COLORADO COURT OF APPEALS Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal from: The District Court for the City and County of Arapahoe District Court Judge: Hon. Elizabeth Beebe Volz District Court Case Number: 2022CV30927 **Plaintiff-Appellant:** THE SENTINEL COLORADO, **v.** **Defendant-Appellee:** KADEE RODRIGUEZ, City Clerk, in her official capacity as records custodian. **Attorney for Plaintiff-Appellant:** 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 rjohnson@rcfp.org	DATE FILED: May 11, 2023 8:46 PM FILING ID: EC01ED258F0EF CASE NUMBER: 2022CA1934 **COURT USE ONLY** Court of Appeals Case No. 2022CA001934

APPELLANT'S REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g). It contains 5,699 words and does not exceed 5,700 words. The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/Rachael Johnson
Rachael Johnson, #43597

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INTRODUCTION

The question before this Court is whether the district court erred in denying *The Sentinel* access to the recording of a March 14, 2022 Aurora City Council executive session that was held in violation of the Colorado Open Meetings Law ("COML"). Appellee urges this Court to ignore the facts that Councilmembers, without notice, met in secret and decided to terminate a censure investigation of one of their members—with that Councilperson present—and only took public action, weeks later, by approving, without discussion or debate, their prior decision. But these facts have not been disputed and, as such, the district court's decision must be reversed, for the following reasons.

First, Appellee's contention that the "roll call" taken by the Council in executive session did not violate the COML because it was not a "formal action" or a "position" that may only take place at a public meeting, Answer Br. at 18–19, strains credulity. It is well-established under Colorado law that decision-making, even informally, is not allowed behind closed doors. *Hanover Sch. Dist. No. 28 v. Barbour*, 171 P.3d 223, 228 (Colo. 2007). Here, the Councilmembers' "roll-call" terminated a censure investigation in executive session and directed their legal counsel to draft terms of a stipulation that reflected their decision. That the Council's decision required subsequent actions—drafting a stipulation and voting to approve the stipulation at a subsequent public meeting, Answer Br. at 22—does

not ameliorate the fact that the Council violated the COML when it decided in a closed session to resolve an investigation of one of its members. *See Hanover Sch. Dist. No. 28*, 171 P.3d 223. Contrary to Appellee's claim that the censure investigation "was always intended to be the subject of discussion and deliberation at a future public meeting," Answer Br. at 15, Appellee seemingly forgets that well before the March 28, 2022 public meeting, in the March 14 executive session, it directed and instructed its counsel to not only "end the investigation" but to end it "***prior to any public hearing***." CF, p. 110 (emphasis added). The purpose of the COML is to ensure the government engages in "open decision-making," *Colo. Off-Highway Vehicle Coal. v. Colo. Bd. of Parks & Outdoor Recreation*, 292 P.3d 1132, 1137 (Colo. App. 2012), and, because the Council violated the COML—through both a notice violation[1] and by taking "formal action," discussing the public's business, or adopting a "position" in executive session, *see also* §24-6-402(3)(a) and (4), C.R.S.—it must produce a recording of the closed meeting to Appellant. § 24-6-402(2)(a) & (2)(d)(II), C.R.S.; *Gumina v. City of Sterling*, 119 P.3d 527, 530 (Colo. App. 2004) (finding the city council's failure to "strictly

[1] The district court found that the Council violated the COML because it failed to properly notice the executive session. CF, pp. 99, 161.

comply" with statutory open meeting requirements rendered its meeting open and a terminated city employee had the right to inspect the minutes).

