District Court, Rio Grande County, Colorado 925 6th Street Del Norte, CO 81132	DATE FILED: October 31, 2022 3:02 PM CASE NUMBER: 2021CV30032
Plaintiff: **LAURA ANZALONE, Trustee of the Town of Del Norte,** v. Defendants: **BOARD OF TRUSTEES OF THE TOWN OF DEL NORTE; and the TOWN OF DEL NORTE**	**▲ COURT USE ONLY ▲** Case No.: **2021CV30032** Division: **C**

ORDER REGARDING PLAINTIFF'S OPEN MEETINGS LAW CLAIM AND C.R.C.P. 106 CLAIMS

THIS MATTER comes before the Court on briefs related to the Plaintiff's claims pursuant to C.R.S. § 24-6-401 *et seq.* ("Open Meetings Law" or "OML") and C.R.C.P. 106(a)(4). Plaintiff's third claim for relief is brought under the Open Meetings Law ("OML Claim").[1] Plaintiff's first and second claims for relief are brought under C.R.C.P. 106 ("R. 106 Claims").[2]

Plaintiff filed a brief concerning her OML Claim on June 28, 2022 ("OML Brief"). On July 19, 2022, Defendants Board of Trustees of the Town of Del Norte and Town of Del Norte (collectively, the "Board") filed a response to Plaintiff's OML Brief ("OML Response Brief"). Plaintiff filed a reply in support of her OML Brief on July 26, 2022 ("OML Reply Brief").

[1] *See Amended Complaint for Judicial Review Under C.R.C.P. 106, Injunctive Relief, and Declaratory Relief (filed on 5/31/22) ("Amended Complaint")* at ¶¶ 73-86.
[2] *Id.* at ¶¶ 66-72.

Plaintiff filed an opening brief concerning her R. 106 Claims on July 20, 2022 ("R. 106 Brief"). On August 31, 2022, the Board filed a response to Plaintiff's R. 106 Brief ("R. 106 Response Brief"). Plaintiff filed a reply brief in support of her R. 106 Brief on September 12, 2022 ("R. 106 Reply Brief").

Based upon the authority discussed below, the Court finds in favor of the Board on Plaintiff's OML Claim and Plaintiff's R. 106 Claims. The applicable authority shows that the Board's opinion of Plaintiff's performance as a trustee, which took the form of a censure, does not fall under the OML. The OML Claim is dismissed on this basis. In addition, Plaintiff did not identify a protected interest for purposes of her R. 106 Claims, nor did she point to any preexisting standards the Board applied to the conduct described in the censure. Therefore, the R. 106 Claims must be dismissed.

I. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

This case concerns the Board's censure of Plaintiff while she was one of the elected trustees who served on the Board. Tellingly, Plaintiff characterizes the fundamental issue in this case as the Board's efforts to remove her as a trustee. *See Case Management Order – As Amended by the Court ("Amended CMO")* at p. 2 (setting forth Plaintiff's description of the case). The Board, on the other hand, contends "no 'formal action' took place" in connection with the censure because the Board "holds the inherent authority to address the conduct of its own members," and thus, the censure does not violate the OML and is not subject to judicial review under C.R.C.P. 106(a)(4). *Amended CMO* at p. 3 (setting forth the Board's description of the case). It is undisputed that Plaintiff was not removed from office. *See Joint Notice of Stipulated and Disputed Facts ("Stipulated and Disputed Facts")* at ¶¶ 1-32 (first set).

Plaintiff initially asserted five claims for relief. *See generally, Complaint for Judicial Review Under C.R.C.P. 106 and Declaratory Relief ("Original Complaint")*. In addition to the OML Claim and R. 106 Claims, Plaintiff asserted a claim alleging a procedural due process violation and a claim for declaratory relief. Prior to the filing of her Amended Complaint, the due process claim was her third claim for relief and the claim for declaratory relief was her fifth claim for relief. *Original Complaint* at ¶¶ 63-65 and 74-77.

On December 20, 2021, the Board filed a motion to dismiss Plaintiff's Original Complaint pursuant to C.R.C.P. 12(b)(5). On January 31, 2022, the Court issued an Order Denying Defendants' Motion to Dismiss ("Order on Motion to Dismiss). In doing so, the Court noted the Board relied on non-binding opinions that do not specifically address the interplay between a public body's censure of a fellow member and the authority that governs Plaintiff's OML Claim and R. 106 Claims.

