The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

DATE FILED: December 7, 2023
CASE NUMBER: 2022CA1934

SUMMARY
December 7, 2023

2023COA118

No. 22CA1934, *Sentinel Colo. v. Rodriguez, K* — Administrative Law — Colorado Sunshine Act — Open Meetings Law — Attorney-Client Privilege

A division of the court of appeals concludes that a local newspaper is entitled to a recording of an Aurora City Council executive session because the City Council violated Colorado's Open Meetings Law by not properly announcing the executive session and then taking a position or formal action during this session.

The division also concludes that the City Council waived its attorney-client privilege by trying to cure the Open Meetings Law violations at the next regularly scheduled City Council meeting.

Finally, the division concludes that the City Council may not rely on *Colorado Off-Highway Vehicle Coalition v. Colorado Board of Parks & Outdoor Recreation*, 2012 COA 146, ¶ 22, which recognizes

that public bodies may cure Open Meetings Law violations by holding a properly convened meeting, because the local newspaper was not challenging the substance of what took place during the executive session.

COLORADO COURT OF APPEALS **2023COA118**

Court of Appeals No. 22CA1934
Arapahoe County District Court No. 22CV30927
Honorable Elizabeth Beebe Volz, Judge

The Sentinel Colorado,

Plaintiff-Appellant,

v.

Kadee Rodriguez, City Clerk, in her official capacity as Records Custodian for City of Aurora,

Defendant-Appellee.

ORDER REVERSED

Division II
Opinion by JUDGE FURMAN
Román, C.J., and Fox, J., concur

Announced December 7, 2023

Rachael Johnson, Denver, Colorado, for Plaintiff-Appellant

Hoffmann, Parker, Wilson & Carberry, P.C., Corey Y. Hoffmann, Katharine J. Vera, Denver, Colorado, for Defendant-Appellee

¶ 1 This litigation began when plaintiff, The Sentinel Colorado (The Sentinel), filed a complaint in the district court against defendant, Kadee Rodriguez, in her official capacity as the City Clerk and Records Custodian (Records Custodian) for the City of Aurora. In its complaint, The Sentinel sought the release of the recording of the Aurora City Council's March 14, 2022, executive session. The Sentinel claimed that the City Council committed Colorado Open Meetings Law (OML) violations under section 24-6-402, C.R.S. 2023, at that executive session. The district court ultimately found that a subsequent public City Council meeting, held on March 28, 2022, cured the City Council's OML violations, and it ordered the Records Custodian not to release the March 14 executive session recording.

¶ 2 The Sentinel appeals, contending that (1) the City Council committed OML violations at the March 14 executive session; (2) the executive session was not protected by the attorney-client privilege; and (3) the City Council did not cure the March 14 executive session's OML violations by holding a subsequent regular public meeting on March 28. The Sentinel also contends that it

should be awarded attorney fees. We agree with The Sentinel in all respects except its request for attorney fees.

I. The City Council's and the Records Custodian's Actions

A. Initiation of Censure Proceedings

¶ 3 On January 28, 2022, The Sentinel reported that City Council Member Danielle Jurinsky appeared on a talk radio show to discuss public safety in Aurora. On the show, Jurinsky commented about the Aurora Police Department Chief and the Deputy Police Chief, calling them "trash" and calling for their removal from office. In response to these comments, City Council Member Juan Marcano initiated proceedings to censure Jurinsky for allegedly violating the City Council's governing rules.

B. Executive Session

¶ 4 On March 14, the City Council held an executive session, which was recorded. The agenda for the March 14 executive session included

- 4.a "Negotiations," "C.R.S. 24-6-402(4)(e)," "estimated time: 45 minutes";
- 4.b "Personnel Matters," "C.R.S. 24-6-402(4)(f)," "estimated time: 30 minutes";

- 4.c “Legal Advice,” “C.R.S. 24-6-402(4)(b),” “estimated time: 1 hour”; and
- 4.d “Legal Advice,” “C.R.S. 24-6-402(4)(b),” “estimated time: 45 minutes.”

