COLORADO COURT OF APPEALS Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: April 6, 2023 10:04 AM FILING ID: 789277753F9D2 CASE NUMBER: 2022CA1934
Plaintiff-Appellant: THE SENTINEL COLORADO, **v.** **Defendant-Appellee:** KADEE RODRIGUEZ, city clerk, in her official capacity as records custodian.	**▲COURT USE ONLY▲**
***Attorneys for Kadee Rodriguez, City Clerk, in her official capacity as records custodian*:** Attorneys: Corey Y. Hoffmann, Reg. No. 24920 Katharine J. Vera, Reg. No. 53995 Firm: Hoffmann, Parker, Wilson & Carberry, P.C. 511 16th Street, Suite 610 Denver, CO 80202 Phone: (303) 825-6444 E-mail: cyh@hpwclaw.com; kjv@hpwclaw.com	Case No.: 2022CA001934
APPELLEE'S ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

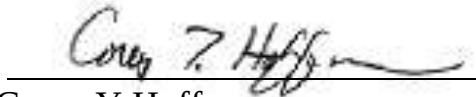
I hereby certify that this Answer Brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The Answer Brief complies with C.A.R. 28(g) in that it contains 6988 words.

The Answer Brief complies with C.A.R. 28(b) in that it contains: (1) a certificate of compliance as required by C.A.R. 32(h); (2) a Table of Contents, with page references; and (3) a Table of Authorities with cases arranged alphabetically and other authorities, with references to the pages of the brief where cited.

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

HOFFMANN, PARKER, WILSON & CARBERRY, P.C.

By: 

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Defendant-Appellee, Kadee Rodriguez, City Clerk, in her official capacity as records custodian of the City of Aurora (the "City"), through undersigned counsel, Hoffmann, Parker, Wilson & Carberry, P.C., hereby submits the following Answer Brief:

ISSUES PRESENTED FOR REVIEW

The City provides a more accurate characterization of the issues presented for review as follows:

1. Whether the district court correctly determined that the City was not obligated to release a recording of the Aurora City Council's March 14, 2022 executive session (the "Executive Session") on the grounds that the Colorado Open Meetings Law violation was cured by publicly discussing the topic at the Council's subsequent March 28, 2022 public meeting.

2. Whether the district court correctly determined after its *in camera* review that the Aurora City Council did not take formal action during the Executive Session.

3. Whether the trial court correctly determined not to release a recording of the Aurora City Council's March 14, 2022 Executive Session under the Colorado Open Meetings Law because the privilege claimed by Defendant-Appellee pursuant to § 24-6-402(d.5)(II)(B), C.R.S. was not waived or destroyed.

4. Whether the district court correctly determined not to award attorney fees to the Sentinel.

STATEMENT OF THE CASE

Because the version of events provided by Appellant The Sentinel Colorado (the "Sentinel" or "Appellant") contains an inaccurate description of the pertinent facts based on evidence taken from newspaper articles written by Appellant's reporter, the City submits a separate statement of the case below.

A. Nature of the Case

This case was initiated in district court by Appellant seeking access to the recording and meeting minutes of a March 14, 2022 Executive Session of the Aurora City Council ("Council" or "City Council") under the Colorado Open Records Act ("CORA"), C.R.S. § 24-72-200.1, *et seq*., and the Colorado Open Meetings Law ("OML"), C.R.S. § 24-6-401, *et seq*. After conducting an *in camera* review of the Executive Session recording in accordance with CORA and the OML, the district court indicated by Order dated July 26, 2022, that it was inclined to release the recording, but allowed the City the opportunity to submit additional briefing prior to release because the recording contained attorney-client privileged discussions.

The City took advantage of the opportunity offered by the district court and filed a Motion Requesting Reconsideration of the court's July 26, 2022 Order (the "Motion for Reconsideration"), which the court granted, holding that the City's subsequent meeting on March 28, 2022 cured the OML violation that occurred at its March 14, 2022 meeting, and that the Executive Session recording was not subject to release. The Sentinel appeals that decision.

B. Statement of Relevant Facts

The pertinent facts and circumstances in this case are as follows. On March 14, 2022, at a publicly held and noticed meeting, City Council entered into an executive session under item 4c of the agenda for purposes of receiving legal advice. *See* Agenda, CF 19. The agenda and announcement of the Executive Session failed to specify the topic of the executive session as required under § 24-6-402(4), which was for the purpose of receiving legal advice within the meaning of C.R.S. § 24-6-402(4)(b).

