COLORADO COURT OF APPEALS Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal from: The District Court for the City and County of Arapahoe District Court Judge: Hon. Elizabeth Beebe Volz District Court Case Number: 2022CV30927 **Plaintiff-Appellant:** THE SENTINEL COLORADO, **v.** **Defendant-Appellee:** KADEE RODRIGUEZ, city clerk, in her official capacity as records custodian **Attorney for Plaintiff-Appellant:** Rachael Johnson, #43597 Reporters Committee for Freedom of the Press c/o Colorado News Collaborative 2101 Arapahoe Street Denver, CO 80205 Telephone: (970) 486-1085 rjohnson@rcfp.org	DATE FILED: March 2, 2023 7:15 PM FILING ID: BF032C5564388 CASE NUMBER: 2022CA1934 **COURT USE ONLY** Court of Appeals Case No. 2022CA001934

APPELLANT'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g). It contains 8,542 words and does not exceed 9,500 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A).

For each issue raised by Plaintiff-Appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/Rachael Johnson
Rachael Johnson, #43597

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3. Whether the trial court erred by failing to release a recording of the Aurora City Council's March 14, 2022 executive session under the Colorado Open Meetings Law because any privilege claimed by Defendant-Appellee pursuant to § 24-6-402(d.5)(II)(B), C.R.S. was either waived or destroyed.

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violated the notice requirement for its March 14, 2022 executive session, per § 24-6-402(9), C.R.S. and *Van Alstyne v. Housing Authority of Pueblo,* 985 P.2d 97, 99-100 (Colo. App. 1998).

STATEMENT OF THE CASE

This case concerns a request under the COML, §§ 24-6-401 *et seq*., C.R.S., by Max Levy, a reporter for *The Sentinel Colorado*, for access to the (audio and video) recording and meeting minutes[1] of a March 14, 2022 executive session of the Aurora City Council ("the City" or "the Council"). CF, p. 21. Specifically, Levy seeks a ruling that the recording of the March 14, 2022 executive session must be made available for public inspection on the ground that the Council violated sections of the COML and the CORA, §§ 24-72-201, C.R.S. *et seq.* The records at issue are in the possession, custody, or control of the custodian, Defendant-Appellee Kadee Rodriguez, who is acting in her official capacity as the City Clerk of the City of Aurora.

A. Censure proceedings against Aurora City Councilmember Danielle Jurinsky and the Council's March 14, 2022 executive session.

As a political reporter for *The Sentinel Colorado,* Plaintiff-Appellant covers issues that are vitally important to the public interest. Through his reporting, Levy

[1] Mr. Levy seeks access to any meeting minutes of the March 14 executive session (should they exist) on the ground that they are public records under the CORA, §§ 24-72-201 *et seq*., C.R.S.

learned that the Council held a secret, closed meeting on March 14, 2022 to discuss the possible censure of one of its members for violating the City's charter and Council rules.

The controversy began on January 27, 2022, when Councilmember Danielle Jurinsky appeared on the Steffan Tubbs talk radio show to discuss public safety in Aurora. During that media appearance, she called for the removal of then-Aurora Police Chief Vanessa Wilson and referred to her and her Deputy Police Chief Darin Parker as "trash." CF, pp. 2, 6, 14, 36. On the grounds that the public rebuke violated rules governing the Council, Councilmember Juan Marcano initiated proceedings to censure Councilmember Jurinsky. CF, pp. 1-2, 14, 36.

On February 24, 2022, *The Sentinel* reported that Councilmember Jurinsky's attorney, David Lane, threatened to take legal action against the City if the censure process was not terminated before March 4, 2022. CF, pp. 6-7. In a March 24, 2022 article, *The Sentinel* reported that the City issued a statement to *The Denver Post* regarding the status of the censure process, saying "[a] public hearing" on the matter had been set for March 30, 2022. CF, p. 14; *see also* CF, p. 7. However, ahead of any public hearing or discussion, the Council met on March 14, 2022, in a secret executive session. CF, pp. 9-15, 65, 97.

Thereafter, two Councilmembers present at the March 14 executive session and Councilmember Jurinsky's attorney provided statements to *The Sentinel*

describing the actions taken by the Council at that non-public meeting. According to Councilmember Marcano, Councilmember Alison Coombs, and Lane, a majority of the councilmembers present at the March 14 executive session voted to end the censure proceedings and/or investigation against Councilmember Jurinsky and settle the matter with Lane. CF, pp. 10-12, 14. In particular, according to Councilmembers Coombs and Marcano, in the March 14 executive session Mayor Mike Coffman asked individual councilmembers if they were for or against continuing the censure process against Councilmember Jurinsky. CF, pp. 15, 26, 36, 91. *The Sentinel* also reported that Councilmember Dustin Zvonek voted against censure during the March 14 executive session and said, "I think we should have this out in the open." CF, p. 17. Nevertheless, after the majority of councilmembers said that they did not agree with continuing the censure process, formal action was taken to end the investigation and censure process against Councilmember Jurinsky. CF, pp. 13-15, 110-11.

This account was confirmed in a March 24, 2022 letter titled "Stipulation to Resolve Charges Brought Against Council Member Jurinsky" from the City's retained counsel Burns, Figa & Will, which detailed that on March 14, 2022 the Council "directed and instructed" special counsel to "end the investigation [against Councilmember Jurinsky] prior to any public hearing and enter into stipulation with Council Member Jurinsky to dismiss the charges brought against her." CF,

pp. 110-11. The letter further explained that Councilmember Jurinsky and the City agreed that the "investigation into the charges brought" against her would be "terminated and the matter [] dismissed effective March 15, 2022." CF, p. 110. These actions by the Council were taken more than two weeks before the March 28 public meeting. There was also no public process with respect to this decision-making.

