

<p>DISTRICT COURT, LARIMER COUNTY, COLORADO 201 LaPorte Ave. Suite 100 Fort Collins, Colorado 80521</p> <hr/> <p>Plaintiffs: THE ESTES VALLEY VOICE, PBC and PATTI BROWN v.</p> <p>Defendant: THE BOARD OF THE ESTES VALLEY FIRE PROTECTION DISTRICT</p>	<p>DATE FILED December 30, 2024 11:57 AM CASE NUMBER: 2024CV30968</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 2024CV30968</p> <p>Division: 3B</p>
<p>ORDER REGARDING APPLICATION</p>	

In previous proceedings, the Court granted the application for in camera review filed by plaintiffs, The Estes Valley Voice, PBC, and Patti Brown (collectively the “Voice”) against the Board of the Estes Valley Fire Protection District (“Fire District”) under the Colorado Open Meetings Law (“COML”), Colo. Rev. Stat. § 24-72-204(5.5)(a). The Court directed the Fire District to provide a recording of the fourth executive session meeting held by on October 9, 2024, which it did. On December 20, 2024, the Court held oral argument with counsel for the parties.¹ The Court has carefully reviewed the recording, the parties’ briefing on the issue, and considered their arguments.

As more fully explained below, the Court concludes that, with one limited exception, the recording of the fourth executive session shall be open to public inspection because the Fire

¹ At the hearing, counsel for applicants pointed out that the Fire District had been incorrectly named in the action. The Court agrees and on its own motion now corrects the caption to reflect that defendant’s correct name is the Board of the Estes Valley Fire Protection District.

District violated the COML by adopting a position to offer the fire chief position to Paul Capo and to eliminate the two other candidates for that position during the fourth executive session.

I. INTRODUCTION.

The Voice and Ms. Brown jointly filed the application under the COML requesting several things. First, they ask that the Court conduct an in camera inspection of the recording of the fourth executive session meeting held by the Fire District on October 9, 2024. The Court granted that request in a previous Order, concluding that the “Voice has shown grounds sufficient to support a reasonable belief that the Fire District ‘adopted a proposed policy, position, resolution, rule, regulation, or formal action in the [fourth] executive session’ held on October 9, 2024, in which the District apparently decided to offer the position of chief to Paul Capo, who was then the interim chief.” Ord. at 2.

Second, the Voice also requests declaratory relief. Specifically, they ask that, after reviewing the recording of the executive session, “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.” Compl. at 7.

Third, the parties ask for an award of attorney’s fees and costs for filing this action. *Id.* (citing Colo. Rev. Stat. § 24-72-204(5)).

II. FINDINGS OF FACT.

By way of background, it appears that the Fire District has experienced turmoil in recent years. Two of its fire chiefs have quit in the past two years—the prior chief quit in July 2024—and its board of directors had experienced turnover, too. *Trail Gazette Editorial: Leadership turmoil at Estes Valley Fire Protection District: A reflection of broader challenges*, <https://tinyurl.com/7tseu5ve> (Jul. 26, 2024). The Fire District thus set out to hire a new fire chief

and on October 9, 2024, interviewed three internal candidates in three separate executive sessions, which aren't at issue here. It then went into the fourth executive session that brings the matter before the Court. The fourth executive session was convened for the following purpose: "to determine positions relative to matters 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 the successful candidate to the fire chief position." Defs.' Resp. to Pls.' App. for in Camera Review, Ex. B (citing Colo. Rev. Stat. § 24-6-402(4)(e)).

The Court generally accepts the Fire District's gloss of what occurred there. The executive session lasted one hour and forty-eight minutes, consisting of two parts: (1) a de-brief with a broader group of Fire District employees, volunteers, and citizens of Estes Park, Colorado (the "hiring committee"); and (2) a conversation between the Fire District's board members and a search firm representative to assist in the hiring process.

In the first part of the fourth executive session, the Fire District and the hiring committee, which included fourteen "advisors," discussed each candidate (Ron Bruchwalski, Paul Capo, and Jon Landkamer). The advisors provided feedback to the board members and a lengthy discussion ensued. It's far from clear how this portion of the executive session fits the stated purpose for the same.

