

District Court, Arapahoe County, State of Colorado 7325 S. Potomac St #100, Centennial, Colorado 80112	DATE FILED: April 4, 2024 3:07 PM FILING ID: EEBD09D1CA1F5 CASE NUMBER: 2024CV30439
In re Records Request Dated January 31, 2024 CITY OF AURORA, COLORADO APPLICANT, and concerning: THE SENTINEL COLORADO, INTERESTED PARTY.	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<i>Attorneys for Applicant:</i> Attorneys: Corey Y. Hoffmann, Reg. No. 24920 Daniel P. Harvey, Reg. No. 49863 Firm: Hoffmann, Parker, Wilson & Carberry, P.C. 511 16 th Street, Suite 610 Denver, CO 80202 Phone: (303) 825-6444 E-mail: cyh@hpwclaw.com ; dph@hpwclaw.com	Case No.: 2024CV30439 Division: 202
<p style="text-align: center;">SECOND AMENDED APPLICATION PERMITTING THE CITY OF AURORA TO RESTRICT DISCLOSURE OF CERTAIN DOCUMENTS PURSUANT TO C.R.S. § 24-72-204(3)(a)(XIII) AND C.R.S. § 24-72-204(6)(a) OF THE COLORADO OPEN RECORDS ACT, C.R.S. § 24-72-200.1 ET SEQ.</p>	

Applicant, the City of Aurora, Colorado through its Official Custodian of Public Records (the "City"), by its undersigned counsel, hereby applies to this Court pursuant to C.R.S. § 24-72-204(3)(a)(XIII) and C.R.S. § 24-72-204(6)(a) for an order permitting the City to restrict disclosure of the recording of a meeting that occurred on October 13, 2023, as requested in a January 31, 2024 Public Records Request submitted by Max Levy of *The Sentinel* newspaper, attached hereto as **Exhibit A**, and incorporated herein by this reference.

Based on the language of the Colorado Open Records Act, C.R.S. § 24-72-200.1, *et seq.* ("CORA"), the City seeks an order permitting the City to restrict such disclosure for two reasons: (1) pursuant to the common law deliberative process privilege as codified in C.R.S. § 24-72-

204(3)(a)(XIII); and (2) because disclosure would do substantial injury to the public interest pursuant to C.R.S. §24-72-204(6)(a). As grounds therefor, the City states as follows:

I. INTRODUCTION AND GENERAL ALLEGATIONS

A. Parties

1. The City is a Colorado home rule municipality located in Arapahoe, Douglas and Adams County, Colorado with a City Hall located in Arapahoe County, and the City is a political subdivision as defined by C.R.S. § 24-72-202(5) of CORA.

2. City Clerk, Kadee Rodriguez is the Official Custodian of public records for the City, as that term is defined in C.R.S. § 24-72-202(2).

3. Max Levy is a reporter for *The Sentinel*, a newspaper that reports on matters involving the City, and *The Sentinel* is the applicant seeking the records at issue in this proceeding, as more particularly described in **Exhibit A**.

B. Jurisdiction and Venue

4 This Court has jurisdiction over the subject matter of this matter pursuant to the specific provisions of C.R.S. § 24-72-204(3)(a)(XIII) and C.R.S. § 24-72-204(6).

5. Venue is proper in this Court pursuant to C.R.C.P. 98 and pursuant to the provisions of C.R.S. § 24-72-204(6) because the records in question are located within the City Hall of the City of Aurora, and within Arapahoe County, Colorado.

C. General Allegations

6. On October 13, 2023, two (2) members of the City of Aurora City Council Appointee Evaluation and Compensation Committee (the "CEC") met with two (2) City staff members to discuss certain City Council appointee evaluations and contracts consisting of self-

evaluations, peer evaluations and City Council personal opinions and assessments (the "October 13 Discussion").

7. To the extent the CEC intended that the meeting be a meeting of the three (3) member CEC in executive session, such a discussion in executive session is authorized by the City of Aurora Rules of Order and Procedure applicable to the City Council (the "Council Policies") and by C.R.S. § 24-6-402(4)(f) of the Colorado Open Meetings Law, C.R.S. § 24-6-401, *et seq.* (the "OML").

8. The October 13 Discussion concerned discussions between two (2) members of the CEC and two (2) City staff members regarding evaluations and contract negotiations regarding four (4) City Council direct appointees, the City Manager, the Municipal Judge, the City Attorney and the Court Administrator (the "Council Appointees").

