DISTRICT COURT, HUERFANO COUNTY, COLORADO Court Address: 200 W. 5th St, Suite 141 Walsenburg, CO 81089 **Plaintiff:** **THE WORLD JOURNAL**, v. **Defendant:** **RICHARD COLANDER**, in his official capacity as deputy city clerk and records custodian. **Attorney for Plaintiff:** 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	**COURT USE ONLY** Case Number: 2023CV030028 Division: B

PLAINTIFF'S HEARING BRIEF

Plaintiff *The World Journal*, by and through undersigned counsel, and pursuant to the Court's August 29, 2023 order, submits this brief to apprise the Court of the factual and legal issues likely to arise during the hearing set for **October 18, 2023** at **9:00am**.

INTRODUCTION

This case concerns a request under the Colorado Open Meetings Law ("COML"), §§ 24-6-401 *et seq*., C.R.S., by Plaintiff Mark Craddock ("Craddock"), a reporter at *The World Journal*,

for access to the audio and video recording and meeting minutes[1] of a January 17, 2023 closed meeting of the Walsenburg City Council ("the City" or "the Council"). It is apparent that the Council's January 17 closed meeting concerned a topic of fundamental importance to the citizens of Huerfano County: the City's water infrastructure. Based on his reporting and coverage of the Walsenburg City Council, and documents obtained at city council meetings,[2] Plaintiff has identified bubbling tensions over mismanagement of the City's failing water infrastructure and acrimony over whether to utilize David Harriman, the former city water manager, as a resource to address these critical issues because of his institutional knowledge of the City's water system in spite of hard feelings regarding his 2020 resignation.[3] Any Council discussion of the City's water infrastructure and improvement efforts is of great public interest and, importantly, does not fall under ***any*** COML exception permitting a local body to convene a closed executive session. Accordingly, for the following reasons, Plaintiff respectfully requests that this Court order that the recording of the Council's January 17, 2023 executive session (hereinafter the "January 17 Recording") be made available for public inspection because the Council failed to comply with

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[1] Plaintiff also seeks access to any meeting minutes of the January 17, 2023 closed meeting (should they exist) on the ground that they are public records under the Colorado Open Records Act ("CORA"), §§ 24-72-201 *et seq*., C.R.S.

[2] *See, e.g.*, E.E. Mullens, *Long time Walsenburg staffer, DPW Director David Harriman resigns*, The World Journal (Aug. 27, 2020), https://worldjournalnewspaper.com/long-time-walsenburg-staffer-dpw-director-david-harriman-resigns/. This Court may take judicial notice of news articles or the contents of a webpage on a specific date and time because they are not subject to reasonable dispute. Colo. R. Evid. 201(b). Judicial notice may be taken at any stage of a proceeding. *See* Colo. R. Evid. 201(f).

[3] Harriman resigned from the City's Department of Public Works in 2020 after 25 years stating, "it is time to part ways due to conflicting views with some members of the City Council." *See* Compl. Ex. J (Harriman's Resignation Letter).

the COML and, therefore, the recording of that putative executive session must be open to the public.

First, the Council failed to properly notice the executive session in violation of the COML. An executive session may be held only at a regular or special meeting, and only after an announcement to the public of the "particular matter to be discussed" in executive session. *See* § 24-6-402(3)(a) & (4), C.R.S. The topic for discussion must be described in "as much detail as possible," § 24-6-402(4), C.R.S., and "at least" include a description of "the subject matter," *Guy v. Whitsitt*, 469 P.3d 546, 553 (Colo. App. 2020). Here, in noticing the topic of the January 17 executive session in its Agenda, the Council merely recited statutory language related to topics that may be discussed in closed meetings under the COML, but did not announce the "particular matter to be discussed," as it must under the law. *See* Compl. Ex. I. This violation, alone, is sufficient for the Court to order the Council to release the January 17 Recording pursuant to § 24-6-402(3)(a) & (4), C.R.S. *Gumina v. City of Sterling*, 119 P.3d 527, 530, 531–32 (Colo. App. 2004) (a public body may conduct an "executive session," only if it "strictly [] compl[ies]" with the requirements for announcing and conducting such a session, and "[i]f an executive session is not convened properly [in accordance with these requirements], then *the meeting and the recorded minutes are open to the public*" (emphasis added)); *see also Zubeck v. El Paso Cnty. Ret. Plan*, 961 P.2d 597, 600–01 (Colo. App. 1998).

Second, the COML itemizes matters that are permissible for a public body to address in a closed meeting. § 24-6-402(4), C.R.S. It is otherwise illegal for a public body to discuss the public's business in private unless a COML exemption applies; therefore, any non-exempt topics addressed in executive session are subject to public inspection. § 24-6-402(2)(b), C.R.S. Here, the Council claims that it entered into an executive session to discuss "negotiations" pursuant to

§ 24-6-402(4)(e), C.R.S. Compl. Ex. I. Yet, just minutes after the illegal executive session was convened, two Councilmembers left the closed meeting and later publicly objected to the purpose of the putative executive session, stating that the Council was not authorized to meet in private on the matters discussed. Accordingly, in addition to improperly noticing the January 17 closed meeting, the accounts of two Councilmembers suggest that the Council engaged in substantial discussion of matters not enumerated in § 24-6-402(4), C.R.S. in violation of the COML, providing an additional ground for the Court to order Defendant to release the January 17 Recording.