On March 30, 2022, Plaintiff filed a motion for partial summary judgment concerning her OML Claim. On May 6, 2022, the Court issued an Order Denying Plaintiff's Motion for Summary Judgment on Plaintiff's Open Meetings Claim ("Order on Motion for Summary Judgment"). The Court explained that it was reluctant to grant Plaintiff's request for summary judgment on her OML Claim absent a link between the censure and the policy-making powers of the Board. *Id.* at p. 8. The rationale of the summary judgment ruling relied primarily on the following opinions: *Intermountain Rural Elec. Ass'n v. Colo. PUC*, 298 P.3d 1027, 1029 (Colo. App. 2012) ("*Intermountain*") and *Bd. of Cnty Comm'rs v. Costilla Cnty. Conservancy Dist.*, 88 P.3d 1188, 1194 (Colo. 2004) ("*Costilla*"). *See generally, Order on Motion for Summary Judgment*.

A case management conference was held in this matter on May 10, 2022. The parties had previously filed a proposed case management order in which they advised the Court of disagreements concerning the need for certification of a record, whether the C.R.C.P. 26(a)(1) applies to this case, whether the OML has been triggered, and how claims other than the R. 106 Claims should proceed. The Court informed the parties it would take the proposed case management order under advisement and issue a case management order prior to May 19, 2022.

The Court issued the Amended CMO on May 17, 2022. The Court directed the parties to confer regarding stipulated and disputed facts and to file a joint notice of the result of this conferral. *Id.* at ¶ 17(c). The parties were directed to brief their positions on the following issues: (1) Whether the provisions of the OML have been triggered; (2) Whether the discovery rules set forth in the Colorado Rules of Civil Procedure are applicable to the OML claim and Plaintiff's claim for declaratory relief; (3) Whether, in light of the stipulated facts, a hearing is required; and (4) Whether an actual controversy exists concerning Plaintiff's claim for declaratory relief. *Amended CMO* at ¶ 17(c).

Two weeks after the Amended CMO was issued, Plaintiff filed an Amended Complaint. Plaintiff dismissed her procedural due process claim as well as her declaratory judgment claim. *OML Brief* at p. 1, n. 1 (explaining she dismissed her declaratory judgment claim to focus on her OML Claim and R. 106 Claims). The parties filed Stipulated and Disputed Facts on June 7, 2022.

A. The following facts are undisputed:

1. Plaintiff served as an elected trustee on the Board from April 2018 to April 2022.

2. The Board is made up of seven trustees, including one that serves as the mayor, and the Board serves as the legislative body of the Town of Del Norte.

3. Del Norte is a statutory town governed by C.R.S. § 31-4-301 *et seq.*

4. Throughout the year 2021, the seven trustees on the Board were: Plaintiff, Mayor Chris Trujillo, Mayor Pro Tem Bob Muncy, Shelly Burnett, Louie Velasquez, Joe Archuleta, and Leigh Anne Lobato.

5. The emails dated October 6 through 15, 2021, reflected in Exhibit 4,[3] are true and accurate copies of some emails sent during that same time period.

6. On October 13, 2021, at a regular board meeting, the Board scheduled a public hearing on the question of removal for November 2, 2021.

7. On October 15, 2021, Mayor Trujillo called for a special meeting to occur at 4:00 p.m., October 18, 2021 ("Special Meeting"). The notice for the Special Meeting ("Special Meeting Notice") identified two agenda items: (1) "For a conference with Town Attorney for the purpose of receiving legal advice on specific legal questions concerning Trustee removal under C.R.S. 24-6-402(4)(b);" and (2) "Action by Town Board as a result of Executive Session relating to Trustee removal."

8. Exhibit 1 is an accurate copy of the Special Meeting Notice. The agenda in the Special Meeting Notice was not amended at any time on October 18, 2021, but was properly and timely posted as to the issues listed in the agenda.

9. The emails dated October 18, 2021, reflected in Exhibit 4, are true and accurate copies of some emails sent during that same time period.

10. On October 18, 2021, the Board held the Special Meeting, the subject matter of which is set forth in Exhibit 1.

11. Attending the Special Meeting were the following five trustees: Mayor Chris Trujillo, Shelly Burnett, Louie Velasquez, Joe Archuleta, and Leigh Anne Lobato.

[3] Unless otherwise specified, each Exhibit referenced in the numbered paragraphs in this section are Exhibits that Plaintiff filed with the Court for purposes of the Stipulated and Disputed Facts on June 8, 2022.

12. The recording for this session reflects that the meeting ran for approximately 95 minutes (4:00 p.m. to approximately 5:35 p.m.), with 9 minutes and 34 seconds occurring in public. The first four (4) minutes and the last five (5) minutes and thirty-five (34) seconds occurred in public.

13. Exhibit 5 is the transcript for the public portion of the Special Meeting.

14. Twenty-five (25) seconds into the recording of the meeting, after a roll call, the Board suggested and then immediately voted unanimously to go into executive session.

15. The sole legal basis stated for the executive session was pursuant to C.R.S § 24-6-402(4)(b) to receive "legal advice on specific legal questions concerning Trustee removal."

