

DISTRICT COURT, CITY & COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, CO 80202 (303) 606-2300	DATE FILED: June 23, 2023 9:57 AM CASE NUMBER: 2023CV31265
THE DENVER POST, STATES NEWSROOM DBA COLORADO NEWSLINE, NEXTAR MEDIA GROUP, KUSA 9NEWS TEGNA, THE DENVER GAZETTE AND COLORADO POLITICS, & CHALKBEAT COLORADO,  Plaintiffs,  v.  STACY WHEELER, in her official capacity as records custodian, for Denver Public Schools, and the BOARD OF EDUCATION of DENVER PUBLIC SCHOOLS, in its official capacity as the governing body of Denver Public Schools,  Defendants.	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
	Case Number: 2023CV31265  Div.: 414
<p style="text-align: center;"><b>ORDER FOR PRODUCTION UNDER C.R.S. §§ 24-72-204(5.5)(b)(II); 24-6-402(2)(d.5)(II)(C)</b></p>	

THE COURT, having conducted an *in camera* review of a recording of a portion<sup>1</sup> of the special meeting of Defendant the Board of Education of Denver Public Schools (“Denver School Board”) held in executive session on Thursday, March 23, 2023 (“executive session”), ORDERS

---

<sup>1</sup> The Court notes that various portions of the executive session recording were inaudible in the version provided to it.

Defendants Stacy Wheeler and the Denver School Board to make the entirety of the recording of the executive session open to public inspection, pursuant to C.R.S. §§ 24-72-204(5.5)(b)(II); 24-6-402(2)(d.5)(II)(C) for the following reasons:

### **BACKGROUND**

This matter commenced with joint Plaintiffs’ Application for Access to Recording and Meeting Minutes or, Alternatively, for *In Camera* Review and Order of Production Under § 24-72-204(5.5), C.R.S filed April 28, 2023. An Amended Complaint and Application for Order to Show Cause Pursuant to § 24-72-204(5), C.R.S. or, Alternatively, for *In Camera* Review and Order of Production Pursuant to § 24-72-204(5.5), C.R.S. was filed May 11, 2023. Plaintiffs seek certain recordings and records from the Denver School Board, arising out of a Denver School Board special meeting held during executive session on March 23, 2023. As required by C.R.S. § 24-72-204(5)(a), the Court set a hearing to show cause for June 1, 2023. By agreement of the parties, that hearing was continued to June 16, 2023, due to scheduling issues for counsel. No witnesses testified at the June 16, 2023 hearing. Following that hearing, the Court ordered Defendants to provide a recording of the executive session to the Court for *in camera* review by June 22, 2023. The Court conducted an *in camera* review on June 22 and 23, 2023.

### **LEGAL STANDARD & ANALYSIS**

“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. The general policy of the Colorado Open Records Act (“CORA”) is that all public records are open to inspection unless specifically excepted by law. *Carpenter v. Civil Service Com’n*, 813

P.2d 773, 777 (Colo. App. 1990). Such exceptions are to be narrowly construed. *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1154 (Colo. App. 1998).

The Denver School Board is a “local public body” as defined by C.R.S. § 24-6-402(1)(a):

- (I) "Local public body" means 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.
- (II) Notwithstanding the provisions of subparagraph (I) of this paragraph (a), in order to assure school board transparency "local public body" shall include members of a board of education, school administration personnel, or a combination thereof who are involved in a meeting with a representative of employees at which a collective bargaining agreement is discussed.

A school district is a “political subdivision of the state” under C.R.S. § 24-6-402(1)(c). A “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).

Under C.R.S. § 24-6-402(2)(d.5)(II)(C), the Court finds that the Denver School Board did engage in a substantial discussion of matters not enumerated in C.R.S. § 24-6-402(4)(c),(d) or (h) or adopted a proposed policy, position, resolution, rule, regulation, or formal action in the

executive session in contravention of C.R.S. § 24-6-402(4) , as noticed in advance of the March 23, 2023 special meeting.

The Denver School Board noticed the following as the stated purposes of the executive session in their own minutes, along with documentation of the vote to enter executive session:

**2. Executive Session**

Discussion: 2.01 Executive Session for the purpose of discussions regarding matters required to be kept confidential by federal or state law or rules and regulations as a result of the incident that occurred on March 22, 2023, as authorized by C.R.S. § 24-6-402(4)(c), Discussion of specialized details of security arrangements or investigations as a result of the incident that occurred on March 22, 2023, as authorized by C.R.S. § 24-6-402(4)(d), and Discussion of individual students where public disclosure would adversely affect that person or persons involved as a result of the incident that occurred March 22, 2023, due to incidents that happened at our schools as authorized by C.R.S. § 24-6-402(4) (h).