C. Denied Request for Executive Session Access

¶ 5 On March 18, 2022, a reporter for The Sentinel filed a request through the City’s website seeking access to the March 14 executive session about the censure of Jurinsky. The Records Custodian denied this request because she claimed that “[t]he record being sought is privileged attorney/client communication and is exempt from disclosure, pursuant to C.R.S. 24-6-402[(2)](d.5)(II)” of the OML.

D. Regular Meeting

¶ 6 The City Council held a regular public meeting on March 28, 2022. It provided an agenda for the meeting, which included Agenda Item 19(f), “Motion to Approve the Stipulation and a Request for Payment of Attorney Fees.” The City Council attached a “packet” of information for Agenda Item 19(f). A part of the “Council Agenda Commentary,” included with the agenda stated that special counsel “representing the City [Council] have reached an agreement

for a stipulation to resolve the [censure] issue. That stipulation is included in the backup for this item."

¶ 7 The agenda also included a letter from the City Council's special counsel addressed to the Council members describing the events of the March 14 executive session, stating that

> 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 . . . 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. 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.

II. District Court's Actions

A. Order Granting In Camera Review

¶ 8 The Sentinel filed an application in the district court for an order granting access to the recording of the March 14 executive session, asking the court to order the release of the recording or to review the recording in camera to determine if any redactions were necessary before releasing the recording.

¶ 9 In the application, The Sentinel asserted that the City Council violated the OML by (1) failing to describe the particular subject of the "legal advice" named in the executive session's agenda and (2) engaging in "formal action" when the City Council took a "roll call" vote to end the censure proceedings against Jurinsky.

¶ 10 In response, the Records Custodian asserted that The Sentinel was not entitled to the recording's release because the March 14 executive session was "entered into for the purpose of receiving attorney-client privileged advice."

¶ 11 The district court issued an order granting in camera review.

B. In Camera Review Order

¶ 12 Following the in camera review, the district court issued an order finding as follows:

- "[T]he subject of the [e]xecutive [s]ession was to receive information from legal counsel on the process to be followed in addressing a censure complaint."
- "The Council did not 'vote' on ending the censure action as alleged in the Sentinel's complaint[;] however, there was a roll-call taken on what direction to give to legal counsel on how to proceed."

- “[T]he announcement of the [e]xecutive [s]ession does not appear to comply with the requirements of the applicable statutes.”

¶ 13 The district court determined that the City Council had violated the OML, and it ordered that the recording of the March 14 executive session should be released to The Sentinel. *See* § 24-6-402(4) (“the announcement” to the public must include “identification of the particular matter to be discussed in as much detail as possible without compromising the purpose” of the executive session). But being “mindful of the special status attorney-client communications hold,” the district court stayed the ruling and granted the Records Custodian an opportunity to argue that the release would violate the attorney-client privilege.

C. Motion for Reconsideration

¶ 14 The Records Custodian moved for reconsideration, asserting that (1) the March 14 executive session was protected by the attorney-client privilege and (2) the City Council cured the OML violations by informing the public of the March 14 executive session “in the agenda and agenda packet” for the City Council’s March 28 regular meeting.

¶ 15 The Sentinel opposed the motion.

D. Motion for Reconsideration Order

¶ 16 The district court granted the Records Custodian's motion for reconsideration. The district court ordered that the recording not be released, now finding that the March 28 public meeting "clearly identified what took place at the [March 14] executive session and that the [City] Council publicly considered the proposed action to adopt a stipulation to terminate any further investigation into Council Member Jurinsky's conduct." The district court was "satisfied that the [March 28] open meeting cured any OML defect in the intended executive session." The district court made no findings on whether the March 14 executive session was protected by the attorney-client privilege.

III. OML Violations

¶ 17 The Sentinel contends that the City Council committed two OML violations at the March 14 executive session: (1) giving an insufficient announcement about the executive session; and (2) taking a "roll call" vote to end pending censure proceedings, which constituted a "formal action." We address each contention in turn.

A. Standard of Review

¶ 18 We review the district court's factual findings for clear error. *Bjornsen v. Bd. of Cnty. Comm'rs*, 2019 COA 59, ¶ 39. "A court's finding of fact is clearly erroneous if there is no support for it in the record." *Gagne v. Gagne*, 2019 COA 42, ¶ 17.

