



# ZANSBERG BEYLKIN

August 14, 2024

*via email*

Commissioner Chris Richardson  
Commissioner Dallas Schroeder  
Commissioner Grant Thayer  
County of Elbert, Colorado  
215 Comanche Street  
Kiowa, CO 80117

Re: Violations of the Colorado Open Records Law

Dear County Commissioners:

This law firm has been retained by the following citizens of Elbert County: Kenneth Cardwell, Jill Duvall, Jim Duvall, Chris Hatton, Nic Meyer, Robert Rowland, and Bob Ware (collectively “Concerned Citizens”), with respect to the matter discussed herein. Specifically, Concerned Citizens write to ask you, respectfully, to formally acknowledge that the two contracts for employment that the County has entered into with the County Administrator (“CAD”) and the County Attorney (“CATY”) are legally invalid, because the Board of County Commissioners (“BOCC”) unlawfully decided, outside of a public meeting, to enter into those contracts.

### Operative Facts

The following facts serve as the basis for our clients’ request:

At some point(s) prior to June 13, 2024, either two or all three County Commissioners discussed among themselves, outside of any noticed public meeting, whether the County should enter into two, new, three-year contracts with the CAD and CATY with specific terms, including level of compensation (both monetary and non-monetary benefits) and duration. Furthermore, in the course of such meeting(s), a majority of the BOCC *decided* that the County should enter into those contracts and they authorized Board Chair Richardson to sign those contracts, thereby binding Elbert County to perform the obligations therein.

After members of the public became aware of the unlawful decision-making by the BOCC, outside of any noticed and open public meeting, they voiced their concerns at a Town Hall on July 17, 2024. Prior to the next regularly scheduled public meeting of the BOCC, on July 24, 2024, an agenda was posted that did not include any discussion of

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the unlawful decisions the BOCC had made to enter into the two employment contracts. Rather, upon convening that public meeting, one Commissioner moved to amend the posted agenda to add that issue as a “Discussion” topic, which motion was approved.

Approximately one hour and twenty-two minutes into the BOCC’s public meeting of July 24, 2024, the Commissioners took up the previously unposted discussion of their unlawful decision to approve and enter into the two employment contracts. The County Attorney opined that no violation of the Colorado Open Meetings Law (“COML”) had occurred, because, in his opinion, the prior secret meetings among the majority of the BOCC to discuss and approve those contracts were exempt from the notice requirement of the COML, because such meetings constituted “day-to-day supervision” of County employees. The County Attorney cited *Ark. Valley Publ'g Co. v. Lake Cty. Bd. of Cty. Comm'rs*, 2015 COA 100, as the basis for his opinion.

Notwithstanding their stated position that no COML violation had occurred in the discussion of, and the decision to enter into, the two employment contracts, the BOCC then proceeded to discuss the reasons why they had made those decisions, defended the *process* by which they were made, and formally voted to “ratify” those decisions.

## Applicable Law

Having outlined what has occurred, we will now explain why the County Attorney’s assessment of the situation was erroneous, nor supported in any way by applicable case law, and we will explain why, in fact, the two decisions made by BOCC to enter into those employment contracts are legally invalid (as a matter of law).

COML requires, first, that any *discussion* of public business by two or more members of the BOCC be conducted in a meeting that is open to the public. § 24-6-402(2)(b) (2024) (“*All meetings of . . . [a quorum] of any local public body . . . at which any public business is discussed . . . are declared to be public meetings open to the public at all times.*”) (emphasis added); *see also* § 24-6-401, C.R.S. (2024) (“[T]he formation of public policy is public business and may not be conducted in secret.”). The COML is to be interpreted most favorably to protect the ultimate beneficiary, the public. *Cole v. State*, 673 P.2d 345, 349 (Colo. 1983). There can be no serious contention that the discussion of two employment contracts for County officials is not public business.

COML further requires, second, that no *decision* can be made by a local public body – such as to approve a contract of employment that commits the County to pay substantial sums of County funds to one or more employees – outside of a properly noticed meeting that is then open to the public. § 24-6-402(8), C.R.S. (2024).

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Indeed, while local public bodies are permitted to *discuss* such employment contracts in a properly convened executive session (to discuss “personnel matters” regarding certain publicly identified county employees), they are expressly prohibited from either taking “formal action” or “adopt[ing] a position” during that executive session. § 24-6-402(4), C.R.S. (2024). Finally, any decision that is made by a local public body outside of a properly noticed and open meeting is legally invalid, as a matter of law. § 24-6-402(8), C.R.S. (2024).

The provision cited by the County Attorney at the BOCC meeting of July 24, section 24-6-402(2)(g), provides special dispensation to County Commissioners when they engage in the “day-to-day . . . supervision of [county] employees”: when a quorum of the BOCC gathers to do so, it is exempt *only* from the requirement that such meeting be publicly *noticed* in advance. *Id.*; *Ark. Valley Publ’g Co.*, 2015 COA 100, ¶ 18, 369 P.3d 725, 728 (“subsection (2)(f) relates only to the notice requirement”). However, the meeting in which a county employee is being supervised, on a day-to-day basis, (i.e., the employee is present at the meeting) is, nevertheless, *required to be open to the public to attend*, even if the public was not provided *notice* of that meeting. And, whether or not notice of the meeting is required, no *decision* can be made by a majority of the BOCC outside of a public meeting. § 24-6-402(8), C.R.S. (2024).

