DISTRICT COURT, ARAPAHOE COUNTY, COLORADO Court Address: 7325 S. Potomac St. Centennial, CO 80112 _____ **Plaintiff:** THE SENTINEL COLORADO, **v.** **Defendant:** KADEE RODRIGUEZ, city clerk, in her official capacity as 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: 2022CV030927 Division:

RESPONSE TO DEFENDANT'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER RELEASING THE MARCH 14 RECORDING

Plaintiff *The Sentinel Colorado* ("Plaintiff" or "*The Sentinel*"), by and through undersigned counsel, submits this Response to Defendant's Motion for Reconsideration of the Court's Order Releasing the March 14, 2022 Executive Session Recording, and states as follows:

CERTIFICATION OF CONFERRAL

Pursuant to C.R.C.P. 121, section 1-15(8), Defendant conferred with Plaintiff before filing its motion on August 8, 2022. Plaintiff opposes Defendant's motion.

INTRODUCTION

On July 26, 2022, this Court held that the Aurora City Council (the "Council" or "Defendant") violated the Colorado Open Meetings Law ("COML") by failing to provide proper notice to the public of its March 14 Executive Session in accordance with § 24-6-402(4), C.R.S.[1] July 26 Order at 2. In finding that the Council violated the law, the Court held that it was "inclined to release" the recording, but would grant the Council an "opportunity to consider the Court's ruling prior to release, in order to take any action they deem appropriate." *Id.* at 2–3.

The Council has now moved for reconsideration. Yet, as discussed *infra*, the standard for filing a motion for reconsideration is not met here by Defendant[2]. Nevertheless, should the Court find that this action is appropriate, based on its Order, Plaintiff sets forth the below.

First, Defendant argues that to release the recording would be "inconsistent with the very purpose of the attorney-client privilege under the factual circumstances of this case," and that "the public policy considerations of retaining the confidentiality of such communications outweigh[] the right of the public to know such legal advice provided by the Aurora City Attorney." Def.'s Mot. for Recons. at 2–3. But, as discussed in detail *infra*, these arguments only highlight the inconsistency with which the Council applies the attorney-client privilege, and ignores the purpose of the COML, which is to prevent public business from being conducted in

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[1] Section 24-6-402(4), C.R.S states: "The members of a local public body subject to this part 4, upon the announcement by the local public body to the public of the topic for discussion in the executive session, . . . and identification of the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized, . . . may hold an executive session . . . ."

[2] Further, Plaintiff's interpretation of the Court's decision to grant the Defendant an "opportunity to consider the Court's ruling prior to release, in order to take any action they deem appropriate," July 26 Order at 2–3, was to afford Defendant the opportunity to request certain protections, such as redaction, to ensure that whatever possible confidences are in jeopardy remain protected.

secret. § 24-6-401, C.R.S; *see also Gumina v. City of Sterling*, 119 P.3d 527, 530 (Colo. App. 2004).

The Council further argues that it "cured" the failure to notice the March 14 Executive Session by having a "robust discussion and vote on March 28, 2022." Def.'s Mot. for Recons. at 2–3. The Council's March 28 session, however, did not "cure" the announcement/notice violation under § 24-6-402, C.R.S., because the Council merely "rubber stamped" its formal action, or the taking of a position, in violation of § 24-6-402(2)(b), C.R.S. *See Walsenburg Sand & Gravel Co. v. City Council of Walsenburg*, 160 P.3d 297, 299 (Colo. App. 2007) (allegations that the mayor and city councilmembers met in a closed meeting before the regular session meeting and discussed a bid offer to which they later voted on in a public meeting was merely a "rubber stamping" of the decisions made in the regular session and sufficient to support a claim for violation of Open Meeting Law); *Bagby v. Sch. Dist. No. 1*, 528 P.2d 1299, 1302 (Colo. 1974) (holding that the Open Meetings Law is designed to avoid mere "rubber stamping" in public decisions that are effectively made in private, since the public is entitled to know "the discussions, the motivations, the policy arguments and other considerations which led to the discretion exercised").

Separately, the Court found that the Council "did not 'vote' on ending the censure action as alleged in the Sentinel's complaint, however, ***there was a roll-call taken*** on what direction to give to legal counsel on how to proceed." July 26 Order at 2 (emphasis added). This roll-call action amounts to an adoption of "formal" action or the taking of a "position" in violation of § 24-6-402(2)(d)(II), C.R.S. Thus, regardless of the separate arguments made by Defendant

regarding attorney-client privilege[3], which are unavailing, the March 14 Recording must be open to the public for inspection because the Council unlawfully convened an executive session. *City of Sterling*, 119 P.3d at 532.