¶ 19 Interpreting the OML is a question of law that we review de novo. *Colo. Off-Highway Vehicle Coal. v. Colo. Bd. of Parks & Outdoor Recreation*, 2012 COA 146, ¶ 22.

B. The OML

¶ 20 The OML's purpose is to provide public access to meetings at which local public bodies discuss public business. *Bjornsen*, ¶ 15. A "local public body" is defined as

> any board, committee, commission, authority, or other advisory, policy-making, rule-making, or formally constituted body of any political subdivision of the state and any public or private entity to which a political subdivision, or an official thereof, has delegated a governmental decision-making function but does not include persons on the administrative staff of the local public body.

§ 24-6-402(1)(a)(I). There is no dispute that the City Council is a "local public body" under section 24-6-402(1)(a)(I).

¶ 21 “The statute carries out [its] purpose by setting forth a general rule that all meetings where public business is discussed are open to the public.” *Gumina v. City of Sterling*, 119 P.3d 527, 532 (Colo. App. 2004); *see* § 24-6-402(2)(b). The statute allows a public body to hold an executive session closed to the public only in limited circumstances. *See* § 24-6-402(4)(a)-(g).

¶ 22 This case deals with the limited circumstance in section 24-6-402(4)(b): a local public body can hold an executive session to confer “with an attorney . . . for the purposes of receiving legal advice on specific legal questions.” But “[m]ere presence or participation of an attorney at [the] executive session” does not satisfy the statute’s requirements. § 24-6-402(4)(b).

¶ 23 An executive session is only permissible when (1) the public announcement includes “specific citation” to section 24-6-402(4) authorizing the local public body to meet in an executive session; (2) the topic of discussion is identified by “as much detail as possible without compromising the purpose for which the executive session is authorized”; (3) two-thirds of the quorum of the local public body present vote in favor of entering into an executive session; and (4) “no adoption of any proposed policy, position,

resolution, rule, regulation, or formal action" occurs. § 24-6-402(4). Discussions that occur in executive session must be electronically recorded unless they are protected by the attorney-client privilege. § 24-6-402(2)(d.5)(II)(A), (B).

¶ 24 When a local public body does not comply with the executive session requirements, "it may not avail itself of the protections afforded by the executive session exception." *Gumina*, 119 P.3d at 532.

¶ 25 If an executive session is convened improperly, the record of the session is open to the public. *Id.* The person seeking access to the executive session recording must show sufficient grounds to support a reasonable belief that the executive session violated the OML. § 24-6-402(2)(d.5)(II)(C); *see* § 24-72-204(5.5), C.R.S. 2023. If the court finds that the person seeking access to the record has properly made this showing, the court may conduct an in camera review of the recorded executive session to determine if there is a violation. § 24-6-402(2)(d.5)(II)(C); § 24-72-204(5.5).

¶ 26 If, on in camera review, a court finds that the local public body (1) "engaged in substantial discussion of any matters" beyond the properly announced particular subject of attorney-client privileged

communications; or (2) "adopted a proposed policy, position, resolution, rule, regulation, or formal action in the executive session," then the part of the recording that reflects these findings is open to public inspection. § 24-6-402(2)(d.5)(II)(C); § 24-72-204(5.5).

C. OML Notice Violation

¶ 27 Both parties agree that the district court correctly found that "the announcement of the [e]xecutive [s]ession does not appear to comply with the requirements of" the OML. We also agree.

¶ 28 The announcement for the March 14 executive session does not identify any "detail" of the topic to be discussed. § 24-6-402(4); s*ee Guy v. Whitsitt*, 2020 COA 93, ¶ 21 ("[P]rivilege ordinarily does not encompass information about the subject matter of an attorney-client communication.").

¶ 29 We therefore conclude the announcement for the March 14 executive session violated the OML public notice requirement. *See Guy*, ¶ 27.

D. OML "Roll Call" Violation

¶ 30 The district court characterized the City Council's action at the March 14 executive session as "a roll call" taken "as to the direction

to be given to legal counsel, concerning the investigation" and found that such action was not a formal action violating the OML. We conclude that the district court committed clear error in making this finding. *See Bjornsen*, ¶ 49.