City Council entered into the Executive Session to receive legal advice from the City's attorney regarding the specific legal question involving a censure action against one of the City Council Members, Council Member Jurinsky. The Executive Session was recorded because the City records even attorney-client privileged communications occurring in executive session, notwithstanding the

statutory language in C.R.S. § 24-6-402(2)(d.5)(II)(B) which authorizes the City not to electronically record such privileged communications. During the Executive Session, the City Council gave direction to its legal counsel to end the censure proceedings regarding Council Member Jurinsky, and to seek to enter into a stipulation with her. On or about March 18, 2022, a reporter from the Sentinel filed a public records request with the City, requesting the Executive Session recording. CF 22. The City denied this request on March 22, 2022, on the basis that the recording is a privileged attorney-client communication exempt from disclosure under C.R.S. § 24-6-402(2)(d.5)(II). *Id.*

On May 9, 2022, the City Council voted to authorize a limited waiver of the attorney-client privilege solely for the purpose of allowing the court's *in camera* review of the Executive Session recording. *See* ¶ 19e, CF 65 and ¶ 26, CF 71. On May 23, 2022, the Sentinel filed an Application for Access to Executive Session Recording and Meeting Minutes and for *In Camera* review (the "Application") pursuant to C.R.S. § 24-72-204(5.5). The factual recitations in the Application were taken from statements contained in the Sentinel's own newspaper articles to support its claim that formal action was taken during the Executive Session. CF 7, ¶¶ 17-18, 20. The Sentinel's Statement of the Case in its Opening Brief also relies

on unverified statements and assertions from its own newspaper articles. Opening Brief, p 3-4.

The City, in its Brief Regarding the Sufficiency of Plaintiff's Application, argued that Sentinel's Application did not allege "grounds sufficient to support a reasonable belief" of a violation of the OML because its Application was not verified and the evidence in the Application consisted of unsworn exhibits and references to its own newspaper articles. CF 86-87.

Notwithstanding what the City believed were deficiencies in the Application, the district court ordered *in camera* review over the City's objection, based on the City's deficient notice of the Executive Session as required by C.R.S. § 24-6-402(4). After conducting *in camera* review, the court found that City Council entered into the Executive Session to receive legal advice from its attorney on the process to be followed in addressing a censure action against one of its Council Members. *See* Order Concerning Recording of Executive Session, ¶ 5, CF 99. The court also stated that during the Executive Session, Council Members took a roll-call vote only for the purpose of giving the City Council's legal counsel direction on how to proceed. *Id.* Therefore, the court found that the Council did not take formal action and did not "vote" to end the censure action, as alleged by the Sentinel. *Id.*

However, the court stated that it was inclined to release the Executive Session recording due to the deficient notice, but was mindful of the "special status attorney-client communications hold" and invited the City to file a brief addressing why the court should not release the recording. CF 166-67. The City filed a Motion for Reconsideration, in which it argued that it was improper to find that the deficient notice warranted the release of an attorney-client privileged communication. CF 113-26. The City also argued that the OML violation was subsequently cured by publicly discussing the executive session topic at its next meeting. The court agreed, finding that the City's March 28, 2022 public meeting cured any OML defect in the March 14, 2022 Executive Session. CF 159.

C. Procedural History

The Sentinel initiated this case in district court on May 23, 2022, with its filing of its Application for *in camera* review pursuant to C.R.S. § 24-72-204(5.5). At a July 7, 2022 status conference, the district court ordered the parties to submit briefing regarding what "grounds" are "sufficient to support a reasonable belief" that the Council violated the OML for purposes of § 24-72-204(5.5). The parties both submitted briefing on this issue. The City argued that the evidence in the Application did not allege grounds sufficient to support a reasonable belief that the Council violated the OML because it consisted of unsworn exhibits and references

to its own newspaper articles. CF 86-87. The district court determined in its July 14, 2022 Order, that an *in camera* review of the recording was warranted due to the City's failure to properly announce the executive session topic under C.R.S. § 24-6-402(4), and also found that the Sentinel had made a sufficient showing to support a good faith belief that OML may have been violated.

Subsequently, following the Court's *in camera* review, the Court issued an Order dated July 26, 2022 (the "July 26 Order"), in which the Court indicated it "… is inclined to release the recording of the subject Executive Session[]" based on the deficiency of the executive session notice under C.R.S. § 24-6-402(4). CF 99. The Court also indicated that it was "… mindful of the special status attorney-client communications hold and therefore will grant the Council an opportunity to consider the Court's ruling prior to release, in order to take any action they deem appropriate." *Id.* at 99-100. The court found that the City Council did not take formal action and did not "vote" to end the censure action, as alleged by Sentinel. *Id.*, ¶ 5.

