

<p>DISTRICT COURT, ARAPAHOE COUNTY, COLORADO  7325 South Potomac Street, #100  Centennial, CO 80112</p>	<p>DATE FILED: April 16, 2024 1:13 PM  FILING ID: D7F8A5CD68CAA  CASE NUMBER: 2024CV30439</p>
<p><b>CITY OF AURORA, COLORADO</b>  Applicant,  v.  <b>THE SENTINEL COLORADO</b>  Interested Party.</p> <hr/> <p><b>THE SENTINEL COLORADO</b>  and  <b>MAX LEVY</b>  Counter-Plaintiffs/Applicants,  v.  <b>THE COUNCIL APPOINTEE EVALUATION AND  COMPENSATION COMMITTEE OF THE CITY OF  AURORA</b>, a local public body of that city,  and  <b>KADEE RODRIGUEZ</b>, in her official capacity as the  Official Custodian of Records for the City of Aurora,  Colorado  Counter-Defendants/Respondents.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorneys for Interested Party and Counter-  Plaintiffs/Applicants:  Steven D. Zansberg, #26634  Zansberg Beylkin LLC  100 Fillmore Street, Suite 500  Denver, CO 80206  Phone: (303) 564-3669  <a href="mailto:steve@zansberglaw.com">steve@zansberglaw.com</a></p>	<p>Case No. 2024-cv-30439  Division: 202</p>
<p style="text-align: center;"><b>INTERESTED PARTY’S RESPONSE TO SECOND  AMENDED APPLICATION AND  COUNTER-PLAINTIFFS/APPLICANTS’  COUNTERCLAIMS</b></p>	

Interested Party, The Sentinel Colorado, by and through its undersigned counsel, hereby responds to the First Amended Application, as follows:

## ADMISSIONS AND DENIALS

As to the allegations of the Second Amended Application, in paragraphs numbered to correspond to the paragraph(s) of same number, the Interested Party, though it is not required to respond:

1 - 3. Admits the allegations of ¶¶ 1 - 3.

4 - 5. Does not plead to the allegations of ¶¶ 4 and 5 in as much as they assert mere legal conclusions without averring any facts.

6 - 9. Admits the allegations of ¶¶ 6 - 9.

10. Denies the allegations of ¶ 10.

11. Is without information sufficient to form a belief as to the truth of the allegations of ¶ 11 and therefore denies the same.

12. Denies the allegations of ¶ 12.

13. Does not plead to the allegations of ¶ 13 in as much as they assert mere legal conclusions without averring any facts.

14. Is without information sufficient to form a belief as to the truth of the allegations of ¶ 14 and therefore denies the same.

15 -19. Admits the allegations of ¶¶ 15 - 19.

20 -22. Denies the allegations of ¶¶ 20 - 22.

23. Is without information sufficient to form a belief as to the truth of the allegation concerning the City's belief in ¶ 23 and therefore denies the same.

24. Admits that the recording of the October 13, 2023 unlawfully closed public meeting of the CEC is available; denies that *in camera* review of that recording is necessary or appropriate, because that it is not a recording of an "executive session."

25. Admits that no notice whatsoever of the October 13, 2023 meeting was provided, as affirmatively pleaded in paragraph 27 below. Interested Party notes, however, that at some point in time the City posted a false notice of that meeting on its website. *See* Exhibit 2.

26. Denies the allegations of ¶ 26.

27. Admits the allegations of ¶ 27.

28. Pleads to the paragraphs incorporated by reference in ¶ 28 as set forth in ¶¶ 1- 27 above.

29 - 34. Denies the allegations of ¶¶ 29 - 34.

35. Admits the allegations of ¶ 35.

36 - 40. Denies the allegations of ¶¶ 36 - 40.

41. Does not plead to the allegations of ¶ 41 in as much as they assert mere legal conclusions without averring any facts.

42. Pleads to the paragraphs incorporated by reference in ¶ 42 as set forth in ¶¶ 1- 41 above.

43. Is without information sufficient to form a belief as to the truth of the allegations of ¶ 43 and therefore denies the same.

44. Denies the allegations of ¶ 44.

45. Does not plead to the allegations of ¶ 45 in as much as they assert mere legal conclusions without averring any facts.

46. Is without information sufficient to form a belief as to the truth of the allegations of ¶ 46 and therefore denies the same.

47 - 49. Denies the allegations of ¶¶ 47 - 49.

50 -51. Does not plead to the allegations of ¶¶ 50 and 51 in as much as they assert mere legal conclusions without averring any facts.

52 - 55. Denies the allegations of ¶¶ 47 - 49.

