DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: January 5, 2024 2:39 PM CASE NUMBER: 2023CV32175
Plaintiffs: PUBLIC TRUST INSTITUTE, a Colorado nonprofit corporation and DAVID FORNOF v. Defendants: THE COLORADO HOUSE OF REPRESENTATIVES, COLORADO HOUSE SPEAKER JULIE McCLUSKIE, REPRESENTATIVE BOB MARSHALL, THE COLORADO SENATE, COLORADO SENATE PRESIDENT STEVE FENBERG, SENATOR JEFF BRIDGES, SENATOR CHRIS HANSEN, and ANDREW LINDINGER	**COURT USE ONLY** Case Number: 23CV32175 Courtroom: 280

ORDER RE: DETERMINATION OF QUESTIONS OF LAW

This matter is before the Court on Public Trust Institute and David Fornof's (collectively, "Plaintiffs") Complaint filed July 26, 2023. Plaintiffs and Colorado House Speaker Julie McCluskie, the Colorado House of Representatives, Representative Bob Marshall, the Colorado Senate, Colorado Senate President Steve Fenberg, Senator Jeff Bridges, Senator Chris Hansen, and Andrew Lindinger (collectively, "Defendants") agree there are no material facts in dispute and the matter is ripe for the Court to rule as a matter of law. The Court having reviewed the pleadings, the file, applicable law, and being fully advised in the premises, finds and concludes as follows:

BACKGROUND

The issue before the Court concerns a voting practice, adopted and used by members of both bodies of the Colorado General Assembly, known as "quadratic voting." In a quadratic voting structure, each voter is allocated a maximum number of votes.[1] The voter may then allocate their

[1] Wulf A. Kaal, *Blockchain Technology for Good*, 17 U. ST. Thomas L.J. 878, 886 (2022).

votes by priority to any issues deemed of higher significance.[2] "The more important a given societal issue is for a voter, the more votes that voter will allocate to the issue."[3] If a certain issue particularly affects a voter, they are able to allocate all of their votes for or against the relevant proposal.[4] Because there are only finite votes available, each additional vote regarding the same proposal costs more than the previous one.[5] In a typical quadratic voting exercise, the cost to the voter is the number of votes cast on the particular issue, multiplied by that same number of votes.[6] For example, if a voter wanted to vote twice for a proposed legislation regarding climate change, it would cost that voter four of their votes. In doing so, quadratic voting can express degrees of preference, rather than simply voting for or against a proposal.[7]

Regarding quadratic voting in this case, individual elected representatives receive an email from a third-party vendor, RadicalxChange, containing several unique links to RadicalxChange's online portal.[8] The portal contains a list of pending legislation sorted into four categories to be prioritized by each individual legislator. Once quadratic voting closes, RadicalxChange aggregates the total votes each proposal receives and emails the results to the General Assembly. RadicalxChange destroys the individualized scoring sheets it received when aggregating the polling data. With the consensus voting results in hand, the General Assembly can use the "point of data" in determining bill priority early in the legislative session.

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[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] MJ Palau-McDonald, *Blockchains and Environmental Self-Determination for the Native Hawaiian People: Toward Restorative Stewardship of Indigenous Land*, 57 Harv. C.R.-C.L. L. Rev. 393, 433 (2022).
[6] Shaan Ray, *What is Quadratic Voting?*, Towards Data Science (Sept. 23, 2019), https://towardsdatascience.com/what-is-quadratic-voting-4f81805d5a06
[7] *Id.*
[8] The Court notes that the parties have stipulated to all material facts. *See* Defs. Colorado House of Representatives, Colorado House Speaker Julie McCluskie, the Colorado Senate, Colorado Senate President Steve Fenberg, Senator Jeff Bridges, Senator Chris Hansen, and Andrew Lindinger Resp. Br. at 2

Plaintiffs contend the particular variation of quadratic voting used by Defendants is purposefully constructed to conceal information the public is entitled to know. Specifically, regarding the concealment and deletion of the individual representative's voting records, Plaintiffs maintain that quadratic voting through RadicalxChange violates: (1) the Colorado Open Meetings Law ("COML"); (2) the Colorado Open Records Act ("CORA"); and (3) Article V, § 14 of the Colorado Constitution. Plaintiffs reason that the legislative process has been unambiguously designed to be open to the public, whereas RadicalxChange denies the public the right to know how their representatives vote and prioritize differing legislation. Plaintiffs request this Court to declare the quadratic voting methodology employed by Defendants through RadicalxChange a violation of COML and CORA, enjoin Defendants from using such quadratic voting practices in future sessions, and order the production of voting documentation to the extent the information exists.

