

District Court, Larimer County, Colorado 201 LaPorte Ave., Suite #100 Fort Collins, CO 80521 970-494-3500	DATE FILED: January 10, 2022 2:20 PM CASE NUMBER: 2021CV30373
<b>Plaintiff:</b> Matt Roane  v.  <b>Defendants:</b> Kristen S. Bennett, et. al.	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p> Case Number: 2021CV30373  Courtroom: 5B
<b>ORDER GRANTING DISCLOSURE OF EXECUTIVE SESSION</b>	

This matter is before the Court following an in-camera review of the Poudre School District School Board’s recording of an executive session that took place on April 7, 2021. Having reviewed that recording, the briefing, and applicable law, the Court finds and orders as follows.

Defendants are ordered to disclose the executive session, subject to redactions.

**I. Background**

This is an open records act case, concerned with the disclosure of a recording of an executive session held on April 7, 2021 by the Poudre Valley School District School Board (“School Board”). The School Board held the executive session as one of the final steps in the decision-making process to hire a new superintendent. Def.’s Resp. 2; Pl.’s Ex. #B. The School Board ultimately selected and hired Brian Kingsley for the job. Pl.’s Ex. #F.

On December 7, 2020 the previous Superintendent for the Poudre Valley School District announced that she was retiring. See Am. Compl. Following this announcement, the Defendant School Board began searching for a replacement.

The School Board’s hiring procedure began with interviews of a substantial pool of candidates, then narrowed down the pool to three finalists. The three finalists flew out for more interviews with the School Board.

The April 7 meeting occurred, seemingly, minutes after the final interviews concluded. See Pl.’s Ex. #B. After a brief open session, the School Board entered an

executive session purportedly to discuss negotiation strategy. *Id.* The executive session lasted just over an hour. *Compare* Pl.’s Ex. #B *with* Pl.’s Ex. #C.

On April 13, 2021 at 5:18 p.m. the School District announced Mr. Kingsley as the new superintendent on Facebook. At 5:30 p.m., the School Board meeting began. No debate comparing the final candidates took place at the meeting. At 6:15 p.m., the School Board voted on and announced Brian Kingsley as the next Superintendent. Pl.’s Ex. #F.

Plaintiff brought suit against Defendants on May 17, 2021, alleging violations of the open meetings laws. See Am. Compl. Plaintiff filed a motion for in-camera inspection on August 30, 2021. The Court granted that motion on October 7.

## **II. Applicable Law**

### **A. The Open Meeting Laws, in General**

The Colorado Open Meetings laws govern the procedure that state and local government bodies must follow. See C.R.S. § 24-6-401 et. seq. School Boards are covered entities under the open meetings laws. See C.R.S. § 24-6-402(1)(a)(II).

State and local bodies subject to the open meetings laws must, generally, conduct their business in public. § 24-6-402(2)(a)-(c). “Any meeting[] at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or at which a majority or quorum of the body is in attendance, or is expected to be in attendance, shall be held only after full and timely notice to the public.” § 24-6-402(2)(c).

Some parts of meetings held by state or local bodies may be held in private. § 24-6-402(3)(a). These private meetings are called “executive session.” The members of a state or local body may vote to enter executive session if the body is going to discuss items that the law allows to be discussed in private, amongst the members of that state or local body. See, e.g., § 24-6-402(3)(a)(II) (authorizing executive sessions to be held to discuss pending litigation against the board); § 24-6-402(3)(a)(V) (authorizing executive sessions to be held to determine negotiation strategy.) Generally, executive sessions must be recorded. § 24-6-402(2)(d.5)(I)(A).

The content of discussions in executive sessions is limited. “[N]o adoption of any proposed policy, position, resolution, rule, regulation, or formal action . . . shall occur at any executive session that is not open to the public[.]” § 24-6-402(3)(a).

