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On Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 2022CA001934

Denver District Court Case No. 2022CV30927

THE SENTINEL COLORADO,
Respondent

v.

KADEE RODRIGUEZ, city clerk, in her official capacity as records custodian
Petitioner.

COURT USE ONLY

Case No. 2024SC000051

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 53, and C.A.R. 25, 28 and 32. Specifically, the undersigned certifies that the brief complies with the word limit, and it contains 3,436 words (3,800 limit).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 53, 28, and 32.

/s/Rachael Johnson
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ISSUES PRESENTED BY PETITIONER

1. Whether the Court of Appeals erred in finding that a general description of the discussion of an executive session in a later public City Council agenda packet constituted a waiver of the entire attorney-client privilege and the executive-session privilege by the public body.
2. Whether the Court of Appeals erred by concluding that a public bodies' providing pre-decisional informal direction to its attorney during an executive session pursuant C.R.S. § 24-6-402(4)(b) was the taking of a "position ... or formal action", resulting in the City Council being precluded from giving its attorney direction in an executive session in response to receiving legal advice.
3. Whether the Court of Appeals erred in finding that the City could not cure a violation of the Colorado Open Meetings Law for an improperly noticed executive session.

STATEMENT OF THE CASE

The case below concerned a request under the Colorado Open Meetings Law ("COML"), §§ 24-6-401 *et seq.*, C.R.S., by Max Levy, a reporter for *The Sentinel Colorado* ("The Sentinel"), for access to the audio and video recording[1] (the

[1] Mr. Levy sought access to any meeting minutes of the March 14 executive session (should they exist) on the ground that they are public records under the CORA, §§ 24-72-201 *et seq*., C.R.S.

"Recording") of a March 14, 2022 executive session of the Aurora City Council ("the Council"). CF, p. 21. In the request, Levy sought a "[r]ecording of the section of the Aurora City Council's March 14 executive session pertaining to the censure of Danielle Jurinsky." *Id.* In a response by the City to Levy on or around March 22, 2022, the City denied Levy's request on the ground that the "record being sought is a privileged attorney/client communication and is exempt from disclosure, pursuant to C.R.S. 24-6-402(d.5)(II)" of the COML. CF, p. 22.

The Sentinel filed a complaint on May 23, 2022 under § 24-72-204(5.5), C.R.S. of the CORA and §§ 24-6-401, *et seq*. of the COML to review the City's decision to withhold the Recording on grounds that access should be afforded to the public pursuant to § 24-6-402(d.5)(II)(C), C.R.S. and could not be denied by the City pursuant to § 24-6-402(d.5)(II), C.R.S. The Sentinel's complaint set forth that there were grounds to support a reasonable belief that at the executive session the Council engaged in discussions not permitted by the COML; and that the Council violated the COML by failing to provide adequate and proper notice of the executive session. The Sentinel also presented relevant facts that any recording of that session was not privileged. CF, pp. 77–83. In its Complaint, The Sentinel sought attorney fees. CF, pp. 35, 43.

Following a status conference and subsequent *in camera* review of the Recording, the trial court issued a July 26, 2022 order finding that the Council

violated the COML because it failed to properly notice the executive session and ordered the Records to be released. CF, pp. 19, 99, 161. However, the court stayed its order for fourteen days so that Respondent could address and substantiate its attorney-client privilege claims. CF, pp. 99–100. The Council thereafter moved the trial court for reconsideration of its July 26 order, arguing that the session was privileged, and that the Council cured the improperly noticed March 14 executive session notice. CF, pp. 113, 116–125. The Sentinel objected to the City's motion on several grounds. CF, pp. 128–44.

On September 22, 2022, the trial court issued a final order granting Respondent's motion for reconsideration on the ground that the Council had sufficiently cured its improper notice of the March 14 executive session by holding a subsequent public meeting on March 28, 2022. CF, pp. 155–59. However, with respect to whether privileged attorney-client communications existed or were waived, the trial court made no finding. CF, pp. 157–59.