9. Pursuant to C.R.S. § 24-6-402(1)(a)(I), a "local public body" is defined in part as "...any board, committee, commission, authority or other advisory, policy-making, rule-making, or formally constituted body of any political subdivision of the state and any public or private entity to which a political subdivision, or an official thereof, has delegated a governmental decision-making function but does not include persons on the administrative staff of the local public body. "

10. The City believes the CEC is an intermediary that does not have any specific delegated "decision-making" functions, and its authorization is limited as follows:

To assure a comprehensive approach to ***Council Appointee*** evaluations and compensation decisions, a Council Committee on Evaluations and Compensation is established with the following duties and obligations ... The Committee shall also be responsible for ***initially handling*** any complaints and/or discipline involving a Council Appointee and, for purposes of the City Council Respectful Workplace Policy ... any complaints and/or discipline involving a Council

Member or the Mayor, for the purpose of making recommendations to the full City Council ... The Committee shall be responsible for *receiving input from* the Council Appointees and providing feedback to the Appointee relative to performance issues on a timely basis *in cooperation with the full City Council* ... In the absence of the Mayor, or after a briefing with the Mayor, any members of the Committee shall be empowered to execute written authorizations to administrative staff *reflecting official decisions of the City Council* regarding Appointee performance reviewed in this subsection D.7.

See City of Aurora Rules of Order and Procedure for the Aurora, Colorado, City Council ("Council Policies"), at Section D(7).

11. The City did not provide public notice of the October 13, 2023, prior to such meeting pursuant to the OML, nor did it post a notice prior to the meeting announcing that the CEC meeting was intended to be an executive session or the topics intended to be discussed in executive session.

12. While not required to do so, subsequent to the October 13 Discussion, the City added a copy of an agenda related to the October 13, 2023, meeting on its website, documenting that the October 13 Discussion occurred, and presently and voluntarily posts such meetings in accordance with the provisions of the OML even though the CEC has not been delegated any governmental decision-making function.

13. The language of C.R.S. § 24-6-402(4)(f) authorizes an executive session by a local public body as defined by the OML for the discussion of personnel matters, but the language of C.R.S. § 24-6-402(4)(f) provides that employees who are the subject of an executive session may request the discussion be held in an open meeting, and thus such employees are entitled to notice of such an executive session discussion.

14. The Council Appointees were not provided notice of the October 13 Discussion, which notice would have allowed such appointees to exercise their respective privacy interests

by being given the right to elect whether such discussions were held in an executive session, or whether such discussions were to be held in a meeting open to the public.

15. In addition, under C.R.S. § 24-6-402(2)(b) of the OML, "All meetings of a quorum or three or more members of any local public body, whichever is fewer, ... may be declared to be public meetings open to the public at all times."

16. Only two (2) members of the City Council participated in the October 13 Discussion, although the two (2) members are two (2) of the three (3) members of the CEC.

17. On January 31, 2024, the City received a Public Records Request under CORA from *The Sentinel*, a copy of which is attached hereto as **Exhibit A**, seeking "any and all electronic recordings of the executive sessions convened by the Council Appointee Evaluation Committee on Oct. 13, 2023; Nov. 14, 2023; Dec. 18, 2023; and January 18, 2024."

18. In response to this request, Ms. Rodriguez responded to *The Sentinel* on February 6, 2023, indicating that no recordings existed for the following meetings: January 18, 2024, December 18, 2023, and November 14, 2023. Concerning the portion of the request related to the October 13, 2023, meeting (the "October 13 Recording"), Ms. Rodriguez indicated that the recording exceeded the 90-day retention period under C.R.S. § 24-6-402(2)(d.5)(II)(E) related to the retention of executive session recordings. *See Exhibit B.*

19. On February 9, 2024, *The Sentinel* asked if the City was still in possession of the October 13 Recording. Thereafter, on February 13, 2024, *The Sentinel* sent an email to the City indicating its belief that the October 13 Recording should be provided because public notice was not properly provided in advance of the meeting and again sought the October 13 Recording. *See Exhibit C.*

20. On February 23, 2024, the City supplemented its previous response to *The Sentinel* by providing *The Sentinel* with a denial of its request of the October 13 Recording based, in part, on the deliberative process privilege. Pursuant to C.R.S. § 24-72-204(3)(a)(XIII), the City also provided *The Sentinel* with a privilege log of the withheld documents and indicated that it would file this application to seek a court order restricting release of this information. *See Exhibit D.* *The Sentinel* did not object to the City filing this Application.

21. Accordingly, pursuant to C.R.S. § 24-72-204(3)(a)(XIII), the City initiates this action as described herein because the October 13 Recording is protected by the deliberative process privilege.

22. In addition, this action is brought in the alternative pursuant to C.R.S. § 24-72-204(6)(a), as the City has also determined to restrict disclosure because the City employees who are Council Appointees have a legitimate expectation of nondisclosure of the withheld requested records, and releasing the requested recording would do substantial injury to the public interest.

