

DISTRICT COURT, CITY & COUNTY OF DENVER,  
STATE OF COLORADO

Court Address: 1437 Bannock St.  
Denver, Colorado 80202

**Plaintiffs:**

**Center for Independent Media**, a District of Columbia nonprofit corporation doing business as *The Colorado Independent*; and,

**John Tomasic**, a citizen of Colorado,

v.

**Defendants:**

**Independent Ethics Commission of the State of Colorado**, a constitutionally enacted state commission and body politic; and,

**Jane T. Feldman**, in her official capacity as executive director of the Independent Ethics Commission of the State of Colorado.

▲ COURT USE ONLY ▲

Case No.: 2009 CV 5109

Ctrm./Div.: 6

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**Introduction**

This matter came before the Court on the Order to Show Cause, issued on July 2, 2009, requiring Defendants Independent Ethics Commission of the State of Colorado and Jane T. Feldman (collectively here, “the Commission”) to show cause why they should not be directed to make available to the plaintiffs and the public the records previously requested by the plaintiffs but denied by the Commission. The Court conducted the Show Cause Hearing on July 31, 2009, hearing testimony from Ms. Feldman, the executive director of the Colorado Independent Ethics Commission, and argument from counsel. Having considered the evidence and argument presented at the hearing, the Court concludes, as more fully discussed below, that the show cause order should be made absolute, and that all records subject to that order should be made available

for public inspection and copying, without redaction, as public records under the Colorado Open Records Act (“CORA”).

The Court’s findings and conclusions follow:

**Findings of Fact**

1. The public records dispute in this case arises from two formal requests under the CORA made by the plaintiffs’ reporter Ernest Luning, seeking access to the recordings of the Commission’s closed-door meetings during the first five months of 2009.

2. Specifically, in a letter dated May 5, 2009, Mr. Luning requested access to “all recordings and any minutes of executive sessions held by the commission in 2009,” citing meetings on January 14, 2009, January 23, 2009, February 2, 2009, February 20, 2009, March 18, 2009, March 19, 2009, March 31, 2009, April 6, 2009, and April 21, 2009.

3. Mr. Luning followed up that request with a second letter dated May 13, 2009, in which he requested access to “all recordings and any minutes and notes kept by any of the participants of the telephonic executive sessions held by the commission on April 16, 2009.”

4. The Commission denied both of these requests on the grounds that the requested records pertained to “executive sessions” and were therefore, in the Commission’s view, “confidential and exempt” from disclosure under a provision of the Colorado Open Meetings Law (“COML”).

5. On May 17, 2009, the plaintiffs gave notice of their intent to sue under both the CORA and the COML, through a letter from their attorney which provided a draft copy of the complaint in this action.

6. On May 20, 2009, the plaintiffs filed this civil action, alleging twelve counts of violations of the COML, one each for the contested closed-door meetings on: January 14, 2009, January 23, 2009, February 2, 2009, February 20, 2009, March 18, 2009, March 19, 2009, March 31, 2009, April 6, 2009, April 13, 2009, April 16, 2009, April 21, 2009 and May 6, 2009.

7. Along with their Complaint, the plaintiffs also applied for an order to show cause under the CORA, pursuant to § 24-72-204(5), C.R.S., seeking judicial enforcement of the plaintiffs’ public records request for access to the recordings, minutes, and any notes of the closed-door meetings that were the subject of the plaintiffs’ allegations of violations of the COML.

8. Although this case primarily involves allegations of improper closed meetings in violation of the COML, the issues at the Show Cause Hearing pertained to the plaintiffs’ public records request under the CORA.

9. The gravamen of the plaintiffs' theory for access to the records of the closed meetings is that the Commission, in the plaintiffs' view, failed to strictly comply with the requirements for convening proper "executive session" closed-door meetings under the COML, and that as a result, the meetings were not properly closed to the public and that therefore the records of the meetings should be made available to the public as public records under the CORA.