B. Plaintiff-Appellant's request for the executive session recording.

To further his reporting on the matter and the public's interest in the Council's activities, Levy sought access to the March 14, 2022 recording[2] and any relevant meeting minutes pertaining to the discussions of censure of Councilmember Jurinsky. Plaintiff-Appellant filed a request for the March 14 executive session recording through the City's public records request portal on March 18, 2022. CF, p. 21. In the request, Levy sought a "[r]ecording of the section of the Aurora City Council's March 14 executive session pertaining to the censure of Danielle Jurinsky." *Id.* In a response through the portal to Levy on or around March 22, 2022, Defendant-Appellee denied Plaintiff-Appellant's March 18, 2022 request on the ground that the "record being sought is a privileged attorney/client

[2] Discussions that occur in an executive session of a local public body shall be electronically recorded. §§ 24-6-402(d.5)(II)(A).

communication and is exempt from disclosure, pursuant to C.R.S. 24-6-402(d.5)(II)" of the COML. CF, p. 22.

C. Proceedings before the trial court.

Plaintiff-Appellant petitioned the trial court under §24-72-204(5.5), C.R.S. of the CORA to review Defendant-Appellee's decision to withhold the records on grounds that access to a recording of the March 14 executive session should be disclosed to the public pursuant to § 24-6-402(d.5)(II)(C), C.R.S. and could not be denied by Defendant-Appellee as privileged pursuant to § 24-6-402(d.5)(II), C.R.S. Plaintiff-Appellant's complaint set forth that there were grounds to support a reasonable belief that at the executive session the Council engaged in discussions not permitted by the COML; and therefore, the Council violated the COML by failing to provide adequate and proper notice of the executive session. Plaintiff-Appellant also presented relevant facts that any recording of that session was not privileged. CF, pp. 77-83. Plaintiff-Appellant also sought meeting minutes of the executive session, should they exist, as they are public records pursuant to the CORA. CF, pp. 43-44, 168.

At a July 7, 2022 status conference, the trial court ordered the parties to submit briefing regarding what "grounds" are "sufficient to support a reasonable belief" that the Council violated the COML for purposes of §24-72-204(5.5), C.R.S. of the CORA. CF, pp. 77. Upon review of the parties' briefing, on July

14, 2022 the trial court issued an order finding sufficient grounds supported the reasonable belief that *in camera* review was warranted because the Council engaged in substantial discussion of matters not enumerated in 24-6-402(3) or (4) or adopted a proposed position or took formal action in the March 14 executive session. The trial court ordered *in camera* review of the executive session recording to determine whether, in fact, the Council had violated the COML. §24-72-204(5.5)(b)(I), C.R.S. CF, pp. 90-96.

Following *in camera* review of the March 14 executive session recording, the Court issued a July 26, 2022 order finding the Council violated the COML because it failed to properly notice the executive session. CF, pp. 99, 161. Specifically, the trial court found that the Council's announcement for the executive session did not comply with the strict requirements of §24-6-402(3)(a) and (4), C.R.S. because the Council failed to identify, as mandated, the "particular matter to be discussed in as much detail as possible" as the Council's agenda obliquely referred to the topic of Councilmember Jurinsky's censure proceedings as "legal advice." CF, pp. 19, 99. The trial court further held that it was "inclined to release" the March 14 executive session recording, but stated that it was "mindful of the special status attorney-client communications hold" and granted the Defendant-Appellee an "opportunity to consider the Court's ruling prior to release, in order to take any action they deem appropriate." CF, pp. 99-100. The

trial court made no finding with respect to whether the attorney-client privilege had been waived nor did it make a finding that the Council had also violated the COML by improperly taking formal action or a position at the March 14 executive session. *Id*. The trial court thus concluded that the March 14 executive session recording "shall be released" based on the COML improper notice violation, but stayed its order for fourteen days so that Defendant-Appellee could address and substantiate its privilege claims with the Court. CF, p. 100.

Thereafter, Defendant-Appellee moved the trial court for reconsideration of its July 26 order, arguing that an "executive session privilege" exists prohibiting the disclosure of attorney-client privileged communications, that the attorney-client privilege was not waived, and that the Council cured the improperly noticed March 14 executive session notice (an argument Defendant-Appellee raised for the first time after the close of all briefings). CF, pp. 113, 116-125.[3] Plaintiff-Appellant

[3] The trial court improperly considered the Defendant-Appellee's Motion Requesting Reconsideration notwithstanding that such motions are disfavored under C.R.C.P. 121, section 1-15(11), and "must allege a manifest error of fact or law that clearly mandates a different result or other circumstance resulting in manifest injustice." *Id*. No such circumstances regarding an error of fact or law were alleged by Defendant-Appellee or considered by the trial court. Further, relitigating new issues after the close of all briefing is not proper in motions to reconsider. *Fox v. Alfini*, 432 P.3d 596, 603 (Colo. 2018) ("As this court has often stated, '[t]he purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion.' Reconsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought

objected to the City's motion on several grounds, including that the motion was disfavored under C.R.C.P. 59 and C.R.C.P. 121, section 1-15(11), that any asserted attorney-client privilege had been waived, and that the Council did not "cure" the notice violation under the COML because its subsequent public meeting merely "rubber stamped" the formal action taken at the March 14 executive session. CF, pp. 128-44.

On September 22, 2022, the trial court issued a final order granting Defendant-Appellee's motion requesting reconsideration on the ground that the Council had sufficiently cured its improper notice of the March 14 executive session by holding a subsequent public meeting on March 28, 2022. CF, pp. 155-59.

D. The March 28 public meeting did not cure the March 14, 2022 notice violation.

After review of Defendant-Appellee's motion for reconsideration—in which it argued for the first time that the Council cured the improper notice in its March 28 public meeting—the trial court found that Defendant-Appellee sufficiently cured the illegal executive session. In its September 22, 2022 Order, the court found:

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during the earlier proceeding.") (quoting *Sousaris v. Miller*, 993 P.2d 539, 547 (Haw. 2000)).

> It appears clear to the Court that the March 28, 2022 public meeting of the Council clearly identified what took place at the March 14, 2022 executive session and that the Council publicly considered the proposed action to adopt a stipulation to terminate any further investigation into Council Member Jurinsky's conduct.

CF, p. 164.