23. Pursuant to C.R.S. § 24-6-402(1)(a), the City believes that the CEC may not have an advisory or "decision-making function" under the OML to constitute a "local public body" conducting a public meeting.

24. Nonetheless, the October 13 Recording is available for *in camera* review if the Court determines such review is appropriate pursuant to C.R.S. § 24-6-402(2)(d.5)(II) and C.R.S. § 24-72-204(5.5).

25. Pursuant to the Council Policies, Section A(1)(6) and C.R.S. § 24-6-402(4), notice was not provided of the topics of the executive session prior to holding the October 13 Discussion.

26. Notwithstanding that the City believes that the CEC may not be delegated an advisory or governmental decision-making function, the Council Policies also do not provide language on whether two (2) members of the CEC constitute a quorum of the CEC.

27. The October 13 Discussion was not publicly noticed, and the City did not publicly post an agenda. *See* C.R.S. § 24-6-402(2)(c) (requiring "full and timely notice" of every meeting, so that interested members of the public have a chance to attend).

II. APPLICATION TO RESTRICT DISCLOSURE

A. Disclosure of the Documents requested in the Records Request Would Cause Substantial Injury to the Public Interest Pursuant to C.R.S. § 24-72-204(3)(a)(XIII), and the City hereby applies to this Court to Restrict Disclosure under the Deliberative Process Privilege.

28. The City incorporates by reference the allegations contained in paragraphs 1 through 27.

29. The Council Appointees had an expectation that information related to their performance, compensation and benefits would be kept confidential in accordance with C.R.S. § 24-72-202(4.5) and C.R.S. § 24-72-204(3) of CORA, and that such discussions were similarly protected by the language of C.R.S. § 24-6-402(4)(f). The information presented in the October 13 Discussion contains personal opinions and data concerning performance of the Council Appointees, and is used for the specific purpose of guiding City Council decisions regarding employment with the City.

30. The City has withheld the October 13 Recording potentially responsive to *The Sentinel's* records request in accordance with the deliberative process privilege. Consistent with C.R.S. § 24-72-204(3)(a)(XIII), public records may be protected and withheld under the

governmental or "deliberative process" privilege if the material is so candid or personal that public disclosure is likely to stifle honest and frank discussion within the government.

31. The City's custodian of records has determined that the deliberative process privilege applies because disclosure of the records at issue "... would expose an agency's decision-making process in such a way as to discourage discussion within the agency and thereby undermine its ability to perform its functions." *Land Owners United, LLC v. Waters*, 293 P.3d 86, 96 (Colo. App. 2011).

32. The October 13 Recording here is both predecisional and deliberative in nature. *City of Colorado Springs v. White*, 967 P.2d 1042, 1052 (Colo. 1998).

33. In addition, the October 13 Recording at issue here is "... so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency." *Id.* (internal citations omitted). For this reason, the deliberative process typically covers "recommendations, advisory opinions, draft documents, proposals, suggestions, and other subjective documents that reflect the personal opinions of the writer rather than the policy of the agency." *Id.* at 1053.

34. The October 13 Recording is also predecisional because the recording involves discussions regarding the Council Appointees' employment with the City, and is intended to guide City Council decision-making regarding compensation and other attributes of employment related to each such Council Appointee position.

35. The City then uses this information to assist in evaluating the Council Appointees' performance, compensation, benefits and continued employment with the City.

36. By way of example, the October 13 Recording contains predecisional information insofar as such discussions resulted in the subsequent consideration and approval of an employment contract with the City Manager.

37. This recording is also deliberative because the October 13 Recording consists of opinions and data related to Council Appointees, provided as a means to evaluate such Council Appointees and determine compensation of such Council Appointees.

38. The October 13 Recording is also not factual in nature, as it consists of opinions and discusses summarized data regarding performance by such Council Appointees.

39. Disclosure of the October 13 Recording would almost certainly stifle honest and frank discussion, as those participating in these Council Appointee evaluations will be less likely to both participate and provide evaluation responses in the absence of confidentiality.

40. Accordingly, because the requested records are both predecisional and deliberative and would almost certainly stifle honest and frank discussions within the City, the deliberative process privilege applies and the records should be withheld.

41. Accordingly, the City through its custodian of records pursuant to C.R.S. § 24-72-204(3)(a)(XIII) hereby requests this Court permit the custodian to restrict disclosure of the October 13 Recording.

B. Disclosure of the October 13 Recording Would Do Substantial Injury to the Public Interest Pursuant to C.R.S. § 24-72-204(6)(a) Because the Council Appointees have a Legitimate Expectation of Non-Disclosure

42. The City incorporates by reference the allegations contained in paragraphs 1 through 41.

43. At no time prior to conducting the meeting on October 13, 2023, did any Council Appointee that was the subject of discussion and evaluation provide any waiver of confidentiality or agree that such information would be publicly disclosed.