Consistent with the opportunity provided by the district court in the July 26 Order, the City requested that the court reconsider the remedy of releasing the recording of the March 14, 2022, executive session based on the special status of the attorney-client privilege under Colorado law. In its Motion for

Reconsideration, the City also set forth that the OML violation had been cured at the subsequent meeting on March 28, 2022. The City argued that releasing the recording would be inconsistent with the purpose of the attorney-client privilege under the factual circumstances of this case, and that there was no precedent for doing so in response to a deficient notice of an executive session. On September 22, 2022 the court granted the City's Motion for Reconsideration on the ground that the City's March 28, 2022 open meeting cured the March 14, 2022 OML violation.[1] Sentinel appeals that order.

SUMMARY OF THE ARGUMENT

The City seeks for this Court to affirm the district court's order granting its Motion for Reconsideration on the following grounds:

1. The City cured the Executive Session notice at issue in this case when it gave notice of and publicly disclosed the subject matter of the Executive Session at its subsequent public meeting, discussed the topic on the record, and took a public vote on the matter. Specifically, the district court found that, "the March 28, 2022 public meeting of the Council clearly identified what took place at the March

[1] Sentinel claims that the City raised the argument that the Council cured the improperly noticed March 14 executive session notice for the first time "after the close of all briefings" in its Motion for Reconsideration. Opening Brief, p. 8. However, the City raised this argument previously in its Answer. *See* CF 75, ¶ 6.

14, 2022 executive session, and that the Council publicly considered the proposed action to adopt a stipulation to terminate any further investigation into Council Member Jurinsky's conduct." CF 164.

2. The City did not take formal action during the Executive Session when it polled the Council to direct its legal counsel to seek to enter into a stipulation with Ms. Jurinsky and end the matter involving her conduct. The manner of seeking direction merely directed City Council's legal counsel to draft a stipulation that would officially end the matter, and the City Council publicly voted to end the censure proceedings by approving the stipulation after deliberating and discussing the matter on the record at its March 28, 2022 meeting.

3. The City disagrees with Sentinel's assertion that this Court should remand the issue of whether the Executive Session was privileged, and whether that privilege was waived to the district court for further determination. The district court's Order Granting the Motion for Reconsideration can be upheld on the ground that the City cured the OML violation. To the extent that the Court decides to address this issue, the district court found that the Executive Session recording contained attorney-client privileged communications, and the deficient and subsequently cured notice of the executive session does not warrant the release of an attorney-client privileged communication. Moreover, two Council Members

cannot waive the attorney-client privilege; waiver requires approval of majority of the City Council on behalf of the municipal corporate entity to waive the privilege.[2] In sum, there is no precedent to support that deficient notice of an executive session warrants the public disclosure of an attorney-client privileged discussion. Such a finding would be contrary to the special status that is afforded to the attorney-client privilege.

4. The district court did not err in failing to award the Sentinel its attorney fees because the City properly withheld the recording of the Executive Session. C.R.S. § 24-72-204(6)(a) mandates an award of costs and attorney fees in favor of the prevailing applicant except in situations in which the custodian properly denied access. If a public entity properly withholds a record under CORA, attorney fees and costs are statutorily prohibited.

[2] In fact, the City voted to authorize a limited waiver of the privilege to allow the *in camera* review of communications that are subject to the attorney-client privilege in this case. CF 65, ¶ 19e, and CF 71, ¶ 26.

ARGUMENT

I. The district court did not abuse its discretion in holding that the City was not obligated to release the Executive Session recording because the Open Meetings Law violation was cured by publicly discussing the topic at the City Council's subsequent March 28 meeting

A. Standard of Review

The City agrees with Sentinel's characterization that Colorado courts review a trial court's factual findings for clear error, *see E-470 Pub. Highway Auth. v. 455 Co.*, 3 P.3d 18, 22 (Colo. 2000), but review the construction and application of the OML *de novo*. *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1170 (Colo. 2005). Additionally, a trial court's decision on a motion to reconsider may not be reversed on appeal absent an abuse of discretion. *Halter v. Waco Scaffolding & Equip. Co.*, 797 P.2d 790 (Colo. App.1990) (citing *Steele v. L.*, 78 P.3d 1124, 1128 (Colo. App. 2003)). In its September 22, 2022 Order, the district court granted the City's Motion for Reconsideration on the basis that the OML violation was cured at the City's subsequent meeting. CF 161-63.

Thus, as pertinent here, a trial court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair. *Lakeside Ventures, LLC v. Lakeside Dev. Co.*, 68 P.3d 516, 518 (Colo. App.2002). *Meyer v. Haskett*, 251 P.3d 1287, 1292 (Colo. App. 2010).