Second, Appellee's bald contention that the Council's subsequent public meeting "cured" its prior COML violations because the Council "discussed" whether to affirm its prior decision to terminate a censure investigation is unsupported in the record. Answer Br. at 8, 15. Importantly, the pertinent COML provision does not recognize that a "cure" meeting deprives a requester of access to the meeting minutes or recording when there has been improper notice or "formal action" was taken in a closed session. 24-72-204(2)(b), C.R.S., § 24-6-402(2)(d)(II), C.R.S.; § 24-6-402(3)(a) and (4), C.R.S. But even if the Court considered Appellee's cure argument, the Council's subsequent meeting did not involve the type of public input or redeliberation necessary to serve as a "cure." *Colo. Off-Highway Vehicle Coal.*, 292 P.3d at 1138. Indeed, the publicly available meeting minutes—of which this Court can take judicial notice—show that there was no redeliberation or discussion because the Council had already made up its mind. *See* Appellant's Opening Br. at 10–11, 18–21; *infra* pp. 17–18. As such, the Council's public meeting merely "rubber stamped" its prior decision and did not "cure" its COML violations. *Gumina*, 119 P.3d at 530; *Zubeck v. El Paso Cnty. Ret. Plan*, 961 P.2d 597, 600–01 (Colo. App. 1998); Appellant's Opening Br. at 30–31.

Third, Appellee's insistence that the Council's executive session recording cannot be released because the Council's discussion constituted a privileged attorney-client communication is demonstrably incorrect. Uncontroverted evidence makes clear that the Councilmember under investigation—who had hired separate counsel and threatened to sue the Council if the censure process was not stopped—was present for the alleged attorney-client communications. CF, pp. 16, 110–12. Thus, because an adverse party was present for the executive session discussion, none of the asserted legal advice was privileged. *People v. Lesslie*, 24 P.3d 22, 26 (Colo. App. 2000). Appellee contends, without support, that individual Councilmembers—either the adverse Councilmember or Councilmembers who later described the executive session to reporters—cannot independently waive the Council's privilege. Answer Br. at 28. Putting aside that communications with legal counsel in front of an adverse party cannot be privileged, Colorado courts have held that individuals empowered to act on a corporation's behalf may waive the privilege. *Affiniti Colo., LLC v. Kissinger & Fellman, P.C.*, 461 P.3d 606, 614 (Colo. App. 2019). Accordingly, the executive session recording may be released and cannot be denied under exemption § 24-6-402(2)(d.5)(II)(B) & (C), C.R.S. of the COML.

Finally, the district court erred as a matter of law by failing to award mandatory attorney's fees to Appellant.

For these reasons, the Court should reverse and remand with instructions for the district court to release the March 14 recording.

ARGUMENT

I. The Council's "roll call" taken in the March 14 executive session constituted "formal action,[2]" "adoption [of a]…position" or discussion of "public business" behind closed doors in violation of the COML.

If the Court finds that there was "formal action," "adopt[ing] [of] a . . . position" or discussion of "***any*** public business" in the March 14 executive session due to the roll call taken, the Council violated the COML, *Gumina*, 119 P.3d at

[2] Appellee provides a "separate statement of the case" because the version provided by Appellant "contains an inaccurate description of the pertinent facts based on evidence taken from newspaper articles written by Appellant's reporter." Answer Br. at 2. Appellee incorrectly suggests that the Court should assume (without evidence on the part of Appellee) that *The Sentinel*'s reporting is inaccurate merely because its Application "was not verified and the evidence in the Application consisted of unsworn exhibits," Answer Br. at 5, is baseless. Indeed, the district court below correctly rejected the necessity of a verified complaint or sworn affidavit, finding that "Colorado courts have consistently held that evidence that might not be admissible at trial can nevertheless be considered in preliminary matters," CF, p. 95, and "the statements of persons reportedly present during the [March 14] Executive Session indicating what actions were taken is sufficient to establish a good faith belief that the law might have been violated and therefore *in camera* review is warranted," CF, pp. 94–96. The public statements the district court was referring to—from Councilmembers Coombs and Marcano—reflect that Mayor Mike Coffman asked individual Councilmembers during the March 14 executive session if they were "***for or against continuing the censure process***" against Councilmember Jurinsky. CF, pp. 15, 26, 36, 91. Appellant stands by the accuracy of that reporting, to which Appellee has offered no evidence to contradict.