I move that the Board of Education enter into Executive Session for the purpose of Discussion of matters required to be kept confidential by federal or state law or rules and regulations as authorized by C.R.S. § 24-6-402(4)(c), Discussion of specialized details of security arrangements or investigations as authorized by C.R.S. § 24-6-402(4)(d), and Discussion of individual students where public disclosure would adversely affect that person or persons involved as authorized by C.R.S. § 24-6-402(4) (h).

Motion by Auon'tai Anderson, second by Scott Esserman.

Final Resolution: Motion Carries

Yea: Auon'tai Anderson, Scott Baldermann, Scott Esserman, Xochitl Gaytan, Charmaine Lindsay, Dr. Carrie Olson, Michelle Quattlebaum

The Board entered into the executive session at 10:20 a.m.

C.R.S. § 24-6-402(4)(c) provides an executive session is appropriate for the purposes of discussing: “Matters required to be kept confidential by federal or state law or rules and regulations. The local public body shall announce the specific citation of the statutes or rules that are the basis for such confidentiality before holding the executive session.” The Denver School Board did not announce the specific citation of the statutes or rules and regulations that form the basis for such confidentiality. Although the Court does not know what matters the Denver School Board considered to be subject to federal or state confidentiality requirements because the Denver School Board did not cite any specific citations to statutes or rules, the Court could not identify instances within the

executive session with discussion of issues subject to federal or state confidentiality law or rules or regulations.

C.R.S. § 24-6-402(4)(d) provides an executive session is appropriate for the purposes of discussing: “Specialized details of security arrangements or investigations, including defenses against terrorism, both domestic and foreign, and including where disclosure of the matters discussed might reveal information that could be used for the purpose of committing, or avoiding prosecution for, a violation of the law.” The Denver School Board did not discuss these issues in executive session, specifically any issues involving specialized details of security arrangements or investigations, including defenses against domestic and foreign terrorism or matters which if made public might reveal information that could be used for the purpose of committing, or avoiding prosecution for, a violation of the law. There was lengthy discussion of general security arrangements, however, including the return of school resource officers to Denver public schools.

C.R.S. § 24-6-402(4)(h) provides an executive session is appropriate for the purposes of: “Discussion of individual students where public disclosure would adversely affect the person or persons involved.” Although there was discussion of an individual student during the executive session, the nature of that discussion would not adversely affect the person involved.

C.R.S. § 24-6-402(8) provides: “No resolution, rule, regulation, ordinance, or formal action of a state or local public body shall be valid unless taken or made at a meeting that meets the requirements of subsection (2) of this section.”

Therefore, the Court finds the March 23, 2023 executive session was convened in violation of statute because the subjects discussed during the executive session were not properly noticed as required by C.R.S. § 24-6-402(4). No resolution, rule, regulation, ordinance, or formal action of the Denver School Board adopted during the executive session is valid, by operation of law. C.R.S. § 24-6-402(8).

### CONCLUSION


Accordingly, Defendants are ordered to release the entirety of the recorded version of the executive session of the March 23, 2023 special meeting as provided to the Court for *in camera* review to Plaintiffs and the public by Monday, June 26, 2023 at noon.

Plaintiffs are authorized to seek reasonable attorneys' fees and costs under C.R.S. § 24-6-402(9)(b). *Van Alstyne v. Housing Auth. City of Pueblo*, 985 P.2d 97, 100 (Colo. App. 1999); C.R.S. § 24-72-204(5).

IT IS SO ORDERED.

DATED: June 23, 2023

BY THE COURT:



---

ANDREW J. LUXEN  
District Court Judge

**DISTRICT COURT, DENVER COUNTY, COLORADO**

1437 Bannock Street  
Denver, CO 80202

---

**Plaintiffs:**

THE DENVER POST, STATES NEWSROOM DBA  
COLORADO NEWSLINE, NEXSTAR MEDIA GROUP,  
KUSA 9NEWS TEGNA, THE DENVER GAZETTE AND  
COLORADO POLITICS, & CHALKBEAT COLORADO.

v.

**Defendant:**

STACY WHEELER, in her official capacity as records  
custodian Denver Public Schools; and the BOARD OF  
EDUCATION of DENVER PUBLIC SCHOOLS, in its  
official capacity as the governing body of Denver Public  
Schools.