For the reasons stated above, and in more detail below, Plaintiff respectfully requests that the Court reject or dispose of Defendant's motion for reconsideration and release the March 14 Recording as previously ordered.

ARGUMENT

A. Standard of review regarding motions for reconsideration

Under C.R.C.P. 121, section 1-15(11), a Motion to Reconsider is "disfavored" and must show more than mere "disagreement" with the Court's order to pass muster. C.R.C.P. 121, section 1-15(11). Additionally, such a motion must "allege a manifest error of fact or law that clearly mandates a different result or other circumstance resulting in manifest injustice." *Id.* The Defendant has made no such allegations of error in fact or law or manifest injustice in its motion. The Defendant has solely made arguments regarding the special status of attorney-client privilege, and asserts its application to these facts which Plaintiff opposes. Given the rule stating disfavor of filing a motion for reconsideration, and that Defendant cannot allege an error in fact or law by the Court, Plaintiff respectfully requests that the Court dispose of Defendant's motion and release the March 14 Recording.

[3] As discussed *infra*, under these facts, the attorney-client privilege has been destroyed because confidential communications and legal advice were discussed in the presence of Councilwoman Jurinsky, an adverse third party. Additionally, the potentially privileged nature of the discussions in that March 14 Executive Session was waived when Councilmembers openly discussed the meeting in the press in articles published by Plaintiff. Pl.'s Ex. C.

Alternatively, should the Court find that the motion to reconsider is appropriate—and based on the Court's order granting Defendant an opportunity to take any action it deems appropriate—Plaintiff asserts the following:

B. An "Executive Session Privilege" is inapplicable under Colorado Law

Defendant's contention that the COML recognizes an "executive session privilege" analogous to an attorney-client privilege is perplexing and misleading. *See* Def.'s Mot. for Recons. at 4. While § 24-6-402(4)(b), C.R.S. states that matters subject to the attorney-client privilege permit a local body to convene an executive session, neither the statute nor Colorado case law recognize an "executive privilege" in this context. Indeed, the only privilege arguably applicable here is the attorney-client privilege, which is, as Defendant points out, acknowledged in § 24-6-402(2)(d.5)(II)(B), C.R.S.:

> If, in the opinion ***of the attorney who is representing the local public body*** and who is in attendance at an executive session that has been properly announced pursuant to subsection (4) of this section, all or a portion of the discussion during the executive session constitutes a privileged attorney-client communication, ***no record or electronic recording shall be required to be kept of the part of the discussion that constitutes a privileged attorney-client communication.*** The electronic recording of said executive session discussion shall reflect that no further record or electronic recording was kept of the discussion based on the opinion of the attorney representing the local public body, as stated for the record during the executive session, that the discussion constituted a privileged attorney-client communication, or the attorney representing the local public body may provide a signed statement attesting that the portion of the executive session that was not recorded constituted a privileged attorney-client communication in the opinion of the attorney.

§ 24-6-402(2)(d.5)(II)(B), C.R.S. (emphasis added).

Citing no authority, Defendant asserts that the foregoing statutory language permits a court to retroactively decide "whether to release a discussion that was not required to be recorded

in the first instance because of the special status afforded to attorney-client privileged communications." Def.'s Mot. for Recons. at 5.[4] Defendant ignores the clear language of the statute that puts the onus on the "***attorney*** who is representing the local public body" to determine whether to record an executive session if its discussions constitute attorney-client communications. § 24-6-402(2)(d.5)(II)(B), C.R.S. (emphasis added). Here, the attorney representing the Council did not make that choice, Def.'s Answer at 6, nor would doing so have made sense since the discussions could not have been privileged attorney-client communications when adverse parties were present, Pl.'s Ex. D.

Defendant's further argument that there is "no case that explicitly indicates" that attorney-client communications were released in cases that address the release of executive session recordings is also unavailing. Def.'s Mot. for Recons. at 5–6. The Court in *Guy v. Whitsitt*, 469 P.3d 546, 554 (Colo. App. 2020)[5], held that if attorney-client communications ***did***

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[4] Defendant's assertion seems to undercut its previous position that a court cannot or should not review attorney-client privileged communications *in camera*. Def.'s Br. at 3–4.