56. Is without information sufficient to form a belief as to the truth of the allegations of ¶ 56 and therefore denies the same.

57. Does not plead to the allegations of ¶ 57 in as much as they assert mere legal conclusions without averring any facts.

Interested party, The Sentinel Colorado, denies all allegations of the Second Amended Application that are not specifically admitted above. Furthermore, as demonstrated in the Motion to Dismiss that Interested Party is filing this same day, the Second Amended Application fails to state a claim upon which relief can be granted, because no CORA exemptions may be asserted to withhold the recording of a public meeting.

WHEREFORE, Interested Party prays that the Second Amended Application be dismissed, that Applicant take nothing, and that judgment be entered in favor of the Interested Party and against Applicant for the Interested Party's costs, attorney fees, and such other relief as the Court deems proper.

## **COUNTER-CLAIMS**

Counter-Plaintiffs/Applicants The Sentinel Colorado and Max Levy, by and through their undersigned counsel at Zansberg Beylkin LLC and the Reporter’s Committee for Freedom of the Press, for their Counter-Complaint and Application for Order to Show Cause, hereby state as follows:

### **INTRODUCTION**

1. This is a civil action under both the Colorado Open Records Act (“CORA”) and the Colorado Open Meetings Law (“COML”). The Counter-Plaintiffs, Max Levy and his employer The Sentinel Colorado, are Applicants seeking an Order to Show Cause directed to Kadee Rodriguez, the official custodian of public records for the City of Aurora, to appear and to show cause why the public record that they have requested to inspect should not be made available to them forthwith.

2. In addition, Counter-Plaintiffs seeks an order of the Court finding that the Counter-Defendant Council Appointee Evaluation and Compensation Committee of the City of Aurora is a local public body that violated the COML when, on October 13, 2023, it conducted a meeting at which public business was discussed, but that meeting was not publicly noticed in advance and the public was denied its statutory right to attend and observe that meeting.

### **JURISDICTION AND PARTIES**

3. This Court has jurisdiction over the claims herein under § 24-72-204(5), C.R.S. (2024). This Court also has jurisdiction over the claims herein under § 24-6-402(9), C.R.S. (2024). On information and belief, the public record at the center of this action can be found in this judicial district.

4. Counter-Plaintiff/Applicant Max Levy, a news reporter at The Sentinel Colorado, is a “person” as defined by CORA, § 24-72-202(3), C.R.S., and as such, he has standing to bring a claim for access to public records under CORA.

5. As a citizen of the State of Colorado, Mr. Levy also has standing to seek relief under section 402(9) of COML.

6. Counter-Plaintiff/Applicant The Sentinel Colorado is also a citizen of the State of Colorado, and thus has standing to seek relief under section 402(9) of COML.

7. Counter-Defendant Kadee Rodriguez is the official records custodian of the City of Aurora, Colorado and is in possession, custody and control of the public record at issue, namely the recording of the unlawfully closed public meeting of the Council Appointee Evaluation and Compensation Committee of the City of Aurora held on October 13, 2023.

8. The Council Appointee Evaluation and Compensation Committee (“CEC”) of the Aurora City Council is a formally constituted body of the City of Aurora. As

established and defined in the officially adopted “Rules of Order and Procedure for the Aurora, Colorado City Council,” (attached hereto as Exhibit 1) the CEC is authorized to make recommendations to the City Council (i.e., to serve as an “advisory body” to the City). Accordingly, the CEC constitutes a “local public body” of a political subdivision of the state, subject to the COML, § 24-6-402(1)(a), C.R.S.

9. Venue for this civil action is proper in this District under Rules 98(b)(2) and (c)(1) of the Colorado Rules of Civil Procedure and under §§ 24-72-204(5) and -204(5.5), C.R.S. of the CORA.

## APPLICABLE LAW

### **A. The Open Meetings Law**

10. The COML defines a “local public body” as “*any board, committee, commission, authority, or other advisory, policy-making, rule-making, or formally constituted body* of any political subdivision of the state and any public or private entity to which a political subdivision, or an official thereof, has delegated a governmental decision-making function but does not include persons on the administrative staff of the local public body.” § 24-6-402(1)(a)(I), C.R.S. (emphasis added).

11. The COML 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 . . . are declared to be public meetings open to the public at all times.” § 24-6-402(2)(b), C.R.S. (emphases added); *see* § 24-6-402(1)(b) (A “meeting” is “any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by [any] other means of communication.”) (emphasis added).

12. The COML requires all local public bodies to provide advance written notice to the public of any public meeting and to allow the public to attend and observe, contemporaneously, the public body’s discussion of public business. § 24-6-402(2)(b), C.R.S.

