

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 South Potomac Street Centennial, Colorado 80112	DATE FILED: May 15, 2024 3:30 PM CASE NUMBER: 2024CV30439
<hr/> Plaintiff: The City of Aurora, Colorado v. Defendant: The Sentinel, Colorado	<hr/> <p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> Case Number: 2024CV30439 Div. 202
ORDER RE: AMENDED APPLICATION PERMITTING THE CITY OF AURORA TO RESTRICT DISCLOSURE	

THIS MATTER comes before the Court on application of the City of Colorado “to restrict disclosure of the recording of a meeting that occurred on October 13, 2023, as requested in a January 31, 2024 Public Records Request submitted by Max Levy of The Sentinel newspaper,” pursuant to C.R.S. §24-72-204(3)(a)(XII) and C.R.S. §24-72-204(6)(a). 2nd Am. Appl, 1. The Court, having considered the pleadings, argument and applicable law finds that the application is DENIED.

INTRODUCTION

1. Application. The City of Aurora (“City”), through its Custodian of Public Records filed an application, on February 28, 2024 pursuant to C.R.S. §24-72-204(3)(a)(XII) and C.R.S. §24-72-204(6)(a) seeking to restrict disclosure of the recording of a meeting that occurred on October 13, 2023. Thereafter, on March 18, 2024, the City filed an Amended Application seeking the same relief. On April 4, 2024, the City filed its Second Amended Application. In its application the City stated the following facts:

- a. On October 13, 2023, two (2) members of the City of Aurora City Council Appointee Evaluation and Compensation Committee (the "CEC") met with two (2) City staff members to discuss certain City Council appointee evaluations and contracts. 2nd App, ¶6.
- b. Pursuant to C.R.S. §24-6-402(1)(a)(I), a 'local public body' is defined in part as '... any board committee, commission, authority or other ... body [to which] ... has [been] delegated a governmental decision-making function... 2nd App, ¶9
- c. The City believes the CEC is an intermediary that does not have any specific delegated 'decision-making' functions ... 2nd App ¶10.
- d. The City did not provide public notice of the October 13, 2023 [meeting] prior to such meeting ... nor did it post a notice prior to the meeting announcing that the CEC meeting was intended to be an executive session ... 2nd App ¶11.
- e. The Council Appointees were not provided notice of the October 13, Discussion, which notice would have allowed such appointees to exercise their respective privacy interests by being given the right to elect whether such discussions were held in an executive session, or whether such discussions were to be held in a meeting open to the public.¹ 2nd App. ¶14.
- f. On January 31, 2024, the City received a Public Records Request under CORA from The Sentinel ... seeking 'any and all electronic recordings of the ... Oct. 13, 2023 [meeting]. 2nd App ¶17

Pursuant to statute, the City requested a hearing on its application.

2. Response and Counterclaims. The Sentinel asserts that the CEC is a public body and that it "violated the COML [Colorado Open Meetings Law] when, on October 13, 2023, it conducted a meeting at which public business was discussed, but that the meeting was not publicly noticed in advance and the public was denied its statutory right to attend and observe that meeting." Rsp/Cntrl, ¶2. The Sentinel seeks

¹ At a hearing on the application, the City clarified that appointees have the right to require that the discussion be held at a public meeting, but apparently do not have the right to demand that the discussion be held in an executive session.

an order directing the City to disclose the entirety of the public record of the subject meeting.

3. Hearing on Application. The Court set the matter for a hearing on May 13, 2024. Prior to the hearing all parties submitted briefs setting out their respective positions. At the hearing, the City acknowledged that a meeting occurred on October 13, 2023, which included two of the three members of the CEC, that there was no public notice prior to the meeting and the public was not given access to the meeting. The City, however, asserts that the City's decision to withhold disclosure of a recording of the meeting was proper pursuant to the deliberative process privilege (C.R.S. §24-72-204(3)(a)(XIII)) and to protect the privacy interests of the subject appointees. The City also contends that the meeting was "pre-decisional" and therefore disclosure is not required.

The Sentinel argued that Colorado case law makes clear that if a public body improperly convenes an executive session, by failing to give notice prior to the session, then the recording of that meeting must be disclosed, and there is no exception for mistake or protection of privacy concerns of persons that might have been the subject of the meeting. The Sentinel further asserts that the October 13, 2023 meeting is subject to the open meetings law since it was a "meeting[] of a quorum ... of any local public body ... at which any public business" was conducted. Sentinel Brief, 4.