[5] *See also Whitsitt*, 469 P.3d 546, 549, 553 (Colo. App. 2020)("The Town Council's failure to provide any information beyond the statutory citation authorizing an executive session for 'legal advice' did not comply with the statutory requirement of identifying 'a particular matter in as much detail as possible without compromising the purpose for which an executive session was called'.") In other words, noticing a general topic that is to be discussed in an executive session is insufficient. Here, it was reported that the council called the March 14 session to "receive legal advice on specific legal questions" (the original agenda merely included the cite as "Legal advice"). *See EDITORIAL: Dubious calls in Jurinsky censure debacle demand release of Aurora secret meeting tapes* https://sentinelcolorado.com/opinion/editorial-dubious-calls-in-jurinsky-censure-debacle-demand-release-of-aurora-secret-meeting-tapes/ This statement is far too general because it fails to identify the particular subject matter of the legal advice provided to the council. This is so, notwithstanding the city's alleged attorney-client privilege implications. For example, the Court in *Whitsitt* held that it was possible to describe what legal advice would be discussed in an executive session without waiving attorney-client privilege. *Whitsitt*, 469 P.3d at 551-553. The court noted that the attorney-client privilege "ordinarily does not encompass information about the subject matter of an attorney-client communication." *Id*. Moreover, the privilege only extends to ***confidential*** matters—it does not include the fact of the

exist in an executive session recording, they must be released. In *Whitsitt*, the Court determined that because an executive session was announced and convened improperly, even though personnel matters and matters related to the *legal advice of an attorney* of § 24-6-402(4), C.R.S. were discussed, the plaintiff was entitled to the recording. *Id.* In so holding, the Court made clear that "to the extent" attorney-client privileged communications were shared at the executive session, they must be disclosed—not, as Defendant suggests, that the presence of such privileged communications was unknown to the Court. Def.'s Mot. for Recons. at 6. In either case, the *Whitsitt* Court's reasoning is certainly applicable to the present matter.

Since § 24-6-402(4), C.R.S. merely sets forth the specific exceptions that permit a local body to hold an executive session, no special "executive session privilege" can be afforded or contemplated in this case. Accordingly, the issue before the Court is whether the attorney-client privilege applies to prevent disclosure, and the answer is no.

C. The special status of the attorney-client privilege is inapplicable because the privilege was destroyed

The issue here is not—as Defendant asserts—whether releasing the recording of the executive session will be "equivalent to a finding that the deficient notices operated as a waiver of the attorney-client privilege." Def.'s Mot. for Recons. at 7. First, as explained *supra*, and as noted by this Court, July 26 Order at 2, binding Colorado appellate case law, and § 24-6-402(4), C.R.S., clearly state that improperly noticed or announced executive sessions violate the COML, and such violations result in the release of any recording or meeting minutes because "the formation of public policy is public business and may not be conducted in secret." § 24-6-401, C.R.S; *see also Whitsitt*, 469 P.3d at 549, 553; *City of Sterling*, 119 P.3d at 530. Put simply: If

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communication, the identity of the attorney, the subject discussed, and details of the meetings, which are not protected by the privilege. *Id.*

an executive session is not convened in accordance with applicable requirements, *see* § 24-6-402(3)(a) & (4), C.R.S, then the meeting and the recorded minutes are open to the public. *City of Sterling*, 119 P.3d at 530 (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 (Colo. App. 1998).

Second, notwithstanding the fact of improper notice in this case, the issue that Defendant does not address in its motion is that any asserted attorney-client privilege attaching to communications occurring during the March 14 Executive Session was destroyed by Councilwoman Jurinsky's presence. Pl.'s Ex. D. As cited by the Court in *Whitsitt*, "[t]he common law attorney-client privilege codified at section 13-90-107(1)(b), C.R.S. 2019, '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.'" *Whitsitt*, 469 P.3d at 551 (quoting *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215, 1220 (Colo. 1982)); *see also Denver Post Corp. v. Univ. of Colorado*, 739 P.2d 874, 880 (Colo. App. 1987) ("[T]he privileges for attorney-client communication and attorney work product established by common law have been incorporated into the Open Records Act."); § 24-6-402(4)(b), C.R.S. (incorporated into the executive session provisions within COML). Under Colorado law, any putative attorney-client communication is destroyed by the presence of an adverse or third party. *Lanari v. People*, 827 P.2d 495, 499–500 (Colo. 1992) (holding that statements made initially in confidence to an attorney lose the shield of the attorney-client privilege if the statements are subsequently disclosed to third parties); *Wesp v. Everson*, 33 P.3d 191, 198 (Colo. 2001) (noting that "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"); *People v.*