13. The COML also requires local public bodies to prepare minutes of their public meetings and to make such minutes available to the public. *See* § 24-6-402(2)(d)(II), C.R.S.

14. The “underlying intent” of the COML is to ensure that the public is not “deprived of the discussions, the motivations, the policy arguments and other considerations which led to the discretion exercised by the [public body].” *Van Alstyne v. Housing Auth.*, 985 P.2d 97, 101 (Colo. App. 1999).

15. Indeed, the Colorado Court of Appeals has made clear that the purpose of the COML is to allow the public to see their public servants’ decision-making processes at work, on full display, regardless of whatever hesitations, foibles, or idiosyncrasies such public deliberations may reveal:

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, and to allow citizens to participate in the legislative decision-making process that affects their personal interests.

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

16. Under the COML, all exemptions from the default rule that a public body's meetings must be open to the public must be narrowly construed, ensuring as much public access as possible. *See Cole v. State*, 673 P.2d 345, 349 (Colo. 1983) ("As a rule, [the Open Meetings Law] should be interpreted most favorably to protect the ultimate beneficiary, the public.").

17. Furthermore, under the COML, the recording of any meeting of a local public body that failed to comply "strictly" with statutory prerequisites for convening a proper "executive session," is, by definition (and binding appellate precedent), a public record that must be disclosed upon request; all statutory exemptions that *might have been applicable* to that recording are waived by the public body's failure to comply with the COML. *See, e.g., Gumina v. City of Sterling*, 119 P.3d 527, 532 (Colo. App. 2004) (holding that "because the Council failed strictly to comply with requirements of the statute for convening the two executive sessions, the *trial court must open the records of those sessions to public inspection*," and it was irrelevant that, as here, the public employee discussed in that closed meeting was not given direct notice thereof) (emphasis added); *The Sentinel Colo. v. Rodriguez*, 2023 COA 118, ¶ 25 ("If an executive session is convened improperly, the record[ing] of the session is open to the public."); *Guy v. Whitsitt*, 2020 COA 93, ¶ 33, 469 P.3d 546, 554 ("Because the Town Council did not comply with COML's notice requirements, Guy is entitled to the recordings and minutes of the executive session[s] . . . involving the matters not properly noticed," including otherwise attorney-client privileged communications); *see also Zubeck v. El Paso Cty. Ret. Plan*, 961 P.2d 597, 601 (Colo. App. 1998) (reversing District Court's order that allowed defendant to redact attorney-client privileged portions of meeting minutes, holding "that the district court erred in permitting the redaction of the minutes of the Plan's meetings that were not conducted in an executive session").

18. Finally, in any suit in which the Court finds a violation of the COML, the Court shall award the reasonable attorney's fees of the citizen who sought the finding of a violation of the statute. *See* § 24-6-402(9), C.R.S.; *see also Van Alstyne*, 985 P.2d at 99-100.

## **B. The Colorado Open Records Act**

19. Under the CORA, any person may request to inspect and/or obtain a copy of a public record. *See* § 24-72-203(1)(a), C.R.S. CORA guarantees access to records of public business so that "the workings of government are not unduly shielded from the public eye." *Int'l Bhd. of Elec. Workers Local Union 68 v. Denver Metro. Major League Baseball Stadium Dist.*, 880 P.2d 160, 165 (Colo. App. 1994).

20. A public record is any “writing” that is “made, maintained or kept by . . . any . . . political subdivision of the state . . . *for use* in the exercise of functions required or authorized by law or administrative rule . . . .” *See* § 24-72-202(6)(a)(I), C.R.S. (emphasis added).

21. Under the CORA, “‘writings’ means and includes all . . . *tapes, recordings, or other documentary materials, regardless of physical form or characteristics.*” And, with the express exemption of “computer software,” writings “include digitally stored data” regardless of where such data is stored. § 24-72-202(7), C.R.S.

22. Under the CORA, a custodian is required to provide public access to a public record unless “[s]uch inspection would be contrary to any state statute” or is otherwise exempted from disclosure by one of the narrow exemptions in Section 204(3)(a) of the CORA. *See* § 24-72-204(1)(a), C.R.S.

23. Any person who, in response to a request to inspect a public record under the CORA, is denied such access may file an application in the District Court for an Order to Show Cause why inspection should not be allowed, directed to the custodian of the requested record. § 24-72-204(5), C.R.S.

24. Under the CORA, upon the filing of such an Application, the Court must schedule the hearing on an Order to Show Cause at the “earliest time practical.” *See id.*

25. Under the CORA, following a Show Cause Hearing, if the Court finds that the requested public record was not “properly” (lawfully) withheld, it *shall* order the custodian to provide the Applicant(s) with a copy of the record, and the Court *must* award the Applicant(s) their reasonable attorneys’ fees in connection with the effort to obtain access to the public record. *See Denver Publ’g Co.*, 121 P.3d at 199.