This finding was determined solely based on Defendant-Appellee's arguments in its motion that the meeting was cured. CF, pp. 163-64. Defendant-Appellee asserted in its motion that the public was "fully-informed" of the subject of the March 14 executive session based on the March 28 agenda and accompanying agenda packet. CF, pp. 115, 124. And, Defendant-Appellee claimed that since the Council publicly disclosed the subject matter of the executive session, discussed the topic on the record, and a public vote was taken, these actions by the Council were sufficient to cure the illegal executive session. CF, pp. 114-15, 121-24. The Defendant-Appellee likened its "cure" to the actions taken by the public body in the *Colorado Off-Highway* case as cited by the Court. CF, p.99-100; *Colo. Off-Highway Vehicle Coal. v. Colo. Bd. of Parks & Outdoor Rec.*, 292 P.3d 1132, 1136-38 (Colo. App. 2012). But, based on the publicly available, live-taped transcript of the March 28 public meeting found on the City's website, *City Council Meeting 3 28 22*, Aurora TV (Mar. 30, 2022),

https://www.auroratv.org/video/city-council-meeting-3-28-22,[4] the Council merely rubber stamped the action taken in the March 14 executive session. During the March 28, 2022 public meeting, the Council never heard any comment from the public nor engaged in any renewed deliberations before announcing its ultimate decision. In fact, the Council never re-voted on the issue of whether Councilmember Jurinsky should be censured and investigated. At the March 28 meeting, the Council only took a vote among councilmembers on the stipulation that they made in executive session. The stipulation was also marked in the City of Aurora Council Agenda Commentary on or around March 21, 2022 as "Approve Item as proposed at Regular Meeting." CF, p. 108. As described above, the stipulation that the Council made in the March 14 executive session was to give direction to its counsel to *end the censure investigation* against Councilmember Jurinsky—which effectively terminated the censure proceeding against her—and pay her attorney, David Lane's, legal fees. CF, p. 110. Thus, the Council merely "rubber stamped" its previous decision in violation of the COML at the March 28 public meeting.

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[4] Judicial notice may be taken at any stage of a proceeding. *See* Colo. R. Evid. 201(f); *Prestige Homes, Inc. v. Legouffe*, 658 P.2d 850, 852–53 (Colo. 1983). This Court may take judicial notice of news articles or the contents of a webpage on a specific date and time because they are not subject to reasonable dispute. Colo. R. Evid. 201(b). Here, this Court may take judicial notice of a publicly available, live-taped public meeting provided on the City's website.

SUMMARY OF ARGUMENT

It is well established that public bodies cannot meet in secret to discuss the public's business. "The intent of the Open Meetings Law is that citizens be given the opportunity to obtain information about and to participate in the legislative decision-making process." *Gumina v. City of Sterling*, 119 P.3d 527, 531 (Colo. App. 2004) (quoting *Cole v. State*, 673 P.2d 345, 349 (Colo. 1983)). The legislature intended to afford the public access to a broad range of meetings at which public business and decision-making takes place so that citizens may be informed of their government's work and to prevent the abuse of "secret" meetings. *Bd. of Cnty. Comm'rs v. Costilla Cnty. Conservancy Dist.,* 88 P.3d 1188, 1193 (Colo. 2004). Here, the Council took deliberate steps to evade public scrutiny of its decision on whether to censure an elected official. Then, notwithstanding that the Council's secret meeting did not involve attorney-client privileged communications, Defendant-Appellee violated the COML by withholding records from the public that would have shed light on the Council's actions. The trial court's decision not to order release of the March 14 executive session recording and its finding that the COML violation had been cured must be reversed for several reasons.

First, the trial court erred in holding that the Council cured the improper notice of the March 14 executive session. The record reflects that the Council's

March 28, 2022 public meeting merely amounted to a "rubber stamping" of the Council's previous decision to terminate the censure proceedings. The subsequent meeting did not involve the type of rigorous public input or redeliberation of its final decision to end the censure process of Councilmember Jurinsky as set forth by the Court in *Colorado Off-Highway* case. The trial court's determination that Defendant-Appellee properly cured the COML notice violation was in error and the recording must be released.

Second, even if the March 28 public meeting "cured" the Council's improper notice of the March 14 executive session—and it did not—the trial court further erred by failing to find that the "roll-call" action in the executive session was sufficient to constitute "formal action" or a "position" that may only take place at a public meeting under §24-6-402(2)(b), C.R.S., § 24-6-402(2)(d)(II), C.R.S., and § 24-72-204(5.5)(b)(II), C.R.S. It is well-established under Colorado law that decision-making, even informally, is not allowed behind closed doors. *Hanover Sch. Dist. No. 28 v. Barbour*, 171 P.3d 223, 228 (Colo. 2007). Here, the Council's decision (and the discussion that led to the decision) to end censure proceedings, even its final decision to end the investigation into the censure against Councilmember Jurinsky, is the kind of formal action the legislature intended public bodies to discuss publicly, and the trial court erred in failing to find this

second COML violation. Thus, this violation requires that the March 14 recording be released.

Third, should the Court find that the March 28 public meeting cured the illegal executive session, and the Council did not merely rubber stamp its previous actions; or that no position or formal action was taken at the March 14 executive session—which it did not—it may still order disclosure of the March 14 recording on the ground that the Defendant-Appellant waived any attorney-client privilege it claimed in executive session. Here, there was no definitive finding by the trial court that the March 14 executive session involved any attorney-client privileged communications, therefore, any records of that meeting must be released under the COML. Indeed, uncontroverted evidence makes clear that although the March 14 executive session concerned whether to censure Councilmember Jurinsky, and her threat to sue the Council if the censure process was not stopped, she—now an adverse party to any legal discussion related to legal strategy taken against her—was present for the alleged attorney-client communications. As such, any claimed attorney-client privilege would be waived. Additionally, two councilmembers who were present during the executive session spoke publicly to *The Sentinel* about what occurred in the session. Accordingly, even if, *arguendo*, the discussion at the March 14 executive session involved attorney-client privileged communications, any such privilege was waived or destroyed because two clients described those

communications to a third party. Notably, upon *in camera* review of the March 14 executive session recording the trial court did not make a finding that any communications in that session were privileged and thus barred from disclosure under COML. Instead, it asked Defendant-Appellee to provide further briefing on the issue and in a subsequent order failed to address the privilege issue at all. Therefore, the trial court's decision not to release the recording was in error because access to the executive session recording could not be denied under exemption § 24-6-402(d.5)(II)(B) & (C), C.R.S. of the COML on the grounds that the recording was a privileged attorney-client communication.