B. Argument

Sentinel cannot meet its burden of establishing that the district court's decision to grant the City's Motion for Reconsideration was manifestly arbitrary, unreasonable, or unfair. The court reviewed the Executive Session recording along with the meeting minutes, agenda and packet of the City's subsequent public meeting and found that the City had cured the prior OML violation:

> Here, it appears clear to the Court that the March 28, 2022 public meeting of the Council clearly identified what took place at the March 14, 2022 executive session and that the Council publicly considered the proposed action to adopt a stipulation to terminate any further investigation into Council Member Jurinsky's conduct. The Court is satisfied that the March 28, 2022 open meeting cured any OML defect in the intended executive session.

CF 164.

In order to cure a prior OML violation, the local public body must hold a subsequent complying meeting open to the public, and the subsequent meeting cannot be a "mere rubber stamping" of an earlier decision made in violation of the OML. C.R.S. § 24-6-401; *Colorado Off-Highway Vehicle Coal. v. Colorado Bd. of Parks & Outdoor Recreation*, 292 P.3d 1132 (Colo. App. 2012). However, "retroactive notice [alone] does not cure an improperly convened executive session." *Id.* In the *Off-Highway Vehicle* case, the defendant, the Colorado Parks

and Wildlife Board (the "Board") committed three separate OML violations while working to rehaul the Off-Highway Vehicle ("OHV") program:

1. The Board discussed proposed changes in a closed meeting to the OHV grant program and the OHV Subcommittee via email to consider a proposal from a Board member;

2. The Board held another closed meeting via telephone and email to again discuss changes to the OHV grant program and OHV Subcommittee;

3. An "OHV Program Modifications Roundtable" meeting was convened by the state Division of Parks and Outdoor Recreation to discuss proposed changes to the OHV grant program and OHV Subcommittee. All Board members were notified of this meeting, two attended it, and one actively participated in the discussion with representatives of constituent groups.

Id. at 1134.

The first two meetings mentioned above were closed to the public and were not noticed. *Id.* The Board argued that these violations were all effectively remedied by the Board's public meeting on July 16th. *Id.* at 1135. The district court agreed, and the court of appeals affirmed, that as a matter of law, the Board could cure the prior violations and did cure them by holding a subsequent properly noticed and properly conducted public meeting in which it fully addressed the matters which formed the basis of the prior violations. *Id.*

In agreeing with the district court, the court of appeals in the *Off-Highway Vehicle* case analyzed the OML as broadly furthering the intent to give citizens a

greater opportunity to meaningfully participate in the decision-making process by becoming fully informed on issues of public importance. *Id.* at 1136. The court also found that existing Colorado case law interpreting the OML implied that a state or local public body may cure a prior violation by holding a subsequent complying meeting. *Id.* at 1136-37 (citing *Van Alstyne v. Housing Authority*, 985 P.2d 97 (Colo. App. 1999); *Bagby v. School District No. 1*, 528 P.2d 1299 (Colo. 1974); *Hyde v. Banking Bd.*, 552 P.2d 32 (Colo. App. 1976)).

Here, the court relied on the *Colorado Off-Highway* case in making its decision and cited to the following language in its Order Granting the City's Motion for Reconsideration:

> [T]he purpose of the OML is to require open decision-making, not to permanently condemn a decision made in violation of the statute. Because the focus of the OML is on the process of governmental decision making, not on the substance of the decision themselves, it follows that the OML would permit ratification of a prior invalid action, provided the ratification complied with the OML and was not a mere 'rubber stamping' of an earlier decision made in violation of the act.

Id. at 1137.

Consistent with the district court's decision, the City substantially cured its prior OML violation by addressing and discussing the subject matter and content of the Executive Session during the City Council's subsequent properly publicly noticed meeting on March 28, 2022. *See Bjornsen v. Bd of Cty Comm'rs of*

Boulder County, 487 P3d 1015, 1022 (Colo. App. 2019). Although the City entered into the Executive Session to confer with and give direction to its legal counsel, the subject of the Executive Session (Ms. Jurinsky's censure) was always intended to be the subject of discussion and deliberation at a future public meeting. The March 28, 2022 meeting was precisely the future public meeting where the discussion occurred. *See* Agenda and Packet of March 28, 2022 Meeting, CF 107, 109-11.

Specifically, at the City's subsequent regular meeting on March 28, 2022, [3] City Council gave notice of and publicly disclosed the subject matter of the Executive Session, discussed the topic on the record, and took a public vote on the matter. The City's agenda contained item 19F, "Motion to Approve the Stipulation and a Request for Payment of Attorney Fees." CF 107. The accompanying packet items for item 19F included an item summary that stated:

> This item originates from an allegation of misconduct brought by Council Member Marcano against Council Member Jurinsky. Special Council [sic] representing the City have reached an agreement for a stipulation to resolve the issue. That stipulation is included in the backup for this item.

