

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 S. Potomac St. Centennial, CO 80112		DATE FILED: September 2, 2022 1:27 PM ORADO: EE0B5F52F37C8 CASE NUMBER: 2022CV30927
Plaintiff: THE SENTINEL COLORADO, v. Defendant: KADEE RODRIGUEZ, city clerk, in her official capacity as records custodian.		▲ COURT USE ONLY ▲
<i>Attorneys for Kadee Rodriguez, City Clerk, in her official capacity as records custodian:</i> Attorneys: Corey Y. Hoffmann, Reg. No. 24920 Katharine J. Vera, Reg. No. 53995 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 ; kjv@hpwclaw.com		Case No.: 2022CV030927 Division:
<p align="center"> REPLY IN SUPPORT OF DEFENDANT'S MOTION REQUESTING RECONSIDERATION OF THE COURT'S ORDER RELEASING THE MARCH 14, 2022 EXECUTIVE SESSION RECORDING </p>		

Defendant, Kadee Rodriguez, City Clerk, in her official capacity as records custodian of the City of Aurora (the "City") through undersigned counsel, Hoffmann, Parker, Wilson & Carberry, P.C., hereby submits the following Reply in Support of Motion Requesting Reconsideration of the Court's Order Releasing the March 14, 2022, Executive Session Recording, and as grounds therefor, states as follows.

I. SUMMARY OF ARGUMENT

This Court's Order dated July 26, 2022, provided the opportunity for the City to take action to attempt to preclude the release of the March 14, 2022, Executive Session of the Aurora City Council ("Council") following the Court's *in camera* review of the recording. Thus, notwithstanding the Plaintiff's protesting of the City's filing of this Motion, this Motion is the only opportunity afforded the City to actually provide legal authority to this Court regarding the basis for the City's position that communications subject to the attorney-client privilege should not be released under the circumstances of this case under the Colorado Open Records Act ("CORA"), C.R.S. § 24-72-200.1, *et seq.*, and the Colorado Open Meetings Law ("OML"), C.R.S. § 24-6-401, *et seq.*

The City's Motion specifically addressed the special status afforded the attorney-client communication as recognized by the Court in its Order dated July 26, 2022. Based on the special status afforded the attorney-client privilege, such confidential attorney-client communications should be protected from disclosure in order to retain the confidentiality of such sensitive communications from an attorney to his municipal client (the City Council as an entity) as the recipient of such legal advice.

Nonetheless, Plaintiff's opposition to the City's Motion can best be summarized by (1) a misunderstanding regarding the law addressing executive sessions generally, and (2) a misunderstanding regarding the nature of the attorney-client privilege as applied to a municipal corporate entity such as the Aurora City Council, including how such a privilege may be waived by the client.

II. ARGUMENT

A. The Executive Session Privilege Generally

Plaintiff suggests the City's explanation of the interplay between the executive session privilege and the attorney-client privilege is "perplexing and misleading." Response, at p. 5. In addition, Plaintiff's suggestion that the City is asserting an "executive" privilege is simply wrong. *Id.* Rather, the provisions of the OML are unambiguous and straight-forward, and contemplate allowing the City to convene an executive session for all of the separate bases enumerated in the City's Motion. *See* C.R.S. § 24-6-402(4). While the executive session privilege is statutory in nature as codified in the OML, it provides the same level of confidentiality for the benefit of the City as the common law attorney-client privilege.

As set forth in the City's Motion, the provisions of C.R.S. § 24-6-402(4), authorize the City Council to hold a meeting closed to the public, statutorily recognized as an executive session, for purposes of maintaining the confidentiality of the topics at issue. In other words, communications received by the governing body in executive session are confidential in nature, may not be disclosed to the public, and are thus identified as communications subject to the statutory executive session privilege. Regardless of nomenclature, and as discussed in detail below with regard to the issue of waiver of the privilege, information in a properly convened executive session is confidential and privileged, and may not be released without the consent of the entity that holds the privilege.