Third, based on the foregoing, if the Court does not order immediate release of the January 17 Recording it must review the recording *in camera* because sufficient grounds exist to support a reasonable belief under § 24-72-204(5.5), C.R.S. that the Council engaged in substantial discussion of non-exempt matters not enumerated in § 24-6-402(4), C.R.S. in violation of the COML. Upon *in camera* review, if the Court finds that the topics addressed at the January 17 closed session violated the COML, the Court should order Defendant to release the January 17 Recording.

Fourth, Plaintiff seeks access to an attachment, the Harriman proposal, that was omitted from a public record produced to Plaintiff in response to a CORA request. Defendant erroneously denied access to the email attachment on the asserted ground that the document was provided in conjunction with an executive session pursuant § 24-6-402(4)(e)(I), C.R.S. Even though, the document was attached to the January 12, 2023 email chain. Whether the document was later circulated to the Council in executive session does not exempt it from release under CORA where, as here, the document was attached to email correspondence among

Councilmembers several days before the closed meeting took place. Accordingly, the Court should order Defendant to release the Harriman proposal to Plaintiff.

Lastly, the Court should reject Defendant's additional bases to deny Plaintiff access to the January 17 Recording. First, Defendant's efforts to discredit the factual allegations set forth in Plaintiff's Complaint are unfounded. *See, e.g.*, Am. Answer at 16 (challenging Plaintiff's citation to "newspaper articles" and "unverified statements from two City Council members"). Indeed, the statements that Defendant challenges cannot be disputed and can be verified in the official records of the January 17, 2023 public Council meeting. *See* Compl. Ex. A (City of Walsenburg, Regular Meeting of City Council (Jan. 17, 2023), https://cityofwalsenburg.ompnetwork.org/sessions/260417/january-17-2023-regular-meeting-of-city-council). Second, Defendant's assertion that Plaintiff cannot obtain access to the January 17 Recording because it contains "privileged communication[s]" of an executive session is baseless and misleading. Am. Answer at 16. There is simply no legal foundation for the claim that executive session discussions are *per se* "privileged" under the COML. Defendant offers no statutory or case law to support its bald allegation, which should be rejected by the Court. And, finally, Defendant's assertion that the Council's improper executive session was later "cured" and, therefore, the Court may decline to order release of the January 17 Recording is likewise unfounded. The COML does not recognize a "cure" in the present case. And, to the extent courts have identified such a remedy, they have done so only upon a showing that the public body made a final decision or took formal action in executive session. Defendant cannot make that showing here because the final decision with respect to Mr. Harriman's contract was made at a future meeting on August 18, 2023; not at the January 17 closed meeting.

In sum, Defendant's attempt to prohibit disclosure of information that is "public business" contradicts the intent of the state public meetings laws and violates the COML. §24-6-401, C.R.S. Based on the pleadings, briefing, and any evidence and argument to be presented at the forthcoming hearing, the Court should order Defendant to immediately release the January 17 Recording.

BACKGROUND

On January 17, 2023 the Walsenburg City Council held a Regular Meeting. *See* Compl. Ex. A (City of Walsenburg, Regular Meeting of City Council (Jan. 17, 2023), https://cityofwalsenburg.ompnetwork.org/sessions/260417/january-17-2023-regular-meeting-of-city-council). During that meeting, the Council discussed convening an executive session to discuss multiple agenda items.

The Agenda posted on the Council's website noticed the executive session as follows:

> **M** **EXECUTIVE SESSION FOR THE PURPOSE OF:**
>
> a. *A conference with the City Attorney for the purpose of receiving legal advice on specific legal questions under C.R.S. Section 24-6-402(4)(b)*
>
> b. *For discussion of a personnel matter under C.R.S. Section 24-6-402(4)(f) and not involving: any specific employees who have requested discussion of the matter in open session; any member of the City Council or any elected official; the appointment of any person to fill an office of the City Council or an elected official; or personnel policies that do not require the discussion of matters personal to particular employees*
>
> c. *For the purpose of determining positions relative to matters that may be subject to negotiations, developing strategy for negotiations, under C.R.S. Section 24-6-402(4)(e)*
>
> **N** **ACTION(S) SUBSEQUENT TO EXECUTIVE SESSION**

Compl. Ex. I. Notably, none of the executive session agenda items mentioned Harriman, his proposal, or the City's water infrastructure concerns. *See id.* Instead, the executive session

topics identified in the Council's agenda merely cite and quote from COML provisions exempting certain matters from public meetings.