In the second part, the Fire District did several things. Initially, after the advisors left the room, the Fire District's public information officer told the board members that "Linda"—an attorney who wasn't present at the meeting—had the following guidance: contrary to the stated purpose of the executive session, according to this individual, the goal was for the Fire District to review the comment cards and for the board members to *come to a consensus* on whom their candidate should be, who'd then be identified as candidate A "to maintain confidentiality" until

employment negotiations started with that individual. She also told them to “discuss negotiation parameters” and to appoint a negotiations committee after the conclusion of the executive session.

The Fire District did as instructed. They reviewed comment cards submitted (mostly anonymously) by members of the community after those individuals had an opportunity to interact with the candidates. They discussed each candidate, weighing their respective pros and cons. And they reached a consensus—an agreement—on their preferred choice for fire chief. They also selected two members for the negotiations committee. Notably, the board members spent little time on the stated purpose of the executive session; that is, they briefly discussed negotiation parameters or potential contract terms for the successful candidate.

The events that occurred in the days after the meeting show that the Fire District took a position or made a decision during the fourth executive session. As the Court previously noted, in an email to Ms. Brown on October 5, the morning of day after the Fire District’s meeting, Ryan Bross, the president of the Fire District, ostensibly confirmed that the Fire District had adopted a formal action—to offer the chief position to Mr. Capo—during that session: “After debrief the board did come to consensus around making an offer. This discussion is ongoing and once a final agreement is in place the District will make a public announcement after first informing the membership.” Compl. Ex. 3.

Five days later, on October 10, Mr. Bross sent an email to the entire membership of the Fire District in which he confirmed that, during the fourth executive session, the body had agreed (or decided) to “begin negotiations” with their preferred candidate:

The board, along with representatives from the staff and volunteer ranks, outside emergency response partners, and engaged community members, interviewed three exceptional candidates yesterday for the position of Fire Chief. After feedback, the board deliberated and came to consensus to begin negotiations with one of the candidates. I’m pleased to share with you that subject to finalizing terms Paul Capo has agreed to accept the Chief position.

Ex. 9.

Despite the wide distribution of the news, Mr. Bross told the entire membership to keep the informal announcement confidential: “This is not yet public so please keep this confidential, and please also help me in congratulating Chief Capo and in thanking both of the other candidates for their hard work and dedication.” *Id.*

Three days after Mr. Bross’ email, Joan Hooper, a citizen who attended part of the executive session at issue, publicly confirmed in a post on the Voice’s website that the Fire District decided to offer the chief position to Mr. Capo during the fourth executive session. As the Court previously noted, in the October 13 post Ms. Hooper said: “Please note that the Sunshine Law for open meetings makes explicit exception for discussion of personnel matters (§24-6-402(4)). It is entirely correct and even necessary that the interview process is confidential; *and that EVFPD Board’s decision to offer the job to Chief Capo was made in executive session.*” Compl. Ex. 4.

Lastly, on October 15, the Fire District issued an official press release on its Facebook page announcing that it had selected Mr. Capo as the fire chief:

The Estes Valley Fire Protection District (EVFPD) Board is thrilled to announce the selection of Paul Capo as the new Fire Chief. Currently serving as the Assistant Chief of Operations & Training and the interim Fire Chief, Capo brings a wealth of experience and leadership to the position.

Chief Capo is expected to officially assume his duties as Fire Chief on October 30th, 2024, subject to negotiation of final contract and board vote approval.

Compl. ¶ 17, Ex. 5.

When the announcement came out, the Fire District hadn’t had a public meeting since its October 9 session. Indeed, on November 13, 2024, during a public meeting, the Fire District voted to approve a contract with Mr. Capo, who was sworn into his position a couple days later.

II. DISCUSSION.

In enacting the COML, the General Assembly has declared “to be a matter of statewide concern and the policy of this state that the formation of public policy is public business and may not be conducted in secret.” Colo. Rev. Stat. § 24-6-401. The law, which applies to all “local public bod[ies],” §§ 24-6-402(1)(a)(I), (2)(c)(IV), provides that “[a]ll meetings of a quorum or 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 to be public meetings open to the public at all times.” § 24-6-402(2)(b).