16. An executive session began approximately 1 minute and 40 seconds into the audio recording (approximately 4:10 p.m.).

17. Attending the executive session were the five trustees and five Town employees/agents: Town Attorney Gene Farish; Town Administrator/Clerk Bernadette Martinez; Code Enforcement Officer Nineah Martinez; Treasurer Ramona Dordan; and Police Chief Frank Archuleta.

18. All five trustees and five Town staff persons attended the entire executive session.

19. The Town Attorney announced that the meeting would involve "attorney/client privileged communication" and suggested that they stop the audio recording. Mayor Trujillo caused the stopping of the audio recording four (4) minutes into the public recording (4:12 p.m.).

20. At 5:30 p.m., the Board ended the executive session and returned to the public meeting.

21. After exiting the executive session, the Town Attorney announced the "next item of business is" and Mayor Trujillo immediately responded, "motion for censure." Town Treasurer Ramona Dordan also quickly followed up by saying, "[c]ensure first he said."

22. The Board moved for a censure and, for the next two minutes, Trustee Burnett read aloud a written motion for censure citing three grounds ("Proposed Censure"). Exhibit 2 is a true and accurate copy of a document provided by the Board as the motion Trustee Burnett read, except for the handwriting on Exhibit 2.

23. The Board concluded that allegations in the Proposed Censure amounted to "misconduct."

24. In the Proposed Censure, the Board explicitly "warned" Plaintiff that "similar infractions may result in her removal from office."

25. After Trustee Burnett made the motion and it was seconded, discussion about the motion occurred when the Town Attorney, an appointee of the trustees, asked about adding more grounds in the first allegation of misconduct. He suggested adding "that [Plaintiff] allegedly created "confusion in the public as to who has the authority to enforce the town code."

26. The Board agreed to add the additional phrasing suggested by the Town Attorney.

27. The Board unanimously approved the motion for censure, as amended.

28. The Board then canceled the public hearing that was scheduled for November 2, 2021 and adjourned the Special Meeting.

29. The emails dated October 19 through 28, 2021, reflected in Exhibit 4, are true and accurate copies of some emails sent during that same time period.

30. The Proposed Censure was read in an open public meeting.

31. The audio of the Special Meeting, sent to the Court on or about March 31, 2022, is an accurate recording of the Special Meeting.

32. The transcript prepared by Mile High Court Reporting, as included in the Rule 106 record, is an accurate transcription of the audio of the Special Meeting to the extent it is consistent with the audio recording.

B. The following facts remain disputed:

33. On October 5, 2021, Mayor Chris Trujillo informed Plaintiff that he had the votes to remove her from office. This was the first time Mayor Trujillo discussed with Plaintiff the plan to remove her.

34. At the October 13, 2021 regular Board meeting, the Board did not discuss any reasons for the removal hearing and did not provide any charges to Plaintiff.

35. Whether a written draft motion for removal was made available to the Board before the executive session commenced.

36. Before the executive session started, no Board member or staff person publicly described or even mentioned in a public meeting the charges the Board would consider or that a censure would be considered.

37. Whether some or all of the attendees of the executive session discussed a motion for censure during the executive session.

38. Whether, during the executive session, the Board and/or staff edited a motion to resolve the issue of removal.

39. The Board spent the next minute and fifteen seconds looking for scripts of the standard assurances about the Board allegedly following the rules during the executive session.

40. Whether 90 seconds passed from the end of the executive session until the point where the Town Attorney said "[s]o the next item of business is . . ."

41. Whether a "censure" was listed on the Special Meeting Notice agenda.

42. When Mayor Trujillo said, "motion for censure," it was the first time the Board mentioned "censure" publicly in connection with Plaintiff. It was also the first time that "censure" was mentioned publicly as a possible outcome to the question of removal.

43. Within seconds of mentioning the idea for censure, the Board made a motion for censure.

44. Whether Trustee Burnett had the written Proposed Censure in hand or in her possession when she exited the executive session.

45. The Board's determinations in the Censure were made outside of a public meeting and without giving Plaintiff an opportunity to respond to the allegations.

46. The statements made in the Proposed Censure were not discussed in any public meeting before the October 18, 2021.

47. Whether, during the executive session, the Board received and discussed information related to the first numbered paragraph in the Proposed Censure, including information provided by the Code Enforcement Officer.

48. Whether, during the executive session, the Board received and discussed information related to the second numbered paragraph in the Proposed Censure, including information provided by the Town Clerk.

49. Whether, during the executive session, the Board received and discussed information related to the third numbered paragraph in the Proposed Censure, including information provided by the Town Clerk/Administrator.

50. Whether, during the executive session, the Board decided to: (1) forego the effort of removing Plaintiff as a trustee; (2) cancel the public hearing that was scheduled for the public removal hearing; (3) agree to a written 260-word motion for censure charging Plaintiff with alleged "misconduct" and explicitly censuring her; and (4) warn her about the possibility of removal in the future if she did not succumb to the Board's demands. None of these decisions were discussed in any public meeting before the executive session.

