive session because the applicable subsection of CORA prohibits disclosure of:

> Records submitted by or on behalf of an applicant or candidate for an executive position as defined in section 24-72-202(1.3) who is not a finalist. For purposes of this subparagraph (XI), "finalist" means 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.

C.R.S. § 24-72-204(3)(a)(XI)(A).

This code section includes a cross reference to part of the COML. The cross-referenced section of the COML requires public agencies to "make public the list of all finalists under consideration for the position of chief executive officer" but protects certain records from disclosure under the cross-referenced part of the CORA including:

> 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). Nothing in this subsection (3.5) shall be construed to prohibit a search committee from holding an executive session to consider appointment or employment matters not described in this subsection (3.5) and otherwise authorized by this section.
>
> C.R.S. § 24-6-402(3.5).

The Board argues that even if this Court finds the Board's executive session to be procedurally deficient, CORA still prohibits disclosure. The Court disagrees for three reasons.

First, the applicable sections of the CORA and the COML only apply to "[r]ecords submitted by or on behalf of an applicant or candidate for an executive position…who is not a finalist," and "[r]ecords submitted by or on behalf of a finalist." C.R.S. § 24-72-204(3)(a)(XI)(A); C.R.S. § 24-6-402(3.5). Roane is not attempting to view the candidates' applications or records. Instead, he wants to obtain the transcript and/or listen to a recording of the Board's deliberations about those candidates. The fact that Board members may be

discussing elements of an application does not turn those discussions into 'records submitted by or on behalf of' a non-finalist for an executive position or a finalist.

Notably, the legislature could have, but did not exempt deliberations about non-finalists for executive positions from disclosure under this subsection of the CORA. This Court presumes that the legislature knew the difference between 'submitted records' (shielded from disclosure as per C.R.S. § 24-72-204(3)(a)(XI)(A)) and a board's "deliberative process" (shielded from disclosure as per C.R.S. § 24-72-204(3)(a)(XIII)) because the legislature used different statutory language to describe each. In sum, Roane is entitled to a record of the Board's deliberations about non-finalists for executive positions because the relevant subsection of the CORA only prohibits disclosure of "records submitted by or on behalf of an applicant or candidate for an executive position… who is not a finalist," and this subsection says nothing about shielding *deliberations about non-finalists* from public view.

Second, CORA prohibits disclosure of "employment selection processes for all executive positions…" C.R.S. § 24-72-204(3)(a)(XI)(C) ("The provisions of this subparagraph (XI) [addressing records submitted by or on behalf of an applicant or candidate for an executive position] shall apply to employment selection processes for all executive positions, including, but not limited to, selection processes conducted or assisted by private persons or firms at the request of a state agency, institution, or political subdivision."). Once again, the legislature could have prohibited disclosure of deliberations about candidates for executive positions but it did not. Instead, the legislature merely prohibited disclosure of "selection processes." The Board policy reason for this prohibition is obvious: it would be odd and potentially unfair to give applicants the interview questions or specific search criteria in advance. In sum, Roane is entitled to a record of the Board's deliberations because deliberations about how applicants measure up against the Board's selection criteria is distinct from disclosing the Board's selection process itself.

Third, the Board argues that despite their failure to properly convene an executive session, the matters discussed during that session are protected as a matter of law under CORA and should remain confidential. The Colorado Court of Appeals addressed this argument in Zubeck.

The plaintiffs in Zubeck sought two categories of information from the El Paso County Board of Retirement of the El Paso County Retirement Plan (the "Plan"): documents and

meeting minutes. 961 P.2d at 698-99. The Plan maintained that it was neither subject to the CORA nor the COML but the lower court and the Colorado Court of Appeals found otherwise. Id. at 599. After the plaintiffs sought documents under the CORA, the lower court refused their request, and the court of appeals reversed. Id. at 600. Most relevant to the case at hand, the Plaintiffs in Zubeck also sought the Plan's board meeting minutes because the Plan failed to properly convene an executive session. Id. at 600-01. The lower court found that the plaintiffs were entitled to the minutes because the executive session was not properly convened. Id. at 601. However, the lower court permitted the Plan to redact portions of its minutes under the legal fiction that had the executive session been properly convened, some portion of the minutes would be entitled to protection. Id. The Court of Appeals disapproved of the redaction and stated:

> [W]e agree that the Plan is subject to the OML, which requires that all meetings of any local public body at which any public business is discussed be open to the public, that minutes be recorded, and that such records be made available for public inspection. See §24–6–402(1)(a), C.R.S.1997. ***A local public body subject to the OML, however, may hold an executive session to consider matters required to be kept confidential by law, as long as such session is called for by a formal vote.*** Section 24–6–402(4), C.R.S.1997.
>
> Here, the district court allowed redaction of the Plan's meeting minutes based on the fiction that if the meetings had been held in an executive session, the minutes would have been confidential. However, the Plan did not follow statutory requirements for calling an executive session, and the meetings were not held in an executive session.
>
> Therefore, we conclude that the district court erred in permitting the redaction of the minutes of the Plan's meetings that were not conducted in an executive session.

Id. at 601 (emphasis added).

In short, the Zubeck court held that even if a public body is required to protect information by law, the information loses its protection if the public body reveals it during an improperly convened executive session. Although it is true that the Zubeck court did not mention the CORA by name in pronouncing this broad rule, the court clearly conceived of a situation where "matters required to be kept confidential by law" would be forced into the public sphere if a public entity failed to comply with the COML's technical procedural rules. Thus,

even if this Court's interpretation of "employment selection procedures" is misplaced, the Board must still disclose its otherwise confidential deliberations under the court's holding in Zubeck.

Thus, for the reasons stated herein, this Court has no choice but to order disclosure.

III. Conclusion

The COML requires an "affirmative vote" before a public body may shield their proceedings by entering an executive session. The plain language of the COML, centuries of parliamentary experience defining the word 'vote', and common sense suggest that capitulation and implied consent are not the same thing as an 'affirmative vote,' no matter how trivial the decision. Because the Board failed to take any action on May 1, 2020 that resembled a vote, the Court hereby ORDERS:

- Defendants must provide Plaintiff Roane with a full copy of the recording and transcript of the executive session that took place on May 1, 2020 within 7 days of this order.

In addition, Plaintiff's Complaint requests attorney fees and costs. The COML includes a provision requiring courts to award costs and fees to prevailing citizen-plaintiffs. C.R.S. § 24-6-402(9)(b) ("In any action in which the court finds a violation of this section, the court shall award the citizen prevailing in such action costs and reasonable attorney fees."). Therefore, the Court hereby ORDERS:

- Roane shall submit a Bill of Costs and Affidavit of Attorney's Fees within 10 days of this Order. Any objection shall be filed 5 days after the Affidavit is filed.

Finally, Roane's Complaint contained two counts. The first pertained to the Board's violation of the COML and its own policy manual by failing to hold a vote before entering an executive session. The second count deals with the Board's alleged violation of the COML and its own policy manual for undertaking formal action while in an executive session. Because this order disposes of the first count and orders disclosure, the second count is rendered moot. Put another way, there is nothing left for this Court to decide, or any remedy for Roane to pursue under the second count after the entry of this order.

- Therefore, Roane shall file either a Motion to Dismiss this case with prejudice 14 days after receiving the disclosure by Defendants, or in the alternative a status report regarding count two.

SO ORDERED this 11th day of December, 2020.

BY THE COURT

Karen Ann Romeo
District Court Judge