### **OPERATIVE FACTS**

26. The CEC was officially “established” (a/k/a “formally constituted”) by the City Council as a Committee of the City Council for the City of Aurora. *See* Exhibit 1 at 13 ¶ D.7.

27. The CEC is officially constituted as a Committee comprised of three members; two of its three members are declared to be the Mayor and the Mayor Pro Tem. *Id.*

28. The CEC is officially authorized to *make recommendations* to the City Council as a whole. *Id.* It is therefore an “advisory body” of the City.

29. As a Committee of the City Council, a majority of the CEC’s members (two) must be present in order for that Committee to convene a meeting. Exhibit 1 at 10 ¶ D.3. *See Merriam Webster Dictionary* (2024), defining “quorum” as “the minimum number of officers or members of a body that is required to be present at a . . . meeting (as to transact business);” *Cf.* § 2-4-111, C.R.S. (2024) (“A quorum of a public body is a majority of the

number of members fixed by statute.”).

30. The CEC is the only Committee of the City Council authorized by its rules to convene executive session meetings. *Id.* at 11.

31. The CEC is expressly required by the official policy of the City of Aurora (which established that Committee) to comply with the Colorado Open Meetings Law. *Id.* at 13 ¶ D.7.

32. Since September 2022 and up to the present, the CEC has posted its meeting agendas on the Committee’s official website, [https://www.auroragov.org/city\\_hall/mayor\\_city\\_council/policy\\_committees/council\\_appointee\\_evaluation\\_committee](https://www.auroragov.org/city_hall/mayor_city_council/policy_committees/council_appointee_evaluation_committee). See Exhibit 2 (all agendas of CEC meetings posted there).

33. As those publicly posted agendas indicate, prior to convening any executive session meeting, as authorized by the Colorado Open Meetings Law, and by the City Council Guidelines (Exhibit 1), it is the announced intention of the CEC, when conducting an executive session, to first convene in public and announce the statutory grounds for the executive session, including the particular matter to be discussed behind closed doors, followed by a vote of the Committee members present, in public, to convene the executive session. *Id.*

34. Indeed, as the transcripts of the meetings the CEC held in February and March of this year, the Committee has met in public, as noticed, and announced the basis for convening an executive session before voting, in public, to convene executive session discussions, as required by the COML. See Exhibit 3.

35. On October 13, 2023, the CEC convened a meeting (a quorum of its members were present) to discuss public business.

36. As the City has freely admitted, prior to its meeting of October 13, 2023, the CEC did not provide any no public notice.

37. The public was not permitted to attend the October 13, 2023 meeting of the CEC at which public business was discussed.

38. In communications with undersigned counsel, and in its two previously filed Applications in this case, the City (and its counsel) have asserted, with no basis in law or fact, that the CEC is not a “local public body,” merely because “the City believes” it is not one.

39. On January 31, 2024, Max Levy, on behalf of himself and his employer, The Sentinel Colorado, requested a copy of the recording of the CEC’s meeting of October 13, 2023 (among other meetings, not relevant here), pursuant to CORA.

40. The City of Aurora, and its official records custodian, Kadee Rodriguez, have, to this day, denied the Counter-Plaintiffs/Applicants’ request, under CORA, to receive a copy of the recording of the CEC’s unlawfully closed meeting of October 13, 2023.



41. After the City filed its Application herein, undersigned counsel spoke, and exchanged emails with, counsel for the City and advised that there were factual errors in the Application, as demonstrated by the City’s own website.

42. The above interaction prompted the City to file a First Amended Application that corrected the factual errors, but the City continued to assert, as its third pleaded claim, that the CEC was not a “local public body” solely because it was not delegated a governmental decision-making function.

43. On March 28, 2024, undersigned counsel provided the City and its counsel notice that unless the First Amended Application were voluntarily dismissed, by mid-day April 1, 2024, the Counter-Plaintiffs/Applicants would seek sanctions under C.R.C.P. Rule 11, because there is no factual or legal basis for the City’s maintaining that the CEC is not a local public body, and because the CEC’s meeting of October 13, 2023 violated the COML, the recording thereof is a public record that is not subject to any CORA exemptions. *See* Exhibit 4.

44. Counsel for the City asked to speak by phone with undersigned counsel on April 4, 2024. *See* Exhibit 5.

45. In that phone conversation, undersigned counsel stated that Counter-Plaintiffs/Applicants would be filing their Response to the First Amended Application and Counterclaims that afternoon, and would seek sanctions.