As a threshold issue, the Court finds that the use of quadratic voting, when applied in compliance with COML and CORA, is a lawful and acceptable practice that enables the party in power to maximize the investment of time, skill, capital, and labor to ensure the party may pass as many bills as possible in a limited period of time. Given the time-constrained nature of the legislative process, and the various preference levels that accompany the many bills proposed in each legislative session, quadratic voting is a useful tool that enables elected representatives to consider as many proposals as possible. With this caveat, the Court proceeds to examine Plaintiffs' asserted claims.

Standard of Review

A party may move the court to decide a question of law at any time after the last required pleading. C.R.C.P. 56(h). When there is no genuine dispute of any material fact necessary to make

such a determination, the court may enter an order determining a question of law. *Id.* All inferences from the undisputed facts must be drawn in favor of the nonmoving party, and any doubts regarding the existence of a triable issue must be resolved against the moving party. *West Elk Ranch, L.L.C. v. U.S.*, 65 P.3d 479, 481 (Colo. 2002) (citing *Martini v. Smith*, 42 P.3d 629, 632 (Colo.2002)). The purpose of C.R.C.P. 56(h) is:

> [T]o allow the court to address issues of law which are not dispositive of a claim (thus warranting summary judgment) but which nonetheless will have a significant impact upon the manner in which the litigation proceeds. [Resolving such issues] will enhance the ability of the parties to prepare for and realistically evaluate their cases ... and allow the parties and the court to eliminate significant uncertainties on the basis of briefs and argument, and to do so at a time when the determination is thought to be desirable by the parties.

Bd. of Cnty. Comm'rs v. U.S., 891 P.2d 952, 963 n. 14 (Colo. 1995) (quoting 5 Robert Hardaway & Sheila Hyatt, *Colorado Civil Rules Annotated* § 56.9 (1985)); *Coffman v. Williamson*, 348 P.3d 929, 934 (Colo. 2015).

ANALYSIS

I. Colorado Open Meetings Law

a. Statutory Interpretation

Turning to COML, this Court is guided by traditional principles of statutory interpretation. *Bd. of Cnty. Comm'rs, Costilla Cnty. v. Costilla Cnty. Conservancy Dist.*, 88 P.3d 1188, 1192 (Colo. 2004). Courts construe statutory schemes as a whole to give consistent, harmonious, and sensible effect to all the statute's parts. *Gumina v. City of Sterling*, 119 P.3d 527, 530 (Colo. App. 2004). However, "if an interpretation of the statute would produce an absurd result, that interpretation is not favored. A reviewing court must interpret a statute in a manner that gives effect to the General Assembly's intent." *Bd. of Cnty. Comm'rs, Costilla Cnty.*, 88 P.3d at 1193. First, courts begin with the direct language of the statute, giving words their plain and ordinary

meaning. *Id.* If the language of the statute is ambiguous, courts will then turn to legislative history, prior law, the consequences of a given construction, and the goal of the statutory scheme to ascertain the correct meaning of the statute. *Id.*

The General Assembly, in enacting COML, stated that "it 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." C.R.S. § 24-6-401. By including sweeping policy declarations, COML was intended to give citizens public access to a broad range of meetings during which public business is being considered. *Cole v. State*, 673 P.2d 345, 347 (Colo. 1983). "In light of this purpose, we interpret the [C]OML broadly to further the General Assembly's intent to give citizens a greater opportunity to meaningfully participate in the decision-making process by becoming fully informed on issues of public importance." *Colorado Off-Highway Vehicle Coal. v. Colorado Bd. of Parks and Outdoor Recreation*, 292 P.3d 1132, 1136 (Colo. App. 2012). Colorado appellate courts have consistently found that COML protects the right of access to public information, a right that is vitally important to our democratic system of government. *Weisfield v. City of Arvada*, 361 P.3d 1069, 1071 (Colo. App. 2015). Exceptions to COML's presumption of open public policymaking must therefore be strictly construed. *Gumina*, 119 P.3d at 532.

b. Whether Quadratic Voting is a "Meeting" Under COML

The COML, as its name suggests, operates by regulating the manner in which "meetings," as defined by the statute, must operate. COML defines "meeting" as "any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication." C.R.S. § 24-6-402(1)(b). Any gathering of two or more members of a state public body, at which any public business is discussed or at which any formal action may be taken, is considered a public meeting and must be "open to the public at all times." C.R.S. § 24-6-

402(2)(a). Further, elected officials cannot exchange electronic communications to discuss pending legislation or other such public business amongst themselves unless such communications fully comply with the requirements of contemporaneous public access. C.R.S. § 24-6-402(2)(d)(III). Electronic communications between public officials that do not relate to the "merits or substance" of pending legislation are not considered a "meeting" under COML. *Id.* The General Assembly has defined "merits or substance" to mean "any discussion, debate, exchange of ideas, either generally or specifically, related to the essence of any public policy proposition, specific proposal, or any other matter being considered by the governing entity." *Id.*