On December 7, 2023, the Court of Appeals reversed the trial court agreeing with "The Sentinel in all respects except its request for attorney fees." Opinion at 2. The Court concluded that The Sentinel was entitled to the Recording for several reasons, including that the Council violated the COML by not properly announcing the executive session; taking a "roll call" vote to end the censure proceedings against Councilperson Jurinsky constituted "formal action . . . or taking a position" during

the executive session in violation of the COML; that the executive session was not protected by attorney-client privilege because "the City Council waived any attorney-client privilege" by describing "everything that occurred" during its executive session in the March 28 public meeting agenda packet, Opinion at 16; and that the Council did not cure the OML violations. *Id.*

With respect to The Sentinel's request for attorney fees pursuant to § 24-6-402(9)(b), C.R.S., the Court determined that The Sentinel was not entitled to fees under the OML because it is not a prevailing "citizen" under the plain meaning of the statute. Opinion 19. The Sentinel filed a Motion for Partial Reconsideration on December 20, 2023, solely on the issue of attorney fees. The Council responded to The Sentinel's motion on December 27, 2023. On December 28, 2023, the Court of Appeals denied The Sentinel's reconsideration request on the issue of attorney fees, with one judge dissenting, and ordered a stay on the mandate to release the Recording to The Sentinel until January 26, 2024, unless either party filed a petition with the Colorado Supreme Court. Order Denying Pet. for Reh'g, *Sentinel Colo. v. Rodriguez*, No. 2022CA1934 (Colo. App. Dec. 28, 2023).

On January 24, 2024, The Sentinel filed a petition for writ of *certiorari* solely of that portion of the Court of Appeals's ruling pertaining to attorney fees. On the same day, the Council filed a separate petition for *certiorari* challenging the Court of Appeals' decision on the merits, to which The Sentinel now responds.

BRIEF IN OPPOSITION

This Court should deny the Council's petition for *certiorari* review for three reasons.

First, the Court of Appeals correctly determined that the Council waived any asserted attorney-client privilege when it "clearly identified what took place at the [March 14] executive session" in a letter from its legal counsel that was disclosed at the March 28 public meeting. Opinion at 14–16. The Council argues that it provided only "informal direction" to its legal counsel and did not reveal privileged communications but its March 24 letter, disclosed to the public at the March 28 public meeting, "describ[ed] everything that occurred" during the Council's closed session. Opinion at 15–16. Accordingly, the Council's argument that the "entire attorney-client privilege" was not waived is at odds with the Court of Appeals' finding and the Council's own actions.

Second, the Court of Appeals correctly held that the Council took "formal action…*or a position*" within § 24-6-402(4), C.R.S. when it took a "roll call" to "direct[] and instruct[]" its legal counsel to terminate an investigation against a councilmember in executive session. Opinion at 11–13. This Court need not decide an issue that is clearly defined by the plain language of the statute, and this Court has already decided in *Hanover* what constitutes "formal action." *Hanover Sch. Dist. No. 28 v. Barbour*, 171 P.3d 223 (Colo. 2007). Therefore, whether "informal

direction" to legal counsel is formal action is not a novel issue for this Court and was correctly decided in this case by the Court of Appeals.

Finally, the Court of Appeals correctly held that curing a COML (or OML) violation only applies where a body seeks to invalidate an action taken in an improperly convened meeting. Opinion at 16. Because The Sentinel does not challenge the decision the Council made to terminate the censure process and investigation into its councilperson, and only requests that the recording be released, cure does not apply and is immaterial to The Sentinel's request for the Recording.

A. The City Council's petition for certiorari mischaracterizes the Court of Appeals' holding and conflates the City Council's violation of the OML with the issue of its waiver of attorney-client privilege.

Beyond its ruling on attorney fees, the Court of Appeals made three distinct rulings in this case: (1) the "Council violated . . . 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"; (2) "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"; and (3) the lower court erred in finding "that the March 28 public meeting 'cured' the OML violations that occurred at the March 14 executive session." Opinion at 18–19.

In its Petition for *Certiorari*, the Council conflates the Court's first two rulings and fails to argue convincingly against either of them. First, in addressing the

attorney-client privilege holding, the Council differentiates between what it characterizes as "informal and pre-decisional direction to legal counsel" and some other unnamed category of legal advice, suggesting that the waiver of the privilege depends on the nature of the attorney-client interaction. Petition at 9. This distinction is irrelevant, was not previously argued by the Council, and is not discussed or even mentioned in the Court of Appeals' opinion; indeed, the words "pre-decisional" and "informal direction" do not appear at all in the opinion. The Council's argument that "the March 28 agenda packet merely reflected Council's informal direction to special counsel to prepare a stipulation for Council formal consideration; it did not place privileged communications at issue and did not result in a waiver" is confounding. *Id*.