## B. Requesting the Recording of an Executive Session

The open records laws allow for the public to request, and sue for the release of, the recording of an executive session. C.R.S. § 24-72-204(5.5)(a). A plaintiff may request that a court review the recording of the executive session in-camera review. *Id.* If the plaintiff “show[s] grounds sufficient to support a reasonable belief” that a state or local body discussed items in an executive session that the law requires to occur in public, the court must review the in-camera. *Id.*

If a court finds that discussion occurred in the executive session that should have occurred in public, that court must require the state or local body to make those portions of the recording public. § 24-72-204(5.5)(b)(II).

### III. **Application of Law**

Plaintiff asserts that the School Board effectively voted on a new superintendent in private during the April 7 executive session. To Plaintiff, that action would violate the open meetings laws prohibition against adopting “any proposed policy, position, resolution, rule, regulation, or formal action” in executive session. § 24-4-402(3)(a).

Defendants argue several points. First, Defendants argue that the School Board may “evaluate finalists” and “determine its contract negotiation strategy” in executive session. Def.’s Resp. 3-6. Second, the Defendants argue that the School Board did not make “a hiring or contract decision in executive session[.]” *Id.* at 7.

The Court will first analyze whether a hiring or contract decision occurred in executive session before turning its attention to Defendant’s statutory arguments.

#### A. Whether the Board Made a Hiring Decision or Negotiation Decision in Executive Session

Defendants, in their motion opposing the in-camera review of the executive session recording, argued that the board did not 1) select Mr. Kingsley as the next superintendent in executive session; or 2) decide to enter contract negotiations with Mr. Kingsley in executive session. *Id.* Specifically, Defendants assert that Plaintiff’s allegations that the Board did make those decisions in executive session “is unsupported speculation.” *Id.* Defendants directly stated that “[t]here can be no reasonable belief that the Board selected Mr. Kingsley as the District’s superintendent or decided to enter contract negotiations with him on April 7, 2021, while in executive session.” *Id.*

The record clearly refutes the District’s claims.

Forty-six minutes and fifty seconds into the executive session, a board member affirms the Board’s tentative plan to negotiate with Brian Kingsley and send a Board

Member to his hotel room and “congratulate” him. Despite Defendant’s denial in its pleadings, the Board clearly decided to enter contract negotiations with Brian Kingsley in the executive session.

The Board also made a final decision on the resolution to hire Brian Kingsley as the next superintendent in the April 7 executive session.

In the first twenty minutes of the executive session, the School Board heard each director’s opinion on the finalists. Most directors offered who their choice for the position was at that time. One director, when pressed, said that she would save her vote. See Executive Session Recording at 4:55. The Board pressed again, asserting a need to be “clear on negotiations.” *Id.* at 5:00. The Board member then gave her ranking of the candidates. *Id.* at 5:05.

Later, as referenced above, the School Board affirmed their consensus and decided to send a Board member to visit Mr. Kingsley and “congratulate him.” *Id.* at 46:50.

The School Board essentially conducted a vote, selected a candidate, and authorized an agent to inform him of the School Board’s decision and “congratulate him”. Little more would be needed to demonstrate that a final decision on a resolution occurred in the April 7 executive session. However, further support for that finding exists.

Specifically, the School Board declined to enter negotiations with any other candidate if negotiations with Mr. Kingsley soured. *Id.* at 57:25. Further, the Board instructed a member to call the other remaining candidate to inform her that she had not been selected.<sup>1</sup> *Id.* at 56:15.

The School Board also discussed the timing of the April 13 public meeting and negotiations with Mr. Kingsley. Specifically, the School Board discussed what the public meeting would look like if the Board had not finalized a contract with Mr. Kingsley by the public meeting. *Id.* at 1:04:45. The School Board decided to vote Mr. Kingsley as the superintendent even if a contract was yet to be finalized, phrasing it as “pending a contract.” *Id.* That is what happened at the April 13 meeting. Pl.’s Ex. E at 45:03.

Finally, and tellingly, the School even publicly announced Mr. Kingsley as the new superintendent over Facebook *before* the public session on April 13. See Pl.’s Ex. #G.