---

**Attorney for Plaintiffs:**

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  
Facsimile: (202) 795-9310  
[rjohnson@rcfp.org](mailto:rjohnson@rcfp.org)

Steven D. Zansberg, # 26634  
Law Office of Steven D. Zansberg, L.L.C.  
100 Filmore Street, Suite 500  
Denver, CO 80206  
Telephone: (303) 564-3669  
Facsimile: (720) 650-4763  
[steve@zansberglaw.com](mailto:steve@zansberglaw.com)

▲ COURT USE ONLY ▲

---

Case Number: 2023CV031265

Division: Courtroom 414

**AMENDED COMPLAINT AND APPLICATION FOR ORDER TO SHOW CAUSE  
PURSUANT TO § 24-72-204(5), C.R.S. OR, ALTERNATIVELY, FOR *IN CAMERA*  
REVIEW AND ORDER OF PRODUCTION PURSUANT TO § 24-72-204 (5.5), C.R.S.**

Plaintiffs, The Denver Post, Statesman Newsroom d/b/a Colorado Newslines, Nextstar Media Group, Inc. KDVR Fox 31, KUSA 9News, Colorado Politics, The Denver Gazette, Chalkbeat Colorado (hereinafter, collectively, the “News Media Coalition” or “Plaintiffs”), by and through undersigned counsel, hereby state as follows:

### Introduction

1. By this civil action under the Colorado Open Records Act (“CORA”), §§ 24-72-201 *et seq.*, C.R.S., and the Colorado Open Meetings Law (“COML”), §§ 24-6-401 *et seq.*, the News Media Coalition seeks access to the recording and meeting minutes from a 5-hour long closed-door meeting that Defendant Denver Public Schools Board (“DPS” or “Board”) held on March 23, 2023. These records are in the possession, custody, or control of the District’s official custodian, Stacy Wheeler (“Defendant”). Each of the Plaintiffs submitted a CORA request for access to the recording of the March 23, 2023 closed-door meeting (hereinafter the “March 23 Recording”), but their requests were denied by the Defendant Wheeler.

2. Plaintiffs seek an Order from the Court directing Defendant Wheeler to immediately release the entirety of the March 23 Recording to them because, *inter alia*, the Board’s actions, as set forth below, violated the COML. Specifically, prior to meeting to discuss public business *for five hours* outside of public view, DPS failed to announce to the public, as required by law, the “particular matter(s)” it would be discussing. Instead, DPS stated publicly in its Agenda, and in the public meeting, that it would discuss only: “Matters required to be kept confidential by federal or state law or rules and regulations as a result of the incident that occurred on March 22, 2023, as authorized by C.R.S. § 24-6-402(4)(c); Discussion of specialized details of security arrangements or investigations as a result of the incident that occurred on March 22, 2023, as authorized by C.R.S. § 24-6-402(4)(d); and Discussion of individual students where public disclosure would adversely affect that person or persons involved as a result of the incident that occurred March 22, 2023, due to incidents that happened at our schools as authorized by C.R.S. § 24-6-402(4)(h).” Accordingly, under settled and binding law, the closed door meeting that followed that announcement was *not* an “executive session,” but rather an unlawfully closed public meeting. The audio recording and/or minutes of that meeting are a public record and should be immediately released to Plaintiffs.

3. Alternatively, if the Court finds that the closed-door meeting was a properly and lawfully convened “executive session,” the Court should review the March 23 Recording *in camera*, pursuant to § 24-72-204(5.5), C.R.S. & § 24-6-402(2)(d.5)(I)(C), C.R.S., because the recording of the public portion of the Board’s Special Meeting itself provides “reasonable grounds” to believe that DPS adopted a position or resolution during that executive session, which the COML prohibits. *See* Board of Education Special Meeting and Executive Session, March 23, 2023:

[https://vimeo.com/810960869?embedded=true&source=vimeo\\_logo&owner=43688279](https://vimeo.com/810960869?embedded=true&source=vimeo_logo&owner=43688279). The record demonstrates that DPS *decided* during the closed session to make an important policy change: to re-deploy armed police officers in every high school in the Denver Public School District (“District”) for the remainder of the school year, thereby formally suspending a formal



District Policy. Accordingly, in the alternative, Plaintiffs seek an order from the Court to have the Defendant Board of Education submit the March 23 Recording for the Court's *in camera* review, and, following that review, to order the Board of Education to make it available to Plaintiffs for their inspection and copying, subject to redactions the Court may deem appropriate — if any.

4. The News Media Coalition consists of several news organizations in Colorado that routinely provide their readers and viewers with newsworthy information about their community, including the conduct of the governing body of the Denver Public School District.

5. Members of the News Media Coalition reported on DPS's March 23 public board meeting and improperly closed five-hour session. *See* The Denver Post, *DPS board votes unanimously to put armed police back in Denver high schools for rest of year* (March 23, 2023) <https://perma.cc/JVK6-AN2C>; Colorado Politics, *DPS executive session was 'clear-cut violation,' Denver attorney says* (April 5, 2023) <https://perma.cc/QP6K-66LS>; Colorado Newsline, *East High School shooting prompts Denver schools to reinstate armed officers* (March 23, 2023) <https://perma.cc/DJE8-KN2U>; KDVR Fox 31, *Board rules to allow officers in all Denver Public Schools high schools* (March 23, 2023) <https://perma.cc/ARM7-SLHM>; Chalkbeat Colorado, *Denver board lifts ban on police on campus* (March 23, 2023) <https://perma.cc/2TSQ-9V8H>; 9News KUSA, *Denver school board suspends policy, will allow armed officers in schools* (March 23, 2023) <https://perma.cc/WC99-J3VB>; Quentin Young (@qpyoungnews) Twitter (March 23, 2023 @3:51pm), <https://twitter.com/qpyoungnews/status/1639022128447246336?s=20> (calling out the improper executive session); The Denver Gazette, *DPS school board minutes of March 23 executive session raises questions, eyebrow* (April 20, 2023) <https://perma.cc/WD74-ZHKA>.