Plaintiffs argue that the quadratic voting methodology employed by Defendants through RadicalxChange, while carefully constructed to avoid open meeting requirements, violates the intent and spirit of COML and the Colorado Constitution's mandate of employing an open legislative process. Plaintiffs stress that court precedent has emphasized that COML is to be broadly construed in favor of the public and to err on the side of public participation, rather than exclusion. Plaintiffs further contend that while Colorado appellate courts have not specifically ruled on COML's applicability to serial communications, several other states have held that conduct like that alleged of Defendants was a violation of open meetings laws. [9]

Defendants counter that, to the extent quadratic voting could be considered a meeting in a general sense, it fails to qualify as a "meeting" for the purposes of the COML because it is wholly unrelated to the "merits or substance" of any matter being considered. Defendants further argue that their quadratic voting scheme has been well covered by the media, thus it cannot be considered

[9] While not discussed previously by Colorado appellate courts, a "serial meeting" or "serial communication" has been defined in other jurisdictions to mean a series of one-on-one meetings, or other such forms of communication, where similar information is discussed at each meeting. *Dewey v. Redevelopment Agency of City of Reno*, 64 P.3d 1070 (Nev. 2003). A "serial meeting" is designed to avoid having the requisite number of representatives present at one time so as not to be considered a meeting or quorum under relevant open meetings laws. *Id.*

a secret meeting. Defendants allege there is no pending action concerning the voting system, as the proposed legislation is later discussed through public hearings, debates, and votes before final action is taken on a bill.

Despite Defendants' arguments to the contrary, the Court finds that the current quadratic voting structure through RadicalxChange is a meeting under both COML and related precedent. As stated above, the explicit purpose of COML is to encourage public participation in the legislative process through an increased awareness of public matters. Here, the General Assembly employed quadratic voting as a tool to help prioritize proposed bills given the time-constrained nature of the legislative process. While Defendants are correct in that no final decision is reached through quadratic voting, courts have held that COML aims to have an open legislative process, as opposed to an open final decision. *See Weisfield*, 361 P.3d at 1074 ("Likewise, [COML] does not regulate substantive *outcomes*; rather, it requires the decision-making *process* to be conducted openly and not in secret."); *see also Benson v. McCormick*, 578 P.2d 651, 653 (Colo. 1978) ("Our Open Meetings Law, enacted by initiative in 1972, reflects the considered judgment of the Colorado electorate that democratic government best serves the commonwealth if its decisional *processes* are open to public scrutiny.") (emphasis added); *Colorado Off-Highway Vehicle Coal.* 292 P.3d at 1137 ("Thus, the purpose of the [C]OML is to require open decision-making… the focus of the [C]OML is on the *process* of governmental decision making, not on the *substance* of the decisions themselves…"). In fact, Defendants themselves argued that quadratic voting has been used specifically in the legislative "process" to help advance bills towards enactment.[10] Certainly, the legislature contemplating a legislator's thoughts and mental impressions on the

[10] Defs. Colorado House of Representatives, Colorado House Speaker Julie McCluskie, the Colorado Senate, Colorado Senate President Steve Fenberg, Senator Jeff Bridges, Senator Chris Hansen, and Andrew Lindinger Opening Br. at 2; Def. Rep. Bob Marshall Opening Br. at 2

importance of upcoming legislation would be considered, at a minimum, a general exchange of ideas relating to the essence of a public policy proposition or a matter being considered by the governing entity, meeting the criteria to be considered a "meeting" under COML.

Defendants next contend that the current quadratic voting application should not be deemed a meeting because RadicalxChange does not permit the legislators to discuss public business, and specifically because it does not relate to the "merits or substance" of pending legislation. The Court disagrees. First, while COML does not define the phrase "discuss public business" as it appears in the definition of "meeting," the Colorado Supreme Court has held the phrase refers to a public body's policy-making function.[11] *Intermountain Rural Elec. Ass'n v. Colorado Pub. Util. Comn'n*, 298 P.3d 1027, 1030 (Colo. App. 2012). "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." *Bd. of Cnty. Comm'rs, Costilla Cnty.*, 88 P.3d at 1194. Further, for an activity to be a "formal action" and part of the policy-making responsibility of the relevant state body, the action must fall within the group's ability to enact public policy. *Intermountain Rural Elec. Ass'n*, 298 P.3d at 1032. The General Assembly is the quintessential example of a state body that has policy-making responsibility. *Id.* at 1032-33.

