DISTRICT COURT, LARIMER COUNTY, COLORADO 201 LaPorte Ave. Suite 100 Fort Collins, Colorado 80521 **Plaintiffs:** THE ESTES VALLEY VOICE, PBC and PATTI BROWN **v.** **Defendant:** THE BOARD OF THE ESTES PARK FIRE PROTECTION DISTRICT **Attorney for Plaintiffs:** Steven D. Zansberg, Esq. #26634 ZANSBERG BEYKIN LLC 100 Fillmore Street, Suite 500 Denver, CO 80206 (303) 564-3669 steve@zblegal.com	DATE FILED November 4, 2024 12:49 PM FILING ID: 26C25C4F55CE6 CASE NUMBER: 2024CV30968 **▲ COURT USE ONLY ▲** Case Number: 2024CV_____ Division:

APPLICATION FOR *IN CAMERA* REVIEW UNDER § 24-72-204(5.5), C.R.S.

Plaintiffs, The Estes Valley Voice, PBC ("*The Voice*"), and Patti Brown, its editor, by and through undersigned counsel, hereby state as follows:

INTRODUCTION

1. By this civil action under the Colorado Open Records Act ("CORA"), §§ 24-72-201 *et seq*., C.R.S., and the Colorado Open Meetings Law ("COML"), §§ 24-6-401 *et seq*., Plaintiff seeks access to the portions of the audio/video recording of the October 9, 2023 executive session of the Board of the Estes Park Fire Protection District ("the Board") in which the Board discussed and decided, unanimously to extend an offer of employment to Paul Capo to serve as the next Chief of the Fire Protection District (hereinafter the "Oct. 9 Recording").

2. Plaintiffs seek an Order from the Court directing Defendant to release the Oct. 9 Recording to Plaintiffs because, *inter alia*, the Council's actions, as set forth below, violated the COML, after the Court completes an *in camera* review of the Oct. 9 Recording, pursuant to § 24-72-204(5.5), C.R.S. & § 24-6-402(d.5)(I)(C), C.R.S. (2024).

PARTIES &JURISDICTION

3. The *Voice* is an online newspaper serving the residents of Estes Park, Colorado and the surrounding communities. The *Voice* provides 24/7 coverage of issues of public interest, including the actions of public bodies in formulating public policy and making important decisions, including the selection of public servants in key executive leadership positions.

4. Patti Brown is the editor and publisher of *Voice*.

5. The Estes Park Fire Protection District ("Fire District") is a Special District organized pursuant to §§ 32-1-101-117, C.R.S. (20204). Defendant, the Board of the Estes Park Fire Protection District, is the governing body of the Fire District. As a multi-party body of a special district, the Board is a "local public body" under § 24-6-402(a)(I) C.R.S. (2024); see also § 24-6-402(c), C.R.S. (defining "political subdivision" to include any "special district").

6. This Court has jurisdiction over the claims herein under § 24-72-204(5.5) of CORA and § 24-6-402(d.5)(I)(C) of the COML. The October 9, 2024 executive session took place in this judicial district, and the Oct. 9 Recording is a public record in the possession, custody and/or control of the Fire District, which is also located in this judicial district.

OPERATIVE FACTS GIVING RISE TO THIS ACTION

7. On August 31, 2024, the Board of the Fire District, in a properly noticed and open public meeting, voted to adopt Resolution 24-04, by which it appointed Paul Capo to serve as the Interim District Chief, until such time as a permanent Chief was selected by the Board. *See* **Exhibit 1** hereto.

8. On October 9, 2024, the Board of the Fire District convened in a public meeting and voted to go into four executive sessions. The first three executive sessions were announced to be for the purpose of discussing "personnel matters," which was used to to interview three candidates (Charles Bruchwalski, Paul Capo, and Jon Lankamer) for the position of Chief. *See* **Exhibit 2** hereto.