6. *No public discussion*, whatsoever, preceded the Board's historic reversal of its formal Official Policy of preventing armed "School Resource Officers" inside the District's high schools. None. It is clear and irrefutable that the Board had already decided, behind closed doors, to adopt the position or resolution in the Memorandum that they then unanimously voted to approve in public without discussion—a mere "rubber stamping" of their earlier decision.

7. By taking formal action or adopting a position (in the form of deciding to approve a Memorandum, suspending its previous Board Policy), and announcing a new policy without any public input or public discussion by the Board, Defendant Board of Education violated the COML. *See* § 24-6-402 (4), C.R.S. The discussion leading to the Board's decision to approve the Memorandum, and the decision to suspend its previous school security Policy, are of substantial public interest, and unquestionably the "public's business," which should have occurred in a public meeting.

8. Plaintiffs respectfully request that at the conclusion of the Show Cause Hearing to be convened "at the earliest practical time," the Court enter an Order directing Defendant Wheeler to release to the Plaintiffs the March 23 Recording in its entirety for their inspection and copying.

9. Assuming *arguendo* that, upon an *in camera* review of the March 23 Recording, the Court determines that certain portions did *not* involve any discussion pertaining to the unlawful decision made behind closed doors, Plaintiffs request that such portions of the recording be redacted, and the remainder released to Plaintiffs.

10. The Court also should award Plaintiffs reasonable costs and attorney's fees associated with litigating this matter, which are mandatory under the COML and the CORA. See § 24-6-402(9), C.R.S.; *Van Alstyne v. Housing Auth. City of Pueblo*, 985 P.2d 97, 99-100 (Colo. App. 1999).

### **Jurisdiction & Parties**

11. This Court has jurisdiction over the claims herein under § 24-72-204(5.5) of CORA and § 24-6-402(2)(d.5)(I)(C) of the COML. On information and belief, the March 23 closed session took place in this judicial district, and the March 23 Recording is a record in the possession, custody and/or control of the Defendant, the custodian of records for DPS, which is also located in this judicial district.

12. The Denver Post is a Pulitzer Prize winning daily newspaper with both print and online publications. Its principal place of business is at 5990 Washington St., Denver, CO 80216. The Denver Post is owned by MediaNews Group.

13. KDVR Fox 31 is a Fox-affiliated FCC-licensed television station in Denver, Colorado, with its principal place of business at 100 E. Speer Blvd, Denver, CO 80203. The station is owned by Nexstar Media Group, Inc., as part of a duopoly with CW affiliate KWGN-TV.

14. KUSA 9News is an NBC affiliated, FCC-licensed television station with its principal place of business at 500 E. Speer Blvd., Denver, CO 80203. KUSA 9News is owned by Tegna, Inc.

15. The Denver Gazette and Colorado Politics are located at 555 17<sup>th</sup> Street, Suite 425, Denver CO 80202. These two news publications are owned by Clarity Media Group LLC, a wholly owned subsidiary of the Anschutz Corporation.

16. The States Newsroom d/b/a Colorado Newslines is an online news operation and a non-profit 501(c)(3) entity. Its principal place of business is 800 Grant St. Unit 310, Denver, CO 80203.

17. Chalkbeat Colorado is a news organization devoted to covering education in the state, with its principal place of business at 2101 Arapahoe St., Denver, CO 80205. Chalkbeat is a non-profit 501(c)(3) entity operated by Civic News Company.

18. Defendant Wheeler is sued in her official capacity as the custodian of records for DPS. The March 23 Recording records are made, maintained, or kept by DPS. *See* § 24-72-202, C.R.S.

19. Defendant the Board of Education for Denver Public Schools is sued in its official capacity as the governing body of the Denver Public School District, also defined as a “local public body” under the COML.

### Facts

#### **A. DPS’s Violations of the COML**

20. As noted, *supra*, and per the Meeting Agenda, the Board met on March 23, 2023 for a Board of Education Special Meeting and Executive Session. A true and correct copy of the posted Agenda for that meeting is attached hereto as **Exhibit A** and incorporated by reference herein (hereinafter the “March 23 Agenda”).