Here, Defendants cast votes to express their varying levels of support for proposed legislation. As the General Assembly, Defendants have the preeminent policy-making ability in this state.[12] Prioritizing pending bills would therefore classify as "formal action" because the process of enacting legislation resides squarely within the General Assembly's ability to make policy. Defendants thus mischaracterize the voting as "simply a momentary snapshot of support

[11] "Meeting means any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication." C.R.S. § 24-6-402(1)(b).
[12] Colo. Const. Art. 5 § 1

for pending legislation."[13] Rather, when Defendants collectively vote and support proposed legislation, they are deliberating the merits and substance of matters. There is an exchange of ideas relating to a public policy proposition or other matter being considered by the governing body.[14] Voting to determine the prioritization of pending legislation is undisputedly tied to the process of formation of public policy. Consequently, the use of quadratic voting can only be considered "discussing public business" under the COML definition of "meeting."

Defendants also argue that because the actual allocation of credits through RadicalxChange was conducted individually and outside the presence of others, it cannot be considered a "meeting" under COML. While COML defines "meeting" as a gathering of two or more members of a state body, the Court disagrees with Defendants' arguments. Here, Defendants contracted with a vendor that is designed to circumvent the requirements of COML by having individual representatives vote by themselves, then sending the votes to a third party, who subsequently relayed the results back to the General Assembly. While no Colorado appellate courts have addressed COML's applicability to serial communications, this Court finds persuasive the decisions of appellate courts of other jurisdictions that have found such meetings violate open meetings laws. *See Dewey v. Redevelopment Agency of City of Reno*, 64 P.3d 1070, 1076 (Nev. 2003) ("However, we also reiterated in *Board of Regents* that it was the nature of the communications and the public body's intent to avoid compliance with the Open Meeting Law that turned the serial communications into a constructive quorum."); *see also Right to Know Comm. v. City Council, City and County of Honolulu,* 175 P.3d 111, 122 (Haw. Ct. App. 2007) ("When Council members engaged in a series of one-on-one conversations relating to a particular item of Council business… the spirit of the

[13] Defs. Colorado House of Representatives, Colorado House Speaker Julie McCluskie, the Colorado Senate, Colorado Senate President Steve Fenberg, Senator Jeff Bridges, Senator Chris Hansen, and Andrew Lindinger Opening Br. at 6.
[14] C.R.S. § 24-6-402(2)(d)(III)

open meeting requirement was circumvented and the strong policy of having public bodies deliberate and decide its business in view of the public was thwarted and frustrated.").[15]

Here, it is apparent to the Court that Defendants attempted to bypass COML by employing remote voting through RadicalxChange's platform to ensure that no two members of the General Assembly would discuss pending public business in person. However, this thwarts the entire purpose of COML because the public is then shielded from knowledge that it would otherwise be entitled to know. As appellate courts in differing jurisdictions found when assessing similar conduct from public officials, this current form of quadratic voting is a "serial meeting" that turned into a constructive quorum, thus being subject to the requirements of COML.

c. Whether Quadratic Voting Through RadicalxChange is a "Secret Ballot" Under COML

Next, Plaintiffs and Defendants disagree on whether quadratic voting through RadicalxChange is considered a "secret ballot" under COML. Plaintiffs argue that the application is constructed in a way that ensures the anonymity of all participating parties. Plaintiffs claim that the individual ballots constitute votes and must therefore be disclosed to the public. Plaintiffs reason that Defendants cannot use a third party in RadicalxChange to keep the votes anonymous, thereby insulating themselves from the public, because citizens are entitled to know how their chosen representatives vote in the legislature. Conversely, Defendants maintain that quadratic voting as presently used is not a "secret ballot" because no formal action is taken on the legislation

[15] The Hawaii Court of Appeals cited numerous cases that supported its decision, such as: *Stockton Newspapers, Inc. v. Members of Redev. Agency of Stockton*, 214 Cal.Rptr. 561, 562 (Cal. Ct. App. 1985) ("a series of telephone contacts does constitute a meeting within" California's public meeting law); *Jones v. Tanzler*, 238 So.2d 91, 93 (Fla. 1970) ("statute should not be circumvented by… small individual gatherings wherein public officials… may reach decisions in private on matters which may foreseeably affect the public"); *Del Papa v. Bd. of Regents of Univ. and Comm. Coll. Sys. Of Nev.*, 956 P.2d 770, 778 (Nev. 1998) (holding that serial electronic communications used to deliberate toward a decision violated open meetings law and "if a quorum is present, or is gathered by serial electronic communications, the body must deliberate and actually vote on the matter at a public meeting"); *State ex rel. Cincinnati Post v. City of Cincinnati*, 668 N.E. 903, 906 (Ohio 1996) ("The Ohio Sunshine law cannot be circumvented by scheduling back-to-back meetings which, taken together, are attended by a majority of a public body").

as the bills must still go through public hearings, debates, and votes before becoming law. Defendants contend the anonymous nature of RadicalxChange is a necessary component of the exercise and that including individualized data would not add relevant information to the public discourse.