Lesslie, 24 P.3d 22, 26 (Colo. App. 2000) (the presence of a third person during a conference with a client and an attorney ordinarily destroys the confidentiality required to assert the attorney-client privilege); *DCP Midstream, LP v. Anadarko Petroleum Corp.*, 303 P.3d 1187, 1198 (Colo. 2013) ("The attorney-client privilege is not absolute[;] [t]here are recognized exceptions to the attorney-client privilege, and the privilege may be waived in certain circumstances." (citing *People v. Trujillo*, 144 P.3d 539, 542–43 (Colo. 2006))). The adverse, third party, in this case, Councilwoman Jurinsky, was present during the March 14 Executive Session, Pl.'s Ex. D, and her presence waives any putative privilege as to communications conveying legal advice to the Council regarding its dispute with Councilwoman Jurinsky, including discussion regarding her possible censure. *Black v. Sw. Water Conservation Dist.*, 74 P.3d 462, 469 (Colo. App. 2003) ("The privilege applies only to communications given in confidence, and intended and reasonably believed to be part of an on-going and joint effort to set up a common legal strategy."). Accordingly, any communications between the Councilwoman and the City's attorney would no longer be part of a *common* legal strategy[6].

Next, Councilmembers Alison Coombs and Juan Marcano, who were present at the March 14 Executive Session, waived any attorney-client privilege when they publicly discussed what occurred during the executive session. *Fearnley v. Fearnley*, 98 P. 819, 824 (Colo. 1908) (finding that a client's disclosure of information protected by the attorney-client privilege waives

[6] Moreover, the City already secured a limited waiver of the privilege from the Council in order to permit this Court to review the March 14 Recording *in camera*. Def.'s Ex. 1 at 14. While we understand Defendant obtained a limited waiver from the Council for the Court to conduct an *in camera* review, it is Plaintiff's position that such waiver was not necessary because any privilege in the communications between legal counsel and the Council at the March 14 Executive Session was waived by both Jurinsky's presence and subsequent waivers by councilmembers who attended the executive session, and then shared what was discussed with the Council's attorney with a third party newspaper. Pl.'s Ex. C.

the privilege (citing *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888))). As Plaintiff reported[7], Councilmembers Marcano and Coombs stated on-the-record that a majority of the councilmembers took a roll-call action in the executive session to end the censure proceedings pending against Councilwoman Jurinsky and settle the matter with Jurinsky's attorney, David Lane. Pl.'s Exs. C–D.

Additionally, it appears that Defendant contradicts its own argument that the March 14 Recording should be afforded attorney-client privileged protection. In arguing that the March 28, 2022 Public Meeting cured the improper notice of the March 14 Executive Session, Defendant states that the recording was the topic of "robust" discussion, Def.'s Mot. for Recons. at 9, and that the "robust" discussion led the Council to adopt a "Motion to Approve the Stipulation and a Request for Payment of Attorney Fees," the precise action taken at the closed March 14 Executive Session. Def.'s Mot. for Recons. at 12; Def.'s Ex. B at 784. The Defendant cannot have it both ways. If Defendant argues that the entire March 14 Recording must be afforded attorney-client privilege protection, yet it appears to disclose confidential discussions from the March 14 Executive Session at the March 28 Public Meeting, then the privilege is, once again, waived. *Trujillo*, 144 P.3d at 543 ("[I]f a client asserts a claim or defense that depends upon privileged information, she cannot simultaneously use the [attorney-client] privilege to keep that information from the opposing party."). The defense that the improper notice at the March 14 Executive Session was cured fails because it depends on privileged information. Thus,

[7] Max Levy, *Aurora lawmakers end censure action against council member during 'flagrant' open meetings violation*, The Sentinel (Mar. 21, 2022), https://sentinelcolorado.com/news/metro/aurora-lawmakers-end-censure-action-against-council-member-during-flagrant-open-meetings-violation/ (reproduced as Pl.'s Ex. C).

the issues discussed in the public session cannot be "placed back into the bag" once discussed publicly. The privilege is waived.