Finally, the trial court erred as a matter of law by failing to award mandatory attorney's fees to Plaintiff-Appellant notwithstanding a finding that Defendant-Appellee violated the notice requirement for the March 14 executive session under the COML, per section § 24-6-402(9), C.R.S., § 24-72-204(5), C.R.S., and *Van Alstyne*, 985 P.2d at 99-100.

In sum, the trial court's ruling improperly limits citizens' access to meetings where policy-making or formal action is taking place. Barring access inhibits the public's ability to be better informed about the decision-making process of its elected officials. This is precisely what the legislature did not intend. *Costilla Cnty. Conservancy Dist.*, 88 P.3d at 1193. For these reasons, Plaintiff-Appellant respectfully requests that this Court remand these issues back to the trial court for a

determination that the recording must be released on the grounds that Defendant-Appellee violated the COML.

ARGUMENT

I. The trial court erroneously concluded that the COML notice violation was "cured" by the March 28 public meeting that merely "rubber stamped" the previous violative action. As such, the March 14 recording must be released to Plaintiff-Appellant as requested.

Standard of review and preservation on appeal:

Whether the Aurora City Council's March 28, 2022 public meeting merely "rubber stamped," rather than cured, the formal action taken in the March 14 executive session was raised in the Plaintiff's Response to Defendant's Motion for Reconsideration filed August 29, 2022, CF, pp. 139-142; and in the trial court's September 22, 2022 Order, CF, pp. 157, 162.

Colorado courts review a trial court's factual findings for clear error, *see E-470 Pub. Highway Auth. v. 455 Co.*, 3 P.3d 18, 22 (Colo. 2000), but review the construction and application of the COML *de novo*, *Harris*, 123 P.3d at 1170; *see also Colo. Off-Highway Vehicle Coal. v. Colo. Bd. of Parks and Outdoor Recreation*, 292 P.3d 1132, 1135 (Colo. App. 2012). This Court can determine *de*

novo whether the Council properly cured its improperly noticed executive session or merely rubber stamped it through the legal application of § 24-6-402(2), C.R.S.[5]

Discussion:

The trial court correctly found that the Council did not comply with applicable public notice requirements before holding its executive session on March 14, 2022. In particular, the Council failed to identify the topic or "particular matter" to be discussed "in as much detail as possible" in executive session. §24-6-402(3)(a) and (4), C.R.S. As a result of this violation, under CORA §24-72-204(5.5)(b)(2), C.R.S. and the COML, the public is entitled to inspect a copy of any recording made of the executive session pertaining to discussion of the censure proceeding. First, the trial court erred in holding that the Council properly cured the March 14 executive session by holding a subsequent public meeting on March 28, 2022. The court's findings that the Council's March 28 meeting "cured" the COML violation because it "clearly identified what took place at the March 14, 2022 executive session and … publicly considered the proposed action to adopt a stipulation to terminate any further investigation into Council Member

[5] The COML does not specifically address whether a state or local body may "cure" a prior violation of the law by holding a subsequent compliant meeting under § 24–6–402(2). *Colo. Off-Highway*, 292 P.3d at 1136. Nevertheless, existing case law interpreting the COML implies that the state or local body may do so, so long as the subsequent meeting is not a "mere rubber stamping" of an earlier decision. *Id*.

Jurinsky's conduct," CF, p. 159, glosses over undisputed facts that the March 28 public meeting merely "rubber stamped" the Council's decision behind closed doors.

The record evidence shows that at the March 28 public meeting the Council had already made up its mind and proceeded to ratify and approve the decision it made in the March 14 executive session. Nevertheless, supporting its holding, the trial court heavily relied on the reasoning in the *Colorado Off-Highway Vehicle Coal.* case to determine what subsequent action in a public meeting is sufficient to cure improper notice:

> Where the record demonstrates that at the subsequent public meeting "the Board heard additional comment from several 'key players,' ... heard public comment from many interested parties, and engaged in renewed deliberations before announcing its ultimate decision" this is sufficient to overcome a charge that the subsequent meeting was a mere "rubber stamping" of the prior decision. *Off-Highway*, 292 P.3d at 1138.

CF, p. 164

However, the record of the Council's March 28 public meeting does not satisfy any of these facts. For example, the agenda merely notes as item number 5, "Executive Session Update" and provides no further information or clear identification of what took place at the March 14 executive session. CF, p. 101. Even upon review of the recorded March 28, 2022 public meeting, *City Council Meeting 3 28 22*, Aurora TV (Mar. 30, 2022), https://www.auroratv.org/video/city-

council-meeting-3-28-22, at 04:33, no details of the March 14 executive session were discussed at this time. Moreover, agenda item 19(f) indicates that the Council would take up a "Motion to Approve the Stipulation and a Request for Payment of Attorney Fees, Daniel Brotzman, City Attorney/Jack Bajorek, Deputy City Attorney," but does not identify or discuss what took place at during the March 14, 2022 executive session necessitating such approval in a public session of the Council. CF, p. 107. Indeed, as the "approve" language implies, what is clear is that a decision was already made, and there would be no need to discuss or engage in renewed deliberations about the Council's prior decision. *Off-Highway*, 292 P.3d at 1138 (finding that engaging in renewed deliberations before announcing its ultimate decision was sufficient to overcome mere "rubber stamping").