Here, as set forth in the City's Motion, because the attorney-client privilege was the basis for convening the executive session, this Court's analysis should recognize that the sanctity of the

attorney-client privilege is and should be a basis for not disclosing the confidential and privileged communications within the March 14, 2022, Executive Session recordings.¹

Plaintiff's response suggests that because the attorney-client communications were recorded, such a recording was a recognition by the City that such communications were somehow not subject to the attorney-client privilege. Response, at pp. 5-6. To the contrary, the language of C.R.S. § 24-6-402(2)(d.5)(II)(B) authorizes the attorney representing the City to opine that such communications are subject to the attorney-client privilege, and therefore determine not to record such communications, but the language regarding recordation is permissive, not mandatory. The language of C.R.S. § 24-6-402(2)(d.5)(II)(B) simply indicates that "...no record or electronic recording ***shall be required*** to be kept of the part of the discussion that constitutes a privileged attorney-client communication... (emphasis added)." Thus, to the extent Plaintiff suggests recording the executive session was an admission that the conversation was not privileged, Plaintiff is simply wrong. Rather, as a matter of practice, the City records all discussions subject to the executive session privilege, including those discussions that are subject to the attorney-client privilege. This recording of such discussions is not any sort of admission that such communications are not subject to the attorney-client privilege.

¹ Put another way, the City acknowledges that if the executive session were to have been convened for another purpose, the executive session privilege would likely be waived by non-compliance with the proper notice provisions contained in the OML. Here, however, for all of the reasons set for in the City's Motion including the robust discussion of the matter on March 28 following the City Council receiving legal advice from its attorney, the attorney-client privilege should be treated differently.

B. *Special Status of the Attorney-Client Privilege*

It is in this context that the attorney-client privilege should be differentiated from the other statutory bases for holding an executive session. Interestingly, Plaintiff does not dispute the sanctity of the attorney-client privilege. In fact, Plaintiff's argument is focused on whether the privilege was destroyed by the presence of an adverse or third party, or whether the privilege was waived. While the issue of waiver is addressed in a separate argument below, Plaintiff does not dispute the purpose of the attorney-client privilege, or "... the roots of this time-honored privilege." *See Losavio v. District Court*, 533 P.2d 32, 34 (Colo. 1975).

As the City set forth in its Motion,

The purpose of the OML, as declared in § 24–6–401, C.R.S.2006, is to afford the public access to a broad range of meetings at which public business is considered; to give citizens an expanded opportunity to become fully informed on issues of public importance, *Bd. of County Comm'rs v. Costilla County Conservancy Dist.*, 88 P.3d 1188 (Colo.2004); and to allow citizens to participate in the *legislative* decision-making process that affects their personal interests. *Cole v. State*, 673 P.2d 345 (Colo.1983).

Walsenburg Sand & Gravel Co., Inc. v. City Council of Walsenburg, 160 P.3d 297, 299 (Colo. App. 2007).

Here, the purpose of the OML is not served by disclosing an attorney-client privileged communication. More specifically, the City Council received legal advice from the City Attorney in the March 14, 2022, Executive Session, and then the City Council subsequently discussed and made a decision on the matter at an open meeting on March 28, 2022. There is simply no valid purpose under the OML for such disclosure. In this regard, as the United States Supreme Court stated regarding the importance of the attorney-client privilege over 75 years ago:

In addition to the difficulty involved in reviewing an attorney's case file, the reviewing court must consider the presumption in favor of the attorney-client privilege. Indeed, the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through subpoena or court order.

Hickman v. Taylor, 329 U.S. 495, 512 (1947). The Colorado Supreme Court similarly recognized the unique nature of the attorney-client privilege as it relates to even disclosure for *in camera* review by a court when it stated as follows:

A trial court should be reluctant to review the contents of an attorney's case file precisely because of the importance of the privileges involved. *In camera* disclosure to the court is still a form of disclosure. Even if it goes no further and the court declines to release any documents to the moving party, the court's review could have a chilling effect on attorneys and their clients, especially if *in camera* review occurred frequently or was easily obtained. *See e.g., PHE, Inc., v. Dep't of Justice*, 983 F.2d 248, 253 (D.C.Cir.1993) ("*In camera* review is generally disfavored.").

People v. Madera, 112 P.3d 688, 691 (Colo. 2005).

Accordingly, based on the special status afforded to the common law attorney-client privilege under both United States and Colorado Supreme Court precedent, and the lack of a public purpose under the OML for disclosing such communications, the City respectfully requests this Court determine **not** to release the recording, because the attorney-client privilege should be respected in this context, even taking into account the deficient (but subsequently cured) notice at issue in this case.

C. The Attorney-Client Privilege was Not Destroyed or Waived by the City Council

Plaintiff argues that the attorney-client privilege was destroyed or waived by virtue of Ms. Jurinsky's presence at the March 14, 2022, Executive Session and by virtue of the alleged disclosure by Councilmembers Marcano and Coombs of what occurred at the Executive Session.

These arguments fail because (1) the City Attorney's client is the City Council as a body, which includes Ms. Jurinsky; and (2) council members cannot act individually to waive the attorney-client privilege on behalf of the entire City Council. No individual council member can act to bind the Council or to waive a privilege.