10. The plaintiffs assert four bases for concluding that the Commission failed to strictly comply with the requirements closing the Commission's meetings: (1) The Commission failed to vote to conduct an executive session; (2) the Commission failed to announce a statutory citation authorizing the particular executive session; (3) the Commission failed to announce the particular matter to be discussed in the executive session in as much detail as possible without compromising the purpose for which the meeting was called; and, (4) there was no legitimate statutory authorization for closing the Commission's deliberations on requests for advisory opinions, letter rulings, position statements, or non-frivolous ethics complaints.

11. On the strength of the plaintiffs' prima facie showing in their Complaint and their Application for Order to Show Cause, the Court issued its Show Cause Order on July 2, 2009.

12. Prior to that show cause order, on July 1, 2009, the Commission submitted a set of recordings to the Court, ostensibly for *in camera* review (although the Court had not issued an order for *in camera* review), of various segments of recordings of the Commission's closed meetings on: January 14, 2009, January 23, 2009, February 2, 2009, March 19, 2009, April 6, 2009, April 21, 2009, and May 6, 2009.

13. The Court has not, to date, reviewed those recordings.

14. At the Show Cause Hearing on July 31, 2009, the Commission stipulated that there are no electronic recordings of the closed meetings on: February 20, 2009, March 18, 2009, March 31, 2009, April 13, 2009, and April 16, 2009.

15. The Commission also stipulated at the hearing that it no longer was objecting to the plaintiffs' request for access to the recordings of the closed meetings on March 19, 2009 and April 21, 2009, or to the greater portion of the remaining recordings, but for portions of those remaining recordings that reflected attorney-client communications.

16. At the close of the evidence at the Show Cause Hearing, the Commission stipulated that it would produce to the plaintiffs copies of the recordings of the closed meetings on March 19, 2009 and April 21, 2009 as soon as possible, as well as thereafter the recordings of the remaining closed meetings (but for the portions that the Commission asserts are protected by the attorney-client privilege).

17. The Court subsequently has been informed by counsel for the plaintiffs that the Commission fulfilled these commitments and provided the specified recordings to the plaintiffs following the Show Cause Hearing.

18. Thus, the only remaining recordings at issue in connection with the Order to Show Cause are the portions of the recordings of the Commission's closed meetings that reflect attorney-client communications.<sup>1</sup>

19. The Commission has failed to identify which specific portions of the recordings it has submitted to the Court contain the portions that the Commission believes should not be released to the plaintiffs or the public. The Court understands, nevertheless, that the portions of the recordings that the Commission wishes to protect from disclosure are contained among the recordings for the meetings on: January 14, 2009, January 23, 2009, February 2, 2009, April 6, 2009, and May 6, 2009.

20. Also still at issue under the Order to Show Cause are any notes created by the Commission concerning the closed-door discussions during the meetings at which the Commission did not create any electronic recordings on: February 20, 2009, March 18, 2009, March 31, 2009, April 13, 2009, and April 16, 2009.

21. For each of the ten meetings still in dispute, the Commission published a notice itemizing the topics to be covered during the meeting. With respect to any executive session discussion, the notice contained some variation of the following language: "Discussion pertaining to requests for advisory opinions and complaints filed with the Commission. C.R.S. §§24-6-402(3)(a)(III); 13-90-107(1)(b); 24-18.5-101; Article XXIX of the Colorado Constitution."

22. On only one occasion did the notice for a meeting specify any particular complaint or advisory opinion: For the Commission's telephonic meeting on April 13, 2009, the notice indicated that there would be "a discussion pertaining to Complaint 08-01 filed with the Commission."

23. The testimony from Ms. Feldman established that for each meeting, prior to going into closed session, the Commission's chair read a script prepared by legal counsel for the Commission that generally followed the pattern of the language contained in the notice, announcing the topic and statutory citations for the closed meeting, albeit never with any specific reference to a particular case number or particular matter to be discussed.

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<sup>1</sup> The Commission initially asserted that it was also seeking to protect the confidentiality of discussions of frivolous ethics complaints and the identities of persons requesting letter rulings. The evidence at the Show Cause Hearing, however, failed to show that there was any discussion during the closed meetings at issue here that falls within those two categories. None of the ethics complaints discussed during the closed meetings in the first five months of 2009 were found by the Commission to be frivolous, and there was no evidence that the recordings contain any identification of a person who requested a letter ruling.