530–31, such that the recording or meeting minutes must be open to the public. As noted *infra*, the COML does not state that this access may be denied if there is a subsequent "cure" meeting. *See also Off-Highway*, 292 P.3d at 1138. Based on the record evidence, this Court should find that the Council's "roll call" action rendered the March 14 executive session unlawful, entitling Appellant to the release of the recording.

The Sentinel does not dispute the district court's finding that there was a "roll call" taken during the March 14 executive session. CF, pp. 99–100. That "there was a ***roll-call*** taken[3] on what ***direction*** to give to legal counsel on ***how to proceed,***" CF, p. 99 (emphasis added), is exactly the type of "formal action" or taking of a "position" or discussion of "public business" that may only take place at a public meeting under §§ 24-6-402(2)(b), 24-6-402(2)(d)(II), and 24-72-204(5.5)(b)(II), C.R.S. Simply put, the taking of the "roll call" to decide what "direction" to give legal counsel on "how to proceed"[4] violated the COML; it was

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[3] Appellee's proffered semantic distinction between a "roll call" and a "roll-call vote" is unavailing. Answer Br. at 18. Either is a formal action, and a "roll call" can be a voting procedure. *See Henderson v. City of Fort Morgan*, 277 P.3d 853, 855 (Colo. App. 2011) (including "roll call" in its definition of "voting procedure" under the COML), *superseded by statute*, § 24-6-402(2)(d)(IV), C.R.S., *as recognized in Weisfield v. City of Arvada*, 361 P.3d 1069 (Colo. App. 2015).

[4] Appellee blatantly misstates the district court's order by claiming it "determined that the Council's manner of giving its attorney direction on how to proceed in executive session was not a formal action." Answer Br. at 18, 19. The district court made no such determination, *see* CF, pp. 98–100.

the voting procedure that the Council used to decide to end the censure investigation of Councilmember Jurinsky. Appellee's arguments that a "roll call" is not "formal action" are meritless, and Appellee entirely ignores Appellant's arguments that the "roll call" constituted, at minimum, the taking of a "position" or discussion of "public business" that requires disclosure of the March 14 recording under the statute. § 24-6-402(2)(d)(II), C.R.S.

Whether the "roll call" is "formal action," the taking of a "position," or the discussion of "public business" under § 24-6-402(2)(b) or § 24-6-402(2)(d)(II), C.R.S. is a question of law reviewed by this Court *de novo*—not, as Appellee claims, for clear error, Answer Br. at 18. *People v. Sprinkle*, 489 P.3d 1242, 1245 (Colo. 2021). The district court's failure to find that the "roll call" vote violated the COML is reversible error for the following reasons.

First, Appellee argues that "poll[ing] the Council," Answer Br. at 9, to give the Council's attorney "direction on how to proceed in executive session" cannot be "formal action" under § 24-6-402(2)(b) or § 24-6-402(2)(d)(II), C.R.S. because it still needed to be "finally negotiated." Answer Br. at 18, 20, 22. This argument is belied by the record and by common sense. Indeed, Appellee does not dispute that in the March 14 executive session the Council agreed, via a "roll call," to "direct[] and instruct[] [its] legal counsel to end the investigation prior to any public hearing and enter into a stipulation with Council Member Jurinsky to

dismiss the charges brought against her." CF, p. 110. And Appellee's efforts to distinguish *Hanover School District No. 28 v. Barbour*, 171 P.3d 223 (Colo. 2007), and *Walsenburg Sand & Gravel Co. v. City Council of Walsenburg*, 160 P.3d 297 (Colo. App. 2007), are unavailing.