¶ 31 The record shows that at the March 14 executive session the City Council adopted a "position . . . or formal action" in deciding to end Jurinsky's censure proceedings, in violation of the OML. *See* § 24-6-402(4) ("[N]o adoption of any . . . position, . . . or formal action . . . shall occur at any executive session that is not open to the public.").

¶ 32 The City Council's formal action is shown in the letter that accompanied the March 28 agenda, which states that special counsel was "directed and instructed" at the March 14 executive session "to end the investigation prior to any public hearing" and to "enter into a stipulation" to dismiss Jurinsky's censure charges. This letter concluded that Jurinsky and the City Council "agree[d] that the investigation . . . is terminated and the matter is dismissed effective March 15, 2022."

¶ 33 We note that the special counsel relied on the Aurora City Council Rules for the authority to hold an executive session about

Jurinsky's censure stipulation. But these rules did not allow the City Council to conduct a roll call or cast a vote to end an investigation of censure charges in an executive session. (Although these rules have since been amended, the City Council still can't conduct a role call to end an investigation of censure charges during an executive session.) *Compare* City of Aurora, *Rules of Order and Procedure for the Aurora, Colorado, City Council* app. G(I)(5)-(6) (effective May 10, 2021), https://perma.cc/F6Y4-CQ83, *with* City of Aurora, *Rules of Order and Procedure for the Aurora, Colorado, City Council* app. G (effective January 30, 2023), https://perma.cc/XVJ4-YVGQ, 38-39.

E. Attorney-Client Privilege

¶ 34 The Sentinel claims that the City Council waived any attorney-client privilege that existed in the March 14 executive session recording. We agree.

1. Standard of Review

¶ 35 We review a district court's conclusions regarding the attorney-client privilege for an abuse of discretion. *Affiniti Colo., LLC v. Kissinger & Fellman, P.C.*, 2019 COA 147, ¶ 23. But we

review application of the attorney-client privilege de novo. *In re Estate of Rabin*, 2020 CO 77, ¶ 16.

2. Applicable Law

¶ 36 The privileges for attorney-client communication have been incorporated into the OML. § 24-6-402(2)(d.5)(II)(B). When an attorney-client privileged communication is subsequently disclosed to a third party, the protection afforded by the privilege is impliedly waived. *Wesp v. Everson*, 33 P.3d 191, 198 (Colo. 2001).

3. Analysis

¶ 37 The district court didn't directly address attorney-client privilege in its order granting the Records Custodian's motion for reconsideration, but the district court found that the March 28 public meeting "clearly identified what took place at the [March 14] executive session." We agree with this district court finding because the City Council included in the March 28 public meeting agenda the letter from special counsel that "clearly identified what took place at the [March 14] executive session." We therefore conclude that the City Council waived any attorney-client privilege. *Rabin*, ¶ 16.

¶ 38 The letter states:

- 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."
- Special counsel "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." (Emphasis added.)
- Jurinsky, through her counsel, and the City Council "agree that the investigation into the charges brought against Council Member Jurinsky is terminated and the matter is dismissed effective March 15, 2022."
- "As a condition of this Stipulation legal counsel for Council Member Jurinsky will be paid $16,162.50 in legal fees for their representation of her in this matter."

¶ 39 The Records Custodian contends that the City Council did not waive its privilege because, at the March 28 public meeting, "[t]here was not discussion about the direction previously given to the City's legal counsel" in the March 14 executive session. But the letter in

the March 28 public meeting agenda packet directly refutes this contention. Again, it states that, at the March 14 executive session, the City Council "directed and instructed special legal counsel to end the investigation" and that special legal counsel "terminated the investigation without making any findings regarding the alleged violations, and without advising the City Council."

¶ 40 We thus conclude that the City Council waived any attorney-client privilege from the March 14 executive session by describing everything that occurred during this meeting in the March 28 public meeting agenda packet. *See id.*

F. Curing the OML Violations

¶ 41 The Sentinel last contends that the district court erred by finding that the City Council cured its OML violations when it held a regular public meeting on March 28. Because case law on curing OML violations only applies where a party seeks to invalidate an *action* taken in an improperly convened executive session, we conclude that the curing cases do not apply here.