The Council voted to retreat into an executive session despite some Councilmembers questioning whether it had "any right" to go into executive session on the proposed topic. *See* Compl. Ex. A at 16:25. Plaintiff, who was also present for the January 17, 2023 public meeting, objected to the Council meeting in executive session to discuss Agenda item M(c), *id*. at 57:07, on the ground that there was "no exemption under 24-6-402(4)" that permitted the closed meeting, *id*. at 57:37.

After meeting in a closed session, the Council returned to the public meeting and several Councilmembers questioned the legality of the closed meeting. *Id*. at 3:33:00. The Mayor Pro Tem Rick Jennings stated that "if any person who participated in the executive session feels that any substantial discussion of any matter not included in the motion to go into executive session occurred during executive session or that any improper action occurred during the executive session in violation of the Colorado Open Meetings Law, I would ask you to state your concerns for the record." *Id*. at 3:33:29. Councilmember Greg Daniels responded, "I've got my hand up, Mayor Pro Tem. I want the record to state that I left the open meetings first discussion, I did not feel it fell under the . . . executive session rules and regulations." *Id*. at 3:33:54. Councilmember Carmen Lara further responded: "I left the meeting because I felt that the meeting was outside the scope of our authority. I did object." *Id*. at 3:34:15. Mayor Charles Bryant said, "given that we have a number of Councilmembers that feel like we worked outside the scope of the executive session, would Council prefer to have the audio recording be made public?" *Id*. at 3:34:40. Some Councilmembers responded to Mayor Bryant saying "no" and the recording was not released. *Id*. at 3:34:55.

Thereafter, on January 23, 2023, Plaintiff submitted a CORA request to Defendant seeking "Electronic recordings of the Walsenburg City Council 1/17/23 improper executive session regarding David Harriman and possible contract to advise the city." Compl. Ex. B. Defendant denied the request on January 26, 2023, stating, in part:

> The City cannot release the requested executive session recording pursuant to C.R.S. § 24-6-402(2)(d.5)(II)(d), because executive session recordings are not subject to public inspection. [The] City Council properly convened and conducted an executive session under C.R.S. § 24-6-402(4)(e) for purposes of determining positions relative to matters that may be subject to negotiations, developing strategy for negotiations, and instructing negotiators in regard to a proposal received by Mr. Harriman for a contract for water department related services.

Compl. Ex. C.

On February 10, 2023, Plaintiff submitted a CORA request to Defendant for an email Mayor Bryant referenced at the January 17 public meeting. In that request, Mr. Craddock sought:

> Any e-mails and subsequent responses from Mayor Charles Bryant to council members regarding possible negotiations with David Harriman regarding consultation on water infrastructure issues. Bryant alluded to the e-mail repeatedly during the Jan. 17 city council meeting so, presumably the e-mail would have been sent that day (Jan. 17) or the previous day, Monday, Jan. 16, 2023.

Compl. Ex. D. On the same day that Plaintiff submitted his February 10 CORA request, Mayor Bryant provided the email to him. Compl. Ex. E. The February 10 CORA request also referred to an attachment that was not included in the email Mayor Bryant transmitted to Plaintiff. Defendant denied Plaintiff's request on February 14, 2023, stating:

> Pursuant to C.R.S. § 24-72-204(1)(a), I am required to deny your request for inspection of said records. More specifically, C.R.S. § 24-72-204(1)(a) authorizes denial of the inspection of records if "[s]uch inspection would be contrary to any state statute." Here, the City cannot release the requested documents because they were

> provided to the City Council in conjunction with an executive session pursuant to C.R.S. § 24-6-402(4)(e)(I) . . . .

Compl. Ex. F.

The February 10 email Mayor Bryant transmitted to Plaintiff included a January 12, 2023 email chain from Mayor Bryant to City Councilmembers with the subject header "Contract Proposal." The email stated, in part:

> It is my intent to have this proposal as a topic during our executive session on Tuesday ***with a potential action item to follow***. I believe Mr. Harriman will be available to attend the executive session if the board desires. In reviewing the contract, I feel that there are several areas that will require legal review and further negotiation. With that being said, I feel a full approval of the contract as-is next Tuesday would be premature. ***I view it more as an opportunity to work out any issues\concerns that the board may identify in the proposal*** and if any action be taken it will be to advance the proposal to the formal draft-contract phase with the accompanying legal review by our new attorney(s). We of course will then have to approve of a finalized contract should the board desire.
>
> **Please consider the forwarded proposal as an executive session item enclosure and handle appropriately.** This proposal and its contents are not public information during this phase of negotiations. I feel that our executive session conversation regarding this issue will be the most productive if we initially have a discussion amongst only ourselves (elected officials) prior to discussing the proposal with the administrator. . . .
>
> We will also be discussing the topic of our new attorney during the executive session with a potential action item to follow.

Compl. Ex. E. (first and second emphases added; third emphasis in original).