In *Hanover*, the Court found that a school board's decision not to renew a teacher's contract could not be made in executive session because it was the requisite formal action that could only occur at a public meeting, *Hanover Sch. Dist. No. 28*, 171 P.3d at 228, and that the superintendent's letter to the teacher the next day stating that his contract would not be renewed was executing the formal action already taken. *Id*.; *see* Answer Br. at 21. Appellee contends that this case is inapposite because the Board in *Hanover* did not have a "subsequent discussion and action" in a later public meeting, and that only those subsequent steps count as the "formal action." Answer Br. at 21. Appellee is patently wrong. The "roll call" taken in the closed session was the formal action because it was the ***decision*** that ended the investigation, just like the Court found in *Hanover* that the ***decision*** to end the teacher's contract constituted formal action. § 24-6-402(2)(b), (4), C.R.S.; *see also Hanover Sch. Dist. No. 28*, 171 P.3d at 228 (holding "important policy decisions cannot be made informally" and "final policy decision[s] . . . can only be made at a public meeting").

Further, in *Walsenburg*, the Court of Appeals found that the Mayor's action of meeting with the City Council in executive session to ***discuss*** and ***accept*** a bid to buy city property constituted formal action even though that decision was subsequently approved in a public meeting. *Walsenburg Sand & Gravel Co.*, 160 P.3d at 300. That subsequent public vote, the court found, was merely the Council "rubberstamping" its ***already-made decision***. *Id.* at 299. This case is no different. Here, the discussion and "roll call" to enter a stipulation to terminate the investigation into Councilmember Jurinsky similarly constituted formal action. Thus, it is irrelevant that some part of the stipulation still needed to be "finally negotiated." Answer Br. at 22. While Appellee does not specifically state what more in the stipulation needed to be negotiated, as in *Hanover* and *Walsenburg*, the decision to enter into the stipulation and terminate the investigation had already been made.

In any event, contrary to Appellee's suggestion, the Council could not have rejected the stipulation at the public meeting. Answer Br. at 20–21. Well before the March 28 public meeting, as detailed in the March 24 letter, the Council's special counsel had already terminated the investigation "***without making any findings*** regarding the alleged violations, and without ***advising the City Council or preparing any report*** on the merits of the charges." CF, p. 110 (emphasis added). The investigation thus had already ended "prior to any public hearing." *Id.* There

was nothing more for the Council to do at the March 28 meeting but to vote to approve the already agreed-upon stipulation to "dismiss the charges brought against" Councilmember Jurinsky and pay her counsel the agreed-upon $16,162.50 in legal fees. These actions subvert the purpose of the COML. The purpose of the COML is to ensure "open decision-making," *Colo. Off-Highway Vehicle Coal.*, 292 P.3d at 1137, which was wholly absent here—the Council's final decision and formal action were made in secret.

Second, even if this Court does not find that the "roll call" was formal action—which it was—the Council adopted a "position" and discussed "public business" in executive session in violation of the COML. § 24-6-402(2)(b), (2)(d)(II), C.R.S. ("All meetings of a quorum or three or more members of any local public body . . . 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." (emphasis added)).

In sum, because the "roll call" ended the censure investigation into Councilmember Jurinsky, it was a "formal action" or, at minimum, it constituted the taking or adopting of a "position" or the discussion of "public business" in an executive session in violation of the COML. Accordingly, this Court should reverse and remand with instructions to release the March 14 recording.

II. The Council's March 28 public meeting did not cure its COML violation; it merely "rubber stamped" its previous decision.

As mentioned *supra,* if this Court finds that the March 14 executive session "roll call" involved ***any*** "formal action," adoption of a "position" or discussion of "public business" in executive session, then there is no need to get to the issue of "cure" because whether or not there was a cure is not relevant to the question of access. *See* § 24-72-204(2)(b), C.R.S., § 24-6-402(2)(d)(II). Indeed, the COML does not explicitly address whether a state or local public body may "cure" a prior violation of the COML by holding a subsequent meeting that complies with the act. *See id.*; *Colo. Off-Highway Vehicle Coal.*, 292 P.3d at 1136. Accordingly, based on the statutory provisions of the COML—and the *Colorado Off-Highway* case—access to the March 14 recording is not dependent on whether or not there was a cure and, as such, the district court erred and should have ordered the recording disclosed. However, if the Court addresses whether the Council's March 28 public meeting cured either of the Council's COML violations, the record shows that the subsequent meeting merely "rubber stamped" the Council's prior decision and Appellant is entitled to the executive session recording.