21. Shortly after the public portion of the meeting was called to order, the Board moved to enter into executive session to discuss:

...[M]atters required to be kept confidential by federal or state law or rules and regulations as authorized by C.R.S. § 24-6-402(4)(c), Discussion of specialized details of security arrangements or investigations as authorized by C.R.S. § 24-6-402(4)(d), and Discussion of individual students where public disclosure would adversely affect that person or persons involved as authorized by C.R.S. § 24-6-402(4) (h).

A true and correct copy of the March 23, 2023 Meeting Minutes is attached hereto as **Exhibit B** and incorporated by reference herein (the “March 23 Public Meeting Minutes”).

22. The Board entered into a closed door meeting (not open to the public) at 10:20 a.m. which concluded at 2:53p.m. *Id.*

23. At 3:08 p.m. the Board reconvened the public portion of its special meeting. *Id.*

24. When the public meeting resumed, Board President Xóchitl Gaytán entered a memorandum dated March 23, 2023 into the record as item 3.01 Board Discussion and Update on School, Student, and Adult Safety. *Id.* A true and correct copy of the March 23, 2023 Memorandum is attached hereto as **Exhibit C** and incorporated by reference herein (herein the “March 23 Memorandum” or “Memorandum”).

25. The memorandum directed that armed police officers would be deployed at all high schools in the District for the remainder of the school year. The Denver Post, *DPS board votes unanimously to put armed police back in Denver high schools for rest of year* (March 23,

2023) <https://perma.cc/Q6QA-49D6>; **Exhibit C**. The Memorandum detailed the Board’s decision to “hereby *suspend* board policy EL-10.10 [or Executive Limitation Policy 10.10 [(or “EL 10.10 policy”)] and its Proclamation Regarding Gun Violence Prevention] through June 30, 2023” and “direct[ed]” Superintendent Dr. Alex Marrero to “develop a systemic Long-term Safety Operational Plan in consideration of EL-11 and in accordance with Safety Ends Policy 4.” *Id.* (emphasis added).

26. The Memorandum also “direct[ed] Superintendent Dr. Alex Marrero to work collaboratively with Mayor Michael B. Hancock and other elected officials to offer and externally fund as many as two Armed Police Officers and as many as two additional mental health professionals (social workers, psychologists, psychotherapists, and/or therapists) to include but not limited to talk, group, family and/or art therapy at all high schools for the remainder of the 2022-23 school year.” *Id.*

27. Further, the Memorandum stated that the Board would request that the Denver Police Department ensure every armed police officer placed in a high school is “appropriately trained in the use of firearms, de-escalation techniques, policing in a school environment, knowledgeable of the school community they intend to serve, and skilled in community policing.” *Id.*

28. In the Memorandum, the Board also directed Superintendent Marrero to “report to the Board, on a monthly basis, disaggregated data concerning on-campus ticketing and arrests to ensure armed officers are only there for safety purposes.” *Id.* And the Board “direct[ed]... Superintendent [ ] Marrero to ensure teachers, staff, and principals are not using armed police officers for discipline issues that arise on campus or in classrooms.” *Id.*

29. After reading the Memorandum to the public, the Board called for a motion to approve item 3.01, which was moved and seconded by members Auon'tai Anderson and Carrie Olson, respectively. *Id.*; **Exhibit D** Board of Education Special Meeting and Executive Session, March 23, 2023: [https://vimeo.com/810960869?embedded=true&source=vimeo\\_logo&owner=43688279](https://vimeo.com/810960869?embedded=true&source=vimeo_logo&owner=43688279) at 5:14:30-5:23:00. No public discussion whatsoever occurred prior to the Board voting, unanimously, to approve the Memorandum. *See id.* at 13:46-15:34. The Board’s meeting adjourned at 3:21pm. *Id.*

30. Days later, on or around Monday, March 27, 2023, Board Vice President Auon'tai Anderson held a press conference at the Brother Jeff Cultural Center where he appeared to disclose information that had been discussed during the March 23, 2023 closed session. As a result, Xóchitl Gaytán, President of the Board, prepared a memorandum, dated March 29, 2023, which proposed to censure Vice President Anderson for violating District policy. A true and correct copy of the March 29, 2023 memorandum, which details what Anderson discussed on March 27, is attached hereto as **Exhibit E** and incorporated by reference herein (herein the “March 29 Memorandum”).

31. Vice President Anderson has explained that he divulged private communications between Denver Mayor Michael B. Hancock and Superintendent Marrero regarding “the creation of an executive order to address school safety” that occurred outside the closed session, which were then also disclosed in the March 23 closed session. *Id*; *see also* Brother Jeff’s Podcast, *East High School Shooting Press Conference with Director Auon’tai Anderson* (March 28, 2023) <https://www.listennotes.com/podcasts/brotherjeffs-podcast/east-high-school-shooting-WNG3JcgTRP6/>. The March 29 Memorandum states that “VP Anderson disclosed information discussed in the Executive Session.” **Exhibit E**; *See* KDVR Fox 31, *DPS board president: Anderson violated several board policies* (March 30, 2023) <https://perma.cc/TK76-3CC4> (Anderson is quoted as saying, “Prior to the meeting, the superintendent approached me and the board president and let me know, let us know, that this was a decision that would happen without the board’s approval. And he let me know that the mayor of Denver had an executive order ready to be drafted, and declare a public health emergency, just like he did vaccinations, to deploy school resource officers back to schools”).