9. Following each of those three announcements and votes, in a public meeting, the Board then met behind closed doors (barring public attendance) during which time the Board (and a citizen consultant, Joan Hooper, whom they'd invited to participate in the executive session) met with each of the three publicly identified individuals who were then under consideration to be selected as the next Chief of the Fire Protection District. *Id.*

10. Upon completing the interviews with each of the three candidates for the Chief position, the Board then convened in public and voted to conduct a fourth executive session meeting, for the announced topic of "to determine positions relative to matter that may be subject to negotiations, to develop strategy for negotiations, and to instruct negotiators, all with respect to the terms of employment to be offered to a successful candidate for the Fire Chief position." *See id.*

11. In that closed door discussion of public business by the Board, which lasted **one hour and 55 minutes**, *id.*, (and with Ms. Hooper present), the Board discussed the three candidates, and **decided**, unanimously, to eliminate two of those candidates (Mssrs. Bruchwalski and Lankamer) and to select Paul Capo to serve as the next Chief.

12. Following the completion of its fourth executive session, on October 9, 2024, the Board convened in public and decided to empanel a "Negotiating Committee," comprised of Board members Chris Buser and Brian Tseng, to negotiate the final terms of an employment contract with "Candidate A." *See id.*

13. On the evening of October 9, 2024, the two candidates who had been interviewed that day by the Board were notified that they had *not* been selected by the Board to become the next Chief, an Mr. Capo was informed that the Board had **decided** to offer him the position.

14. On October 10, 2024 at 7:30 a.m. the Chair of the Board (Mr. Ryan Bross) emailed Ms. Brown and stated "[a]fter debrief[ing,] *the board did come to consensus* [yesterday, in executive session] around making an offer" to Mr. Capo. *See* **Exhibit 3** hereto.

15. On October 10, 2024 at 5:04 p.m., the Chair of the Board sent an email to all District members, via the District's internal LISTSERVE, announcing that the Board had selected Paul Capo to serve as the next Chief of the District – despite there having been no discussion of the Board's decision at any public meeting.

16. October 13, 2024 at 2:40 a.m., Joan Hooper posted a comment on the *Estes Valley Voice* website in which she declared that "[The] EVFPD Board's *decision* to offer the job to Chief Capo *was made in executive session*." (emphasis added). *See* **Exhibit 4** hereto.

17. Although no public meeting of the Board occurred since the conclusion of its meeting on October 9, on the morning of October 15, 2024, the District issued a formal Press Release in which it announced that *Paul Capo had been chosen by the Board to become the next Chief of the District.* It posted that Press Release on the District's Facebook page. *See* **Exhibit 5** hereto.

PLAINTIFFS' REQUEST UNDER CORA AND DEFENDANT'S DENIAL

18. On October 15, 2024, Ms. Brown submitted a request, pursuant to CORA, to inspect and/or obtain a copy of the portions of the Oct. 9 Recording during which the Board discussed, in executive session, which of the three candidates it had interviewed that day it would select to serve as the next Chief, and the decision made, by consensus of all in attendance, that the Board would extend the offer of employment to Paul Capo. *See* **Exhibit 6** hereto.

19. On October 16, 2024, Board Chair Ryan Bross denied Ms. Brown's request. See **Exhibit 7** hereto.

20. By letter dated October 17, 2024, Plaintiffs, through their undersigned counsel, sent correspondence to the Board (through its Chairman), urging the Board to reconsider its denial decision, and provided extensive legal authorities in support of Plaintiffs' position that the Board's decision to select Mr. Capo as the District's Chief in the course of an executive session was a clear violation of the COML. *See* **Exhibit 8** hereto.

21. In light of the unambiguous settled law in this area, Plaintiffs urged the Board to avoid having the Fire District incur the expense of the present litigation, by exercising its authority to release the portions of the executive session recording in which the Board deliberated upon its decision, and then decided, to extend the job offer to Mr. Capo. *Id.*

22. After requesting and obtaining an extension of the deadline for their response to the above referenced correspondence from Plaintiffs' counsel, the Board met in executive session on October 30, 2024, and upon emerging from that closed door meeting reconvened in public and voted to reject the Plaintiff's request that it reconsider its denial of Ms. Brown's CORA request. Thus, the Defendant has refused to provide Plaintiffs with the portions of the Oct. 9 Recording in which the Board discussed its decision to offer the position of Chief of the District to Mr. Capo.