51. Whether the Board concluded, without hearing from Plaintiff, that she engaged in "misconduct."

52. The Board did not use the procedures for censures outlined in the Robert's Rules of Order Newly Revised (11th edition 2011), which Del Norte adopted for its meetings.

53. The Board did not follow the public hearing procedures contained in its Municipal Code.

54. The Town Attorney suggested adding "the language that [Trustee] Joe [Archuleta] was talking about [during the executive session]."

55. Whether the Board added a clause to the Proposed Censure and approved the Proposed Censure without discussion.

56. The final censure was a "proposed policy, position, resolution, rule, regulation, or formal action."

57. On October 19, 2021, the Town Attorney notified Plaintiff of the Board's "official action" and sent her a copy of the final draft of the censure officially adopted by the Board ("Censure").

58. The transcript provided to the Court, as Exhibit 7 to the Plaintiff's Motion for Summary Judgment on Plaintiff's Open Meetings Claim, is accurate.

59. The Censure did not contain any penalties, nor did it limit or impair Plaintiff's duties and responsibilities as a trustee.

60. The Censure is fiscally neutral, in that its passage did not incur any financial obligation or expenditure of any public funds.

61. The Censure did not rely upon any statutory or constitutional authority of the Town of Del Norte or the Board.

62. The Censure merely expressed the opinions of Plaintiff's fellow trustees with respect to her conduct – it did not affect her duties or obligations as a trustee.

C. The Contents of the Censure

The Censure was not included in the parties Stipulated and Disputed Facts. However, the Censure was filed as Exhibit 2 to Plaintiff's Original Complaint, as Exhibit 6 to Plaintiff's motion for summary judgment, and is included in the certified record as part of Plaintiff's R. 106 Claims.

63. The Censure is set forth verbatim below:

> The Town Board of Trustees of the Town of Del Norte has received credible information from Town staff that Trustee Laura Anzalone has performed the following acts:
>
> 1. Trustee Anzalone has taken it upon herself to assume duties belonging to the Code Enforcement Officer by encouraging citizens to file complaints concerning the Del Norte lighting ordinance and has interfered with the Town Code Enforcement Officer's procedure and protocol making it difficult for her to perform her essential functions who [sic] creates confusion in the public as to who has the authority to enforce the town code .[sic] In doing so she has incurred liability for the Town in acting outside the scope of her proper authority.
>
> 2. Trustee Anzalone has attempted to call a Special Meeting of the Board of Trustees by contacting the Town Clerk and using the following language "We as Trustees…ask to have a special meeting to be held for the purpose of discussing Town procedure and Trustee appointees…" This correspondence did not have the concurrence of

other Board Trustees, was deceptive, and such meeting would normally be a Work Session of the Board, which, when attempted to be called between regular meetings, could only be called by the Mayor.

3. Trustee Anzalone has stated to the Town Clerk/Administrator that there should be a replacement of Town Staff every few years thereby making their job performance more difficult, their tenure uncertain, imposing unnecessary stress upon their personal lives, and creating unnecessary tension in the work environment.

I, therefore, move that Trustee Anzalone be censured by the Board of Trustees for the above misconduct and warned that future similar infractions may result in her removal from office.

(Emphasis in original).

II. ANALYSIS

It bears repeating that Plaintiff was not removed from her role as a trustee. She was censured based upon the information the Board considered during the executive session. The Censure, Plaintiff contends, represents a step in the removal process. *Amended Complaint* at ¶ 5 (noting that, in filing this action, she seeks "to overturn the Board's quasi-judicial decision on the question of removal, declare violations of the [OML]," and "invalidate the [Censure] . . ."). After considering the effect of the Censure in relation to the authority discussed below, the Court concludes Plaintiff's OML Claim is not viable because the Censure does not concern the formation of public policy, nor is the Censure a proposed policy, position, resolution, rule, regulation, or formal action under the OML and corresponding case law. Thus, the OML does not apply to the Censure. This conclusion is not affected by any of the facts the parties dispute. *See Stipulated and Disputed Facts* at ¶¶ 1-26 (second set) and 1-4 (third set). Based upon the conclusion that the Censure does not fall under the OML's provisions, it logically follows that the OML Claim is not subject to the discovery rules in the Colorado Rules of Civil Procedure and a hearing is not appropriate in light of the circumstances of this case.

As for Plaintiff's R. 106 Claims, the Censure does not constitute a quasi-judicial action of the Board. It is true that the process by which a governmental body makes a decision is material to claims brought under C.R.C.P. 106(a)(4). However, this is only part of the analysis; the Court must also consider the nature of the governmental decision in determining whether the governmental body's action is "quasi-judicial" within the meaning of C.R.C.P. 106(a)(4) and case law construing the Rule. As explained below, the Court concludes the Censure falls short of a quasi-judicial action, as it does not adversely impact Plaintiff's protected interests and was not the result of application of preexisting legal standards to present or past facts.