32. Anderson also called for the release of the March 23 executive session recording. Auon’tai M. Anderson (@AuontaiAnderson) Twitter (March 27, 2023 @6:20pm), <https://twitter.com/AuontaiAnderson/status/1640509167600566272>.

33. Additionally, the March 29 Memorandum revealed that during the March 23 closed session external talking points were prepared by the Board to deliver to the press about their decision to reverse and suspend their Proclamation Regarding Gun Violence Prevention and its EL 10.10 policy. *Id*.

34. The March 29 Memorandum states as a reason for disciplining Vice President Anderson that he “was not seen using any of the talking points which were previously prepared for the press conference on Thursday 03/23/2023.” *Id*.

#### **B. The Plaintiffs’ Requests and Defendant’s Denials**

35. On March 23, 2023, KUSA 9News submitted a request to Defendant, under both CORA and the COML, seeking “copies of a recording of the Executive Session during 03/23/2023 School Board meeting.” A true and correct copy of that request is attached hereto as **Exhibit F** and incorporated by reference herein (the “9News Request”).

36. On March 24, 2023, The Denver Post and KDVR Fox 31 each submitted a request to Defendant, under both CORA and the COML, seeking, respectively “The meeting minutes and video and/or audio recording of the Board of Education’s executive session held during their special meeting on March 23, 2023,” and “the full recording of the Executive Session of the Denver Public Schools Board.” A true and correct copy of those requests are attached hereto as **Exhibit G, H**, respectively, and incorporated by reference herein (“The Denver Post & KDVR Requests”).

37. Subsequently, on March 27, 2023, Colorado Newsline submitted a request to Defendant under both CORA and the COML seeking the full recording of the Denver School

Board's March 23 executive session. A true and correct copy of that request is attached hereto as **Exhibit I** and incorporated by reference herein.

38. On March 29, 2023, Chalkbeat Colorado submitted a request to Defendant under CORA and the COML seeking the full recording of the Denver School Board's March 23 executive session. A true and correct copy of that request is attached hereto as **Exhibit J** and incorporated by reference herein.

39. On March 30, 2023, The Denver Gazette and Colorado Politics submitted a joint request to Defendant under CORA and the COML seeking the full recording of the Denver School Board's March 23 executive session. A true and correct copy of that request is attached hereto as **Exhibit K** and incorporated by reference herein.

40. Each of the above requests was denied by Defendant for the same reason. All of the denials stated: "Denver Public Schools is in possession of records responsive to your request that are not subject to disclosure pursuant to the Colorado Open Meetings Act, CRS 24-6-402(2)(d.5)(I)(D), or the Colorado Open Records Act, 24-72-204(1)(a)." See **Exhibits E-K**.

41. On April 17, 2023 Plaintiffs notified Defendant in writing that there is a factual basis for the expedited need for their accessing the March 23 Recording pursuant to 24-72-204(5)(a), C.R.S. A true and correct copy of that expedited request is attached hereto as **Exhibit L** and incorporated by reference herein.

#### Applicable Law

42. The policy underlying the state's Sunshine Law, or COML, is that "the formation of public policy is public business and may not be conducted in secret." § 24-6-401, C.R.S.; see also *Gumina v. City of Sterling*, 119 P.3d 527, 530 (Colo. App. 2004).

43. The COML requires that "all meetings attended by two or more members of any state board, commission, committee, or other body at which any public business is discussed or at which any formal action may be taken are declared public meetings open to the public at all times." § 24-6-402(2)(a), C.R.S.

44. 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. The minutes of a meeting during which an executive session authorized under subsection (4) of this section is held shall reflect the topic of the discussion at the executive session. § 24-6-402(d)(II), C.R.S.

45. The CORA defines meeting minutes as public records. § 24-6-402(2)(d)(I) and (II).

46. Under the CORA, a public record “means and includes *all writings* made, maintained, or kept by the state, any agency, institution, a nonprofit corporation incorporated pursuant to section 23-5-121(2), C.R.S., or political subdivision of the state, or that are described in section 29-1-902, C.R.S., and held by any local-government-financed entity for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.” § 24-72-202(6)(a)(I), C.R.S. (emphasis added).

47. “All writings” include “recordings.” § 24-72-202(7), C.R.S.

48. Under the COML, an executive session may be held only at a regular or special meeting, and only after the announcement to the public of the *particular topic* that will be discussed in the executive session and, thereafter, the affirmative vote of two-thirds of the quorum present of the local public body. §§ 24-6-402 (4), C.R.S.