1. Applicable Law

¶ 42 The OML does not explicitly allow a local public body to "cure" prior OML violations. *See* § 24-6-402. But Colorado case law has

interpreted the OML to allow a local public body to "cure an improperly convened executive session by holding a subsequent meeting that [is] open to the public to consider the matters discussed in the executive session." *Bjornsen*, ¶ 31. In doing so, the subsequent meeting must not "be a mere rubber stamping of the decision made in the improperly convened executive session." *Id.*

> Because the focus of the OML is on the *process* of governmental decision making, not on the *substance* of the decisions themselves, it follows that the OML would permit ratification of a prior invalid action, provided the ratification complied with the OML and was not a mere "rubber stamping" of an earlier decision made in violation of the act.

Colo. Off-Highway Vehicle Coal., ¶ 31.

2. Analysis

¶ 43 The district court largely relied on *Colorado Off-Highway Vehicle Coalition* to support its finding that the City Council cured the OML violations that occurred at the March 14 executive session.

¶ 44 In *Colorado Off-Highway Vehicle Coalition*, the plaintiff sued the Colorado Parks and Wildlife Board and asked the district court to enjoin or invalidate the Board's changes to its programs because

the Board violated the OML. *Id.* at ¶ 11. On appeal, a division of this court agreed with the district court that the Board's decision made in a later regular public meeting served as a "cure" to the previous OML violation. *Id.* at ¶ 31. The division reasoned that the OML's purpose is to "require open decision-making, not to permanently condemn a decision made in violation of the [OML]." *Id.* Unlike the plaintiff's request in *Colorado Off-Highway Vehicle Coalition*, The Sentinel does not challenge the validity of the City Council's decision to terminate Jurinsky's censure proceedings. The Sentinel only requests that the recording of the March 14 executive session be released.

¶ 45 We therefore do not address whether the narrowly tailored, court-created concept of allowing a state or local public body to "cure" a prior violation of the OML by holding a subsequent compliant meeting under section 24-6-402(2) — which includes allowing comment from the public, key players, and interested parties and renewing deliberations — applies here. *See id.* at ¶ 31.

¶ 46 Accordingly, we conclude that the district court erred by relying on *Colorado Off-Highway Vehicle Coalition* to find that the March 28 public meeting "cured" the OML violations that occurred

at the March 14 executive session. *See id.* (The OML's focus is "on the *process* of governmental decision making" and "not on the *substance* of the decisions themselves.").

G. Summary

¶ 47 We conclude that the City Council violated section 24-6-402(4) of the OML by improperly convening and taking a "position . . . or formal action" in deciding to end Jurinsky's censure proceedings during the March 14 executive session.

¶ 48 And because we have concluded that the City Council waived the attorney-client privilege regarding its communications at the March 14 executive session, the recording of this session must be released under section 24-6-402(2)(d.5)(II)(C).

IV. Attorney Fees

¶ 49 The Sentinel last contends that it should be awarded its attorney fees. We disagree because The Sentinel is not a "citizen" under section 24-6-402(9)(b).

A. Applicable Law

¶ 50 The OML provides, "In any action in which the court finds a violation of this section, the court shall award the citizen prevailing

in such action costs and reasonable attorney fees." § 24-6-402(9)(b).

B. Analysis

¶ 51 Based on the plain meaning of the OML, we conclude that The Sentinel is not a "citizen." "Citizen" is commonly defined as "a native or naturalized person who owes allegiance to a government and is entitled to protection from it." Merriam-Webster Dictionary, https://perma.cc/BG6Y-87YD. The Sentinel does not meet this definition.

V. Conclusion

¶ 52 The district court's order preventing the release of the March 14 executive session recording is reversed, and the Records Custodian must release to The Sentinel the March 14 executive session recording pertaining to Jurinsky's censure.

CHIEF JUDGE ROMÁN and JUDGE FOX concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
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(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

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