

El Paso County, CO, District Court Court address: 270 South Tejon Colorado Springs, CO 80901-2980 Phone Number: (719) 452-5000	DATE FILED: February 23, 2021 10:41 AM CASE NUMBER: 2019CV32570
MELANIE KNAPP, Plaintiff, v. BOARD of EDUCATION, ACADEMY DISTRICT TWENTY, Defendant.	<hr/> Court Use Only <hr/> Case Number: 2019CV32570 Division 3, Courtroom S406
ORDER – SECOND MOTION FOR DETERMINATION OF LAW	

This case is before the Court on a Second Motion for Determination of Law filed by the Plaintiff, Melanie Knapp (Knapp). By Order dated June 25, 2020, the Court determined that the names of the finalists should have been disclosed by the Defendant in the course of an interview process conducted by the Defendant, Board of Education Academy District Twenty (Board) per the requirements of the Colorado Open Records Act (CORA). The Plaintiff now requests a determination of law that all executive sessions held by the Board per 24-6-402(4)(g) were in violation of the Colorado Open Meetings Law (COLA) and that all records of the executive sessions should be made available to the Plaintiff. The Court has considered the Court file, the written submissions of the parties, the applicable legal authorities and all stipulated facts and here enters the following Conclusions of Law and Order:

I. STATEMENT OF THE CASE AND STIPULATED FACTS

This action arises from the interview process conducted by the Defendant, Board Of Education Academy District Twenty (Board) for the position of superintendent of the school district. The Board interviewed five individuals for the position in the spring of 2019. The board then publicly announced a sole finalist, Ms. Kimberly Hough, on April 4, 2019. Finalist Hough then withdrew her name for consideration. The Board then publicly named a different sole finalist, Mr. Thomas Gregory, who was ultimately appointed to serve as superintendent.

Plaintiff, Melanie Knapp (Knapp) served requests on the Board to make public the names and application materials of the other finalists per the Colorado Open Records Act (CORA). The Board refused. By earlier Order, this Court held that the names of the five finalists in the context of this case should have been provided to the parties. Per stipulation, the Court finds the following facts:

1. The Board is a "local public body" subject to the Colorado Open Meetings Law and Colorado Open Records Act.

2. Plaintiff Melanie Knapp is a "citizen" under Colorado Open Meetings Laws and "person" under Colorado Open Records Act, granting her standing to bring a claim under each statute.

3. On November 1, 2018, after Superintendent Mark Hatchell announced his retirement, the Board began its search for a new Superintendent.

4. The Superintendent is the "chief executive officer" of Academy District 20, as that term is used in § 24-6-402(3.5) and § 24-72-204(3)(a)(XI), C.R.S.

5. On the following dates, pursuant to a motion reciting the specific citation and a vote of at least two-thirds of the quorum present, the Board held executive sessions under § 24-6-402(4)(g) C.R.S., to review the 'Superintendent applications and candidates':

- a. February 26, 2019
- b. March 5, 2019
- c. March 6, 2019
- d. March 7, 2019 (two meetings)
- e. March 11, 2019
- f. March 12, 2019
- g. March 13, 2019
- h. March 14, 2019
- i. March 21, 2019
- j. April 4, 2019
- k. April 18, 2019
- l. April 20, 2019
- m. May 7, 2019
- n. May 9, 2019

6. The Board worked with Hazard, Young, Attea, & Associates (HYA) to assist with the Superintendent search.

7. The Board received applications from twenty-six (26) qualified candidates for the Superintendent position.

8. During the search process, the Board entered into the recited executive sessions, citing 24-6-402(4)(g) to review the applications and the candidates. In these executive session the Board narrowed the applicants to five, then to three, then to two and finally to one for public disclosure. On April 4, 2019, following execution session, the Board announced in open session, one finalist, Dr. Kimberly Hough, for the Superintendent position. At that open session, Board President Tracey Johnson stated 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; 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 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.

9. Shortly after the Board publicly announced Dr. Kimberly Hough as a finalist, Dr. Hough withdrew her name from consideration. After the withdrawal, the Board convened for additional executive sessions to consider the applicants from the same list of five.