On March 7, 2023, Plaintiff requested that the Council reconsider its denial of access to the January 17 Recording and provided notice of intent to file an application under § 24-72-204(5) & (5.5), C.R.S., Compl. Ex. G; however, the request was again rejected by the City on March 10, 2023, stating:

> [T]he City cannot release the requested executive session recording pursuant to C.R.S. § 24-6-402(2)(d.5)(II)(d), because executive session recordings are not subject to public inspection. City Council properly convened and conducted an executive session under C.R.S. § 24-6-402(4)(e) for purposes of determining positions relative to matters that may be subject to negotiations, developing strategy for negotiations, and instructing negotiators in regard to a proposal received by Mr. Harriman for a contract for water department related services.

Compl. Ex. H.

On June 1, 2023, Plaintiff notified Defendant in writing that it intended to file a complaint regarding access to the January 17 Recording pursuant to § 24-72-204(5)(a), C.R.S. Compl. Ex. K. The parties met and conferred via Zoom on June 13, 2023, but did not resolve the matter. Plaintiff filed its Complaint on June 22, 2023.

LEGAL STANDARD

The policy underlying the 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*, 119 P.3d at 530. "The intent of the Open Meetings Law is that citizens be given the opportunity to obtain information about and to participate in the legislative decision-making process." *Gumina*, 119 P.3d at 531 (quoting *Cole v. State*, 673 P.2d 345, 349 (Colo. 1983)). To that effect, the COML requires that "[a]ll meetings of a quorum or three or more members of any local public body . . . at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times." § 24-6-402(2)(b), C.R.S. Consistent with this policy favoring disclosure, minutes of any meeting of a local public body at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or could occur shall be taken and promptly recorded, and such records shall be open to

public inspection. § 24-6-402(2)(d)(II), C.R.S. If that local body is to meet in executive session, the meeting minutes must reflect the topic of the discussion at the executive session. *Id.*

When asked to review a challenge to the secrecy carveouts of an executive session, this Court is guided by procedure outlined in § 24-72-204(5.5)(a)–(b), C.R.S. and § 24-6-402(2)(d.5)(II)(C), C.R.S. 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 entire membership of the state public body or two-thirds of the quorum present at the local public body. § 24-6-402(3)(a) & (4), C.R.S. The COML prohibits a local body from meeting in executive session unless it is for one of the enumerated purposes set forth under § 24-6-402(4), C.R.S. Section 24-6-402(4)(e)(I), C.R.S., the provision Defendant relies upon in this case to claim that its January 17 closed session was permissible under the COML, permits a local body to meet in private for the limited purposes of "[d]etermining positions relative to matters that may be subject to negotiations; developing strategy for negotiations; and instructing negotiators."

Moreover, under the COML, a public body may conduct an "executive session," *i.e.*, a closed-door meeting, only if it "strictly [] compl[ies]" with the requirements for announcing and noticing such a session. *Gumina*, 119 P.3d at 531–32; § 24-6-402(3) & (4), C.R.S. If an executive session is not convened properly in accordance with the legal requirements of the COML, then the meeting and the recorded minutes are open to the public. *Gumina*, 119 P.3d at 530 (city council's failure to "strictly comply" with the requirements of the COML rendered its meeting open and requester had the right to inspect the minutes); *Zubeck*, 961 P.2d at 600. An executive session is properly convened and noticed if the "particular" topic of the executive

session is announced in "as much detail as possible" without compromising the purpose for which an executive session was authorized. § 24-6-402(4), C.R.S.

Even if an executive session has been properly announced and voted upon in a public meeting,

> [u]pon 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.

A prevailing "applicant" or plaintiff under the COML or the CORA is entitled to recover all reasonable attorney's fees and costs incurred in litigating the matter. *See* § 24-6-402(9)(b), C.R.S.; § 24-72-204(5)(b), C.R.S.; *Van Alstyne v. Hous. Auth. of Pueblo*, 985 P.2d 97, 99–100 (Colo. App. 1999).

ARGUMENT

I. The Walsenburg City Council failed to properly notice the closed session of January 17, 2023, rendering the meeting unlawful and the recording of that meeting open for public inspection.

Sufficient grounds demonstrate that the City Council failed to properly notice its January 17, 2023 closed session. It is well-established under the COML that the topic of an executive session must be properly announced by "identif[ying] [] the *particular matter* to be discussed in *as much detail as possible*," including the "specific citation" to the subsection authorizing the body to meet, and two-thirds of the quorum must be present. § 24-6-402(4), C.R.S. (emphasis

added). Further, any meetings at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs, or at which a majority or quorum of the body is in attendance, can only be held after full and timely notice to the public. § 24-6-402(2)(c)(I), C.R.S. Thus, full and timely notice of the meeting must be posted in a designated public place within the boundaries of the local public body no less than twenty-four hours prior to the holding of the meeting. *Id*. Here, the Council's January 17, 2023 meeting agenda parroted the language of the COML and stated only that the executive session would be used for "determining positions relative to matters that may be subject to negotiations, developing strategy for negotiations, under C.R.S. Section 24-6-402(4)(e)." Compl. Ex. I. The agenda thus failed to mention the actual matter to be discussed—specifically, the Harriman contract proposal, and more generally, the City's water infrastructure planning. It also failed to provide notice to the public of the particular topic of the executive session at least twenty-four hours in advance of the meeting. In this manner, the City failed to comply with its obligation, under the COML, to timely announce to the public the particular topic that will be discussed in the executive session, rendering the meeting and the recorded minutes open to the public. § 24-6-402(4), C.R.S. § 24-6-402(2)(b), C.R.S.