Based on the above, the Court finds that the Board came to a final decision on a resolution in the executive session. The School Board’s vote was not contingent on successful negotiations before the public meeting. The School Board did not negotiate

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<sup>1</sup> The third candidate withdrew before the executive session.

with any other candidates. The School Board heard input from each Board member and came to a consensus based on that input.

Colorado Law requires those discussions to be held in an open session. See C.R.S. § 24-6-402(4)(requiring that “no adoption of any proposed policy, position, resolution, rule, regulation, or formal action. . .shall occur at any executive session that is not open to the public.”)

B. Whether the Law Allows the School Board to Vote on a Superintendent in Executive Session

Plaintiff asserts that the School Board’s selection of Brian Kingsley was, in effect, taking a formal action in executive session prohibited by § 24-6-402(3)(a). Pl.’s Mot. 4. Defendants disagree and argue three different points. First, Defendants argue that “selecting a preferred finalist” need not be done in public, because the School Board’s obligations under the open meetings laws is complete after publishing a list of finalists.

Second, Defendants argue that a School Board may select a preferred finalist in executive session because it relates to statutory exceptions to the open meetings and records laws. Finally, Defendants assert that the prohibition on the discussion of letters of reference in public implies an exception to the open meetings laws here.

The Court addresses each argument in turn, beginning with Plaintiff’s.

The Court agrees with the Plaintiff. As established above, the School Board essentially voted Brian Kingsley to be the new superintendent in executive session. Of course, a contract was not finalized at that point. However, a contract was not finalized when the Board voted on and adopted the resolution in public at the April 13 meeting. See Pl.’s Ex. #E at 45:03. Defendant’s characterization of the selection of a superintendent to be “selecting a preferred candidate” is unconvincing. While it is true that there may be a distinguishable line between “selecting a preferred candidate” and conclusively selecting the next superintendent in other scenarios, in this case, a final decision was made.

The School Board heard input from each member of the board. The School Board reached a consensus on a candidate they preferred, all choosing Mr. Kingsley. The School Board decided on a plan to inform Mr. Kingsley of their decision and to “congratulate” him. The School Board planned on how to announce Mr. Kingsley’s position in the event that a contract was yet to be finalized before the April 13 public meeting. The School Board did not plan any negotiations with any other candidates at that time. Plainly, to hold that the decisions made in executive session were anything short of a final decision on a resolution would elevate form over function and be contrary to the purpose of the open meetings laws.

The Court turns its attention to Defendant's statutory arguments.

First, Defendants argue that the absence of a requirement to "select a preferred finalist" in the open meetings laws implies that the legislature intended School Districts to make that decision in executive session. Defendants point to the requirements that the legislature did impose: 1) disclosure of job search goals; and 2) selection of finalists. See C.R.S. § 24-6-402(3.5). Defendants argue that "selecting a preferred finalist" falls under the ambit of §24-6-402(3.5)'s final clause, which says: [n]othing in this subsection. . .shall be construed to prohibit a search committee from holding an executive session to consider appointment or employment matters not described. . .and otherwise authorized by this section."

However, as discussed above, the statute is not silent on this matter. At multiple points, the §24-6-402 cautions that: "no adoption of any proposed policy, position, resolution, rule, regulation, or formal action. . .shall occur at any executive session that is not open to the public[.]" Indeed, § 24-6-402(3.5) itself recognizes that the limitations placed on "search committees" are subject to the same broad requirements of the rest of the statute: [n]othing in this subsection. . .shall be construed to prohibit a search committee from holding an executive session to consider appointment or employment matters not described in this subsection. . .and otherwise authorized by this section. (emphasis added). The School Board, as a local body, made a final decision that was not otherwise authorized by § 24-6-402(3.5).

Accordingly, because the statute is not silent on whether a school board may make a final decision on a resolution in executive session, the School Board may not restrict disclosure on that ground. The Court turns to Defendant's second argument.