A. Plaintiff's OML Claim

Section 24-6-401 of the OML provides that "[i]t is declared to be a matter of statewide concern and the policy of this state that the formation of public policy is public business and may not be conducted in secret." Plaintiff's OML Claim is brought pursuant to C.R.S. § 24-6-402 ("Statute"). The Statute defines a "local public body" as "any board . . . of any political subdivision of the state" and it defines a "meeting" as "any kind of gathering, convened to discuss public business . . ." *Id.* at (1)(a)(I),(1)(b). "All meetings of a quorum or 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." *Id.* at (2)(b).

The Statute goes on to provide that "[n]o resolution, rule, regulation, ordinance, or formal action of a state or local public body shall be valid unless taken or made at a meeting that meets the requirements of subsection (2) of this section." *Id.* at (8). The remedy Plaintiff seeks in connection with her OML Claim is set forth in the Statute as follows:

> Any person denied or threatened with denial of any of the rights that are conferred on the public by this part 4 has suffered an injury in fact and, therefore, has standing to challenge the violation of this part 4.
>
> The courts of record of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state. 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. In the event the court does not find a violation of this section, it shall award costs and reasonable attorney fees to the prevailing party if the court finds that the action was frivolous, vexatious, or groundless.

Id. at (9)(a),(9)(b).

In large part, Plaintiff's OML Claim focuses on subsection (4) of the Statute. In pertinent part, subsection (4) provides:

> 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; except 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:
>
> ***
>
> Conferences with an attorney for the local public body for the purposes of receiving legal advice on specific legal questions. Mere presence or participation of an attorney at an executive session of the local public body is not sufficient to satisfy the requirements of this subsection (4).

Id. at (4),(4)(b).

The resolution of Plaintiff's OML Claim largely turns on whether (a) the Board discussed "public business" during the executive session at the October 18, 2021 special meeting, and (b) whether the Censure constitutes a "proposed policy, position, resolution, rule, regulation, or formal action."

Plaintiff argues "the Board secretly discussed public business and adopted a 'proposed policy, position, resolution, rule, regulation or formal action' outside of a public meeting." *OML Brief* at p. 2 The Board asserts that "the OML is not triggered by a fiscally-neutral, penalty-free Censure that did not inhibit [Plaintiff] from exercising any of her duties as a Trustee." *OML Response Brief* at p. 1.

The primary task when interpreting statutes is to ascertain the General Assembly's intent. *Arkansas Valley Publishing Company v. Lake Cnty. Bd. of Cnty. Comm'rs*, 369 P.3d 725, 726 (Colo. App. 2015) (citations omitted). "We look primarily to the language of a statute to determine legislative intent." *Gumina v. City of Sterling*, 119 P.3d 527, 530 (Colo. App. 2004) (citation omitted). "In determining the meaning of a statute, we must adopt a construction that will serve the legislative purposes underlying the enactment." *Id.* "When reviewing a specific provision of a statute, we consider the statutory scheme as a whole in an effort to give consistent, harmonious, and sensible effect to all its parts." *Id.* "If interrelated statutory sections are implicated, we apply the same rules of construction to further the underlying intent of the statutory provisions." *Id.*

"The intent of the [OML] is that citizens be given the opportunity to obtain information about and to participate in the legislative decision-making process which affects, both directly and indirectly, their personal interests." *Cole v. State*, 673 P.2d 345, 349 (Colo. 1983); *see also Gumina*, 119 P.3d at 531. "A citizen does not intelligently participate in the legislative decision-making process merely by witnessing the final tallying of an already predetermined vote. As a rule, these types of statutes should be interpreted most favorably to protect the ultimate beneficiary, the public." *Cole*, 673 P.2d at 349.

"'Public business' is not defined in the [Statute], but the supreme court has held that 'a meeting must be part of the policy-making process to be subject to the requirements of the OML.'" *Arkansas Valley Publishing Company*, 369 P.3d at 726 (quoting *Costilla*, 88 P.3d at 1194). "'A meeting is part of the policy-making process if it concerns a matter related to the policy-making function of the local public body holding or attending the meeting.'" *Id.*

The OML contains rules relating to the "formation of public policy." C.R.S. § 24-6-401. The OML does not define "public policy." *See generally, Part 4 of Article 6 of Title 24 of Colorado Revised Statutes*. "In the absence of a statutory definition, we may consider a definition in a recognized dictionary." *Mook v. Bd. of Cnty. Comm'rs of Summit Cnty.*, 457 P.3d 568, 574 (Colo. 2020) (citation and quotation omitted). "Public policy" means "the body of laws and other measurers **that *affect the general public***[.]"[4] (Emphasis added). This is consistent with the definition used by the New Mexico Court of Appeals: "'public policy' [is defined as] '[t]he collective rules, principles, or approaches to problems that affect the commonwealth or [especially] promote the general good; [specifically], principles and standards regarded by the [L]egislature or by the courts as being of fundamental concern to the state and the whole of society.'" *Sherrill v. Farmers Ins. Exch.*, 374 P.3d 723, 728 (N.M. Ct. App. 2016) (quoting *Black's Law Dictionary 1426* (10th ed. 2014) (first modification added; remainder of modifications in original).