APPLICABLE LAW

23. The policy underlying the state's Sunshine Law, or COML, is that "the formation of public policy is public business and may not be conducted in secret." § 24-6-401, C.R.S; *see also Gumina v. City of Sterling*, 119 P.3d 527, 530 (Colo. App. 2004).

24. The COML requires that "all meetings attended by two or more members of any state board, commission, committee, or other body 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." § 24-6-402(2)(a), C.R.S.

25. 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. The minutes of a meeting during which a lawfully convened executive session is held shall reflect the topic of the discussion at the executive session. § 24-6-402(d)(II), C.R.S.

26. Under the CORA, a public record "means and includes ***all writings*** made, maintained, or kept by the state, any agency, institution, . . . or political subdivision of the state . . . for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds." § 24-72-202(6)(a)(I), C.R.S. (emphasis added).

27. "Writings" subject to CORA are defined to include "recordings." § 24-72-202(7), C.R.S.

28. Under the COML, a local public body may convene an executive session only at a regular or special meeting, and only after the announcement to the public of the particular topic for discussion in the executive session and the affirmative vote of two-thirds of the quorum present of the local public body. § 24-6-402(4), C.R.S. (2024).

29. The COML *expressly* prohibits a local body from adopting "*any* proposed policy, *position*, resolution, rule, regulation, or formal action" while the public body is meeting in an executive session. *See* § 24-6-402(4), C.R.S. (2024) (emphasis added).

30. COML requires all local public bodies to make audio recordings of its executive session discussions (other than those involving receipt of advice from counsel), and to maintain those recordings for a minimum of 90 days after the executive session meeting. §§ 24-6-402(2)(d.5)(II)(A)& (E), C.R.S. (2024).

31. Any person who believes a public body has violated the COML, in any way, has standing to bring an action asking the District Court for the district in which the public body sits, to issue a declaration that such violation occurred. § 24-6-402(9), C.R.S. (2024).

32. "Any person seeking access to the record of an executive session meeting of a . . . local public body recorded pursuant to section § 24-6-402(2)(d.5) shall, upon application to the district court for the district wherein the records are found, show grounds sufficient to support a reasonable belief that the . . . local public body adopted a proposed policy, position, resolution, rule, regulation, or formal action in the executive session. . . ." § 24-72-204(5.5)(a), C.R.S. (2024).

33. "Upon a finding that sufficient grounds exist to support a reasonable belief that the . . . 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 . . . local public body . . . adopted a proposed policy, position, resolution, rule, regulation, or formal action in the executive session. . . ." §24-72-204(5.5)(b)(1), C.R.S.; § 24-6-402(d.5)(II)(C), C.R.S. (2024).

34. "If a court finds, upon application of a person seeking access to the record of the executive session of a local public body in accordance with section 24-72-204 (5.5) and after an *in camera* review of the record of the executive session, that . . . the body adopted a proposed policy, position, resolution, rule, regulation, or formal action in the executive session in contravention of subsection (4) of this section, the portion of the record of the executive session that reflects . . . the adoption of a proposed policy, position, resolution, rule, regulation, or formal action shall be open to public inspection pursuant to section 24-72-204 (5.5)." § 24-6-402(d.5)(II)(D), C.R.S. (2024).

35. Any party who obtains a ruling from a District Court that a local public body violated the COML (or the CORA) is entitled to recover all reasonable attorney's fees and costs

incurred in litigating the matter. *See* § 24-6-402(9), C.R.S.; § 24-72-204(5), C.R.S.; *Van Alstein v. Housing Auth.*, 985 P.2d 97, 99-100 (Colo. App. 1998).