24. Although Ms. Feldman testified that the Commission used a script for these announcements of the closed meetings, the Commission failed to offer a copy of that script into evidence, or otherwise provide any direct evidence of the specific text of the script that was used.

25. Ms. Feldman further testified that the Commission regularly voted on the question of whether to go into a closed session, even though Ms. Feldman failed to record this fact in any of the minutes for meetings at issue in this case prior to the May 6, 2009 meeting. Ms. Feldman did not give any explanation for why she failed to record the Commission's votes to go into closed session. Ms. Feldman indicated, however, that she began recording this fact starting with the minutes for the May 6, 2009 meeting as a result of the plaintiffs raising the issue in their request for access to the Commission's recordings.

26. In connection with each meeting at issue here, other than the meeting on April 13, 2009 when the Commission announced that it intended to discuss Complaint No. 08-01 in closed session, the Court finds that it would have been possible to provide more detail concerning the matters to be discussed.

27. The announcements for the following closed meetings failed to provide as much detail as possible, as described here:

- a. With respect to the Commission's meeting on January 14, 2009, the Commission could have, but did not, announce that its closed meeting would consider the ethics complaint contained in Complaint No. 09-01.
- b. With respect to the Commission's meeting on January 23, 2009, the Commission could have, but did not, announce that its closed meeting would consider a motion to recuse a commissioner from participating in deliberations on the ethics complaint brought against former Secretary of State Michael Coffman in Complaint No. 08-01. The Commission also could have, but did not, announce that its closed discussion would consider a proposed position statement regarding gifts from lobbyists and organizations represented by lobbyists in Position Statement No. 09-01.
- c. With respect to the Commission's closed sessions on February 2, 2009, the Commission could have, but did not, announce that its closed discussions would cover procedural motions in the ethics complaint against Mr. Coffman in Complaint No. 08-01, the merits of the ethics complaint in Complaint No. 09-02, and requests for guidance in Letter Ruling Nos. 09-01 and 09-02, concerning whether a professional lobbyist may have lunch with a public official or employee at a venue where the public official or employee is not allowed to pay for his own meal, and whether a not-for-profit non-lobbyist entity may host public officials and employees at an annual luncheon.

- d. With respect to the Commission's closed sessions on February 20, 2009, the Commission could have, but did not, announce that its closed discussions would cover consideration of the Commission's subpoena power in the ethics complaint against Mr. Coffman in Complaint No. 08-01, and a request for an advisory opinion concerning university professors in Advisory Opinion No. 09-01.
- e. With respect to the Commission's closed meeting on March 18, 2009, the Commission could have, but did not, announce that its closed discussion concerned the ethics complaint against Mr. Coffman in Complaint No. 08-01.
- f. With respect to the Commission's second<sup>2</sup> closed discussion on March 19, 2009, the Commission could have, but did not, announce that it would consider a request for a letter ruling pertaining to meals to board members in Letter Ruling No. 09-03, and a motion for reconsideration of the dismissal of the ethics complaint in Case No. 09-02.
- g. With respect to the Commission's closed telephonic meeting on March 31, 2009, the Commission could have, but did not, announce that it would consider the ethics complaint against Mr. Coffman in Case No. 08-01.
- h. With respect to the Commission's closed discussion during its meeting on April 6, 2009, the Commission could have, but did not, announce that it would consider a request for an advisory opinion regarding administrative law judges' bar memberships in Advisory Opinion No. 09-02, a request for an advisory opinion regarding State Patrol members in Advisory Opinion No. 09-03, an ethics complaint in Complaint No. 09-03, and an ethics complaint regard school board members and employees of a school district in Complaint No. 09-04.
- i. With respect to the Commission's closed discussion during its meeting on April 16, 2009, which closed discussion was not listed in the notice for the meeting, the Commission could have, but did not, announce that its consideration of Advisory Opinion No. 09-04 pertained to issues relating to travel expenses from a nonprofit entity.