Finally, the general assembly considered what effect a deficient notice would have on the release of important attorney-client communications. In fact, the language of the statute, § 24-6-402(2)(d.5)(II)(B), C.R.S., indicates that such a factor was contemplated: "If, in the opinion of the attorney who is representing the local public body and who is in attendance at an executive session ***that has been properly announced*** pursuant to subsection (4) of this section, all or a portion of the discussion during the executive session constitutes a privileged attorney-client communication, ***no record or electronic recording shall be required to be kept of the part of the discussion that constitutes a privileged attorney-client communication.***" *Id.* (emphasis added). Here, the language "that has been properly announced" indicates that in order to convene an executive session to discuss confidential attorney-client communications, the session *must* still be properly announced or noticed. Further, the remaining language of § 24-6-402(2)(d.5)(II)(B), C.R.S. sets forth the tool that a public body can use to protect attorney-client privileged communications while in executive session, which is to not record or keep that part of the discussion that is privileged. Thus, there are mechanisms in place to ensure that the privilege is protected. Such mechanisms also include redaction of the specific communications—should the Court find that waiver of the attorney-client privilege did not occur, and there are protected attorney-client privileged information—rather than withholding the entire March 14 Recording. *See e.g.*, *Ritter v. Jones*, 207 P.3d 954, 960 (Colo. App. 2009) ("where a single document contains both public and confidential information, *it is appropriate to redact the confidential information prior to inspection*") (emphasis added); *Land Owners United, LLC v. Waters,* 293

P.3d 86, 99 (Colo. App. 2012) (holding that District Court has "discretion to direct redaction of specific confidential information").

Since Defendant cannot overcome the issue of waiver, any claim of attorney-client privilege with respect to whatever legal advice, if any, may have been provided at the March 14 Executive Session is destroyed. Thus, the March 14 Recording—although already disclosable to the public because of the announcement violation discussed *supra*—cannot be withheld on the basis of privileged attorney-client communications.

D. The Council did not cure the improper notice of the March 14 Executive Session; it merely "rubber stamped" the illegal formal action, or the position adopted

The March 28 Public Meeting did not "cure" the improper notice of the March 14 Executive Session as Defendant claims. Instead, the subsequent meeting merely rubber stamped the formal action taken at the March 14 Public Session. City Attorney Daniel Brotzman publicly acknowledged that the decision to halt the censure process against Councilwoman Jurinsky was made at the March 14 Executive Session, saying the Council "gave direction" to City staff to reach a settlement with Councilwoman Jurinsky's attorney that would address the scope of the investigation, how attorney's fees will be paid, and other topics. *See* Pl.'s Ex. D; Aurora City Council Study Session, AuroraTV (Mar. 21, 2022), https://www.auroratv.org/video/study-session-3-21-22, at 3:03:00. Even though, as the Court found, no vote occurred, a roll-call was taken on what direction to give the Council to proceed. July 26 Order at 2. And, according to the result of that March 14 roll-call, a motion to ***approve*** the stipulation and ***request*** a payment of attorney's fees to Councilwoman Jurinsky's attorney was discussed in the March 28 Public Meeting. Def.'s Ex. B at 784. In this manner, the Council's decision in the March 14 Executive Session ended the investigation and censure against Councilwoman Jurinsky. *See id.*; Def.'s

Mot. for Recons. at 12 ("Those materials include a letter that states that Council met on March 14 to discuss the charges against Council Member Jurinsky and ***instructed legal counsel to end the investigation and enter into a stipulation with her***." (emphasis added)).

As such, the Council's decision at the March 14 Executive Session was later "rubber stamped" or "approved" at the March 28 Public Meeting—and did not cure the open meeting violation. *See Bjornsen v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, 487 P.3d 1015, 1022 (Colo. App. 2019) (regarding curing an improperly convened executive session, "the subsequent meeting must not be a mere rubber stamping of the decision made in the improperly convened executive session"); *Lanes v. State Auditor's Office*, 797 P.2d 764, 766 (Colo. App. 1990) ("[O]nce the failure to hold an open meeting was challenged, Lanes' 'after the fact' approval of the Board's executive session was not sufficient to validate the Board's meeting under § 24-6-402(4), C.R.S."); *Van Alstyne v. Hous. Auth. of Pueblo*, 985 P.2d 97 (Colo. App. 1999) (holding that subsequent approval in an open meeting of a previous decision made at a closed meeting to sell city owned property constituted rubber stamping and violated the Open Meetings Law); *see also Bagby*, 528 P.2d at 1302 (holding that the Open Meetings Law is designed to avoid mere "rubber stamping" in public decisions that are effectively made in private, since the public is entitled to know "the discussions, the motivations, the policy arguments and other considerations which led to the discretion exercised").