Furthermore, *Ark. Valley Publ’g Co.* makes it unmistakably clear that determining and “setting [the] rates of compensation” of a county employee is not “day-to-supervision,” but is “the formation of public policy” that must be conducted in a properly *noticed and convened* executive session:

We disagree with the district court that this interpretation of section 24-6-402(2)(f) cannot be harmonized with section 24-6-402(4)(f)(I), which *permits personnel matters to be discussed in executive session* unless an employee requests that the meeting be open to the public. *Personnel matters may include a wide-ranging list of topics, including setting rates of compensation* or the amount of leave employees may earn. *Subsection (4)(f)(I) includes all personnel matters for any local public body, not just day-to-day supervision by county commissioners. . . . For any personnel matter not falling within subsection (2)(f)’s limited scope, proper notice is still required before the local public body may convene an executive session.*

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*Ark. Valley Publ'g Co.*, 2015 COA 100, ¶ 18, 369 P.3d 725, 728 (emphasis added)

## Result

Because the two decisions made by BOCC, to enter into three-year employment contracts with two County employees, were unquestionably made outside of any public meeting (and *also* were not noticed, as the law requires), those two decisions – and the contracts resulting therefrom – are legally invalid. *See Rogers v. Bd. of Trustees for Town of Fraser*, 859 P.2d 284 286 (Colo App. 1993) (termination of a town employee that was done outside of an open public meeting declared “null and void”); *Hanover School Dist. v. Barbour*, 171 P.3d 223, 228 (Colo. 2007) (“the decision not to renew a teacher is a final policy decision that can only be made at a public meeting,” so “any decision not to renew Barbour's contract made . . . in executive session could have no binding effect”).

Nor did the BOCC’s actions on July 24, 2024, serve to “cure” the Board’s prior unlawful decisions: the agenda for that meeting did not provide notice to the public that the topic would be discussed. The decision to ratify two previously-entered employment contracts certainly cannot be considered “day-to-day supervision” of employees, and therefore notice of that topic discussion was required by law. *See also Walsenburg Sand & Gravel Co., Inc. v. City of Walsenburg*, 160 P.3d 297 (Colo. App. 2007) (merely rubber-stamping in a public meeting an earlier-made unlawful decision does not “cure” the violation); *Van Alstyn v. Housing Auth.*, 985 P.2d 97 (Colo. App. 1999) (same).

## Request

While our clients are not pleased with the substantive terms of the two employment contracts at issue, they understand that the BOCC has the authority to negotiate, either directly or through designees, and to agree to, the terms of employment of County employees (provided the sums paid do not exceed appropriations). This dispute is not about the *substance* of those contracts but about the *process* by which the BOCC entered into them.

The process taken by the BOCC violated Colorado’s Open Meetings Law. That renders those decisions – *regardless of their substance* – legally invalid, i.e., null and void. *See, e.g., Sch. Dist. No. 11 of Cty. of El Paso v. Colo. Springs Teachers Ass’n*, 583 P.2d 952, 954 (1978) (declaring invalid a Master Agreement negotiated and adopted outside of a public meeting); *Littleton Educ. Ass’n v. Arapahoe Cty. Sch. Dist.*, 553 P.2d 793, 798 (1976) (same); *see also Hardesty v. Pino*, 222 P.3d 336, 340 (Colo. App. 2009) (“Trial courts have no discretion to disregard binding appellate rulings.”) (citations omitted).

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Of course, upon starting over and re-doing the process lawfully, i.e., *discussing* these two employment contracts in publicly noticed and properly convened executive sessions, and then *deciding* to enter into these contracts, in properly noticed and open public meetings, the BOCC may – and is fully within its power to – reach the identical outcome.<sup>1</sup>

What the BOCC is *not* permitted to do is to honor and fulfill its obligations as set forth in the two employment contracts that were the product of decisions made outside of any properly convened and open public meeting.

Accordingly, Concerned Citizens hereby respectfully request that the BOCC, at a properly noticed and open public meeting decide, formally, to rescind those two employment contracts, declaring them null and void. Doing so would obviate the need to bring this matter to a court of law and have a judge declare the BOCC's decisions made outside of a public meeting unlawful. Of course, as you know, any person who prevails in litigation by obtaining a judicial declaration that a public body violated the COML is entitled to an award of his/her reasonable attorney's fees and costs. *See* [CITES].

Please respond, in writing, no later than September 4, 2024, with a commitment that the BOCC will honor the Concerned Citizens' request as outlined above.

Thank you, in advance, for your cooperation. We look forward to your prompt response.

Sincerely,



Steven D. Zansberg

cc: Clients

Bart Greer, Esq., Elbert County Attorney

Jeff Roberts, Colorado Freedom of Information Coalition

Nicky Quinby, *Elbert County News*

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<sup>1</sup> Financial obligations in any contracts entered into by BOCC cannot exceed the amount the County has previously appropriated to cover such expenses. Any sums paid out by the County in excess of amounts previously appropriated are the *personal* legal liability of the individual Commissioners who unlawfully authorized such expenditures. *See* § 30-25-103, C.R.S. (2024).