Additionally, there was an opportunity for discussion among the councilmembers, but the discussion was held *after* the motion to approve the stipulation was seconded, and was solely for the purpose of hearing from councilmembers who opposed the motion. *See City Council Meeting 3 28 22*, at 3:37:00. After the stipulation was seconded, the Council merely discussed a proposal to reform the censure process. *Id*. at 3:43:00. There was no engagement in "renewed deliberations." *Id*. Thus, the Council had already made up its mind and proceeded to ratify and approve the decision it made in the March 14 executive

session. *Id*. Additionally, in stark contrast to *Colorado Off-Highway*, there is no evidence that the Council heard any comments from the public, interested parties, or key players at the March 28 meeting on their decision not to censure Councilmember Jurinsky. Notwithstanding these scant notations, the trial court determined that the Council properly cured the March 14 executive session.

Furthermore, the trial court pointed to a March 24, 2022 letter, CF, p. 110, in the agenda packet as evidence that the "Council discussed whether to end Ms. Jurinsky's censure on the record before taking action." CF, p. 157. But the Council did not discuss the letter at the March 28 meeting, nor did they discuss whether to end the censure process on the record. Indeed, the letter only makes it more clear that the censure had already been decided. The letter states:

> [O]n March 14, 2022 the city Council directed and instructed special legal counsel to ***end the investigation prior to any public hearing and enter into a stipulation with Council Member Jurinsky to dismiss the charges brought against her***….
>
> Council Member Jurinsky, through her counsel, and the City of Aurora agree that ***the investigation into the charges*** brought against Council Member Jurinsky ***is terminated*** and the matter is dismissed effective March 15, 2022.

CF, p. 110 (emphasis added).

The trial court erred in failing to consider, and give sufficient weight to, these facts.

The record further shows that the March 28 meeting was a mere rubber stamping of the Council's formal action. At the meeting, Councilmember Marcano stated to Councilmember Jurinsky: "You…stopped the investigation [into your censorship]." *See City Council Meeting 3 28 22*, at 3:42:00. Councilmember Coombs also explained, "[We didn't even] hav[e] a public discussion and a public vote on the matter of this censure because it was disposed of in an executive session." *Id*. at 3:46:00. And, according to Councilmember Zvonek, the proposal to reform the censure process would improve on the process that took place with respect to Councilmember Jurinsky because it would "allow all of you in the public to hear all the arguments whenever someone brings forward a censor charge." *Id*. at 3:44:00. These comments underscore the fact that the decision, or the formal action to end the censorship process against Councilmember Jurinsky was done in secret in violation of the COML.

As such, the Council's decision at the March 14 executive session was later "rubber stamped" or "approved" at the March 28 Public Meeting—and did not cure the open meeting violation. *See Bjornsen v. Bd. of Cty. Comm'rs of Boulder Cty.*, 487 P.3d 1015, 1022 (Colo. App. 2019) (holding, with regard to curing an improperly convened executive session, "the subsequent meeting must not be a

mere rubber stamping of the decision made in the improperly convened executive session"); *Lanes v. State Auditor's Off.*, 797 P.2d 764, 766 (Colo. App. 1990) ("[O]nce the failure to hold an open meeting was challenged, Lanes' 'after the fact' approval of the Board's executive session was not sufficient to validate the Board's meeting under § 24-6-402(4), C.R.S."); *Van Alstyne,* 985 P.2d at 101-02 (holding that subsequent approval in an open meeting of a previous decision made at a closed meeting does not satisfy the Open Meetings Law "if it is held merely to 'rubber stamp' previously decided issues"); *see also Bagby v. Sch. Dist No. 1, Denver*, 528 P.2d 1299, 1302 (Colo. 1974) (holding that the Open Meetings Law is designed to avoid mere "rubber stamping" in public decisions that are effectively made in private, since the public is entitled to know "the discussions, the motivations, the policy arguments and other considerations which led to the discretion exercised").

Thus, even if *arguendo* there was a cure—and there was not—Defendant-Appellee merely "rubber stamped" its final decision or formal action at the March 14 executive session and must provide the Plaintiff-Appellant public access to the recording.

In sum, the facts show that there was merely a "subsequent approval" and/or an "after the fact" approval of the Council's March 14 executive session, and no

renewed deliberation took place. Accordingly, the trial court erred, and its decision must be reversed, opening the March 14 recording to public inspection.

II. The Council further violated the COML when it took formal action in the form of a "roll-call" in executive session in violation of the COML pursuant to §24-6-402(2)(b), C.R.S., § 24-6-402(2)(d)(II), C.R.S., § 24-72-204(5.5)(b)(I), C.R.S.

Standard of review and preservation on appeal:

Whether the trial court erred when it failed to consider the formal, illegal action taken by the Council was raised in Plaintiff's Demand Letter, Plaintiff's Complaint and in Plaintiff's Response to Defendant's Motion for Reconsideration, CF, pp. 26-27, 36, 40-41; 139-142, and in the trial court's July 14 Order, CF, p. 93. Thus, the issue is properly preserved for appeal.

Colorado Courts review the construction and application of the COML *de novo*, *see Harris*, 123 P.3d at 1170; *see also Colo. Off-Highway*, 292 P.3d at 1135 ("Likewise, interpreting the OML presents a question of law that we review de novo."). Additionally, courts review a trial court's findings of fact for clear error or abuse of discretion. *In re Marriage of de Koning*, 364 P.3d 494, 496 (Colo. 2016). Here, the trial court found that the Council took a "roll call" "on what direction to give to legal counsel on how to proceed," but it committed clear error by failing to deduce that the "roll call" action resulted in effectively ending the investigation into the censure of Councilmember Jurinsky. Also, the trial court did

not properly consider whether the "roll call" was the requisite "formal action" or taking of a "position" under §24-6-402(2)(b), C.R.S., § 24-6-402(2)(d)(II), C.R.S., and § 24-72-204(5.5)(b)(I), C.R.S. in violation the COML. As such, this Court may review the trial court's failure to determine that the "roll call" ended the investigation into Councilmember Jurinsky as reversible error; and this Court can determine de novo whether the "roll call" involved formal action under the COML which is purely a question of law. *Colo. Off-Highway Vehicle Coal.*, 292 P.3d at 1135.