Under COML, "[n]either a state nor a local public body may adopt any proposed policy, position, resolution, rule, or regulation or take formal action by secret ballot." C.R.S. § 24-6-402(2)(d)(IV). The legislator then defined secret ballot to mean "a vote cast in such a way that the identity of the person voting or the position taken in such vote is withheld from the public." *Id.* Despite being enacted in 1972, COML was not amended to include the recited secret ballot provision until 2012. *Weisfield*, 361 P.3d at 1072. The General Assembly's prohibition of secret ballots came as a direct result of a Colorado Court of Appeals decision that held the use of secret ballots to fill vacancies on a city council did not violate COML as it had been currently constructed. *Id.*

The crux of Defendants' argument is that because no proposed policy, position, resolution, rule, or regulation is being adopted, nor is any formal action taken, the current quadratic voting system does not violate COML's secret ballot provision. Once again, in keeping with the stated legislative intent and wording of COML, the Court disagrees. By attaining data points and information that are used in prioritizing pending bills, Defendants are, in essence, voting on a proposed position concerning how to proceed in a given legislative session. There is no dispute regarding the anonymous nature of quadratic voting, which intrinsically hides the identity of the person voting and the position taken from the public.[16] *See* C.R.S. § 24-6-402(2)(d)(IV).

[16] Def. Rep. Bob Marshall Opening Br. at 3 ("The identities and preferences of individual responders (or those who declined to respond) are not communicated."); Defs. Colorado House of Representatives, Colorado House Speaker Julie McCluskie, the Colorado Senate, Colorado Senate President Steve Fenberg, Senator Jeff Bridges, Senator Chris

Adopting a proposed position through anonymous voting is precisely the reason why the General Assembly amended COML to prohibit secret ballots. *Weisfield*, 361 P.3d at 1072. COML was enacted to keep the public informed through increased knowledge of the legislative process, and such anonymity in quadratic voting withholds vital information from the public. *See Colorado Off-Highway Vehicle Coal.* 292 P.3d at 1136 ("The supreme court reasoned that when the majority of the public body's work is done outside the public eye, the public is deprived of the discussions, the motivations, the policy arguments and other considerations which led to the discretion exercised by the Board."). Simply put, ranking a bill and emphasizing the importance of a bill evidences that legislator's mental impressions, including strategic considerations, trading relationships, and sympathetic ideologies with other legislators. These considerations may conflict or be consonant with a position that the legislator has taken with his or her constituents. The public has the right to know.

The Colorado Court of Appeals in *Weisfield* adopted a similar rationale to that adopted by the Court today. Through COML's provision against secret ballots, that plaintiff brought suit against the defendant for the alleged use of secret ballots to fill a vacancy left on the city council. *Weisfield*, 361 P.3d at 1070. The plaintiff in that case claimed that he did not know, nor had never known, which city council members cast which ballots during the secret voting. *Id.* at 1074. The court of appeals found that "Weisfield's lack of knowledge about how his council members voted is, in our view, precisely the type of injury contemplated under the Open Meetings Law." *Id.* While Defendants in this case did not use quadratic voting to fill a city council vacancy, they did employ a secret ballot to adopt a position, which is precisely the type of activity prohibited by COML. The public was thus deprived of the ability to know how their elected representatives

Hansen, and Andrew Lindinger Opening Br. at 8 ("Anonymity of the participants – and preservation of their anonymity – was a critical component of the exercise…")

voted to prioritize pending legislation, hampering their ability to hold their representatives accountable for how they cast their votes. *See Cole*, 673 P.2d at 350 ("A free self-governing people needs full information concerning the activities of its government not only to shape its views of policy and to vote intelligently in elections, but also to compel the state, the agent of the people, to act responsibly and account for its actions.").

In conclusion, because the quadratic voting procedure constitutes a meeting under COML, and because the nature of quadratic voting through RadicalxChange is non-public, the procedure as currently constituted violates COML.