36. In addition to COML's prohibiting a local public body from "adopting any . . . position" outside of a properly noticed meeting that is open to the public, the COML also declares that "[n]either a state nor a local public body may adopt any proposed policy, *position*, resolution, rule, or regulation or take formal action by secret ballot unless otherwise authorized in accordance with the provisions of this subparagraph (IV). . . . For purposes of this subparagraph (IV), 'secret ballot' means a vote cast in such a way that *the identity of the person voting or the position taken in such vote is withheld from the public*." § 24-6-402(2)(d)(IV), C.R.S. (2024) (emphasis added); *see also Henderson v. City of Fort Morgan*, 277 P.3d 853, 854 (Colo. App. 2011) ("COML . . requires that the public have access to meetings of local public bodies and b*e able to observe the decision-making process*.") (emphasis added).

37. The COML further provides that "[m]inutes of any meeting of a local public body at which *the adoption of any* proposed policy, *position*, resolution, rule, regulation, or formal action *occurs* or could occur shall be taken and promptly recorded, and *such records shall be open to public inspection*." § 24-6-402(2)(d)(II), C.R.S. (2024) (emphasis added).

38. Colorado's appellate courts have made it clear that the adoption of a position, outside of a public meeting, is prohibited even if the position is adopted without a formal "vote" by the public body. *See Hanover Sch. Dist. v. Barbour,* 171 P.3d 223, 228 (Colo. 2007) ('[I]mportant policy decisions cannot be made [outside of a public meeting even] *informally*") (emphasis added);

First Claim for Relief
Request for *In Camera* Review
(§ 24-72-204(5.5)(b)(1), C.R.S.; § 24-6-402(d.5)(II)(C), C.R.S.)

39. Paragraphs 1 through 38 above are incorporated herein by reference and made a part hereof with the same force and effect as if fully set forth herein.

40. Plaintiffs have shown grounds sufficient under § 24-72-204(5.5), C.R.S. to support a reasonable belief that *a position was adopted* by the Defendant Board during its executive session meeting on October 9, 2024, namely to *decide* (apparently unanimously) t*o offer the Chief position to Paul Capos*, and *to eliminate the two other candidates for that position* whom the Board interviewed that same day.

41. Accordingly, the Court should forthwith order the Defendant to tender the Oct. 9 recording, forthwith, for the Court's *in camera* review of that recording.

42. Upon completion of that *in camera* review, the Court should order the Defendant to make available to the Plaintiffs all portions of the Oct. 9 Recording in which the Board discussed and decided, in executive session, to engage in employment discussions with Mr. Capo to fill the position of Chief of the Fire District.

Prayer for Relief

WHEREFORE, pursuant to § 24-72-204(5.5), C.R.S., Plaintiff prays that:

a. The Court enter an Order, forthwith, finding the Plaintiffs have shown sufficient grounds to warrant a reasonable belief that the Board adopted a position in the course of its executive session meeting on October 9, 2024;

b. In light of that finding, the Court should forthwith order the Defendant to file, under seal, a copy of the complete Oct. 9 Recording for the Court's *in camera* review (a proposed Order, so directing, is being tendered herewith for the Court's convenience);

c. Upon completing its *in camera r*eview of the Oct. 9 Recording, the Court enter an Order identifying the portions of that recording in which the Board unlawfully engaged in discussion that led up to **its decision to select Paul Capo to serve as the District's next Chief**, and to eliminate the two other candidates it had interviewed from further consideration for that position;

d. The Court enter an Order awarding Plaintiffs their costs and reasonable attorney's fees associated with the preparation, initiation, and maintenance of this action, as mandated by § 24-72-204(5), C.R.S., and § 24-6-402(9) C.R.S.; and

e. The Court award such other and further relief as the Court deems proper and just.

Respectfully submitted this 3rd day of November 2024.

ZANSBERG BEYLKIN LLC

By *s/ Steven D. Zansberg*
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