49. The COML authorizes a local public body to conduct an executive session for purposes of receiving legal advice on *specific* legal questions.<sup>1</sup> However, the mere presence or participation of an attorney at an executive session does not automatically make communications during that executive session attorney-client privileged or exempt them from disclosure. See § § 24-6-402(4)(b), C.R.S.

50. Moreover, the COML *expressly* prohibits a local body from adopting “*any* proposed *policy, position*, resolution, rule, regulation, *or* formal action” during an executive session. See § 24-6-402 (4), C.R.S. (emphasis added).

51. Under the COML, a public body may conduct an “executive session,” *i.e.*, a closed-door meeting, *only* if it “strictly complies” with all of the requirements for announcing and conducting such a session. See §§ 24-6-402(3)(a) & (4), C.R.S.; see also *Gumina*, 119 P.3d at 532. If an executive session is not convened properly in accordance with these requirements, *then the meeting and the recorded minutes are open to the public*. *Id.* at 530 (City council’s failure to “strictly comply” with the requirements of the statute rendered its meeting open and the terminated city employee had the right to inspect the minutes); *Guy v. Whitsitt*, 469 P.3d 546 (Colo. App. 2020); *Zubeck v. El Paso County Ret. Plan*, 961 P.2d 597, 600 (Colo. App. 1998).

52. Upon filing an Application for judicial review of a records custodian’s decision to withhold access to one or more public records, the Court is required to set a hearing “at the

---

<sup>1</sup> In *Guy v. Whitsitt*, the Court of Appeals held that a town council’s failure to identify with “as much detail as possible” and “to describe *at least* the ‘subject matter’” of the legal advice to be discussed in an executive session violated the COML. 469 P.3d 546, 549, 553 (Colo. App. 2020) (“The Town Council’s failure to provide any information beyond the statutory citation authorizing an executive session for ‘legal advice’ did not comply with the statutory requirement of identifying ‘a particular matter in as much detail as possible without compromising the purpose for which an executive session was called.’”). Because those purported “executive sessions” were unlawfully closed public meetings, the recordings thereof were public records. *Id.*

earliest practical time” at which the records custodian must show cause why she should not make the particular public record(s) at issue available to Applicant(s). § 24-72-204(5), C.R.S. If, at the conclusion of that Show Cause hearing, the custodian has not established either (a) that the record at issue is not a public record, or (b) that an exemption from disclosure of the public record makes her withholding decision “proper,” the Court shall order the custodian to disclose the public record(s) to the Applicant(s).

53. Even if an executive session has been properly announced and voted upon in a public meeting, “[u]pon a finding that sufficient grounds exist to support a reasonable belief that the state public body or local public body engaged in substantial discussion of any matters not enumerated in section 24-6-402(3) or (4) or that the state public body or local public body adopted a proposed policy, position, resolution, rule, regulation, or formal action in the executive session in contravention of section 24-6-402(3)(a) or (4), the court shall conduct an *in camera* review of the record of the executive session to determine whether the state public body or local public body engaged in substantial discussion of any matters not enumerated in section 24-6-402(3) or (4) or adopted a proposed policy, position, resolution, rule, regulation, or formal action in the executive session. . . .” § 24-72-204(5.5)(b)(1), C.R.S.; § 24-6-402(2)(d.5)(I)(C), C.R.S.

54. “Any person seeking access to the record of an executive session meeting of . . . a local public body recorded pursuant to section § 24-6-402(2)(d.5) shall, upon application to the district court for the district wherein the records are found, show grounds sufficient to support a reasonable belief that the . . . local public body engaged in substantial discussion of any matters not enumerated in section § 24-6-402. . . (4) or that the . . . local public body adopted a proposed policy, position, resolution, rule, regulation, or formal action in the executive session. . . .” § 24-72-204(5.5)(a), C.R.S.

55. A prevailing “applicant” or plaintiff under the COML or the CORA is entitled, as of right, to recover all reasonable attorney’s fees and costs incurred in litigating the matter. *See* § 24-6-402(9), C.R.S.; § 24-72-204(5), C.R.S.; *Van Alstyne*, 985 P.2d at 99-100.

**First Claim for Relief --Against Defendant Wheeler**

Request for Access to Recording of a Public Meeting  
That Was Unlawfully Closed to the Public  
(§ 24-72-204(5), C.R.S.)

56. Paragraphs 1 through 55 above are incorporated herein by reference and made a part hereof with the same force and effect as if fully set forth herein.

57. The DPS Board did not properly announce the closed-door meeting of March 23, 2023, which renders it an unlawfully closed public meeting, and the recording thereof a public record.

58. Under the COML, an executive session may be held only at a regular or special meeting, and only after the announcement to the public of the *particular topic* for discussion in



the executive session and the affirmative vote of two-thirds of the quorum present of the local public body. §§ 24-6-402 (4), C.R.S. (emphasis added).