In addition to demonstrating, on its face, that the Council's January 17, 2023 meeting agenda failed to provide statutorily sufficient notice of the specific topic to be discussed in closed session, Plaintiff has come forward with sufficient evidence demonstrating that the agenda failed to specify the topic that was actually discussed in closed session—the Harriman proposal. The February 10, 2023 email from Mayor Bryant to Plaintiff transmitting his January 12, 2023 email chain makes this clear:

> Good evening! In the forwarded message you will find my email that I sent to council ***prior to the [January 17, 2023] meeting where***

> ***we discussed the Harriman proposal in executive session***. It is my understanding that you had submitted a CORA request concerning it.

See Compl. Ex. E (emphasis added).

Mayor Bryant's January 12, 2023 email, which was sent to all Councilmembers five days before the January 17, 2023 public meeting, further confirms the Council's intent to discuss the Harriman proposal in the closed meeting:

> Good morning, in the forwarded message you will find Mr. Harriman's proposal for the services that he is willing to offer. His ask is slightly inflated compared to what was relayed to us in last Friday's work session. ***It is my intent to have this proposal as a topic during our executive session on Tuesday with a potential action item to follow***. I believe Mr. Harriman will be available to attend the executive session if the board desires. In reviewing the contract, I feel that there are several areas that will require legal review and further negotiation. With that being said, I feel a full approval of the contract as-is next Tuesday would be premature. I view it more as an opportunity to work out any issues\concerns that the board may identify in the proposal and if any action be taken it will be to advance the proposal to the formal draft-contract phase with the accompanying legal review by our new attorney(s). We of course will then have to approve of a finalized contract should the board desire.

Id. (emphasis added). Thus, notwithstanding the Mayor and the Council's understanding at least five days before the January 17 meeting that they would meet in closed session to discuss the Harriman proposal, the Council's agenda failed to identify this particular topic for discussion in violation of the COML.

Furthermore, based on the objections from Councilmembers before agreeing to the motion to go into the closed meeting, and the objections from Councilmembers after leaving the closed meeting, it is evident that the Council failed to properly announce the particular topic for which it convened the closed session. Two Councilmembers, Greg Daniels and Carmen Lara, stated that they left the putative executive session before the conclusion of the Council's

discussions. Compl. Ex. A at 3:33:00–3:34:55. Councilmember Lara explained that the closed session was "outside the scope of our authority. I did object [to the session]." *Id*. at 3:34:15. And Councilmember Daniels left with the understanding that there was no Harriman "contract" negotiations or strategy to discuss in executive session. Furthermore, Mayor Bryant asked if any Councilmember would like to make a motion to agree to release the executive session recording to the public because their meeting was improper. *Id*. at 3:34:40. It follows that based on these public statements by two Councilmembers, and the Mayor's acknowledgement of their concerns, not only was the topic of the closed meeting improperly noticed, but the Council engaged in substantial discussion of matters not enumerated in § 24-6-402(3) or (4), C.R.S. and, for reasons discussed *infra* at Section II, the Council violated the COML.

By failing to specify the particular topic to be discussed in closed session, the Council violated its statutory obligation under § 24-6-402(4), C.R.S. In *Guy v. Whitsitt*, the Colorado 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, 549–50, 553 (Colo. App. 2020). Indeed, the court explicitly rejected as statutorily insufficient the town council's "***failure to provide any information beyond the statutory citation authorizing*** an executive session for 'legal advice.'" *Id*. at 553 (emphasis added); *see also* § 24-6-402(4), C.R.S. Similarly, here, the City Council failed to provide any notice of the particular topic to be addressed in closed session and instead merely provided a statutory citation. Because the particularity requirements set forth in the COML and in *Guy* were not met, the Council violated the COML and Plaintiff is entitled to the recording and minutes of the unlawfully closed meeting. 469 P.3d at 554 ("Because the Town

Council did not comply with COML's notice requirements, [plaintiff] is entitled to the recordings and minutes of the executive session . . . .").[4]

II. The Walsenburg City Council did not convene in executive session for a lawful purpose.

Under the COML, any meeting in which a quorum of three or more members of a local body meet to discuss the public's business or take formal action must be open to the public. § 24-6-402(2)(b), C.R.S.; *Hanover Sch. Dist. No. 28 v. Barbour*, 171 P.3d 223, 227–28 (Colo. 2007) (decision-making, even informally, is not allowed behind closed doors). The COML itemizes which matters are permissible in closed, executive session. § 24-6-402(3)(a) & (4), C.R.S. Thus, it is illegal for a public body to discuss the public's business in private unless a COML exemption applies. Any non-exempt topics addressed in executive session are subject to public inspection. § 24-6-402(2)(b), C.R.S.