The Censure does not fall under the declaration of purpose set forth in the OML. The Censure represents the Board's opinion on Plaintiff's performance as a Trustee. The Censure does not have anything to do with laws or measures that affect the general public. To say the Censure concerns "the formation of public policy" stretches the OML too far. The Court must

[4] *See* https://www.dictionary.com/browse/public-policy (accessed on 10/27/22). The Court notes Plaintiff cited to the same online dictionary in her OML Brief. *Id.* at pp. 8-9.

adopt a construction that serves the legislative purposes underlying the OML. *Gumina*, 119 P.3d at 530 (citation omitted). This foundational consideration is critical, as the Statute cannot be properly construed without taking it into account.

As the Court explained in the Order on Motion for Summary Judgment, a "formal action" in this context refers to an action that is tied to the body's policy-making responsibility. *Id.* at pp. 5 (citing *Intermountain*, 298 P.3d at 1032 and *Costilla*, 88 P.3d at 1189).[5] Plaintiff notes that the facts of the *Costilla* case are distinguishable. *OML Brief* at pp. 13-14. That is true, but the legal principles articulated in *Costilla* are informative because they concern the statutory language that Plaintiff's OML Claim is based upon. The same goes for the legal principles articulated in *Intermountain*. The import of these opinions is that: (1) In construing the Statute, the Court must be mindful of the "central purpose" of the OML — "to ensure public participation in the policy-making process[,]" *Costilla*, 88 P.3d at 1191; (2) "the OML applies to meetings that are convened for the purpose of policy-making rather than . . . merely discussing matters of public importance[,]" *Id.* at 1193; (3) "for a meeting to be subject to the requirements of the OML, there must be a demonstrated link between the meeting and the policy-making powers of the government entity holding or attending the meeting[,]" *Id.* at 1194; and (4) "the mere fact that a public body reaches a 'decision' does not necessarily mean that making the decision is a 'formal action.'" *Intermountain*, 298 P.3d at 1033.

The foregoing reasoning is reason enough to find in favor of the Board on Plaintiff's OML Claim. Even if the Court assumes each disputed fact is consistent with Plaintiff's account of how the Censure came to be, the outcome is the same. Simply put, without a showing that the Censure concerned the formation of public policy and/or was somehow connected to the Board's

[5] The Court will not repeat in full the previous application of *Intermountain* and *Costilla*; however, the analysis section of the Order Denying Plaintiff's MSJ is incorporated herein by this reference.

policy-making responsibility, the OML Claim does not pass muster. A recent opinion of the Supreme Court of the United States bolsters this conclusion.

In *Houston Community College System v. Wilson*, 142 S. Ct. 1253 (2022), the Supreme Court explained that "elected bodies in this country have long exercised the power to censure their members" and that "the power of assemblies in this country to censure their members was more or less assumed." *Id.* at 1259 (citation and quotation omitted). In summarizing the history of censures, the Supreme Court went on to explain that "censures along these lines have proven more common yet at the state and local level" and that "it seems elected bodies in this country issued no fewer than 20 censures in August 2020 alone." *Id.* at 1260 (citation omitted).

In *Wilson*, the plaintiff was a member of the Houston Community College System's board of trustees. *Id.* at 1257. The issue in *Wilson* concerned the plaintiff's contention that the board of trustees' censure, in which the board characterized the plaintiff's conduct as "inappropriate" and "reprehensible," violated his First Amendment right to free speech. *Id.* at 1262. Still, there are parallels that support a ruling in favor of the Board as it relates to the Plaintiff's OML Claim. The Supreme Court noted that the censure in *Wilson* "concerned the public conduct of another elected representative[,]" that "[e]veryone involved was an equal member of the same deliberative body[,]" and that "the censure did not prevent [the plaintiff] from doing his job," nor did it "deny him any privilege of office[.]" *Id.* at 1261. Significantly, board's censure imposed penalties upon the plaintiff, such as deeming him ineligible for election to board officer positions and for reimbursement "'for any College related travel[.]'" *Id.* at 1258. Yet, the Supreme Court ultimately determined the censure did not materially deter the plaintiff, an elected official, "from exercising his own right to speak." *Id.* at 1261. The Supreme Court

unanimously held that the board's censure was not a materially adverse action that could raise a cognizable retaliation claim under the First Amendment. *Id.*

The reasoning articulated in the *Wilson* opinion lends credence to the Board's contentions that the Censure of Plaintiff represents nothing more than the other trustees opinion of her performance, *OML Response Brief* at p. 12, and that the other trustees have a First Amendment right to voice their opinion. *Amended CMO* at ¶ 4 (The Board's description of the case). The Supreme Court's analysis in *Wilson* bolsters the Court's conclusion that the OML does not apply to the Censure. The Censure is not tied to the Board's policy-making power and it cannot be treated as the Board's then-ongoing effort to remove Plaintiff from her office. There is a stark contrast between removal proceedings and what happened on October 18, 2021. Had the Board actually endeavored to remove Plaintiff from her office, a different analysis would be required. That, however, did not occur.