44. Given the nature of the employee evaluations by the CEC and the personal, peer and City Council evaluations contained therein, each Council Appointee had an expectation of privacy as this information was highly personal. *See Todd v. Hause*, 371 P.3d 705, 713 (Colo. App. 2015) ("expectations of privacy are legitimate if the information which the state possesses is highly personal or intimate") (internal citations omitted).

45. The language of both C.R.S. § 24-6-402(4)(f) and C.R.S. § 24-72-202(4.5) [defining "personnel files" under CORA] provide that the Council Appointees have an expectation of privacy in certain confidential information related to their employment.

46. Furthermore, the Council Appointees who were the subject of the meeting were not provided notice and an opportunity to require discussions to be held in an open meeting or otherwise waive confidentiality. *See Gumina v. City of Sterling*, 119 P.3d 527 (Colo. App. 2004) [requiring sufficient notice to an employee that they are the topic of an executive session].

47. For this reason, disclosure of the October 13 Recording, if publicly released, could have a chilling effect on the City's need for candid responses and evaluations, and could affect the trust that exists between the City Council and its Council Appointees and the effectiveness of its employment decisions.

48. Therefore, in the alternative to the withholding of the records under the deliberative process privilege as set forth above, pursuant to C.R.S. § 24-72-204(6)(a), the

official custodian may apply to the district court for an order permitting him or her to restrict such disclosure or determine if disclosure is prohibited:

if, in the opinion of the official custodian of any public record, disclosure of the contents of said record would do substantial injury to the public interest, notwithstanding the fact that said record might otherwise be available to public inspection.

49. The Council Appointees in this circumstance have a right to confidentiality that would prevent disclosure of the October 13 Recording.

50. The provisions of C.R.S. § 24-72-204(6)(a) have been construed to include protection of information collected by the government, the disclosure of which would violate an individual's right to privacy. *Todd*, 371 P.3d at 711.

51. When the right of confidentiality is invoked to prevent disclosure of personal information, a court must engage in a three-part balancing inquiry:

(1) Does the party seeking to come within the protection of right to confidentiality have a legitimate expectation that the materials or information will not be disclosed?

(2) Is disclosure nonetheless required to serve a compelling state interest?

(3) If so, will the necessary disclosure occur in that manner which is least intrusive with respect to the right of confidentiality?

Martinelli v. District Court In and For City and County of Denver, 612 P.2d 1083, 1091 (Colo. 1980); *Denver Post*, 739 P.2d 874 (Colo. App. 1987).

52. Here, such information is "highly personal or sensitive" and therefore objectionable to a reasonable person of ordinary sensibilities. *Todd*, 371 P.3d at 713.

Furthermore, no waiver of confidentiality was provided by the Council Appointees at issue and

such employees were not provided with an opportunity to determine whether discussions regarding their employment would be held in a public setting.

53. No interest exists to override the privacy interests of the Council Appointees.

54. Because the October 13 Recording consists entirely of discussions and shows data directly related to Council Appointees, the City's custodian of records could not provide this recording in a manner that also preserves the Council Appointees' rights to confidentiality.

55. The October 13 Recording also implicates self-evaluations provided by the discussed employees, as well as personal opinions and comments from both peer employees and City Council members. The privacy of all these individuals would be implicated by disclosure of these documents.

56. The individuals that participated in the October 13 Discussion did not have the legal authority to waive the privacy and confidentiality protections afforded to the Council Appointees.

57. Therefore, the City through its custodian of records pursuant to C.R.S. § 24-72-204(6)(a) request this Court permit the custodian to restrict disclosure of the October 13 Recording because the release of such records would do substantial injury to the public interest.

III. PRAYER FOR RELIEF

WHEREFORE, the City respectfully requests that this Court enter an order as follows:

A. Pursuant to CORA, and for the reasons set forth above, the City requests this Court hold a hearing at the earliest practical time pursuant to C.R.S. § 24-72-204(6)(a);

B. Following the hearing, permitting the City through its custodian of records to restrict disclosure of the October 13 Recording pursuant to the deliberative process privilege as codified in CORA by C.R.S. § 24-72-204(3)(a)(XIII);


C. In the alternative, following the hearing, permitting the City through its custodian of records to restrict disclosure of the October 13 Recording because the release of such records would do substantial injury to the public interest within the meaning of C.R.S. §24-72-204(6)(a);

D. If the Court determines it appropriate to review the October 13 Recording, the City can provide the same for *in camera* review; and

E. For such other relief the Court determines appropriate under CORA and the OML.

RESPECTFULLY SUBMITTED this 4th day of April 2024.

**HOFFMANN, PARKER, WILSON &
CARBERRY, P.C.**

By: 
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