Here, Defendant claims, pursuant to § 24-6-402(4)(e)(I), C.R.S., that it met in a closed session on January 17, 2023 to "determin[e] positions relative to matters that may be subject to negotiations, develop[] strategy for negotiations, and instruct[] negotiators." *See* Compl. Exs. H, I. However, Plaintiff has come forward with sufficient evidence that the Council met in private to discuss unauthorized topics not subject to any executive session exemption. At the January 17, 2023 meeting, before the Council met in secret, it engaged in discussion regarding whether or not it had the authority to meet in executive session. *See* Compl. Ex. A at 16:25, 26:36. Upon

[4] Moreover, even if the executive session topic for discussion were properly announced—which it was not—the Council also failed to provide full and timely notice of the meeting in accordance with § 24-6-402(2)(c)(I), C.R.S, which requires public notice to be posted "no less than twenty-four hours prior to the holding of the meeting." Here, the Council further violated the COML because it failed to properly notice the January 17, 2023 meeting twenty-four hours in advance because the Agenda it noticed did not include the ***specific agenda information*** (*i.e.*, the particular topic of discussion: the Harriman proposal) as required.

reconvening to the public meeting after the closed meeting ended, the Mayor Pro Tem Jennings stated that "if any person who participated in the executive session feels that any substantial discussion of any matter not included in the motion to go into executive session occurred during executive session or that any improper action occurred during the executive session in violation of the Colorado Open Meetings Law, I would ask you to state your concerns for the record." *Id*. at 3:33:29. Councilmember Daniels responded, "I've got my hand up, Mayor Pro Tem. I want the record to state that I left the open meetings first discussion, I did not feel it fell under the . . . executive session rules and regulations." *Id*. at 3:33:54. Councilmember Carmen Lara further responded, "I left the meeting because I felt that the meeting was outside the scope of our authority. I did object." *Id*. at 3:34:15. Mayor Bryant said "given that we have a number of Councilmembers that feel like we worked outside the scope of the executive session, would Council prefer to have the audio recording be made public?" *Id*. at 3:34:40.

The objections and conduct of the Councilmembers and Mayor raise serious doubts as to whether the Council convened the closed meeting solely (if at all) to determine positions on negotiations or strategy related to Mr. Harriman's proposal. And an email among Councilmembers five days before the January 17 meeting confirms Mayor Bryant's understanding that the Council's planned closed session would serve as "an opportunity ***to work out any issues\concerns*** that the board may identify in the proposal." *See* Compl. Ex. E (emphasis added). Given the Council's reported disagreements over engaging Harriman after his 2020 resignation, *see supra* note 3, it is more than likely that the issues and concerns the Council actually discussed behind closed doors concerned matters outside the scope of determining a negotiating position under § 24-6-402(4)(e)(I), C.R.S.

As such, because sufficient evidence demonstrates that the Council's January 17 closed meeting discussions did not in whole, or possibly even in part, conform to a recognized or authorized basis for an executive session, Plaintiff respectfully requests that the Court find that the January 17, 2023 closed meeting was convened in violation of the COML and order Defendant to release the entirety of the recording and/or meeting minutes to Plaintiff.

III. Alternatively, *in camera* review is warranted as there is sufficient evidence to support a reasonable belief under § 24-72-204(5.5), C.R.S. that the Council engaged in substantial discussion of matters not enumerated in § 24-6-402(4) in violation of the COML.

If this Court does not order Defendant to provide immediate access to the January 17 Recording and related minutes as Plaintiff urges, Plaintiff respectfully requests that the Court review the January 17 Recording *in camera* and thereafter issue an order disclosing it to Plaintiff pursuant to § 24-72-204(5.5)(b)(1), C.R.S. and § 24-6-402(2)(d.5)(I)(C), C.R.S.

As discussed *supra* at Section II, there are sufficient grounds to support a reasonable belief that topics not enumerated under § 24-6-402(4), C.R.S. were discussed at the Council's January 17 closed session. There can be no dispute that before going into the January 17 closed meeting, Councilmembers, including Councilmembers Daniels and Lara, seriously questioned whether the Council had authority to meet in executive session to discuss the Harriman proposal as intended. *See* Compl. Ex. A at 3:33:00–3:34:55. Councilmembers Lara and Daniels abruptly left the "executive session" only minutes after it began stating, respectively, that the closed meeting was "outside the scope of our authority," *id*. at 3:34:15, and "I did not feel it fell under the . . . executive session rules and regulations," *id*. at 3:33:54. These facts, alongside evidence demonstrating that the Council failed to properly notice the closed meeting in violation of the COML, *see supra* Section I, are sufficient for this Court to take *in camera* review of the January 17 Recording.