Discussion:

The Council's formal action by a "roll call" vote at the March 14 executive session constituted a second COML violation necessitating public access to the meeting recording under §24-72-204(5.5)(b)(II), C.R.S. Based on the trial court's *in camera* review of the executive session recording, it found that "[t]he Council did not 'vote' on ending the censure action," but that "***there was a roll-call taken*** on what direction to give to legal counsel on how to proceed." CF, p. 99-100 (emphasis added). The Council's March 24, 2022 letter regarding the March 14 executive session, described the effect of its "roll call":

> [O]n March 14, 2022, the city Council directed and instructed special legal counsel to end the investigation prior to any public hearing and enter into a stipulation with

> Council Member Jurinsky to dismiss the charges brought against her.
>
> Accordingly, special legal counsel from Burns Figa & Will, P.C. terminated the investigation without making any findings regarding the alleged violations, and without advising the City Council or preparing any report on the merits of the charges.

CF, p. 110.

It could not be more clear that the "roll call" action effectively ended the investigation into Councilmember Jurinsky on the censure issue, the Council decided to enter into a stipulation to dismiss the charges against her, and the Council decided to pay her attorney's fees. *Id*. These decisions were improperly made in a closed executive session in violation of the COML. The trial court's failure to deduce that the "direction" "on how to proceed" ended the investigation and resulted in the stipulation to dismiss the censure proceeding against Councilmember Jurinsky is reversible error.

Further, as discussed *supra*, the ending of an investigation and stipulation to dismiss the censure against the Councilmember is formal action. *Guy v. Whitsitt*, 469 P.3d 546, 549, 550 (Colo. App. 2020) ("Section 24-6-402 provides that, generally speaking, meetings of public officials to discuss or take formal action on public business must be open to the public."). Under the COML, minutes of any meeting of a local public body at which the adoption of any proposed policy,

position, resolution, rule, regulation, ***or formal action*** occurs or could occur shall be taken and promptly recorded, and such records shall be open to public inspection. § 24-6-402(2)(b), C.R.S.; § 24-6-402(2)(d)(II), C.R.S. (emphasis added); *see also Gumina*, 119 P.3d at 531; *Guy*, 469 P.3d at 550-1; *see also* § 24-6-402(2)(d.5)(I)(C), C.R.S.

Under the COML, executive sessions may be held to conduct deliberations on a matter exempt from the Open Meetings Law, but any final decision must be taken at a subsequently reconvened public meeting. § 24-6-402(4), C.R.S. Where, however, executive sessions are convened to take a formal position or action, such sessions are in violation of the Open Meetings Law. §§ 24-6-402(2)(b), (4), C.R.S.; *see also Hanover Sch. Dist. No.*, 171 P.3d at 228 (holding "important policy decisions cannot be made informally" and "final policy decision[s] … can only be made at a public meeting"). In applying this requirement, courts have found, for example, improper formal action to include, for example, a city council executive session to discuss a real estate bid offer before noting the offer in the public meeting and formal action as deciding not to review a teacher's contract in a closed-door meeting. *Walsenburg Sand & Gravel Co. v. City Council of Walsenburg*, 160 P.3d 297, 299-300 (Colo. App. 2007); *Hanover Sch. Dist. No. 28*, 171 P.3d at 227-8 (The school board's decision not to renew a teacher's contract in executive session had "no binding effect" and the decision not to renew was formal

action that can "only be made in a public meeting."). Here, the Council effectively settled with Councilmember Jurinsky on the issue of censure. A settlement of a legal claim can only be viewed as formal action under the COML. Thus, even if the Council decided by "roll call" to enter into a stipulation, that is a final decision constituting "formal action" under §24-6-402(2)(b), C.R.S. and § 24-6-402(2)(d)(II), C.R.S. mandating that the recording be open for public inspection. § 24-6-402(2)(d)(II), C.R.S. ("All meetings of a quorum or three or more members of any local public body … 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") (emphasis added); *see Henderson v. City of Fort Morgan*, 277 P.3d 853, 855 (Colo. App. 2011) (including "roll call" in its definition of "voting procedure" with respect to the COML), *superseded by statute*, § 24-6-402(d)(IV), *as recognized in Weisfield v. City of Arvada*, 361 P.3d 1069 (Colo. App. 2015).

Thus, the trial court erred in failing to consider this second COML violation and the Council must provide the March 14 recording to Plaintiff-Appellant as requested.

For the reasons set forth above, the trial court failed to consider the evidence that the "roll call" effectively ended the investigation into Councilmember Jurinsky censure and that this "roll call," and the discussion leading up to the roll call, was the requisite "formal action" and taking of a "position" that violated the COML.

As such, should this Court find that the trial court erred and sections § 24-6-402(2)(b), C.R.S. and § 24-6-402(2)(d)(II), C.R.S. of the COML were violated, the Court must remand its finding with instructions to release the March 14 recording to public inspection.

III. Defendant-Appellee failed to establish that any portion of the March 14 executive session recording involved privileged attorney-client communications and even if it did, any such privilege was waived.

Standard of review and preservation on appeal:

Whether the trial court should have ordered Defendant-Appellee to release the recording of the March 14 executive session on the ground that it was not exempt from disclosure under § 24-6-402(d.5)(II), C.R.S. was raised in Plaintiff-Appellant's complaint and petition, CF, p. 34, and Defendant-Appellee's Answer, CF, p. 69; and was briefed by both parties, CF, pp. 134-36 (Plaintiff-Appellant's Response to Defendant-Appellee's Motion for Reconsideration), CF, pp. 149-53 (Defendant-Appellee's brief). Thus, the issue is properly preserved on appeal.