As the supreme court observed, the COML “was conceived to ‘afford the public access to a broad range of meetings at which public business is considered.’” *Hanover School Dist. No. 28 v. Barbour*, 171 P.3d 223, 227 (Colo. 2007) (quoting *Benson v. McCormick*, 195 Colo. 381, 383, 578 P.2d 651, 652 (1978)). The Court’s present task is to determine whether the Fire District violated the COML. Because the Voice made the required showing, the Court has conducted the in camera review of the recording “to determine whether 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).” Colo. Rev. Stat. § 24-72-204(5.5)(b)(I).

In general, the COML “requires that the public have access to meetings of local public bodies and be able to observe the decision-making process.” *Henderson v. City of Fort Morgan*, 277 P.3d 853, 854 (Colo. App. 2011). The local body may enter into an executive session closed to the public “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.” Colo. Rev. Stat. § 24-6-402(4). The COML identifies certain matters appropriate for consideration in executive session, including “[d]etermining positions relative to matters that may be subject to

negotiations; developing strategy for negotiations; and instructing negotiators.” § 24-6-402(4)(e)(I). But the COML prohibits the local body from adopting a position or taking any formal action during that executive session. § 24-6-402(4) (“except that no adoption of any proposed policy, position, resolution, rule, regulation, or formal action, except the review, approval, and amendment of the minutes of an executive session recorded pursuant to subsection (2)(d.5)(II) of this section, shall occur at any executive session that is not open to the public.”); *see also* *Walsenburg Sand & Gravel Co., Inc. v. City Council of Walsenburg*, 160 P.3d 297, 299-300 (Colo. App. 2007) (same).

Two things may occur if a public body violates the COML. One, “if a local public body fails strictly to comply with the requirements set forth to convene an executive session, it may not avail itself of the protections afforded by the executive session exception.” *Gumina v. City of Sterling*, 119 P.3d 527, 532 (Colo. App. 2004). Two, “if a public body holds a private meeting in violation of the OML, the remedy is to invalidate any ‘resolution, rule, regulation, ordinance, or formal action ... taken or made’ at the meeting.”² *Board of Cnty. Com’rs, Costilla Cnty. v. Costilla Cnty. Conservancy Dist.*, 88 P.3d 1188, 1193 (Colo. 2004) (quoting § 24-6-402(8)).

After carefully reviewing the entire recording of the Fire District’s fourth executive session, the Court concludes that the Fire District violated the COML because it adopted a position or took formal action during that executive session. Colo. Rev. Stat. § 24-6-402(4). Of course, the position or action the Fire District took was to reach a consensus, an agreement, that Mr. Capo would be the person to whom they’d offer the fire chief position. This conclusion flows easily from the way in which the second half of the executive session unfolded. When the fourteen advisors left the meeting, the public information officer, relying on the advice of counsel, told the board

² The Voice doesn’t seek invalidation of the Fire District’s decision to select Mr. Capo as the fire chief.

members that they had to choose a preferred candidate during that executive session.³ Her wording was that the board had to “reach a consensus.” The definition of that word is “general agreement or concord.”⁴ And that’s precisely what the board members did. While they avoided taking a formal vote or ranking all the candidates, it’s clear that after discussing each of the candidates and weighing their strengths and weaknesses, the board members *agreed* that the Fire District should offer the fire chief position to Mr. Capo.