CF 109.

[3] Although the Sentinel extensively cites to the recording of the March 28, 2022 City Council meeting and urges the Court to take judicial notice of the recording, the recording is not a part of the record on appeal.

The question before City Council regarding item 19F was: "Does the City Council wish to approve the stipulation with and authorize Special Counsel to execute the stipulation on behalf of the City?" *Id.* Although City Council had directed legal counsel to work on negotiating a stipulation with Council Member Jurinsky, the City Council had not taken formal action on this item, which formal action was reserved for discussion and final resolution at the March 28, 2022 public meeting. Contrary to the Sentinel's bald and unsubstantiated assertion, the City did not conspire to conduct its business in secret. Rather, it held an attorney-client privileged discussion with its legal counsel, and thereafter took action on the record based on the result of the direction given to its legal counsel regarding seeking to enter into a stipulation. The agenda packet for the March 28, 2022 meeting also contains a letter that gives additional background on the topic of discussion during the Executive Session:

> …on March 14, 2022, the Council directed and instructed special 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 110.

Sentinel points to the above quoted section as evidence that City Council had already made its decision to end the censure process against Ms. Jurinsky and that the March 28, 2022 City Council action was a mere "rubberstamping."

However, the district court quoted the above section of the letter and after considering the evidence presented by the City about the subsequent cure, stated that, "[i]t appears undisputed that at the March 28, 2022 Council meeting, which was open to the public, the 'Council discussed whether to end Ms. Jurinsky's censure on the record before taking action.'" CF ¶ 4, 162. In addition to this discussion, the Council's action of taking a vote to approve the stipulation with Council Member Jurinsky constituted the formal action to end the censure process. Its direction to its legal counsel to enter into a stipulation with Council Member Jurinsky was not a formal action; it was a preliminary instruction that required formal action and approval on the record.

Upholding the purpose of the OML, which "is to require open decision-making, not to permanently condemn a decision made in violation of the statute," the district court correctly found that the March 28, 2022 meeting cured any notice defect with the March 14, 2022 meeting. Accordingly, the district court correctly found that the Executive Session recording should not be disclosed.

II. The trial court correctly found that the City Council did not take formal action during the Executive Session when it sought consensus to provide its attorney direction on how to proceed

A. Standard of Review

Sentinel argues that the district court erred in determining that what the Sentinel characterized as a "roll-call vote"[4] did not constitute formal action. The district court's factual findings are reviewed for clear error. *Bjornsen*, 487 P.3d at 1023. For example, in *Bjornsen*, the court of appeals reviewed the district court's determination that drafts of an email were considered work product and were not subject to public disclosure under CORA for clear error. The same standard applies to the facts and circumstances in this case.

B. Argument

The district court correctly determined that the Council's manner of giving its attorney direction on how to proceed in executive session was not a formal action. Sentinel argues that under the OML, minutes of any meeting of a local public body at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or could occur shall be taken and promptly

[4] Rather, what occurred in executive session is better characterized as the City Council seeking consensus in order to provide its attorney direction based on the legal advice provided.

recorded, and such records shall be open to public inspection. C.R.S. § 24-6-402(2)(b).

However, consistent with the district court's determination following the court's *in camera* review, no formal action or adoption of any matter was taken. The provisions of C.R.S. § 24-6-402(4), authorize the City Council to hold a meeting closed to the public, statutorily recognized as an executive session, for purposes of maintaining the confidentiality of the topics at issue. In other words, communications received by the governing body in executive session are confidential in nature, may not be disclosed to the public, and are thus identified as communications subject to the statutory executive session privilege.

Here, the City Council entered into the Executive Session for the purpose of obtaining legal advice from their attorney on how to proceed with the censure action against Ms. Jurinsky. Discussing matters subject to the attorney-client privilege pursuant to C.R.S. § 24-6-402(4)(b) is one of the statutory bases for entering into executive session, and is subject to executive session privilege.

The special status of the attorney-client privilege as one of the bases for entering into an executive session is recognized in the language of C.R.S. § 24-6-402, because the statutory language creates an exception to recording the executive session for attorney-client privileged communications as follows:

> If in the opinion of the attorney who is representing the local public body and who is in attendance at the executive session that has been properly announced pursuant to subsection (4) of this section, all or a portion of the discussion during the executive session constitute a privileged attorney-client communication, ***no record or electronic recording shall be required to be kept of the part of the discussion that constitutes a privileged attorney-client communication.*** The electronic recording of said executive session discussion shall reflect that no further record or electronic recording of the discussion based on the opinion of the attorney representing the local public body, as stated for the record during the executive session, that the discussion constituted a privileged attorney-client communication, or the attorney representing the local public body may provide a signed statement attesting that the portion of the executive session that was not recorded constituted a privileged attorney-client communication in the opinion of the attorney. [Emphasis added.]