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<sup>2</sup> The minutes for the March 19, 2009, meeting reflect that there was an unscheduled, ten-minute executive session discussion prior to the regularly scheduled closed discussion later in the meeting. Ms. Feldman testified that this ten-minute discussion involved legal advice by the Commission's attorney in response to a question from a Commission member regarding "PDQs" for staff positions with the Commission. The Commission has failed to indicate whether this legal advice is contained in the set of recordings for the March 19, 2009 meeting that the Commission has submitted to the Court.

- j. With respect to the Commission's closed discussion during its meeting on April 21, 2009, the Commission could have, but did not, announce that it would consider a further letter from the complainant in the dismissed ethics complaint in Complaint No. 09-02.
- k. With respect to the Commission's closed discussion during its meeting on May 6, 2009, the Commission could have, but did not, announce that it would consider a request for an advisory opinion regarding the acceptance of a fellowship from a nonprofit entity in Advisory Opinion No. 09-05.

28. In every case where the Commission deliberated on a particular case, whether it was a complaint or a request for a letter ruling or advisory opinion, or a position statement, it was possible for the Commission to identify the particular matter of the specific case without undermining the purpose for holding the discussion behind closed doors. In each instance, disclosure of the generic details of the specific case would not have undermined the purpose for conducting the discussion behind closed doors.

29. Apart from these deliberations behind closed doors by the Commission, there appear to be various instances where the Commission received legal advice from its attorneys. The Commission, however, failed to present any evidence during the Show Cause Hearing as to which portions of the various recordings reflected these attorney-client communications.

30. In addition, other than the ten-minute discussion with the Commission's legal counsel on March 19, 2009, the record does not reflect that the Commission ever announced either the particular nature of the legal questions or the specific pending litigation cases to be discussed behind closed doors.

31. The Commission presented no evidence demonstrating that it was not possible to provide an identification of the particular nature of the legal questions or pending litigation that was the subject of these closed-door attorney-client communications.

32. And finally, the Commission's attorneys failed to provide any certification when the Commission did not make an electronic recording of the closed meetings that the discussion involved a privileged attorney-client communication.

### **Conclusions of Law**

33. The COML is to be construed broadly in favor of its purpose of providing the maximum extent possible of public access to the meetings of governmental bodies. *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."); *Benson v. McCormick*, 195 Colo. 381, 383, 578 P.2d 651, 653 (1978) (noting that the statute "reflects the considered judgment of the Colorado electorate that democratic government best serves the commonwealth if its decisional processes are open to public scrutiny"); *Bagby v. School Dist. No. 1, Denver*, 186 Colo. 428, 434, 528 P.2d 1299, 1302 (1974) (same, because the COML was

“designed *precisely* to prevent the abuse of secret or ‘star chamber’ sessions of public bodies”) (citation omitted) (emphasis in original).

34. The COML’s “underlying intent” 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. 1998); *see also Hanover Sch. Dist. No. 28 v. Barbour*, 171 P.3d 223, 227 (Colo. 2007); *Walsenburg Sand & Gravel Co. v. City Council*, 160 P.3d 297, 299 (Colo. App. 2007).

35. Under the COML, all exemptions from the default rule that a public body’s meetings must be open to the public are to be narrowly construed, ensuring as much public access as possible. *See Gumina v. City of Sterling*, 119 P.3d 527, 530 (Colo. App. 2004) (“In our view, this rule [of a presumption in favor of public access] applies with equal force to the executive session exception carved out in the Open Meetings Law.”); *Zubeck v. El Paso County Ret. Plan*, 961 P.2d 597, 600 (Colo. App. 1998) (construing both the COML and the CORA in harmony and requiring narrow construction of any exemption limiting public access); *see also 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.”)

36. The COML requires that a state public body such as the Colorado Independent Ethics Commission must make an electronic recording of its closed-door executive sessions, unless the public body’s attorney certifies that the unrecorded discussion behind closed doors was a privileged attorney-client communication. *See* § 24-6-402(2)(d.5)(I)(C).

37. The COML otherwise provides that any such recording of an “executive session” is privileged and not subject to disclosure. *See* § 24-6-402(2)(d.5)(I)(D), C.R.S.