Defendants cite to § 24-6-402(4)(e)(1) for the proposition that the executive session was properly held. That section allows for executive session discussion of: "[d]etermining positions relative to matters that may be subject to negotiations; developing strategy for negotiations; and instructing negotiators." See § 24-6-402(4)(e)(1). To Defendants, the process of selecting a superintendent is determining a position relative to the negotiation of that superintendent's contract.

Regardless of subsection (4)(e)(1), a School Board cannot come to a final position on a resolution in executive session. As discussed *supra*, that is exactly what happened on April 7, 2021. Accordingly, subsection (4)(e)(1) does not provide an exception to the majority of the content discussed in executive session on April 7.<sup>2</sup>

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<sup>2</sup> The Court notes that there is some discussion that is clearly protected by this subsection. For example, part of the meeting involves deciding the starting point for salary or benefit negotiations. Those discussions are clearly covered, as the Board was "[d]etermining positions relative to matters that may be subject to negotiations[.]" See § 24-6-402(4)(e)(1).

Defendants also argue that the executive session concerned “personnel matters” which, they argue, would obviate the need for a public meeting. Def.’s Resp. 6. The “personnel matters” exception is tied to § 24-6-402(4)(f)(1). Defendants cite to *Arkansas Valley Pub. Co. v. Lake Cnty. Bd. of Cnty. Comm’rs* for an example of the Courts dealing with a similar issue. 369 P.3d 725 (Colo. App. 2015).

The Court disagrees. *Arkansas Valley* is a case where a land use board held an executive session to consider issues surrounding potential employee discipline. *Id.* at 725. That employee, present in the executive session, resigned before the Board could make a final decision. *Id.* at 728. *Arkansas Valley* recognized that local bodies may not make final decisions on resolutions in executive session, and that is precisely what happened on April 7.

Here, however, the School Board made a final decision in executive session that, as the court applying the personnel matter exception in *Arkansas Valley* noted, is prohibited. See 369 P.3d at 728; *Hanover Sch. Dist. V. Barber*, 171 P.3d 223, 228 (Colo. 2007) (holding that “[w]hile in executive session, the members may discuss policies, but they are limited in their policy making authority and may not adopt positions or make formal decisions.”)<sup>3</sup>

Finally, no letters of reference were discussed at this executive session. The School Board did not cite the potential reading of letters of reference in deciding to enter executive session. Accordingly, there is no basis in the record before the Court today that any exception to disclosure related to letters of reference applies.

The Court’s ruling in this matter is based upon and limited to the specific content of what School Board members said in the April 7 executive session.

#### **IV. Order**

The Court orders the release of portions of the recording of the April 7, 2021 executive session to be produced to the public. However, portions of the executive session include discussion that was clearly proper to be conducted in private. For example, the School Board discusses negotiation strategies with regard to Mr. Kingsley. Negotiation topics like salary ranges, start date, and related considerations are protected. The School Board also speaks with an attorney for portions of the recording. Those conversations are also protected.

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<sup>3</sup> The Court disagrees with Defendant that *Littleton Education Association v. Arapahoe County School District No. 6* or the Attorney General Opinion cited in their response are on point in this matter. 553 P.2d 793, 798 (Colo. 1976). Whatever *Littleton* tells the Court of legislative intent, it is of limited usefulness outside of the collective bargaining space. The clear text of § 24-6-402(4) applies.

Defendant is ordered to review the recording and submit, to the Court, a proposed redacted version of the executive session with discussion directly related to negotiation strategy, attorney-client privilege, or another valid basis redacted from the recording.

Defendants may file any objections under on the basis of C.R.S. § 24-72-204(6)(a)-(b) within fourteen days.

If no objections are filed, the Court orders the proposed redacted executive session to be produced to the Court, in a format that complies with Chief Justice Directive 11-01, within fourteen days.

Dated: January 10, 2022

BY THE COURT:



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Gregory M. Lammons  
District Court Judge