The Court of Appeals did not find that the action taken by the Council was "informal" or "pre-decisional," Petition at 9, and instead concluded the opposite—that the Council made a decision and "the district court committed clear error in" finding that the roll call vote was "not a formal action violating the OML." Opinion at 12. Thus, the Council's new claim that it could not have waived attorney-client privilege by later divulging to the public its instructions to counsel is based on a mischaracterization of the nature of the March 14 meeting that is neither supported by any record evidence nor the findings of the Court of Appeals. Opinion at 16. "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," Opinion at 12, *and also* that "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." Opinion at 16. Additionally, the attorney-client privilege waiver occurred pursuant to § 24-6-402(2)(d.5)(II)(B) and case law establishing that when an attorney-client privileged communication "if a communication to which the privilege has previously attached is subsequently ***disclosed to a third party***, then the protection afforded by the privilege is impliedly waived." *Wesp v. Everson*, 33 P.3d 191, 198 (Colo. 2001) (emphasis added).

Finally, the Court's Opinion does not "abrogate a public body's ability to receive advice from counsel." Petition at 14. Section 24-6-402(d.5)(I)(B), C.R.S. provides a mechanism for a public body to protect communications with counsel by allowing the body to stop recording attorney-client protected discussion in executive session. *See* § 24-6-402(d.5)(I)(B). The Council concedes that it records all attorney-client privileged discussions in executive sessions, but it need not do so. Petition at 4. It is the City Council's role, not this Court's, to enforce protections for attorney-client communications already available under law.[2]

[2] Moreover, the Court of Appeals held that the Council provided inadequate public notice before moving to executive session on March 14, and the Council does not dispute this finding. Opinion at 11. Thus, regardless of whether or not the

B. The Court of Appeals correctly held that the Council took a "position . . . or formal action" within § 24-6-402(4), C.R.S. when it took a "roll call" in executive session that "direct[ed] and instruct[ed]" its counsel to end the censure process against its Councilmember.

The Council incorrectly claims that this Court must review the Court of Appeals decision because it addresses, as a matter of first impression, whether "informal direction" to legal counsel during executive session constitutes "formal action" under §24-6-402(4), C.R.S. Petition at 11. Council's argument fails for several reasons. First, there is no record evidence to support the Council's new argument that it merely gave its attorney "informal direction" during the March 14 executive session. The Court of Appeals correctly held that the Council took a "position . . . or formal action" within 24-6-402(4), C.R.S. when it took a "roll call" to "direct[] and instruct[]" its legal counsel to "end the investigation" against a councilmember in executive session. Opinion at 11–13. Indeed, the Council admits—as it must—that it "polled" its members and directed its legal counsel "to end the censure proceedings regarding Council Member Jurinsky." Petition at 4, 12.

Council took formal action in that closed session, it must still disclose the Recording under § 24-6-402 (4), C.R.S. If an executive session is not convened in accordance with applicable requirements, then the meeting and the recorded minutes are open to the public. *see* § 24-6-402 (4), C.R.S.; *Gumina v. City of Sterling*, 119 P.3d 527, 530 (Colo. App. 2004) (finding the city council's failure to "strictly comply" with statutory open meeting requirements rendered its meeting open and a terminated city employee had the right to inspect the minutes); *Zubeck v. El Paso Cnty. Ret. Plan*, 961 P.2d 597, 600–01 (Colo. App. 1998).

Accordingly, the Council's new claim that this direction was "informal" is unsupported and lacks merit[3].

Second, the Council's claim that these facts present a novel legal issue requiring review by this Court is likewise incorrect. This Court previously interpreted what constitutes "formal action" under § 24-6-402(4), C.R.S. in *Hanover*, 171 P.3d 223. In that case, this Court found that a school board's decision not to renew a teacher's contract could not be made in executive session because it

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[3] The Court of Appeals considered the actions taken by the Council in the March 14 executive session based on the March 24 letter in its March 28 agenda packet that was disclosed to the public. The March 24 letter states that the Council:

(i) direct and instruct 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;
(ii) 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 in the original.)
(iii) 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***." (emphasis added.)
(iv) "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."

Opinion at 14–15.