As Plaintiff addressed in its Response, the Council's meeting minutes reflect that the Council's procedure for authorizing a waiver of a privilege is to vote by motion as a body to authorize the waiver.² The City of Aurora, as a municipal corporation, vests the corporate authority and legislative authority of the city in the City Council, as the governing body of the City. § 2-32 of the Aurora City Code. A city council's legislative and discretionary powers can be exercised only by the coming together of the members who compose it, or those who are its duly constituted representative-the legal corporate authorities-and its purposes or will can be expressed only by acts or votes embodied in some distinct and definite form. *See* 4 McQuillin Mun. Corp. § 13:9 (3d ed.). Accordingly, individual members cannot effect a valid act except as a board; acting separately and individually, they can do nothing to bind such board. *Id.*

In this regard, courts have held that individual employees or officers of a corporation cannot act to waive the corporation's privilege. *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1371 (10th Cir. 1997); *Genova v. Longs Peak Emergency Physicians, P.C.*, 72 P.3d 454, 462 (Colo. App. 2003). These courts stress that the corporation as an entity, and not its individual shareholders or managers, is the client. *Genova*, P.3d at 463 (citing *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985))(holding that the trustee of a corporation in

² Plaintiff alluded to this very fact in footnote 6 of its Response. Council by Motion approved the limited waiver of the attorney-client privilege to allow the Court to conduct the *in camera* review in this case. *See* Answer to Plaintiff's "Application for Access to Executive Session Recording and Meeting Minutes and for In Camera Review under § 24-72-204(5.5), C.R.S.", at ¶ 26, incorporating Exhibit 1 thereto.

bankruptcy, as the current manager of the corporation, has the power to waive the attorney-client privilege) and *Milroy v. Hanson*, 875 F. Supp. 646 (D.Neb.1995)(holding that a director and minority stockholder of a corporation has no right to documents otherwise protected under the attorney-client privilege). As an inanimate entity, the corporation must act through its agents and only actions undertaken by individuals empowered to act on behalf of the corporation will bind it. *Commodity Futures Trading Comm'n*, 471 U.S. at 348-49. The *Genova* court held that the former director of a corporation could not act alone to waive the attorney-client privilege held by the corporation; the privilege belonged to the corporation and could only be waived by the corporation. *Genova* at 462-63.

Similarly, the attorney-client privilege in this case is held by Council and can only be waived on motion by Council acting and voting as a body. The privilege cannot be waived by individual councilmembers speaking to the press of their own accord or by virtue of Ms. Jurinsky's presence during the March 14, 2022, Executive Session. As cited to by Plaintiff, the privilege extends only to confidential matters communicated by or to the client in the course of gaining counsel, advice, or direction with respect to the client's rights or obligations. Here, Ms. Jurinsky, as a member of City Council, *is* the client and as articulated above, the attorney-client privilege cannot be waived by an individual member without authority from the body to do so. Thus, to the extent Plaintiff relies on cases involving waiver related to the presence of a third party or adverse party in an executive session, such authorities are inapposite because Ms. Jurinsky is a member of the body.

Additionally, Plaintiff claims that the City waived the privilege by disclosing confidential discussions from the March 14, 2022, Executive Session at the March 28, 2022, Council

meeting. Plaintiff misstates the City's Motion, stating that the recording was the topic of "robust discussion." The recording and its attorney-client privileged content were not the topic of robust discussion at the public Council meeting; rather, the topic for discussion at the March 14, 2022, Executive Session was identified in the March 28, 2022, Council meeting packet and Council discussed whether to end Ms. Jurinsky's censure on the record before taking action. There is simply no foundation for Plaintiff's claim that the City destroyed or waived the attorney-client privilege in this case.

III. CONCLUSION

WHEREFORE, the City respectfully requests that the Court reconsider its July 26, 2022, Order, and determine not to release the recording of the attorney-client privileged communications reviewed by this Court *in camera*.

DATED this 2nd day of September, 2022.

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

By: /s/Corey Y. Hoffmann
Corey Y. Hoffmann
Katharine J. Vera

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that on this 2nd day of September, 2022, I caused a true and correct copy of the foregoing **REPLY IN SUPPORT OF DEFENDANT'S MOTION REQUESTING RECONSIDERATION OF THE COURT'S ORDER RELEASING THE MARCH 14, 2022 EXECUTIVE SESSION RECORDING** to be served via CCES, electronic mail, and/or U.S. mail on the following:

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