II. Colorado Open Records Act

Plaintiffs seek, from this Court, an order directing the production of "individual ballots, score sheets, and other records related to RadicalxChange." See Complaint, p. 5, ¶ 3; see also *Id*. at p. 14, ¶ 86 ("Plaintiffs are entitled to review all records of quadratic voting held by any of the defendants or by the vendor they hired to facilitate the process."). Plaintiffs contend, in their Opening Brief, that while Defendants have failed to provide a copy of the User Agreement governing their relationship with RadicalxChange, the Privacy Policy provided "explicitly states that Defendants have the right to access any information that RadicalxChange collected from them." Plaintiffs' Opening Brief, p. 12. In the conclusion of their Opening Brief, they seek "the production of documents to the extent they exist." *Id*. at ¶ 14.

Defendants, in turn, have argued that they have complied with the CORA requests to the extent they are able, even going so far as to affirmatively waive certain privileges. See Defendants' Opening Brief, p. 6. Defendants emphasize that "individual score sheets" and records relating to the individual voters' "support clicks" are *not* created and made available to legislators, arguing that the entire point of the exercise is anonymity as to those very things. *Id*. Consequently,

Defendants contend that they are not in possession or control of such records, to the extent they ever existed in a meaningful sense. *Id.*; see also Clarification of Position, pp. 2-3 (stating that an unsuccessful request to RadicalxChange has been made since the initiation of litigation, and that such records were "immediately deleted" by RadicalxChange).

Plaintiffs, in their Response Brief, again argue that Defendants have not even produced a copy of a User Agreement, and assert that Defendants have a right to obtain "the data" under RadicalxChange's Privacy Policy, and are therefore considered legally in custody of the data. Plaintiffs' Response Brief, pp. 6-7. Defendants, in turn, emphasize that they have provided what they have, but cannot provide what they do not have or that which does not exist. Defendants' Response Brief, p. 4.

As a threshold matter, the Court finds that it lacks jurisdiction to entertain Plaintiffs' CORA claim in the context of this suit. C.R.S. § 24-72-204(5) and (6) "contemplate the filing of *independent actions* in the district court to resolve disputes over the accessibility of documents." *People in Interest of A.A.T.*, 759 P.2d 853, 854 (Colo. App. 1988) (emphasis added). "These sections require that any action filed either by the custodian or the party requesting the record be a separate, independent action in the appropriate district court and that the action cannot be filed as part of any ongoing proceeding." *Id*. at 855. Plaintiffs' CORA claim is not brought as a "separate, independent action," and as such, this Court lacks subject matter jurisdiction, and the claim must be dismissed without prejudice. *Id*.

Moreover, even if this Court were to have subject matter jurisdiction over the claim, Plaintiffs' CORA claim, as understood by the Court, borders on the advisory and speculative. Underscoring this point is the apparent dispute between the parties as to the very *existence* of the documents sought by Plaintiffs. As mentioned, Plaintiffs primarily seek individualized "score

sheets" and a user agreement, documents which Defendants deny exist.[17] Such a dispute, in the first instance, would make relief impossible under C.R.C.P. 56, as it would constitute a dispute as to a material fact.

It is worth noting, though, that Plaintiffs' position is *not* that the documents do exist: it's that they do not know whether they exist. Plaintiffs have qualified their requested relief as only reaching documents "to the extent they exist." See, *e.g.*, Plaintiff's Opening Brief, p. 13 ("Plaintiffs request this Court…order the production of documents to the extent they exist."); Plaintiffs' Reply Brief, p. 3 ("To the extent they exist, there is no question that they have a right to access these documents."). And, at oral argument, counsel for Plaintiffs took a rather frank position regarding the existence of the documents: "we don't know. I mean in the electronic world, we have no idea whether those records exist or not, and we have nothing back from the vendor to indicate whether they do." FTR Recording, Dec. 7, 2023, 12:26:38-12:26:46; *see also Id*. at 12:28:38-12:28:46 ("The only real dispute is whether or not the scores exist, and we won't know that until the Court orders the production of them and then we see whether they exist.").

Relief under CORA is limited to an order compelling the inspection of public records improperly withheld.[18] *See*, C.R.S. § 24-72-204(5)(b); *see also Pope v. Town of Georgetown*, 648 P.2d 672, 673 (Colo. App. 1982); *Wick Comm. Co. v. Montrose Cty. Bd. of Cty. Comm.*, 81 P.3d 360, 363 (Colo. 2003). A Plaintiff, in order to obtain relief, must establish that the public entity: 1) improperly; 2) withheld; 3) public records. *Wick Comm.*, 81 P.3d at 362. Naturally, if a Plaintiff has not established that the records in question even exist, they have failed to establish that they

[17] This apparent dispute persists despite the parties stipulating that this case is appropriate for disposition under C.R.C.P. 56 during oral argument on December 7, 2023.