LEGAL ANALYSIS

Colorado's Open Meetings Law ("OML") 'is intended to afford the public access to a broad range of meetings at which public business is considered. [Courts] have sought to honor this aim by interpreting the OML broadly to further the legislative intent

that citizens be given a greater opportunity to become fully informed on issues of public importance so that meaningful participation in the decision-making process may be achieved.” *Board of County Com’rs, Costilla County v. Costilla County Conservancy Dist.*, 88 P3d 1188, 1193 (Colo. 2004). In *Costilla County* the Colorado Supreme Court noted that “the definition of a ‘local public body’ is any board, committee, commission, authority or other *advisory, policy-making, rule-making*, or other formally constituted body of any political subdivision of the state.” (italics in original) *Costilla County, Id.* It is not disputed that the CEC is a committee of the Aurora City Council. Additionally, case law interpreting the OML has held that “...[a] meeting is part of the policy-making process if it concerns a matter related to the policymaking function of the local public body.” *Costilla County, Id.* at 1194. While the City argues that the October 2023 meeting was not decisional and therefore not subject to the OML, the Court finds that such a factor is not determinative. Rather, the Court finds that the CEC meeting involved public business and therefore notice of an executive session was required, if the meeting was not open to the public.

The OML requires a local public body to provide notice of any meeting held or attended by a quorum of the public body when that meeting concerns matters that are related to the policy-making function of that body.

Costilla County, Id. at 1195.

See also: *Zubeck v. El Paso County Retirement Plan*, 961 Ps 597, 600 (Colo. App. 1998) (Minutes of El Paso County Retirement Plan meeting was subject to OML despite fact that the Plan “performs fiduciary functions and does not establish public policy, it operates as an agency or instrumentality of the County and is thereby subject to the OML and ORA.”).

The failure of the CEC to comply with requirements for an executive session requires the minutes of that meeting to be made public. *Gumina v. City of Sterling*, 119 P3d 527 (Colo. App. 2004). In *Gumina*, the City Council for Sterling voted to convene two separate executive sessions, one on August 15 and one on August 27, 2002 to discuss various matters including “personnel matters.” *Gumina, Id.* at 529. The trial court determined that the announcements preceding these sessions did not satisfy the OML, because the descriptions of the topics to be discussed were not specific enough. The trial court, however, did not grant plaintiff access to the minutes of those meetings, asserting that she had failed to establish that what occurred at the meetings was subject to the OML. On appeal the Court of Appeals held that “because the Council did not strictly comply with the requirements for convening an executive session, the two sessions were open meetings subject to the public disclosure requirements of the Open Meetings Law.” *Gumina, Id.* at 530. The reviewing court concluded that “[i]f an executive session is not convened properly, then the meeting and the recorded minutes are open to the public.” *Gumina, Id.* at 53. See also: *Guy v Whitsitt*, 469 P3d 546 (Colo. app. 2020) (Requester entitled to recordings and minutes of executive session, including those involving “legal advice” and “personnel matters” where town council failed to properly identify subject matter of executive session); *Sentinel Colorado v. Rodriquez*, 544 P3d 1278 (Colo. App. 2023) (Attorney-client privilege waived as to recording of executive session where counsel’s announcement of executive session failed to comply with OML). Together, these cases instruct that where a public body fails to comply with the requirements for holding an executive session, the recordings or minutes of that session are open to the public. There do not appear to be any


exceptions to this result, including matters that might have properly been the subject of an executive session, as well as privileged communications.

CONCLUSION

Based on the foregoing, the Court finds that the City held a meeting subject to the Open Meetings Law when two members of the CEC met to discuss personnel matters related to City appointees. It is undisputed that the City failed to give notice of an executive session meeting and the public was not admitted to the meeting. The Court therefore concludes that the recording of the October 13, 2023 meeting is public and should be provided to The Sentinel as requested. The City's application to restrict disclosure is DENIED.

SO ORDERED THIS May 15, 2024.

BY THE COURT:



Elizabeth Beebe Volz
District Court Judge