As an initial point, Appellee argues that *The Sentinel* cannot meet its burden of establishing that the district court's decision to grant the Motion for Reconsideration was "manifestly arbitrary, unreasonable, or unfair." Answer Br. at 12. This is not a high standard. Yet, even if this Court finds that the district

court did not abuse its discretion by granting the Motion for Reconsideration,[5] this Court has been asked to weigh whether the Council's March 28 public meeting constituted cure or was merely a rubber stamping of the Council's previous decision based on the legal application of § 24-6-402(2), C.R.S. The district court's interpretation and application of the COML, including its ultimate decision to deny *The Sentinel* access to the recording at issue, is reviewable by this Court *de novo*. *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1170 (Colo. 2005); *Sprinkle*, 489 P.3d at 1245.

Appellee argues that it cured the improperly noticed March 14 executive session during the March 28 public meeting.[6] Appellee is wrong. The record makes clear that at the March 28 public meeting the Council merely "rubber stamped" the decision it had previously made in the March 14 executive session terminate the censure investigation of Councilmember Jurinsky. *See Bjornsen v.*

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[5] Indeed, the district court's findings were "unreasonable" given that the weight of the evidence shows that the Council made a final decision via a "roll call" vote to end the censure investigation in executive session and later voted on the stipulation, the "rubber stamping," without any open discussion, public comment or the type of renewed deliberations that were required by this Court in *Colorado Off-Highway*, 292 P.3d at 1138.

[6] Although Appellee raised the issue of cure in its Answer below, CF, p. 75, it improperly litigated new issues after the close of all briefing. Appellant's Opening Br. at 8–9 n.3; *Fox v. Alfini*, 432 P.3d 596, 603 (Colo. 2018).

Bd. of Cnty. Comm'rs of Boulder Cnty., 487 P.3d 1015, 1022 (Colo. App. 2019). That is insufficient.

Indeed, Appellee's description of the "cure" meeting in its briefing only highlights its defects. According to Appellee, a motion to ***approve*** the (already agreed to) stipulation to end censure proceedings against Councilmember Jurinsky was placed on the March 28 public meeting agenda; Appellee asserts (without any factual support) that the motion was "discussed," and that the Council "took a public vote on the matter." Answer Br. at 8. But as *Colorado Off-Highway*—a case cited by both Appellee and the district court—makes clear, a proper "cure" meeting should involve "additional comment from several 'key players,' . . . public comment from . . . interested parties, and . . . renewed deliberations before [the announcement of an] ultimate decision." *Colo. Off-Highway Vehicle Coal.*, 292 P.3d at 1138. Appellee does not—and cannot—contend that any of that occurred at the March 28 meeting. *See* Answer Br. at 12–14 (discussing *Colorado Off-Highway*). On the contrary, the publicly available minutes and recording of the March 28 public meeting show that the Council's purported "discussion"—which did not address any of the particulars of what was discussed or decided in the March 14 executive session—lacks any indicia of a true "cure" meeting.

Indeed, a review of the minutes of the March 28 public meeting shows that the Council did not receive "additional comment from . . . 'key players,'" or

"public comment from . . . interested parties," *Colo. Off-Highway Vehicle Coal.*, 292 P.3d at 1138, before voting to approve the previously agreed-to stipulation to end censure proceedings against Councilmember Jurinsky. *See* City Council Meeting, AuroraTV (Mar. 28, 2022), https://www.auroratv.org/video/city-council-meeting-3-28-22, at 3:37:10. There was no public comment whatsoever. *Id.* The Councilmembers only discussed reforming the censure process, generally, and some expressed their disapproval of the fact that the decision to stipulate to end censure proceedings, the "roll call," against Councilmember Jurinsky was made behind closed doors, in executive session. *See* City Council Meeting, *supra*, at 3:45:50.