[18] For the same reason, the Court notes that Plaintiffs' nominal "Fourth Claim for Relief," which is not an independent claim but rather a requested remedy, is improper, as CORA provides no authority permitting the Court to mandate continuous future public disclosure of as-yet non-existent documents. Such relief is beyond the cognizance of a proper CORA claim.

have been improperly withheld. The Court further finds that the sort of "qualified order" request by Plaintiff goes beyond the relief available under the statute and amounts to what is essentially a declaration as to what Plaintiffs' rights would be under CORA under hypothetical circumstances. The requested relief is conditioned upon a hypothetical: *i.e.*, *if* the documents exist, *then* Plaintiffs are entitled to access. The Court finds that such an advisory declaration is unavailable as a form of relief under CORA.

Consequently, even if the Court were to have jurisdiction over the CORA claim, Plaintiffs have failed to establish a prima facie case under CORA, and their requested relief is unavailable pursuant to the statute, providing an additional basis for dismissal.

III. Requested Relief

As stated previously, the Court initially notes that quadratic voting is a useful and legally acceptable practice when employed in compliance with COML. When quadratic voting abides by open government requirements, the party in power can maximize its valuable time in each legislative session to consider and pass as many proposals as possible. With this in mind, the Court turns to Plaintiffs' requested relief.

a. Declaratory Relief Under COML

Declaratory judgment proceedings, pursuant to C.R.S. § 13-51-101, et seq., "are designed to resolve a dispute between parties as to their respective rights, status, or obligations under a law, controlling instrument, or relationship." *Board of Directors of Alpaca Owners and Breeder Ass'n, Inc. v. Clang,* 80 P.3d 945, 948 (Colo. App. 2003). "[A] trial court may exercise its discretion to declare rights, status, and other legal relations, so long as the declaratory judgment would terminate the uncertainty or controversy." *ZAB, Inc. v. Berenergy Corp.,* 136 P.3d 252, 255 (Colo. 2006). "A favorable exercise of that discretion is warranted when (1) 'the judgment will serve a useful

purpose in clarifying and settling legal relations in issue' and (2) 'when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.'" *Id.* at 261 (quoting *People ex rel. Inter–Church Temperance Movement of Colo. v. Baker*, 297 P.2d 273, 277 (Colo. 1956)).

Under the facts presented, the Court has found that quadratic voting as currently used through RadicalxChange violates COML. First, the intent of COML is to have a more informed public through increased awareness of elected representatives' legislative activities, an intent frustrated by the present inability to scrutinize the individual voter's preferences in the quadratic voting exercise. Next, contrary to Defendants' arguments, courts have consistently found that COML pertains to the legislative *process*, as compared to simply the final decisions made by legislators. As currently used, quadratic voting aids the General Assembly in its law-making process by allowing it to assess and prioritize pending legislation. By ranking pending bills, Defendants are exchanging ideas relating to the essence of policy propositions, or, at the least, "any other matter" considered by the legislature. Ranking preferences go to the merits or essence of prioritization vis-à-vis the legislative agenda, even if the results of the exercise are not outcome determinative. They are, essentially, communications or expressions concerning the subject matter under consideration: what bills ought to be prioritized. The Court further finds that quadratic voting constitutes a "serial communication" because, as a whole, it was a series of communications that were designed to circumvent the requirements of open meetings laws. Finally, quadratic voting as currently used violates COML's secret ballot provision because Defendants adopted a position, and the identity of the voters, including their positions taken, was shielded from the public.

b. Request to Produce Documents Held by Defendants

As the Court has dismissed Plaintiffs' CORA claim without prejudice, no relief is available thereunder.

c. Injunctive Relief

Plaintiffs seek injunctive relief to bar further violations of COML and to order the future production of voting ballots produced through quadratic voting. In this regard, "[b]ecause equitable relief in the nature of an injunction constitutes a form of judicial interference with continuing activities, the courts have generally been reluctant to grant such relief where the actions complained of are those of departments of the executive and legislative branches of government, in the exercise of their authority." *Rathke v. MacFarlane*, 648 P.2d 648, 651 (Colo. 1982). Courts afford deference to the activities of the other branches of government due to the doctrine of separation of powers, which serves to ensure that one branch does not usurp or restrain the proper exercise of powers of another branch. *Id.* In all cases, "a trial court should grant injunctive relief sparingly and cautiously and with a full conviction of its urgent necessity." *DeJean v. Grosz*, 412 P.2d 733, 736 (Colo. App. 2015).

Though Plaintiffs sought preliminary and permanent injunctive relief, as the parties have agreed that this matter is suited for disposition under C.R.C.P. 56(h) and, therefore, this order effectively resolves the dispute, the Court considers whether Plaintiffs have met the standards for issuing a permanent injunction.