46. Prior to the Counter-Plaintiffs/Applicants’ filing, as they had announced, the City filed its Second Amended Application that continues to assert CORA exemptions to the recording of a public meeting of the CEC, which is completely contrary to three binding precedents of the Colorado Court of Appeals, as set forth above in paragraph 17.

**FIRST CLAIM FOR RELIEF**  
for Declaratory Relief  
(§ 13-51-106, C.R.S.; C.R.C.P. 57)

47. Counter-Plaintiffs/Applicants incorporate by reference all of the allegations and statements in the foregoing Paragraphs.

48. A genuine controversy exists between the parties with respect to their respective rights and responsibilities under the COML and CORA.

49. Specifically, the parties disagree over whether the CEC constitutes a “local public body” as defined by § 24-6-402(1)(a)(I), C.R.S.

50. Counter-Plaintiffs/Applicants are entitled to an Order declaring that the CEC is a “local public body” under, and subject to, the COML.

**SECOND CLAIM FOR RELIEF**  
for Declaratory Relief  
(§ 13-51-106, C.R.S.; C.R.C.P. 57)

51. Counter-Plaintiffs/Applicants incorporate by reference all of the allegations and statements in the foregoing Paragraphs.

52. A genuine controversy exists between the parties with respect to their respective rights and responsibilities under the COML and CORA.

53. Specifically, the parties disagree over whether the CEC’s meeting of October 13, 2023 to discuss public business, with no public notice or public attendance permitted, violated the COML.

54. Counter-Plaintiffs/Applicants are entitled to an Order declaring that the CEC’s meeting of October 13, 2023 violated the Colorado Open Meetings Law.

**THIRD CLAIM FOR RELIEF**  
Application for Order to Show Cause  
(§ 24-27-204(5), C.R.S.)

55. Counter-Plaintiffs/Applicants incorporate by reference all of the allegations and statements in the foregoing Paragraphs.

56. Counter-Plaintiffs/Applicants have established a *prima facie* basis to believe that the requested document – the recording of the CEC’s unlawfully closed public meeting of October 13, 2023 – is a “public record” pursuant to the CORA, and that they have been denied access to that public record.

57. Pursuant to § 24-72-204(5), C.R.S., the Counter-Plaintiffs/Applicants are entitled to – and do hereby apply for – an Order to Show Cause, directing Ms. Rodriguez to show cause why the recordings of the CEC’s closed-door meeting at which public business was discussed should not be disclosed to them.

58. As required by the CORA, the Court should set the date of the show cause hearing in its Order at “the earliest time practical.”

59. Upon completion of the hearing on the Order to Show Cause, the Court should enter an order directing Ms. Rodriguez to provide the Counter-Plaintiffs/Applicants with the public record they requested to inspect.

**Prayer For Relief**

WHEREFORE, pursuant to §§ 13-51-105 and 24-6-402(8), and 24-72-204(5), C.R.S., Counter-Plaintiffs/Applicants pray that:

- A. The Court enter an Order directing the City of Aurora’s Official Records Custodian, Kadee Rodriguez, to show cause why she should not permit

inspection and copying of the requested public record – the recording of the CEC’s meeting of October 13, 2023;

- B. The Court conduct a hearing pursuant to such Order “at the earliest practical time” at which the Court may make the Order to Show Cause absolute;
- C. At the conclusion of the hearing on the Order to Show Cause, the Court enter an order directing Ms. Rodriguez to disclose the entirety of the public record to Counter-Plaintiffs/Applicants;
- D. The Court also enter an Order declaring that the CEC is a local public body under the COML and that its October 13, 2023 meeting violated the COML because no notice was posted and the public was denied its right to observe that meeting;
- E. At the conclusion of the hearing on the Order to Show Cause, the Court enter an order, pursuant to § 24-6-402(9) and § 24-72-204(5), C.R.S., directing the Counter-Defendants/Respondents to pay Counter-Plaintiffs/Applicants their reasonable attorneys’ fees and costs incurred in securing access to the public record and in obtaining a judicial finding that the CEC violated the Open Meetings Law,
- G. Enter such further and additional relief as the Court deems just and proper.

Dated: April 16, 2024

By                   /s/ Steven D. Zansberg                    
Steven D. Zansberg  
Michael Beylkin

ZANSBERG BEYLKIN LLC

*Attorneys for Interested Party The Sentinel  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of April, 2024, a true and correct copy of the foregoing document was served on all attorneys of record through the ICCES electronic court filing system.

*s/ Steven D. Zansberg*  
Steven D. Zansberg