> Councilmember Coombs: "I am appalled at the . . . behind closed doors nature of how this has been conducted . . . We didn't even undertake . . . a public discussion and a public vote on the matter of this censure because it was disposed of in an executive session." *Id.* at 3:45:50, 3:46:35.
>
> Councilmember Murillo: "All of this happened behind closed doors . . . so we won't know the conversation[s]." *Id*. at 3:48:49.
>
> The proposal to reform the censure process would "allow all of you in the public to hear all the arguments whenever someone brings forward a censor charge," Councilmember Zvonek said. *Id*. at 3:44:25.
>
> The Mayor noted, "If the resolution for the change in this process passes . . . it will be a completely public and open process, unlike the process we have right now." *Id*. at 3:47:40.

Nor do the minutes of the March 28 public meeting show that the Council engaged in any "renewed deliberations" about their decision to end the censure process either before or after the motion to approve the stipulation had been made and seconded. *See id.* at 3:39:16. On the contrary, the Mayor simply called for a "vote" to approve the already-decided stipulation. *Id*. at 3:50:07 ("The question before us is the ***adoption*** of item number 19-f. Call for the question: Does the City Council wish to approve the stipulation and authorize Special Counsel to execute the stipulation on behalf of the City?" (emphasis added)). Absent any indicia of a true public discussion or deliberation, this Court must conclude that the March 28 meeting did not "cure" the Council's prior improperly noticed executive session.

Further, as discussed *supra*, the stipulation included in the March 28 public meeting packet that was voted on by the Council—which Appellee perplexingly argues supports its claim that it "cured" the COML violation—shows that the censure investigation had already ended ***before*** the March 28 public hearing. CF, pp. 108–09 ("Special Council [sic] representing the City have reached an agreement for a stipulation to resolve the issue"; "this item authorizes the payment of attorney's fees in the amount of $16,162.50 to the attorneys representing Council Member Jurinsky"). And the motion to approve that stipulation that was included in the March 28 meeting packet likewise confirms that the Council's posture at the public meeting was to approve an action already deliberated and

decided outside the public's view. The motion expressly states that the Council's attorney had "reached an agreement for a stipulation to resolve the issue" with Councilmember Jurinsky's counsel, CF, p. 109, and it offers the public no explanation as to why the Council decided to "resolve" the censure investigation in that way.

The March 24 stipulation letter, which explains the details of the stipulation the Council agreed to, also explicitly states that the Council's attorney, at the Council's direction, terminated the investigation "prior to any public hearing," "without making any findings regarding the alleged violations, and without advising the City Council or preparing any report on the merits of the charges." CF, p. 110. And it does not provide any information about how or why the Council came to its decision not to censure Councilmember Jurinsky. Thus, contrary to Appellee's arguments, Answer Br. at 16, that letter cannot cure the Council's prior COML violation because the public still does not know how the Council came to its decision, just that it made a decision. CF, p. 110.

The transparency guaranteed by the COML is transparency into why a government body made a decision or took a formal action. § 24-6-402(2)(b), C.R.S. ("All meetings of a quorum or three or more members of any local public body . . . 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.");

Bagby v. Sch. Dist. No. 1, Denver, 528 P.2d 1299, 1302 (Colo. 1974) (holding that the COML is designed to avoid the mere "rubber stamping" in public of decisions 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"); *see also Bd. of Cnty. Comm'rs v. Costilla Cnty. Conservancy Dist.*, 88 P.3d 1188, 1193 (Colo. 2004).

Because there was no public deliberation or discussion regarding the Council's decision to terminate the censure investigation, to this day the public has no insight into how or why the Council decided not to censure Councilmember Jurinsky. And because the terms of the Council's stipulation with Councilmember Jurinsky were already agreed to in a closed-door executive session before the Council's March 28 public vote to "rubber stamp" that agreement, there was no cure. *Cf. id.* (finding that engaging in renewed deliberations before announcing ultimate decision was sufficient to overcome mere "rubber stamping").

III. No portion of the March 14 executive session involved privileged attorney-client communications and, even if it did, any such privilege was waived.