59. Here, before the Board convened behind closed doors to discuss public business there was no announcement or notice that the particular topic to be discussed would be DPS's Safety Ends Policy nor its decision to suspend and end/terminate the policy by reinstating police officers into the district high schools. **Exhibit A, B, D**. Instead, the Board merely announced that it would discuss "specialized details of security arrangements or investigations as a result of the incident that occurred on March 22, 2023." **Exhibit B**.

60. The Board also did not *announce* the particular topic of discussion regarding their conversation with the Mayor's Office to consider issuing an Executive Order instead of reversing its EL 10.10 policy. *Id.*

61. Here, the Board's closed door discussion of the Mayor's Office communications and the proposed Executive Order were neither noticed on the March 23 Agenda nor announced publicly as a particular topic for discussion. *Id.*

62. Thus, at the conclusion of the mandatory Show Cause hearing, the Plaintiffs are entitled to an Order from the Court directing the Defendant to release the March 23 Recording to them because it is a public record, and Defendant did not cite any provision of CORA (other than for recordings of lawfully convened executive sessions) to withhold it.

**Second Claim for Relief – Against Defendant Board of Education**

(In the Alternative) Request for *In Camera* Review & Production  
(§ 24-72-204(5.5)(b)(1), C.R.S.; § 24-6-402(2)(d.5)(I)(C), C.R.S.)

63. Paragraphs 1 through 62 above are incorporated herein by reference and made a part hereof with the same force and effect as if fully set forth herein.

64. Plaintiffs are informed and believe, based on the recording of the Board's public meeting on March 23, the March 23 Memorandum, news reporting, and the March 29 Memorandum, that DPS unlawfully adopted a position or resolution during the March 23 executive session, namely, to draft and approve the policy position set forth in the March 23 Memorandum. **Exhibit D** at 5:11:34.

65. Plaintiffs respectfully request that the Court review the March 23 Recording *in camera* and thereafter issue an Order disclosing it to Plaintiffs. If, following an *in camera* review, the Court finds that portions of March 23 Recording should not be disclosed, Plaintiffs requests that those portions be redacted, and the remainder be disclosed.

**Prayer for Relief**

WHEREFORE, pursuant to § 24-72-204(5.5), C.R.S. and § 24-72-204(5), C.R.S. Plaintiffs pray that:

- a. The Court enter an Order to Show Cause, pursuant to § 24-72-204(5), C.R.S., directing the Defendant to appear “at the earliest practical time,” and show cause why she should not make the public record at issue available to the Plaintiffs;
- b. At the conclusion of that hearing, enter an Order directing Defendant to make the March 23 Recording, in its entirety, available to the Plaintiffs or, alternatively,
- c. If the Court finds it necessary, conduct an *in camera* review of the March 23 Recording and, thereafter, enter an Order directing Defendant to release the entirety of the March 23 Recording or, if the Court determines that a portion or portions of the March 23 Recording should not properly be disclosed, enter an Order directing the Defendant to redact such portion(s), and release the remainder of the recording to the Plaintiffs;
- d. The Court enter an Order awarding Plaintiffs costs and reasonable attorney’s fees associated with the preparation, initiation, and maintenance of this action, as mandated by § 24-72-204(5), C.R.S., and § 24-6-402(9) C.R.S.; and
- e. The Court award such other and further relief as the Court deems proper and just.

Respectfully submitted this 9<sup>th</sup> day of May 2023.

By /s/Rachael Johnson

Rachael Johnson  
Reporters Committee for Freedom of the Press  
Steven D. Zansberg  
The Law Office of Steven D. Zansberg, L.L.C.  
*Attorneys for Plaintiffs*  
*News Media Coalition*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 9<sup>th</sup> day of May 2023, a true and correct copy of the foregoing **APPLICATION FOR ACCESS TO PUBLIC RECORD RECORDING AND MEETING MINUTES OR, ALTERNATIVELY, FOR IN CAMERA REVIEW AND ORDER OF PRODUCTION UNDER § 24-72-204 (5.5), C.R.S.** 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:

Jon P. Fero, Esq.  
Brent Case, Esq.  
Semple, Farrington, Everall & Case, P.C.  
1120 Lincoln Street, Suite 1308  
Denver, Colorado 80203  
Phone: (303)595-0941  
[jfero@semplelaw.com](mailto:jfero@semplelaw.com)  
[bcase@semplelaw.com](mailto:bcase@semplelaw.com)

Aaron Thompson  
General Counsel  
Denver Public Schools  
1860 Lincoln St. Denver, CO 80203, Ste.1230  
P. 720-423-3913  
[aaron\\_thompson@dpsk12.net](mailto:aaron_thompson@dpsk12.net)

/s/Rachael Johnson  
Rachael Johnson, Esq.