Thus, as the Court of Appeals found, the action adopted or taken by Council, as the letter represents, is the formal action already taken.

constituted a formal action that could only occur at a public meeting. This Court further held that the superintendent's letter to the teacher the next day stating that his contract would not be renewed executed the formal action already taken in closed session. *See also Walsenburg Sand & Gravel Co. v. City Council of Walsenburg*, 160 P.3d 297, 299–300 (Colo. App. 2007) (a city council executive session to discuss a real estate bid offer before noting the offer in the public meeting). Here, as in *Hanover*, the Court of Appeals correctly concluded that the Council's roll call vote in executive session to conclude the censure proceedings was an improper formal action under § 24-6-402(4), C.R.S. The Council's argument that the "informal direction" in the stipulation was not yet approved, Petition at 4, until the March 28 meeting is equally confounding given that, like in *Hanover*, the March 24 letter was the formal action already taken since the Council had already decided to end the censure investigation.

Moreover, Petitioner fails to grapple with the fact that it also "took a position" in executive session in violation of § 24-6-402(4). As the Court of Appeals correctly concluded, a position was taken when the Council took a "roll call" to provide direction to end the censure proceeding. Opinion at 12; *see* § 24-6-402(4), C.R.S. ("[N]o adoption of any . . . position, . . . or formal action . . . shall occur at any executive session that is not open to the public"). On this point alone, the Court

correctly found that The Sentinel prevails, and the Recording must be released to public inspection pursuant to § 24-6-402(2)(d.5)(II)(C).

C. The Court of Appeals properly held that the "cure" remedy does not apply because no party seeks to invalidate Council's March 14, 2022 action.

The Council misunderstands and mischaracterizes the "cure" remedy sometimes recognized by Colorado courts in narrow circumstances. 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 . . . [cure the illegal meeting]," provided the subsequent meeting is not a mere "rubber stamping" of an earlier decision. *Id*. (emphasis added). A "cure" does not repair secrecy itself; rather, it is a public policy tool to avoid invalidating important and exigent business that was conducted in secret, *e.g.*, previously endorsed contracts or project approvals, which would have profound harmful consequences for the public's business if invalidated.

In the present case, the Court of Appeals properly held that "[b]ecause 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." Opinion at 16. Neither party contends that The Sentinel or any other party sought to invalidate the March 14, 2022 decisions made regarding Jurinsky or any other matter. Accordingly, there is no rationale for any court to deem any later public meetings as having "cured" the COML violations.

Furthermore, the City's interpretation of "cure" would run contrary to the heart of the COML, which affirms that discussion of the public's business "may not be conducted in secret." § 24-6-401, C.R.S.; *Gumina*, 119 P.3d at 531 (quoting *Cole v. State*, 673 P.2d 345, 349 (Colo. 1983)) ("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."); *Bd. of Cnty. Comm'rs, Costilla Cnty. v. Costilla Cnty. Conservancy Dist*., 88 P.3d 1188, 1193 (Colo. 2004) (The purpose of the COML is to "afford the public access to a *broad range of meetings* at which public business is considered.") (emphasis added). Thus, in light of this purpose, the COML must be interpreted broadly. *Id*.; §§ 24-6-401 *et seq.*, C.R.S. Fundamentally, there is no way to cure anything but a final decision because the discussions that led to the decision or action cannot be replicated in detail. The same discussion simply cannot be repeated, and it is that nuanced debate of the public's business that the OML seeks to protect from secrecy. *Bagby v. Sch. Dist. No. 1, Denv.*, 528 P.2d 1299, 1302 (Colo. 1974) (the public is entitled to know "the discussions, the motivations, the policy arguments and other considerations which led to the

discretion exercised."). For these reasons, the Council's argument that the Court in *Off Highway* does not contain the "prerequisite" found in this case, that curing only applies where a party seeks to invalidate an action, is irrelevant. Thus, the Opinion in this case is not in conflict with the OML, *Bagsby* or *Off Highway*. Here, because no party seeks to invalidate any decision made behind closed doors on March 14, 2022, the Council has no grounds to argue that there is anything to be "cured."

CONCLUSION

For the foregoing reasons, The Sentinel opposes the Council's petition for certiorari and requests that *certiorari* be granted only on the matter of attorney fees.

Respectfully submitted this 7th day of February 2024.

By */s/Rachael Johnson*

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February 2024, a true and correct copy of the foregoing **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** was served on the following counsel through the Colorado Courts E-File & Serve electronic court filing system:

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