Setting forth "grounds sufficient to support a reasonable belief" that a violation of the COML occurred is not a heavy burden—it does not require substantial evidence or other proof that a violation occurred; it merely requires an applicant, like Plaintiff, to set forth grounds that would lead a reasonable person to believe that a violation may have occurred. § 24-72-204(5.5)(a), C.R.S. Here, the facts alleged in Plaintiff's application—including public statements from two Councilmembers, admitting that the Council engaged in substantial discussion about topics not noticed or enumerated; and the request by the Mayor to release the recording to the public—are sufficient grounds to support a "reasonable belief" that the Council violated the COML warranting disclosure or, alternatively, *in camera* review. Indeed, Colorado courts routinely take *in camera* review on access petitions that meet this threshold. *See* Ex.1 at 6 (Order re: Petition for Access to or in Camera Review of Executive Session Recording and Meeting Minutes, *Sentinel Colorado v. Rodriguez*, No. 2022CV30927 (Arapahoe Cnty. Dist. Ct. July 14, 2022) (holding that *in camera* review was warranted because the Defendant failed to cite the particular topic of legal advice, only "legal advice" and the relevant citation, before entering executive session: "The fact that the Agenda does not comply with the law is sufficient alone to warrant at least an *in camera* review of the meeting"); *see also* Ex. 2 (Order re: 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., *Denver Post v. Wheeler*, No. 2023CV31265 (Denver Cnty. Dist. Ct. June 20, 2023) (ordering *in camera* review of an executive session based on a school board's failure to properly notice the executive session).

Based on the facts asserted herein this Court should order Defendant to disclose the January 17 Recording, or, alternatively, the Court should take *in camera* review. § 24-72-204(5.5), C.R.S.; § 24-6-402(2)(d.5)(I)(C), C.R.S.

IV. Defendant is required by CORA to disclose the Harriman proposal because it is a non-exempt public record.

CORA reflects a strong presumption in favor of public access. *See* § 24-72-201, C.R.S.; § 24-72-203(1)(a), C.R.S.; § 24-72-202(6)(a)(I), C.R.S. (mandating that public records "made, maintained, or kept by . . . any agency . . . of the state" are open to the public unless a specific exception applies). Consistent with this policy in favor of disclosure, the Colorado Supreme Court has held that a public official has no authority to deny any person access to a public record unless there is a specific law or regulation setting forth the grounds for withholding the information requested. *See Denver Publ'g Co. v. Dreyfus*, 520 P.2d 104, 108 (Colo. 1974); *Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874 (Colo. App. 1987). Any exception to CORA—here, § 24-72-204(1)(a), C.R.S.—must be narrowly construed. *See City of Westminster v. Dogan Constr. Co*., 930 P.2d 585, 589 (Colo. 1997); *see also Gumina*, 119 P.3d at 532 (holding that the rule that exceptions to CORA's presumption in favor of disclosure are to be narrowly construed "applies with equal force" to exceptions to public access under Colorado's Open Meetings Law). Under 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.

Defendant improperly denied Plaintiff access to the Harriman proposal, which was attached to a January 12, 2023 email thread between the Mayor and Councilmembers ahead of the January 17 meeting. Defendant claimed that the attachment was exempt from disclosure under CORA because the document was "provided to the City Council in conjunction with an

executive session pursuant to C.R.S. § 24-6-402(4)(e)(I)." Compl. Ex. F. However, this argument is misplaced. Defendant points to an exception under CORA that permits nondisclosure of a public record on the ground that inspection would be "contrary to [] state statute," § 24-72-204(1)(a), C.R.S., to argue that it cannot release the attachment because doing so would be contrary to § 24-6-402(4)(e)(I), C.R.S. Yet, § 24-6-402(4)(e)(I), C.R.S. says not one thing about *public records, or any other documents* that are required for discussion in executive session being exempt from public disclosure. It merely states that a local body may enter executive session to *discuss*:

> (e)(I) Determining positions relative to matters that may be subject to negotiations; developing strategy for negotiations; and instructing negotiators.

Id.

Again, Defendant provides no statutory authority for this reasoning. But it makes the unsupported, and self-serving, argument that anything related to the purposes of an executive session is *per se* "privileged."

Further, the face of the January 12 email demonstrates that the Harriman proposal was provided to the Councilmembers five days ***in advance*** of the January 17 closed session—not "in conjunction" with that meeting. And, moreover, the attachment is not a "privileged communication" simply because it is to be discussed at an executive session. Indeed, Defendant sets forth no legal foundation, as it cannot, for the proposition that matters discussed and documents reviewed in executive session are *per se* "privileged" under the COML.

As such, the document at issue is a public record that must be disclosed to Plaintiff.

V. Defendant's subsequent public meetings did not "cure" the unlawful January 17 closed meeting.

On September 1, 2023, Defendant amended its Answer to assert an additional affirmative defense that it allegedly "cured" the unlawful January 17, 2023 closed-door meeting. Defendant wrongly argues that the meeting was "cured" because the Council held three subsequent meetings—which all took place after Plaintiff filed its Complaint and Application on June 22, 2023—that purportedly publicly discussed and took action on Mr. Harriman's proposal. But Defendant's latent defense is unfounded under the COML.