In granting a permanent injunction, courts effectively employ the same analysis as granting a preliminary injunction. *Dallman v. Ritter*, 225 P.3d 610, 621 (Colo. 2010). The distinction lies in assessing actual success on the merits of the case and eliminating irrelevancies from the *Rathke* factors. *Id*. at n.11 ("A party seeking a permanent injunction must show that: (1) the party has

achieved actual success on the merits; (2) irreparable harm will result unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause to the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest), quoting *Langlois v. Bd. of County Comm'rs*, 78 P.3d 1154, 1158 (Colo. App. 2003).

Defendants argue that the Court is constitutionally barred from entering injunctive relief under the doctrine of separation of powers. They argue that only a declaration as to whether the legislature has complied with statutory requirements is appropriate, citing *Markwell v. Cooke*, 482 P.3d 422 (Colo. 2021) and *Colorado Common Cause v. Bledsoe*, 810 P.2d 201 (Colo. 1991). While neither *Markwell* nor *Bledsoe* dealt with issues arising under the COML, which specifically provides this Court with the "jurisdiction to issue injunctions to enforce the purposes of [the COML]," C.R.S. § 24-6-402(9)(b), the Court is mindful of *Markwell*'s holding that courts have "no business dictating the specifics of *how* the legislature might comply" with applicable law. The Court does not presume to do so by means of this order. The Court does not specify the *manner* in which the Defendants must comply with the COML, it is merely finding that it the quadratic voting process *must* comply with the COML, if it is to be appropriate under the law, and enjoining the continued use of the current non-complying process.

i. Actual Success on the Merits

Plaintiffs have proven actual success in bringing their COML claim. To avoid repetition, the Court incorporates its previously explained COML decision.

ii. Irreparable Harm

Plaintiffs have shown a danger of real, immediate, and irreparable injury.[19] The term "irreparable harm" is a flexible term that necessitates adaptation to the unique circumstances each

[19] The Court notes that irreparable harm and the absence of a plain, speedy, and adequate remedy are correlative. *See Gitlitz v. Bellock*, 171 P.3d 1274, 1279 (Colo. App. 2007) ("Generally, irreparable harm has been defined as

case presents. *Gitlitz v. Bellock*, 171 P.3d 1274, 1278-79 (Colo. App. 2007). "Generally, irreparable harm has been defined as certain and imminent harm for which monetary award does not adequately compensate." *Id.* (internal quotations omitted). Therefore, when monetary damages would be difficult to ascertain or there is no pecuniary standard for the measurement of damages, the injury may be irreparable. *Id.* In this case, Plaintiffs' alleged injury is a denial of the constitutional right to an open legislative process.[20] An award of damages for this injury would be judicially impossible to conceive. Injunctive relief is necessary to immediately halt any use of quadratic voting that does not comply with COML. Regardless, the COML specifically provides for the availability of injunctive relief to enforce the provisions of the COML. C.R.S. § 24-6-402(9)(b).

iii. The Balance of Equities Favors the Injunction, and the Injunction will not Adversely Affect the Public Interest

The Court will address the third and fourth permanent injunction factors together. The Court finds that the granting of an injunction directly serves the public interest as the public has a constitutional right to an open legislative process.[21] Under the balance of equities factor, the Court likewise finds that they favor the issuance of injunctive relief. Plaintiffs have shown an injury to a constitutional right, whereas Defendants have claimed that anonymity is a necessary part of the RadicalxChange quadratic voting scheme. Contrary to Defendants' argument, the Court finds they will suffer little to no injury if injunctive relief is granted because disclosing the individualized voting results is aligned with constitutional mandates.

'certain and imminent harm for which a monetary award does not adequately compensate'…thus, as a corollary, an injunction is available as equitable relief is there is no legal remedy that provides full, complete, and adequate relief."), citing *El Paso Natural Gas Co. v. TransAmerican Natural Gas Corp.*, 669 A.2d 36, 39-40 (Del. 1995).

[20] Colo. Const. Art. 5 § 14

[21] Colo. Const. Art. 5 § 14

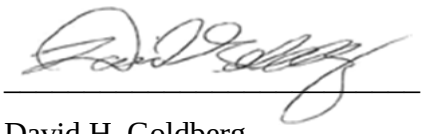
Accordingly, the Court enjoins anyone acting by, through, under, or in concert with the named Defendants from using the quadratic voting process without full transparency as required by the COML.

Conclusion

Plaintiffs Public Trust Institute and David Fornof's First and Second Claims for Relief are GRANTED; Plaintiffs' Third and Fourth Claims for relief are DISMISSED WITHOUT PREJUDICE.

SO ORDERED: this 5th day of January 2024

BY THE COURT:



David H. Goldberg
District Court Judge