C.R.S. § 24-6-402(2)(d.5)(II)(B).

After conducting an *in camera* review of the Executive Session recording, the court found that the Council did not vote on ending the censure action, and instead provided legal counsel direction on how to proceed. CF 99-100. Sentinel claims that the court erred in making this determination because what the Sentinel improperly characterized as a roll call, in the Sentinel's language, effectively ended the investigation into Councilmember Jurinsky on the censure issue." Opening Brief, 25. Sentinel also states that "the ending of an investigation and stipulation to dismiss the censure against the Councilmember is formal action." *Id.* In support of this argument, Sentinel cites to *Hanover Sch. Dist. No. 28 v. Barbor,* 171 P.3d

223 (Colo. 2007) and *Walsenburg Sand & Gravel Co. v. City Council of Walsenburg*, 160 P.3d 297 (Colo. App. 2007).

While both cases cited by Appellant hold that no final decisions shall be made in executive session, they are wholly inapposite. More particularly, in *Hanover*, the court found that a school board's decision not to renew a teacher's contract in executive session was a formal action that could only be made in a public meeting. *Hanover Sch. Dist. No.* 28, 171 P.3d at 228. In that case, the superintendent's letter to the teacher the next day that his contract would not be renewed was executing the formal action already taken. *Id.* No subsequent discussion and action occurred in a public meeting as occurred in this case. In the *Walsenburg* case, the allegation was that the mayor engaged in a formal action on behalf of the city in accepting an offer to buy city property shortly before a city council meeting. The city council then met in executive session before the regular session meeting, discussed the offer and then voted at the regular session meeting to accept that offer. *Id.* The court held that, if proven on remand, the mayor engaged in a formal action that should have occurred only in a session open to the public and the city council acted similarly, such conduct would render the acceptance of the offer at the regular meeting a "rubber stamp" of the formal action and a violation of the OML.

In the case at hand, the Council's manner of seeking direction sought consensus to direct legal counsel to enter into a stipulation with Council Member Jurinsky, which still needed to be finally negotiated. Such direction does not constitute formal action, and necessitates further discussion and approval by the City Council. Thus, the manner of seeking consensus on a direction to proceed on a contested legal matter did not constitute formal action. Instead, the decision to approve the stipulation was the formal action of the City Council. CF 162, ¶ 4. Put another way, the City Council could have rejected the stipulation and determined to resume the censure proceedings against Council Member Jurinsky when the matter was presented for its consideration. Therefore, the trial court correctly determined no formal action was taken in the Executive Session, and its decision should be affirmed.

III. The entirety of the March 14 Executive Session recording is attorney-client privileged and such privilege was not waived

A. Standard of Review

The City agrees that the question of whether the March 14 Executive Session is subject to the attorney-client privilege, and if so, whether such privilege was waived, is subject to *de novo* review.

B. Argument

Sentinel's assertion that this Court should remand the issue of whether the Executive Session was privileged, and whether that privilege was waived to the district court for further determination is simply incorrect as a matter of fact and as a matter of law. The district court's holding that the Executive Session recording should not be released was based on the finding that the City cured the OML violation. CF 160-64. The district court did not make any finding as to whether the Executive Session recording was attorney-client privileged, and if it was, whether such privilege was waived. After conducting *in camera* review, the court stated that:

> …there was a roll-call taken on what direction to give to legal counsel on how to proceed. While this action might very well fall into the category of legal advice, the Court is still faced with the fact that the announcement of the Executive Session does not appear to comply with the requirements of the applicable statutes.

CF 99.

The court invited the City to file additional briefing on the issue of attorney-client privilege, stating that it was "also mindful of the special status attorney-client communications hold." *Id.* at 99-100. Sentinel's claim that "at the trial court, Defendant-Appellee's showing was insufficient and came forward with no evidence establishing that the recording contained any

attorney-client communications" is misleading and inaccurate. Opening Brief, 29.

The City extensively briefed the attorney-client privilege issue, and as a result of the briefing, the court decided not to release the Executive Session recording on other grounds. Sentinel suggests that the attorney-client privilege was waived due to Council Member Jurinsky's presence in the executive session, and because two Council Members described the Council's discussion to a third party. Opening Brief, 30. However, assuming the facts as described by the Sentinel are the unvarnished truth, the Executive Session recording remains subject to the attorney-client privilege, and there is no action that can constitute a waiver of the privilege.