The Court's reasoning on this point relating to Plaintiff's OML Claim resolves the other issues that were briefed. With respect to whether the Board violated subsection (4)(b) of the Statute concerning executive sessions, Plaintiff argues "[t]he executive session privilege does not absolve the Board from its obligation to discuss public business in public." *OML Brief* at p. 13. However, this assumes the Censure relates to public business. For purposes of the OML, it is "the formation of public policy" that is "public business[.]" C.R.S. § 24-6-401. The Court does not view the Censure as relating to public policy; thus, it follows that the Censure is not "public business" within the meaning of the OML.

At any rate, the Court does not see a problem with the Town's staff members participating in the executive session, which occurred so the Board could receive legal advice. "[T]he attorney-client privilege protects communications made to the attorney to enable him to

give sound and informed legal advice." *Alliance Const. Solutions, Inc. v. Department of Corrections*, 54 P.3d 861, 866 (Colo. 2002) (citing *Upjohn Co. v. U.S.*, 101 S. Ct. 677 (1981)); *see also Denver Post Corp. v. University of Colorado*, 739 P.2d 874 (Colo. App. 1987) (Governmental agencies are recognized as clients for purposes of the privilege). Based upon the contents of the Censure, it appears the Town staff members participated in the executive session to provide input so the Town Attorney could advise the Board. The Court will not belabor this point, however, because the Board could not violate subsection (4) of the Statute if it did not discuss public business or adopt a proposed policy, position, resolution, rule, regulation, or formal action in the executive session.

As for the issue of whether the discovery rules apply to Plaintiff's OML Claim, the Court need not address this at length because this issue is clearly settled by the determination that the OML does not apply to the Board's opinion of Plaintiff's performance as a trustee. The Court notes, however, that Plaintiff's first and second claims for relief are the R. 106 Claims, and C.R.C.P. 106 provides that "[w]here claims other than claims under this Rule are properly joined in the action, the court shall determine the manner and timing of proceeding with respect to all claims." *Id.* at (a)(4)(VI).

B. Plaintiff's R. 106 Claims

On January 31, 2022, after considering the Board's motion to dismiss pursuant to C.R.C.P. 12(b)(5), the Court declined to dismiss Plaintiff's R. 106 claims. *See generally*, *Order on Motion to Dismiss*. Of course, at this point of the litigation, before extensive briefing occurred, the Court was loath to dismiss Plaintiff's Original Complaint on the basis that she failed to state a claim upon which relief could be granted. After reviewing relevant case law, the Court agrees with the Board that the Censure is not reviewable under C.R.C.P. 106(a)(4).

The certified record consists of seventeen pages, the contents of which are adequately set forth in Section I. *Supra* at pp. 4-12. For the sake of efficiency, the Court incorporates paragraphs 1 through 32 and paragraph 63 herein by this reference.

Judicial review under C.R.C.P. 106(a)(4) is available "where an inferior tribunal (whether court, board, commission, or officer) exercising judicial or quasi-judicial functions, has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy." *City and County of Denver v. Eggert*, 647 P.2d 216, 220 (Colo. 1982). "Administrative proceedings are accorded a presumption of validity and regularity, and all reasonable doubts as to the correctness of administrative rulings must be resolved in favor of the agency." *City & Cnty. Of Denver v Bd. of Adjustment for City & Cnty. Of Denver*, 55 P.3d 252, 254 (Colo. App. 2002). "The burden is on the party challenging an administrative agency's action to overcome the presumption that the agency's acts were proper." *Id.* (citations omitted).

The first inquiry under C.R.C.P. 106(a)(4) is whether the governmental body or officer acted in a judicial or quasi-judicial capacity when it took the action(s) a plaintiff asks the court to review. "An action is quasi-judicial if the governmental decision is likely to affect adversely the protected interests of specific individuals by application of preexisting legal standards or policy considerations to facts presented to the governmental body." *Dill v. Bd. of Cnty. Comm'rs of Lincoln Cnty.*, 928 P.2d 809, 812 (Colo. App. 1996). "[I]t is the nature of the decision rendered by the governmental body, and not the existence of a legislative scheme mandating notice and a hearing, that is the predominant consideration in determining whether the governmental body has exercised a quasi-judicial function in rendering its decision." *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill.*, 757 P.2d 622, 627 (Colo. 1988) ("*Cherry Hills*") (citing *Eggert*, 647 P.3d at 222-23).