Appellee denied Appellant's right to access the March 14 executive session recording on the asserted ground that the recording was attorney-client privileged under § 24-6-402(2)(d.5)(II), C.R.S. CF, pp. 22, 34. The district court made no finding on Defendant's attorney-client privilege claim, CF, pp. 162–63. This Court

should determine *de novo* that § 24-6-402(2)(d.5)(II), C.R.S. is inapplicable and require the disclosure of the March 14 executive session recording for the following reasons.

First, Appellee erroneously claims that the district court found "the Executive Session recording contained attorney-client privileged communications." Answer Br. at 9. The district court made no such finding. After conducting an *in camera* review of the executive session recording, the district court found only that the Council's "action" of a "roll-call taken on what direction to give to legal counsel on how to proceed . . . might very well fall into the category of legal advice," and requested that Appellee provide the court with additional briefing on the issue. CF, pp. 99–100. And, in its order granting Appellee's motion for reconsideration, the district court again did not find that the March 14 executive session would be exempt from disclosure pursuant to § 24-6-402(2)(d.5)(II), C.R.S. as an attorney-client privileged communication. The district court made no findings that the legal matters discussed at the March 14 executive session were privileged.

The factual record before the Court makes clear that Appellee's privilege claim is unsupportable. In particular, ***the presence of the adverse third party***, Councilmember Jurinsky, at the March 14 executive session destroys any claim that the meeting involved privileged attorney-client communications. CF, pp. 16,

36. Under Colorado law, any putative attorney-client privilege is waived by the presence of an adverse or third party. *Lesslie*, 24 P.3d at 26–27; *Denver Post Corp. v. Univ. of Colorado*, 739 P.2d 874 (Colo. App. 1987) (privileges for attorney-client communication and attorney work product established by common law, though incorporated into Open Records Act, are waived by disclosure of privileged information to potential adversaries of client). As the subject of a censure investigation, Councilmember Jurinsky's presence rendered any discussion between and amongst her fellow Councilmembers and an attorney for the Council regarding whether to proceed with the investigation, how to terminate the investigation, and her threat to sue the Council not privileged. *See 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." (internal citations omitted)); *Guy v. Whitsitt*, 469 P.3d 546, 551 (Colo. App. 2020) ("The common law attorney-client privilege . . . '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.'" (quoting *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215, 1220 (Colo. 1982))).

Although Appellee does not address, much less acknowledge, these facts, there can be no doubt that a positional conflict existed between Councilmember Jurinsky and the Council, as a whole, at the March 14 executive session. Councilmember Jurinsky had hired separate legal counsel to represent her in the censure investigation. CF, pp. 6, 36, 110–12. Under these facts, any putative attorney-client privilege had been destroyed with respect to the March 14 executive session discussion because legal advice regarding the censure investigation was communicated in the presence of Councilmember Jurinsky, an adverse third party.

Instead of addressing Councilmember Jurinsky's obvious adversity, given her threat to sue the Council, Appellee argues that remarks by Councilmembers present at the March 14 executive session to news reporters describing the deliberations and Councilmember Jurinsky's presence could not waive the alleged privileged nature of the communications on the unsupported theory that only the Council as a whole can waive privilege. Answer Br. at 26. This argument fails. Contrary to Appellee's claim, Answer Br. at 27–28, a corporation can waive privilege,[7] as can an individual member within that entity. *Affiniti Colo., LLC*, 461 P.3d at 614 ("[T]he authority to assert and waive a solvent corporation's attorney-

[7] The fact that the Council collectively voted to waive attorney-client privilege for the limited purpose of permitting the district court to review the recording *in camera*, CF, p. 65, does not establish as a matter of law that one Councilmember cannot waive privilege, as Appellee seems to suggest. Answer Br. at 10.

client privilege rests with its ***current management***." (emphasis added)). Further, the cases cited by Appellee do not establish that organizational officers or officials can never waive the privilege. In fact, Colorado courts have held that a corporation may only assert or waive the attorney-client privilege through individuals empowered to act on its behalf. *Id.* (citing *Genova v. Longs Peak Emergency Physicians, P.C.*, 72 P.3d 454, 462 (Colo. App. 2003)). And, the codified rules that Appellee cites, section 1.13 of the Colorado Rules of Professional Conduct and § 13-90-107(1)(b), C.R.S., Answer Br. at 27–28, are irrelevant because there can be no claimed privilege in the first place. Any privilege was destroyed or waived by Councilmember Jurinsky's presence in the March 14 executive session.