Courts "review de novo questions of law concerning the correct construction and application of CORA" and the COML. *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1170 (Colo. 2005); *see also Colo. Off-Highway Vehicle Coal.*, 292 P.3d at 1132-5. In interpreting the COML, courts must give effect to the intent of the General Assembly and give words their plain and ordinary meaning. *Bd. of Cnty. Comm'rs*, 88 P.3d at 1193. If the language is ambiguous, courts may look to the

"legislative history, prior law, the consequences of a given construction, and the goal of the statutory scheme to ascertain the correct meaning of a statute." *Id.* (citation omitted). The purpose of the COML is to "afford the public access to a *broad range of meetings* at which public business is considered." *Id.* (emphasis added) (citation omitted). Thus, in light of this purpose, the COML must be interpreted broadly. *Id*.; §§ 24-6-401, C.R.S. *et seq*. Here, this Court can determine *de novo* whether § 24-6-402(d.5)(II), C.R.S. and § 24-6-402(4)(b), C.R.S. are applicable—they are not—and bar disclosure of the March 14 executive session recording.

Discussion:

For the foregoing reasons, Plaintiff-Appellant is entitled to access the executive session recording and portions may only be withheld if Defendant-Appellee has met its burden of establishing that the communications were attorney-client privileged. In responding to Plaintiff-Appellant's March 18, 2022 COML request for the executive session recording, Defendant-Appellee denied access on the ground that the recording contained privileged attorney-client communications and was exempt from disclosure under § 24-6-402(d.5)(II), C.R.S. CF, pp. 22, 34. But at the trial court, Defendant-Appellee's showing was insufficient and came forward with no evidence establishing that the recording contained any attorney-client communications. Instead, the record shows that parties adverse to the

Council—Councilmember Jurinsky and her legal counsel—were present at the March 14 executive session, thus defeating any claim that the recording could contain attorney-client communications between the Council and its attorneys. And, even if it could be established that the March 14 executive session involved privileged attorney-client communications, any such privilege was waived when two councilmembers described the Council's discussion to a third party. Critically, even after its *in camera* review of the executive session recording, the trial court did not make any findings that privileged legal advice was communicated to the Council at the meeting, CF, p. 99. To the contrary, the court found only that the Council's "action" of a "roll-call taken on what direction to give to legal counsel on how to proceed … *might* very well fall into the category of legal advice," and requested that Defendant-Appellee provide the court with additional briefing on the issue. *Id*. (emphasis added). Ultimately, the trial court did not issue a determination on Plaintiff-Appellant's waiver argument despite Colorado law that says the privilege would be destroyed. And, even if the Court could find that the recording included privileged attorney-client communications, any such privilege was waived for the reasons set forth below; thus, the March 14 executive session recording must be released.

First, binding Colorado case law and § 24-6-402(4), C.R.S. require that improperly noticed or announced executive sessions violate the COML, and such

violations result in the release of any recording or meeting minutes, as it is well-established that "the formation of public policy is public business and may not be conducted in secret." § 24-6-401, C.R.S.; *see also Guy*, 469 P.3d at 550-53; *City of Sterling*, 119 P.3d at 530. If an executive session is not convened in accordance with applicable requirements, *see* §§ 24-6-402(3)(a), (4), C.R.S., then the meeting and the recorded minutes are open to the public. *Gumina*, 119 P.3d at 530 (finding the city council's failure to "strictly comply" with statutory open meeting requirements rendered its meeting open and a terminated city employee had the right to inspect the minutes); *Zubeck v. El Paso Cnty. Ret. Plan*, 961 P.2d 597, 600-01 (Colo. App. 1998). This is so even if the public body failed to properly announce its intention to discuss legal advice as required under § 24-6-402(3)(a), C.R.S. In *Guy*, this Court held that if attorney-client communications ***did*** take place in an improperly noticed executive session, a recording of that meeting—including those attorney-client communications—must be released in accordance with COML. 469 P.3d at 554. Here, the trial court found that "the announcement of the Executive Session does not appear to comply with the requirements of the applicable statutes," CF, p. 99, citing §24-6-402(4), C.R.S., and stated that it was "inclined to release the recording." *Id*. The trial court's decision should have ended there. Instead, the court granted the Defendant-Appellee an opportunity to brief whether the recording included privileged attorney-client communications,

CF, pp. 99-100, and ultimately held that a "cure" meeting nullified Plaintiff-Appellant's access to the recording, CF, p. 159.

Second, notwithstanding the improper notice in this case, the court should have granted Plaintiff-Appellant access to the recording under COML because the record evidence confirms that no discussion at the March 14 executive session involved a privileged attorney-client communication due to the attendance of Councilmember Jurinsky. CF, pp. 16, 36.[6] Under Colorado law, any putative attorney-client privilege is waived by the presence of an adverse or third party. *People v. Lesslie*, 24 P.3d 22, 26 (Colo. App. 2000). The adverse, third party, in this case, Councilmember Jurinsky, was present during the March 14 executive session, CF, p. 16, and her presence waives any putative privilege as to communications conveying legal advice to the Council regarding its dispute with Councilmember Jurinsky, including discussion regarding her possible censure and her threat to sue the Council. *See Black v. Sw. Water Conservation Dist*., 74 P.3d

[6] "The common law attorney-client privilege codified at section 13-90-107(1)(b), C.R.S. 2019, 'extends only to confidential matters communicated by or to the client in the course of gaining counsel, advice, or direction with respect to the client's rights or obligations.'" *Guy*, 469 P.3d at 551 (quoting *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215, 1220 (Colo. 1982)); *see also Denver Post Corp. v. Univ. of Colorado*, 739 P.2d 874, 880 (Colo. App. 1987) ("[T]he privileges for attorney-client communication and attorney work product established by common law have been incorporated into the Open Records Act."); § 24-6-402(4)(b), C.R.S. (incorporated into the executive session provisions within the COML).

462, 469 (Colo. App. 2003) ("The privilege applies only to communications given in ***confidence***, and intended and reasonably believed to be part of an on-going and ***joint effort to set up a common legal strategy***.") (emphasis added) (internal citations omitted). Notably, here, the privilege does not apply because Councilmember Jurinsky had hired her own lawyer and threatened to sue the Council if they moved forward with the censure process. It is clear that there was no common legal strategy between the Council and Jurinsky, and no discussions between the Council were confidential. Based on these undisputed facts, the executive session was not privileged, and the trial court erred by not holding as such.