10. On May 9, 2019, following executive session, the Board announced Thomas Gregory as a finalist for the Superintendent position, in open session. At that open session, Board President Tracey Johnson stated 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 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.”

II. STATEMENT OF THE ISSUE

Does the Colorado Open Meetings Law (COML) require disclosure of all recordings and transcripts of the executive sessions that resulted in a list of finalists?

III. CONCLUSIONS OF LAW

The Plaintiff asserts that the earlier Order of Court resolved the issues surrounding all executive sessions of the Board conducted in this application process. The Plaintiff's assertions that the Court has ordered disclosure of all executive sessions is rejected. The earlier Order of Court required disclosure of the five candidates who were designated as finalists noting that Board President announced publicly on April 4, 2019 and again on May 9, 2019 "after extensive interviews with five very fine and capable candidates." The declaration of five candidates under consideration from an initial application list of twenty six was an announcement of finalists and accordingly the Court concludes that the five names should be disclosed per CORA. The question here is whether the executive sessions in which the list of five became a list of three, then two and then one should also be made public per COML. The first announcement of finalists took place on April 4, 2019. The Court finds the recordings and transcripts of the executive sessions after the decision was made to narrow the list of applicants to five names should be produced. Neither CORA nor COML expressly require formal action to designate the finalist or finalists of a chief executive search. The only statutory requirement is that the public entity "make public" their chosen finalist or finalists, at least fourteen days before filling the position, 24-72-204(3)(a)(XI)(A), C.R.S.

The Court finds the use of executive sessions prior to the list of five names in this case to be lawful and appropriate in balancing confidentiality of qualified applicants during the various stages of the search.

CORA and COML must balance public transparency and the need for confidentiality. ***Zubeck v. El Paso Cty. Ret. Plan***, 961 P.2d 597 (Colo. App. 1998) If public bodies cannot go into executive session to consider candidates for positions, they may lose qualified individuals. There is a distinct interest in protecting the confidentiality of nonfinalist candidates, which is why the General Assembly created an express CORA exception to protect their application materials and, consequently, served as the justification for the executive sessions in this case. One reason for the necessary confidentiality is that qualified individuals may not apply for executive positions if they know that their name may be disclosed in the process. Most often applicants to executive positions hold esteemed roles in other agencies or private enterprises, and if word got out that they were applying for another position, they might lose their current position. CORA has provided candidates with guaranteed confidentiality until and unless they are selected as a finalist. Plaintiff's request for all of the fourteen executive sessions to be deemed open in this matter, completely obliterates confidentiality for individuals who were applicants for the Superintendent position, and may chill

applications for future positions. Furthermore, the CORA and COML statutes provide for public transparency by providing a fourteen-day period between public disclosure and formal employment. Under the COML the only requirement is that the finalist or finalists must be made public "no later than fourteen days prior to appointing or employing" the selected candidate. § 24-6-402(3.5), C.R.S. During that fourteen-day window, there is ample opportunity for the public to weigh in on the decision making of the governmental entity. In this instance, if the public disliked Dr. Kimberly Hough or Thomas Gregory, they had fourteen-days to voice their opinion to the Board members. At the time they were convened, some of the fourteen executive sessions were statutorily permitted to include confidential discussions about the candidates and should therefore remain confidential.


IV. ORDER

The request of the Plaintiff to require from the Board disclosure of all recordings and transcripts of the executive sessions is DENIED. The request to require disclosure of the recordings and transcripts of the executive sessions that occurred after the initial applications were reduced to five names is granted.

The Court stays this Order or a period of twenty eight days from the date of a final Trial Court Order regarding attorney fees and costs to allow for a meaningful appeal. The Plaintiff is ordered to submit any Motion for Attorney Fees within 28 days of the date of this Order. There will be response and reply time per the Colorado Rules of Civil Procedure.

Dated this 23rd day of February, 2021.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Thomas K. Kane". The signature is fluid and cursive, with a long horizontal stroke at the end.

THOMAS K. KANE
DISTRICT COURT JUDGE