Thus, simply put, the Fire District took actions involving its policy-making functions during the fourth executive session, which is prohibited. *Anzalone Trustee of Town of Del Norte v. Board of Trustees of Town of Del Norte*, 549 P.3d 255, 265 (Colo. App. 2024). And the Fire District then widely communicated that position or action to the public in the days after the October 9 meeting. The Court may properly rely on a local body’s post-meeting actions to determine whether a violation of the COML occurred during an executive session. For example, in *Anzalone*, the court of appeals concluded that the local body there violated the COML when it took a position during an executive session, a position that was shown in the agenda for the next meeting of the local body. *Id.* at 263–64 (“The City Council’s formal action is shown in the letter that accompanied the March 28 agenda, which states that special counsel was “directed and instructed” at the March 14 executive session “to end the investigation prior to any public hearing” and to “enter into a stipulation” to dismiss [the council member's] censure charges.”). As the court of appeals further reasoned:

These undisputed facts lead to the inevitable conclusion that the Board discussed in executive session the pending removal proceedings, the alleged

³ The Court feels compelled to reveal this portion of the fourth executive session to transparently explain its decision and the rationale behind it, given the Fire District’s arguments, which paint an incomplete version of events. Further, since the Voice didn’t raise the issue, the Court won’t address whether the presence of non-board members waives the protections of the executive session.

⁴ Consensus, Dictionary.com, www.dictionary.com/browse/consensus (last visited Dec. 23, 2024).

misconduct by Anzalone, the substance of the censure resolution, the adoption of the censure resolution in lieu of removal, and the resulting cancellation of the November public meeting that had been set to address Anzalone's removal. These actions involve the Town's policy-making functions and could not be undertaken in executive session.

Id. at 264–65.

As in *Anzalone*, the Fire District's record of proceedings during the October 9 meeting demonstrate that it took a formal action to offer Mr. Capo the fire chief job. After the Fire District came out of the fourth executive session, the Fire District decided to appoint a "negotiations committee" who'd "enter into negotiations with candidate A." Compl. Ex. 2. As the Court previously noted, "[i]t doesn't take much divining to infer that candidate A is Mr. Capo, the Fire District's preferred choice." Ord. Granting App. for In Camera Review at 3. With the benefit of having reviewed the fourth executive session, the Court's prior observation is now ineluctable: "during the executive session, the Fire District decided on a candidate—Mr. Capo—and then decided to negotiate terms of employment with him." *Id.*

The Fire District's other actions in the days following the October 9 meeting also demonstrate that it took formal action during the fourth executive session. To recap, they are:

- October 5, 2024, email by Mr. Bross to Ms. Brown: "After debrief the board did come to consensus around making an offer. This discussion is ongoing and once a final agreement is in place the District will make a public announcement after first informing the membership."
- October 10, 2024, email by Mr. Bross to the membership of the Fire District: "The board, along with representatives from the staff and volunteer ranks, outside emergency response partners, and engaged community members, interviewed three exceptional candidates yesterday for the position of Fire Chief. After feedback, the board deliberated and came to consensus to begin

negotiations with one of the candidates. I'm pleased to share with you that subject to finalizing terms Paul Capo has agreed to accept the Chief position.

- October 15, 2024, Fire District's press release: "The Estes Valley Fire Protection District ... Board is thrilled to announce the selection of Paul Capo as the new Fire Chief. Currently serving as the Assistant Chief of Operations & Training and the interim Fire Chief, Capo brings a wealth of experience and leadership to the position."

The Court rejects the Fire District's arguments that it didn't violate the COML. Initially, the Fire District argues that it "did not hold a vote, formal or informal, on any of the candidates. No roll call was taken. No motion was made." Def.'s Resp. to App. for In Camera Review at 9. That's all correct. But, as explained above, none of those things are required for a COML violation to occur. Naturally, to determine whether a violation occurred requires, if appropriate, in camera review of the meeting at issue. The key issue is to determine whether the local body took a position or formal action that should've occurred in public. Because the board members thought that their marching orders were to reach a consensus on their preferred candidate and because that's what they did, a violation occurred.