As alluded to above, the special status of the attorney-client privilege is recognized in the language of C.R.S. § 24-6-402 because the statutory language creates an exception to recording the executive session for attorney-client privileged communications. The language allowing attorney-client communications to not be recorded at a minimum creates an inference that discussions that were not required to be recorded in the first instance should not be released, and the language of C.R.S. § 24-6-402(2)(d.5)(II)(B) specifically authorizes communications that are protected by attorney-client privilege to not be

recorded. This is a legislative acknowledgement that attorney-client privileged discussions are granted more protection; they are not discoverable and are not subject to public inspection under CORA. *See e.g.*, C.R.S. § 24-72-204(1)(a) [authorizing the denial of inspection of public records that would be contrary to state statute, which would include the attorney-client privilege codified at C.R.S. § 13-90-107(1)(b)], and C.R.S. § 24-72-204(3)(a)(IV) [the records custodian shall deny the right of inspection to "privileged information"].

While there are a number of cases that address the release of executive session recordings for failure to comply with the statutory provisions governing executive sessions, there is no case that explicitly indicates such attorney-client privileged communications were actually released. In *Guy v. Whitsitt*, 469 P.3d 546, 549 (Colo. App. 2020), the Court of Appeals did address matters that were subject to the attorney-client privilege and were also asserted to be personnel matters, and the court found that plaintiff was entitled to such executive session recordings and minutes, but only "to the extent they exist." *Id.* at 554. This "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.

The remaining published cases involving executive session challenges do not involve the release of attorney-client privileged communications. By way of example, the Court of Appeals in both *Gumina v. City of Sterling*, 119 P.3d 527 (Colo. App. 2004), and *Arkansas Valley Publ'g Co. v. Lake Cnty. Bd. of Cnty. Commissioners*, 369 P.3d 725 (Colo. App. 2015) addressed personnel matters, as opposed to attorney-client privileged communications. No independent common law basis or separately codified privilege exists covering any of the other bases for holding an executive session, and thus the release of such information in other cases does not raise the same public policy considerations as the potential release of an attorney-client privileged communication. That a deficient notice of an executive session could act as a waiver of the attorney-client privilege would simply undermine the special status afforded to the attorney-client privilege.

Sentinel also argues that the attorney-client privilege was destroyed or waived by virtue of Council Member Jurinsky's presence at the March 14 Executive Session and by virtue of the alleged disclosure by Council Members Marcano and Coombs of what occurred at the Executive Session. These arguments fail because the City Attorney's client is the City Council as a body, which includes Council Member Jurinsky, and because Council Members cannot act individually to waive the attorney-client privilege on behalf of the Council.

Section 1.13 of the Colo. Rules of Prof. Conduct defines an "organization," including a governmental entity, as a client. The codified attorney-client privilege states as follows: "An attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment." C.R.S. § 13-90-107(1)(b). The Colorado Supreme Court has recognized the importance of confidentiality between an attorney and their client, stating that this privilege encourages the following:

> [o]pen and honest communication between attorney and client [and] thus furthers the attorney's ability to serve her client's interests … the right of parties within our justice system to consult professional legal experts is rendered meaningless unless communications between attorney and client are ordinarily protected from later disclosure without client consent.

Wesp v. Everson, 33 P.3d 191, 198 (Colo. 2001).

Here, the client is the City Council because the City of Aurora, as a municipal corporation, vests the corporate authority and legislative authority of the City in the City Council, as the governing body of the City. *See* § 2-32 of the Aurora City Code. Colorado courts have treated corporations and governmental entities the same for purposes of the attorney-client privilege. *See Alliance Const. Solutions, Inc. v. Department of Corrections*, 54 P.3d 861 (Colo. 2002) (finding that communications between Department of Corrections attorney and its

independent contractor were protected by attorney-client privilege). Therefore, a municipal attorney's client is the municipality itself, by and through its City Council as a body. *See* Colo. Rules of Prof. Conduct, Rules 1.13(a) ("a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents") & 1.13 Comment 9 ("the duty defined in this Rule applies to governmental organizations").

Accordingly, the authority to waive attorney-client privilege in this matter properly rests with the City Council as a whole. There is simply no legal authority for the conduct of individual Council Members to act as a waiver of the attorney-client privilege of the City Council as a body. No individual Council Member can act to bind the Council or to waive a privilege. The City Council's legislative and discretionary powers can be exercised only by the coming together of the Members who compose it, or those who are its duly constituted representative-the legal corporate authorities-and its purposes or will can be expressed only by acts or votes embodied in some distinct and definite form. 4 McQuillin Mun. Corp. § 13:9 (3d ed.). Accordingly, contrary to the argument of the Sentinel, individual City Council Members cannot cause a valid act or waiver except as a board; acting separately and individually, they can do nothing to bind such board. *Id.*

Additionally, Sentinel claims that the City waived the privilege by disclosing confidential discussions from the March 14 Executive Session at the March 28 Council meeting. Sentinel claims that the City cannot have it both ways and claim that a privileged recording was the topic of "robust discussion." Contrary to Sentinel's assertion, however, the recording and its attorney-client privileged content were not the topic of robust discussion at the public Council meeting; rather, the topic for discussion at the March 28 City Council meeting involved whether to end Ms. Jurinsky's censure proceedings based on consideration of a stipulation, and discussion of whether to do so. There was not discussion about the direction previously given to the City's legal counsel in executive session. Accordingly, there is simply no foundation for Sentinel's claim that the City destroyed or waived the attorney-client privilege in this case.