Moreover, Councilmembers Alison Coombs and Juan Marcano, who were present at the March 14 executive session, waived any putative attorney-client privilege when they publicly discussed what occurred during the executive session. *Lanari v. People*, 827 P.2d 495, 499 (Colo. 1992) (holding that "statements made initially in confidence to an attorney lose the shield of the attorney-client privilege if the statements are subsequently disclosed to third parties"); *Wesp v. Everson*, 33 P.3d 191, 198 (Colo. 2001) (noting that "if a communication to which the privilege has previously attached is subsequently disclosed to a third party, then the protection afforded by the privilege is impliedly waived"); *Fearnley v. Fearnley*, 98 P. 819, 824 (Colo. 1908) (finding that a client's disclosure of information

protected by the attorney-client privilege waives the privilege) (citing *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)); *DCP Midstream, LP v. Anadarko Petroleum Corp*., 303 P.3d 1187, 1198 (Colo. 2013) ("The attorney-client privilege is not absolute[;] [t]here are recognized exceptions to the attorney-client privilege, and the privilege may be waived in certain circumstances.") (citing *People v. Trujillo*, 144 P.3d 539, 542–43 (Colo. 2006))). As Plaintiff reported, Councilmembers Marcano and Coombs stated on-the-record that a majority of the councilmembers voted in a "roll call" action during the executive session to end the censure proceedings and/or investigation pending against Councilmember Jurinsky. CF, pp. 10, 15. Councilmember Zvonek also discussed, on-the-record, the roll call action in the executive session. CF, p. 17. (And the trial court found that a "roll call was taken at the March 14 executive session. CF, p 99.) By publicly disclosing what occurred and was discussed at the March 14 executive session, Councilmembers Marcano and Coombs waived any possible attorney-client privilege over the recording.

Additionally, in arguing that the March 28, 2022 public meeting cured the improper notice of the March 14 Executive Session, Defendant states that the recording was the topic of "robust" discussion, CF, p. 121, and that the "robust" discussion led the Council to adopt a "Motion to Approve the Stipulation and a

Request for Payment of Attorney Fees,"[7] the precise action taken at the closed March 14 Executive Session. CF, p. 124. The Defendant cannot have it both ways. If Defendant argues that the entire March 14 recording must be afforded attorney-client privilege protection, yet it claims that it discussed that confidential information subject to privilege at the March 28 Public Meeting, then the privilege is, once again, waived. *Trujillo*, 144 P.3d at 543 ("[I]f a client asserts a claim or defense that depends upon privileged information, she cannot simultaneously use the [attorney-client] privilege to keep that information from the opposing party."). Moreover, the defense that the improper notice was cured fails because it depends on privileged information. Thus, the issues discussed in the public session cannot be "placed back into the bag" once discussed publicly. The trial court should have found that the privilege was waived.

For the foregoing reasons, the March 14 executive session recording must be disclosed as section § 24-6-402(d.5)(II), C.R.S. of the COML does not apply. Since the trial court erred in not finding that the privilege was waived, this issue must be remanded back to the trial court for a determination that exemption §24-6-

[7] As discussed more fully *infra*, the Motion to Stipulate implies that the decision not to move forward with the censure was decided in the executive session.

402(d.5)(II), C.R.S. does not apply, and the recording must be released to Plaintiff-Appellant.

IV. The trial court erred by failing to award mandatory attorney's fees to Plaintiff-Appellant notwithstanding its conclusion that the Council violated the COML.

Standard of review and preservation on appeal:

Whether the trial court erred by not awarding attorney's fees was raised in Plaintiff's Demand Letter, CF, p. 28; Plaintiff's initial Complaint, CF, p. 43; Plaintiff's Response to Defendant's Motion for Reconsideration, CF, p. 142; and in Plaintiff's Notice of Intent to Appeal, CF, p. 180. Thus, the issue is properly preserved on appeal.

The issue of attorney's fees is a question of law concerning the application of section § 24-6-402(9)(b), C.R.S.; and § 24-72-204(5), C.R.S. of the COML and the Colorado Open Records Act ("CORA"). Matters of statutory interpretation, generally, including statutory interpretation of public records laws, are questions of law subject to *de novo* review on appeal. *People v. Sprinkle*, 489 P.3d 1242, 1245 (Colo. 2021).

Discussion:

Colorado Courts award mandatory attorney's fees to the prevailing party in matters under the COML and the CORA. *See* § 24-6-402(9), C.R.S.; § 24-72-204(5), C.R.S.; *Van Alstyne*, 985 P.2d at 99–100. Since Plaintiff has already

prevailed in its application because the trial court found that Defendant-Appellee violated the COML, CF, p. 100, it is entitled to mandatory attorney's fees—regardless of the trial court's further finding that the violation had been cured by a subsequent public meeting. § 24-6-402(9), C.R.S.; *Van Alstyne*, 985 P.2d at 99–100 (reversing trial court's finding of mootness based on a cure meeting because the trial court "overlooked the General Assembly's establishment of mandatory consequences for a violation of the statute," including costs and reasonable attorneys' fees); *Tanner v. Town Council of E. Greenwich*, 880 A.2d 784, 794–95 (R.I. 2005) (holding in an open meetings case that "[t]he fact that one remedy—injunctive relief—may have been rendered moot does not affect the viability of the case or the remaining remedies"). Accordingly, Plaintiff-Appellant is entitled to recover reasonable costs and attorney's fees associated with the preparation of this matter.

CONCLUSION

For the reasons stated herein, the trial court should reverse the decision of the trial court, order Defendant-Appellee to release the March 14 executive session recording, and remand for further proceedings to award Plaintiff-Appellant's costs and reasonable attorney's fees associated with the preparation, initiation, and maintenance of this action.

Respectfully submitted this 2nd day of March 2023.

By /s/*Rachael Johnson*

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March 2023, a true and correct copy of the foregoing **OPENING BRIEF** was served on the following counsel through the Colorado Courts E-File & Serve electronic court filing system, pursuant to C.R.C.P. 121(c), § 1-26:

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