38. The Colorado Court of Appeals, however has held that the privilege for non-disclosure of the recording of an “executive session” does not apply if the public body fails to “strictly comply” with the requirements under the COML for closing the public body’s meeting. *See Gumina*, 119 P.3d at 532 (“[W]e conclude that 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.”) (emphasis added); *Zubeck*, 961 P.2d at 601 (requiring disclosure of minutes of meetings not properly closed); *see also Barbour v. Hanover Sch. Dist. No. 28*, 148 P.3d 268, 273 (Colo. App. 2006) (noting that strict compliance is required with the COML’s mandates), *aff’d in pertinent part*, 171 P.3d 223 (Colo. 2007); *WorldWest LLC v. Steamboat Springs Sch. Dist. RE-2 Bd. of Educ.*, Case No. 07-CA-1104, 37 Media L. Rep. 1663, 1668-69 (Colo. App. Mar. 26, 2009) (same).

39. In such circumstances where a public body has not properly convened an “executive session,” the recording of the closed meeting will be treated as an ordinary public record, subject to disclosure under the CORA, because the meeting does not constitute a privileged “executive session.” *See Zubeck*, 961 P.2d at 601.

40. In the context of the show cause issues in this case, the Commission bears the burden of proof to demonstrate that its denials of the plaintiffs' CORA requests were proper. *See Zubeck*, 961 P.2d at 601.

41. Because the basis of the Commission's denials of the plaintiffs' CORA requests was the Commission's assertion that the requested recordings pertained to "executive session" meetings, and were thus privileged under § 24-6-402(2)(d.5)(I)(D), C.R.S., the burden is therefore on the Commission to demonstrate that it "strictly complied" with the mandatory procedures for convening a closed-door "executive session." *See Gumina*, 119 P.3d at 532.

42. Under the COML, and assuming that the matter to be discussed is one permitted for a closed-door discussion under the COML, a public body may retire behind closed doors for an "executive session" only if it complies with the following procedural requirements: (1) announce the categorical topic of the planned discussion, such as "attorney conference" or "personnel matter" or the like, (2) announce the specific statutory citation under the COML that authorizes the closure of the meeting, (3) identify the "particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized," and (4) vote by two-thirds majority to close the meeting. *See* § 24-6-402(3)(a), C.R.S.

43. The Court concludes that the Commission has carried its burden of demonstrating that the Commission announced the categorical topic of its closed meetings, as well as the statutory citations for such closures.

44. The Commission also has carried its burden of demonstrating that the Commission voted by two-thirds majority to close the meetings at issue in this case, albeit without memorializing such votes in the minutes of the meetings prior to the May 6, 2009 meeting.

45. The Commission, however, has failed to carry its burden of demonstrating that it identified the "particular matters" to be discussed in as much detail as possible, except for the closed meeting on April 13, 2009, when the Commission announced that it intended to discuss "Complaint 08-01 filed with the Commission."

46. In each such case other than the meeting on April 13, 2009, it was feasible for the Commission to announce the particular case to be discussed, and in every case, it was possible to describe the generic nature of the complaint or request for letter ruling or advisory opinion, or the position statement, as was in fact done in the minutes for each meeting.

47. In addition, with respect to the Commission's deliberations on ethics complaints, advisory opinions, letter rulings, and position statements, there is no statutory basis for conducting such discussions behind closed doors. The COML does not contain an exemption for deliberations behind closed doors, and Colorado law does not authorize closed-door meetings for quasi-judicial bodies to discuss the adjudicative matters before them. *See Lanes v. State Auditor's Office*, 797 P.2d 764, 766 (Colo. App. 1990) ("[T]he fact that the Board was acting in a

quasi-judicial capacity did not negate its obligation to comply with the Open Meetings Law.”); *see also Colonial Bank v. Colo. Fin. Servs. Bd.*, 961 P.2d 579, 587-88 (Colo. App. 1998) (“[A]s required by the COML, Board members deliberated in public prior to voting.”); *Gilpin Cty. Bd. of Equalization v. Russell*, 941 P.2d 257, 264 n.13 (Colo. 1997) (noting that the COML applies to public bodies acting in quasi-judicial capacity).