IV. The trial court did not err in failing to award attorney fees to Sentinel because only a prevailing records requester is entitled to fees

A. Standard of Review

The City agrees that the question of whether the trial court erred in failing to award attorney fees to Sentinel is subject to *de novo* review.

B. Argument

The Colorado Supreme Court has made clear that, while a court may award attorney fees and costs to a requester of a public record at issue, this remedy exists

only for those that prevail. *Reno v. Marks*, 349 P.3d 248 (Colo. 2015) ("We hold that where a records custodian seeks an order prohibiting or restricting disclosure of public records under C.R.S. § 24-72-204(6)(a), a prevailing records requester is entitled to costs and reasonable attorney fees in accordance with section 24-72-204(6)(a)").

CORA provides two avenues for a records requester or a public entity to seek review: Subsections 5(a) and 6(a) of C.R.S. § 24-72-204. Subsection 5(a) provides a records requester who has been denied access to a record the right to apply to a district court for an order directing the custodian to show cause why the inspection should not be permitted. C.R.S. § 24-72-204(5)(a). Subsection 5(a) further entitles the requesting party to recover court costs and reasonable attorney fees if the record requester is deemed to be a "prevailing applicant":

> Unless the court finds the denial of the right of inspection was proper, it shall order the custodian to permit such inspection and shall award court costs and reasonable attorney fees to the prevailing applicant in an amount to be determined by the court.

Id.

The *Van Alstyne v. Hous. Auth. of City of Pueblo, Colo.*, 985 P.2d 97, 100 (Colo. App. 1999) case states that mandatory consequences for a violation of the OML include costs and reasonable attorney fees. However, the statute explicitly

provides that the court shall award the citizen prevailing in such action costs and reasonable attorney fees. C.R.S. § 24-6-402(9).

The Colorado Supreme Court has defined a "prevailing applicant" to mean "any person who applies for and receives an order from the district court requiring a custodian to permit inspection of a public record." *Benefield v. Colorado Republican Party*, 329 P.3d 262, 268 (Colo. 2014). In such case, an award of attorney fees and costs is mandatory, leaving a court with no discretion to make this determination. *Id.* at 265 ("there can be little doubt that [Subsection 5] was intended to mandate an award of costs and attorney fees in favor of the prevailing applicant except in situations in which the custodian properly denied access"). Conversely, if a public entity properly withholds a record under CORA, attorney fees and costs are statutorily prohibited.

As such, the law is clear that *only* a prevailing record requester may obtain attorney fees and costs in an action under C.R.S. § 24-72-204(6)(a). If the custodian properly withheld a record, the requester is not entitled to attorney fees. 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. *See Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1089 (Colo. 2011).

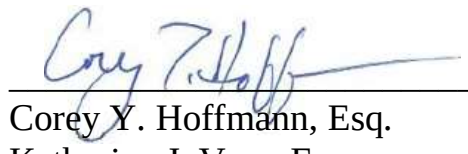
CONCLUSION

WHEREFORE, for the reasons stated herein, the district court's Order Granting the City's Motion for Reconsideration should be affirmed. The Sentinel's arguments fail to demonstrate that the district court abused its discretion in finding that the Executive Session recording was not subject to release. There is overwhelming evidence in the record to support that the City cured any Open Meetings Law violation related to deficient notice of an executive session for legal advice, and no formal action was taken during the Executive Session.

In addition, there is no basis for remanding the issue of attorney-client privilege back to the district court. Finally, the City respectfully requests that this Court deny the Sentinel's claims, including any claim for attorney's fees, and affirm the district court's September 22, 2022 Order Granting the City's Motion for Reconsideration.

Respectfully submitted this 6th day of April 2023.

HOFFMANN, PARKER, WILSON & CARBERRY, P.C.

By: 

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CERTIFICATE OF SERVICE

I certify that on this 6th day of April, 2023, I caused a true and correct copy of the foregoing **APPELLEE'S ANSWER BRIEF** to be served via CCES, electronic mail, and/or U.S. mail on the following:

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