Next, the Fire District argues that no violation occurred because it "discussed the development of its strategy for negotiations and then adopted a formal policy upon returning to open session and directing the negotiation committee to pursue the candidate that all Board members already preferred." *Id.* at 10. The Court respectfully disagrees with that assessment of the meeting. The Fire District devoted very little time to the stated purpose of the fourth executive session—it briefly discussed contract terms and spent virtually no time to "develop a strategy for negotiations." Instead, the board members discussed the candidates, the comment cards, and agreed upon their preferred choice. It'd be a different story if the board members had discussed,

for example, a range of acceptable salary for the successful candidate, benefit package, and other perks or benefits. But that didn't occur. The Fire District took a position in executive session and then rubber-stamped its decision, with little discussion, a month later when it formally offered the fire chief job to Mr. Capo. *Van Alstyne v. Housing Auth. of the City of Pueblo*, 985 P.2d 97, 101 (Colo. App. 1999) (it's a COML violation when "at the public meetings, the matters were given only cursory treatment, indicating that a debate on the issues had previously taken place. . . . [A] public body's meeting is not in compliance with the Open Meetings Law if it is held to 'rubber stamp' previously decided issues.").

The Court also concludes that the Fire District violated by COML by conducting the first half of the fourth executive session outside of public view. As noted above, in the first half of the executive session, the board members heard from the hiring committee and their views of each candidate. The Fire District, however, has failed to cite any decisions that would sanction such a discussion to occur in executive session. The legal authorities decisively point in the other direction and hold that the public must be allowed to know and understand the reasons for a local body's decisions by having access to such deliberations. For example, in *Bagby v. School Dist. No. 1, Denver*, 528 P.2d 1299 (Colo. 1974) the supreme court disapproved of the school district private conferences, where "much of the work of the public meeting was already done at the conference" because "the public and news media were deprived of the discussions, the motivations, the policy arguments and other considerations which led to the discretion exercised by the Board and influenced the vote announced without discussion at the later public meeting. One has not participated in a public meeting if one witnesses only the final recorded vote." *Id.* at 1302. *See also Cole v. State*, 673 P.2d 345, 348 (Colo. 1983) ("There is rarely any purpose to a nonpublic premeeting conference except to conduct some part of the decisional process behind closed doors.

Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices.”).

In the alternative, the Court concludes that the Fire District violated the COML on the first half of the fourth executive session because it didn’t properly notice to purpose of that session. Recall that the stated purpose was “to determine positions relative to matters 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 the successful candidate to the fire chief position.” But none of that occurred during that portion of the session. As such, the COML protections have been lost. *Cf. Guy v. Whitsitt*, 469 P.3d 546, 554 (Colo. App. 2020) (concluding town violated COML because its notice “should at least have notified the public that the personnel matters that would be discussed in executive session concerned” the town manager and it failed to do so).

Accordingly, the vast majority of the fourth executive session must be released to the Voice.⁵ Colo. Rev. Stat. § 24-6-402(2)(d)(II) (“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.”); *see also Guy*, 469 P.3d at 554.

Given the Court’s conclusions, the last issue to address is whether to award attorney’s fees and costs to prevailing party. The COML requires that the prevailing “citizen” be awarded reasonable attorney’s fees and costs: “In any action in which the court finds a violation of this section, the court shall award the citizen prevailing in such action costs and reasonable attorney fees.” Colo. Rev. Stat. § 24-6-402(9); *see also Gumina*, 119 P.3d at 530. The parties spar over the

⁵ The Court agrees with the Fire District that the matter discussed at 02:26:00–2:29:21 of the recording isn’t subject to public inspection under CORA because it’s a personnel matter. *Arkansas Valley Publ’g Co.*, 369 P.3d at 727 (holding that “personnel discussions may take place in executive session”). Accordingly, this portion of the recording may be withheld.

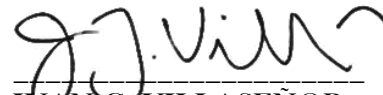
meaning of “citizen” and whether the Voice may be awarded such fees. It’s unnecessary to reach that issue because Ms. Brown is a “citizen” under the statute and attorney’s fees and costs may be awarded to her. She may file an appropriate motion as Rule 121 allows.

III. CONCLUSION.

In sum, for the reasons stated above, the Voice’s application is granted and the Fire District is ordered to produce to the Voice a recording of the fourth executive session as set forth above. It shall do so on or before January 3, 2025.

SO ORDERED on December 30, 2024.

BY THE COURT:



JUAN G. VILLASEÑOR
District Court Judge