48. As for the Commission’s closed discussions with its attorneys to receive legal advice, as of the time of these meetings, the COML limited the ability of a state public body such as the Commission to close its discussions with its legal counsel, providing authorization for such a closure only when the discussion pertains to “disputes involving the public body that are the subject of pending or imminent court action.” § 24-6-402(3)(a)(II), C.R.S.<sup>3</sup>

49. The Commission has failed to carry its burden of demonstrating that any of the attorney conferences that it seeks to protect in the recordings at issue here involved disputes with the Commission itself that were the subject of pending or imminent court action.

50. In circumstances such as are present here, where a public body has failed to strictly comply with the requirements for convening a proper “executive session,” any record of such improperly closed meetings is subject to disclosure under the CORA as a public record, and it is not protected by any privilege against non-disclosure. *See Gumina*, 119 P.3d at 532.

51. As a result, because of the Commission’s failure to adequately identify the particular matter to be discussed behind closed doors, and because the Commission’s deliberations on non-frivolous complaints, advisory opinions, letter ruling, and position statements were not in any event matters that could properly be discussed behind closed doors, the Court concludes that the entire recordings of the following meetings must be made available for inspection and copying as public records: January 14, 2009, January 23, 2009, February 2, 2009, March 19, 2009, April 6, 2009, April 21, 2009, and May 6, 2009.

52. In addition, with respect to the meetings for which the Commission did not make a recording, *i.e.*, the meetings on February 20, 2009, March 18, 2009, March 31, 2009, April 13, 2009, and April 16, 2009, the Commission is directed to submit to the Court for *in camera* review any notes or other written materials that the Commission believes to be the protected work product of the Commission’s members or attorneys. The Court will determine whether such material may indeed be protected from disclosure as protected work product. Otherwise, however, any other written materials reflecting the Commission’s deliberations during these unrecorded closed meetings is to be made available for inspection and copying as public records.

53. Finally, because the Court has concluded that the Commission improperly denied the plaintiffs’ request for access to the recordings of the closed meetings, the plaintiffs are

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<sup>3</sup> This limitation on the scope of attorney conferences for state public bodies was changed by the General Assembly in its most recent session, but the legislation enacting the change did not go into effect until after the meetings at issue in this case.

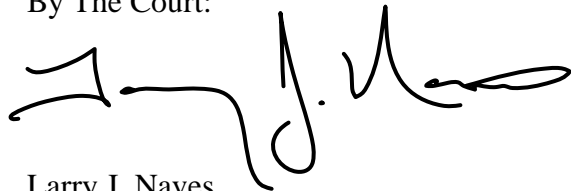
entitled to an award of their reasonable attorney's fees and costs relating to this matter. *See* § 24-72-204(5), C.R.S.; *see also Van Alstyne*, 985 P.2d at 99-100 (finding reversible error in the failure to award attorney's fees to a citizen who prevailed in establishing a violation of the COML because "the trial court overlooked the General Assembly's establishment of **mandatory** consequences for a violation of the statute") (emphasis added).

### Conclusion

In light of the foregoing, the Commission is directed immediately to make available for inspection and copying the recordings of the following closed meetings in their entirety: January 14, 2009, January 23, 2009, February 2, 2009, March 19, 2009, April 6, 2009, April 21, 2009, and May 6, 2009. The Commission also is directed within three business days of this order to submit to the Court for *in camera* review any notes or other written records that it believes constitute protected work product for the following closed meetings: February 20, 2009, March 18, 2009, March 31, 2009, April 13, 2009, and April 16, 2009. Any notes or written records of the unrecorded closed meetings on those dates that the Commission does not assert to be protected work product must be released at the same time of the *in camera* submission to the Court. And finally, the plaintiffs are directed within ten business days of this order to submit an application detailing their reasonable attorney's fees and cost in connection with these proceedings.

Dated this 31st day of August, 2009.

By The Court:

A handwritten signature in black ink, appearing to read "Larry J. Naves". The signature is fluid and cursive, with a large initial "L" and a distinct "N".

Larry J. Naves  
District Court Judge