Therefore, Defendant's attempt to argue that the Council subsequently cured the improperly noticed March 14 Executive Session must fail.

E. The roll-call action taken at the March 14 Executive Session is the requisite adoption of "formal action," or a "position" taken under § 24-6-402(2)(d)(II), C.R.S., that mandates the recording and meeting minutes be open to the public

Here, as discussed *supra*, no vote was taken, but the Council took formal action,[8] or, at a minimum, adopted a position to "end the investigation [into Jurinsky's censure] and enter into a stipulation with her." Def.'s Mot. for Recons. at 12. The decision to "end" an investigation, and enter into a stipulation, constitutes a formal action, and such final decisions must be open to the public.

Under the COML, minutes of any meeting of a local public body at which the adoption of any proposed policy, ***position***, resolution, rule, regulation, ***or formal action*** occurs or could occur shall be taken and promptly recorded, and such records shall be open to public inspection. §24-72-402(2)(b), C.R.S.; § 24-6-402(2)(d)(II), C.R.S. (emphasis added); *see also Gumina*, 119 P.3d at 529-530; *Whitsitt*, 469 P.3d at 549-551. Additionally, under § 24-72-204(5.5)(b)(I), C.R.S.:

> Upon 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***. . . ."

Id. (emphasis added); *see also* § 24-6-402(2)(d.5)(I)(C), C.R.S.

Further, under the COML, executive sessions may be held to conduct deliberations on a matter exempt from the Open Meetings Law, but any final decision must be taken at a

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[8] Under § 24-6-402(2)(b), C.R.S., all meetings of a quorum, or of three or more members of any local public body, whichever is fewer, at which any public business is discussed or at which any formal action may be taken, are declared public meetings open to the public at all times.

subsequently reconvened public meeting. § 24-6-402(4), C.R.S. Where, however, executive sessions are convened to take a formal position or action, such sessions are in violation of the Open Meetings Law. § 24-6-402(2)(b) & (4), C.R.S. In applying this requirement, courts have found, for example, improper formal action to include a city council executive session to discuss a real estate bid offer before noting the offer in the public meeting. *City Council of Walsenburg*, 160 P.3d at 299. Here, the Council took formal action by ending the investigation against Jurinsky on the censure issue and approving the request for attorney's fees to pay Jurinsky's attorney David Lane. Def.'s Ex. B. Both positions were improperly determined in closed executive session in violation of the Open Meetings Law.

Thus, the Court must find that the action taken at the March 14 Executive Session constitutes formal action (or a position) and the March 14 Recording, and any other records, such as meeting minutes, must be open to the public.

F. Plaintiff is entitled to attorney's fees and costs

Finally, as discussed in Plaintiff's application, Pl.'s Appl. at 8, 11, a court may award attorney's fees to the prevailing party who is entitled to recover all reasonable attorney's fees and costs incurred in litigating the matter, which is mandatory under the COML and the CORA. *See* § 24-6-402(9), C.R.S.; § 24-72-204(5), C.R.S.; *Van Alstyne*, 985 P.2d at 99–100. Since Plaintiff has already prevailed in its application because the Court found that Defendant violated COML, July 26 Order at 2, it is entitled to mandatory attorney's fees. § 24-6-402(9), C.R.S. Accordingly, should the Court deny Defendant's motion for reconsideration, Plaintiff should nevertheless be entitled to recover reasonable costs and attorney's fees associated with the preparation of this response (it does not change the Court's finding that the Defendant failed to afford the public proper notice of the executive session in violation of the COML). *Id.*

CONCLUSION

For the reasons herein, the Court must reject the Defendant's motion for reconsideration and find that the Council violated the COML requiring release of the complete March 14 Recording to Plaintiff. Additionally, the Court should enter an award of attorney's fees to Plaintiff, including all costs and reasonable attorney's fees associated with the preparation, initiation, and maintenance of this action.

Respectfully submitted this 29th day of August 2022.

By */s/Rachael Johnson*

Rachael Johnson
Reporters Committee for Freedom of the Press
Attorney for Plaintiff
The Sentinel Colorado

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August 2022, a true and correct copy of the foregoing **RESPONSE TO DEFENDANT'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER RELEASING THE MARCH 14 RECORDING** 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), section 1-26:

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