First, the COML does not permit an agency to "cure" an unlawful, non-compliant meeting. When a local body violates the COML, the meeting is deemed invalid and the meeting minutes of the closed or otherwise unlawful meeting must be disclosed to the public. § 24-6-402(2)(d.5)(II)(C), C.R.S. As addressed in *Colorado Off-Highway Vehicle Coalition v. Colorado Board of Parks & Outdoor Recreation*, "[t]he OML does not explicitly address whether a state or local public body may 'cure' a prior violation of the OML by holding a subsequent meeting that complies with the act." 292 P.3d 1132, 1136 (Colo. App. 2012). Instead, some Colorado courts interpreting the COML have held that "case law interpreting the OML ***implies*** that a state or local public body ***may*** do so [cure the illegal meeting]," provided the subsequent meeting is not a mere "rubber stamping" of an earlier decision. *Id*. (emphasis added). This interpretation in *Colorado Off-Highway Vehicle Coalition*, however, by no means mandates cure as a defense. Instead, the legislature has already identified a remedy for unlawful, closed meetings—release of any recording or minutes of the closed session. § 24-6-402(2)(d.5)(II)(C), C.R.S.

Moreover, the Colorado courts have recognized "cure" in limited circumstances that are not present here. Acknowledging the harm that could result when a public body takes final action in a closed session that is later invalidated by a COML violation, some courts have

acknowledged that a subsequent public meeting replicating the public body's formerly secret decision-making may "cure" the violation. *Colorado Off-Highway*, 292 P.3d at 1137–38. Providing such a "cure" avoids invalidating important business, *e.g.*, previously endorsed contracts or project approvals, which would have profound harmful consequences for the public's business. *Id.* Here, neither party contends that the Council took any formal action or made any decision in the January 17 closed session. Accordingly, there is no rationale for this Court to deem any later public meetings discussing the Harriman proposal as having "cured" the COML violations identified by Plaintiff.

The reasoning underlying the COML resounds: discussions by public bodies that lead to decision-making on behalf of the public must be done in public. *Colorado Off-Highway*, 292 P.3d at 1137 ("The intent of the Open Meetings Law is that citizens be given the opportunity *to obtain information about and to participate in the legislative decision-making process*. . . . A citizen does not intelligently participate in the legislative decision-making process merely by witnessing the final tallying of an already predetermined vote." (quoting *Cole*, 673 P.2d at 349) (emphasis in original)). "[W]hen 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.'" *Colorado Off-Highway*, 292 P.3d at 1136 (quoting *Bagby v. Sch. Dist. No. 1*, 528 P.2d 1299, 1302 (Colo. 1974)); *see also id.* ("The OML is intended to afford the public access to a broad range of meetings at which public business is considered." (citation and internal quotation marks omitted)). Here, because no final decision was made by the Council behind closed doors on January 17, 2023, Defendant cannot avoid disclosure of the January 17 Recording by claiming it later "cured" its COML violations.

Finally, even if, *arguendo*, the dictates of the COML do not preclude Defendant's "cure" defense—and they do—the subsequent public meetings cited by Defendant are inadequate to "cure" the ill effects of the January 17, 2023 closed meeting. The public is still deprived of the private discussions of the public's business that occurred in the Council's unlawful closed meeting. *Cole*, 673 P.2d at 349 ("The intent of the Open Meetings Law is that citizens be given the opportunity to obtain information about and to participate in the legislative decision-making process . . . ."); *see also Gumina*, 119 P.3d at 531. Defendant's claim that subsequent public discussions on August 1, August 15, and August 18, 2023, "cured" the illegal January meeting, *see* Am. Answer at 17–18; *see also id.* Exs. 1–4, presumes without proof that everything discussed at those public meetings was also discussed in the secret meeting on January 17, 2023. But even if that were the case, there is no harm to Defendant in releasing the January 17 Recording to Plaintiff.

For the reasons set forth above, Defendant's subsequent discussions on August 1, August 15, and August 18, 2023, have not cured the Council's COML violations.

CONCLUSION

Therefore, based on the arguments set forth above, Plaintiff respectfully requests that at the conclusion of the show cause hearing this Court enter an order directing Defendant to make the January 17 Recording, in its entirety, available to Plaintiff, or, alternatively, if the Court finds it necessary, that the Court conduct an *in camera* review of the January 17 Recording and, thereafter, enter an order directing Defendant to release the entirety of the January 17 Recording or, if the Court determines that a portion or portions of the January 17 Recording should not properly be disclosed, enter an order directing Defendant to redact such portion(s), and release the remainder of the recording to Plaintiff.

Respectfully submitted this 18th day of September 2023.

By /s/*Rachael Johnson*

Rachael Johnson
Reporters Committee for
Freedom of the Press
Attorney for Plaintiff,
The World Journal

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September 2023, a true and correct copy of the foregoing **HEARING BRIEF** was served on the following counsel through the Colorado Courts E-File & Serve electronic court filing system, pursuant to C.R.C.P. 121(c), § 1-26:

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