Finally, even if it could be found that the March 14 executive session recording includes privileged attorney-client communications—and it cannot—Appellee cannot withhold the recording in its entirety. As the court held in *Guy v. Whitsitt*, "to the extent" attorney-client privileged communications were shared at the executive session, a recording of that session must be released. 469 P.3d at 554. Appellee tries to minimize this holding, arguing that the court in *Guy* must have been uncertain whether privileged communications existed on the recording or that the "to the extent they exist" language "suggests that such attorney-client

privileged communications were not recorded as authorized by the statute, and therefore may not have existed," Answer Br. at 25, but this is mere speculation.

Moreover, § 24-6-402(2)(d.5)(II)(B), C.R.S. allows for "an out" if there is concern that a COML notice violation will result in the release of privileged communications. It permits the attorney for the body to not keep a record "of the part of the discussion that constitutes a privileged attorney-client communication." § 24-6-402(2)(d.5)(II)(B), C.R.S. Appellee, however, states that notwithstanding the statutory language, the Council records every meeting even if it is privileged. Answer Br. at 3–4. Accordingly, this Court is empowered to release the entirety of the executive session recording.

In sum, the factual record makes clear that due to an adversity of interests at the March 14 executive session, none of the claimed legal matters discussed between the Council and its attorney regarding Councilmember Jurinsky's censure investigation were privileged communications. Accordingly, since the district court erred in not finding that the privilege was waived, this issue must be remanded back to the district court for a determination that exemption § 24-6-402(2)(d.5)(II), C.R.S. does not apply, and the recording must be released to Appellant.

IV. The district court erred by failing to award mandatory attorney's fees to Appellant.

Appellant prevailed in its application because the district court found that Appellee violated the COML, CF, p. 100, and thus Appellant is entitled to mandatory attorney's fees. *See* § 24-6-402(9), C.R.S.; § 24-72-204(5), C.R.S.; *Van Alstyne*, 985 P.2d at 99–100. As discussed in Appellant's Opening Brief, this is so regardless of the district court's later finding that the violation was cured by a subsequent public meeting. Appellant's Opening Br. at 36–37; *Tanner v. Town Council of E. Greenwich*, 880 A.2d 784, 794–95 (R.I. 2005). Thus, Appellant is the "prevailing applicant." *Benefield v. Colo. Republican Party*, 329 P.3d 262, 268 (Colo. 2014).

Citing *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1089 (Colo. 2011), Appellee argues that it would be "illogical" for a court to find that a custodian was correct in withholding a record and then punish that very same custodian by awarding attorney fees to the requester." Answer Br. at 31. However, the district court found that the notice was improper, and made no finding that the custodian was correct to withhold the recording. CF, pp. 99–100. Further, *Ritter* is inapplicable to the facts here because the Supreme Court was interpreting the Colorado Open Records Act, not the COML, and the Court made no mandatory ruling with respect to attorney's fees. § 24-6-402(9), C.R.S.

Regardless, if this Court finds that the custodian should have permitted inspection but denied it, the Court may order attorney's fees pursuant to § 24-6-

402(9), C.R.S. Accordingly, Appellant is entitled to recover reasonable costs and attorney's fees in this matter.

CONCLUSION

For the reasons herein, this Court should reverse the decision of the district court and remand with instructions for the district court to order release of the March 14 executive session recording and award Appellant costs and reasonable attorney's fees in this action.

Respectfully submitted this 11th day of May 2023.

By /s/*Rachael Johnson*

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May 2023, a true and correct copy of the foregoing **REPLY BRIEF** 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), § 1-26:

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