> While we acknowledge that there is no litmus-like test for identifying quasi-judicial action, we are nonetheless satisfied that the essential characteristics of quasi-judicial action are sufficiently distinct to provide a workable basis for determining whether the jurisdictional prerequisites for judicial review under C.R.C.P. 106(a)(4) have been satisfied. The central focus, in our view, should be on the nature of the governmental decision and the process by which that decision is reached. If, for example, the governmental decision is likely to adversely affect the protected interests of specific individuals, and if a decision is to be reached through the application of preexisting legal standards or policy considerations to present or past facts presented to the governmental body, the one can say with reasonable certainty that the governmental body is acting in a quasi-judicial capacity in making its determination.

Cherry Hills, 757 P.2d at 627 (citations omitted); *see also Widder v. Durango School Dist. No. 9-R*, 85 P.3d 518, 527 (Colo. 2004) ("Thus, in determining whether a school board is performing a quasi-judicial function, our inquiry must focus on the nature of the governmental decision and the process by which that decision is reached.") (citation omitted).

In the Order on Motion to Dismiss, the Court emphasized the following portion of *Widder*: ". . . and the process by which that decision is reached." *Order on Motion to Dismiss* at p. 6. Again, this ruling was issued early in the case prior to the filing of the certified record and the parties' comprehensive briefing of the issues. Now that the circumstances surrounding the Censure have been fleshed out, the Court finds the Board's analysis of Plaintiff's R. 106 Claims persuasive. The bottom line is the Censure did not adversely affect Plaintiff's rights. It did it prevent her from continuing as a trustee. Rather, it simply sets forth the other trustees opinion on her performance. And as the Board accurately observes, the Censure does not compare Plaintiff's performance as a trustee to a code of conduct or any other governing rules. *R. 106 Response Brief* at pp. 1-2.

As Plaintiff points out, the Special Meeting was called for a conference with the Town Attorney so the Board could receive legal advice on questions concerning trustee removal. *R. 106 Brief* at p. 5. Prior to that, the Board had scheduled a public hearing on the question of

removal for November 2, 2021. Plaintiff seems to be conflating the Special Meeting with the hearing that was scheduled for November 2, 2021, but never actually occurred. *Id.* (Where Plaintiff notes that "[r]emoval requires charges, an opportunity to be heard, and a decision based on the evidence presented."). Since the Censure did not adversely affect any of Plaintiff's protected interests, it must be distinguished from a removal hearing. Had the Board held a removal hearing, any action(s) the Board took as a result of said hearing would constitute quasi-judicial action(s). But that is not what happened in this case.

The Court adopts the Board's analysis of the *Cherry Hills* and *Widder* opinions. Both opinions involved the application of preexisting legal standards to past/present facts. Though the Board published the Special Meeting Notice and held the Special Meeting, the Censure reads as the other trustees' opinion of Plaintiff's performance as a trustee. It is true that the Board opined that Plaintiff had acted "outside the scope of her property authority," but the Board did not cite to any rules with respect to that portion of its opinion of Plaintiff, nor did it cite to any rules in connection with any other portion of its opinion. Notably, Plaintiff does not identify any protected interest that is specifically related to the Censure. Instead, she references the statutory removal process set forth in C.R.S. § 31-4-307, which is not invoked by the Censure.[6]

The foregoing analysis leads to the conclusion that Plaintiff's R. 106 Claims are not appropriate for review under C.R.C.P. 106(a)(4). Without a showing of quasi-judicial action(s), the R. 106 Claims must be dismissed.

[6] Plaintiff does assert that the conduct mentioned in the Censure is authorized by the Town Code. *R. 106 Brief* at pp. 8-10; *R. 106 Reply Brief* at p. 10. The Board asserts the parties' disagreement about whether the conduct described in the Censure is authorized by the Town Code or other authority is more appropriately addressed in the form of declaratory relief. *R. 106 Response Brief*. The Court agrees. If those issues were before the Court (and were justiciable, *i.e.*, not moot), they could have been resolved by applying the legal principles concerning claims for declaratory judgments.

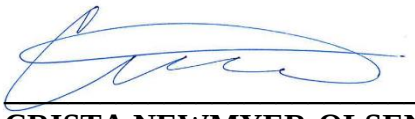
ORDER

IT IS THEREFORE ORDERED THAT Plaintiff's first and second claims for relief under C.R.C.P. 106(a)(4) are dismissed.

IT IS FURTHER ORDERED THAT Plaintiff's third claim for relief pursuant to the Open Meetings Law (C.R.S. § 24-6-401 *et seq.*) is also dismissed.

Done this 31st day of October 2022.

BY THE COURT:



CRISTA NEWMYER-OLSEN
DISTRICT COURT JUDGE