

COURT OF APPEALS, STATE OF COLORADO

Court Address: 2 E. 14th Ave.
Denver, CO 80203

Appeal from Logan County District Court
The Honorable Joseph J. Weatherby
Case No. 2002CV153

Appellant: PAMELA R. GUMINA

Appellees: CITY OF STERLING, COLORADO; THE CITY COUNCIL OF STERLING, COLORADO; JAMES THOMAS, individually and in his official capacity as City Manager; J. MICHAEL STEGER, individually and in his official capacity a City Council member and Mayor; CHARLES GILLESPIE, individually and in his official capacity as City Council member; and the employees of the City of Sterling, Colorado.

Attorney for *Amicus Curiae*:

Geoffrey T. Wilson, #11574
COLORADO MUNICIPAL LEAGUE
1144 Sherman Street
Denver, CO 80203-2207
Telephone: 303.831.6411
Telefax: 303.860.8175
E-mail: gwilson@cml.org

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Case Number 03-CA-1709

**ANSWER BRIEF
OF THE COLORADO MUNICIPAL LEAGUE AS *AMICUS CURIAE***

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COMES NOW the Colorado Municipal League (the "League") by its undersigned counsel, pursuant to Rule 29, Colo. App. R., and files this brief as *amicus curiae* in support of Appellees, the City of Sterling, et. al. ("Appellees" or "the City").

STATEMENT OF ISSUES ON APPEAL

The League hereby adopts and incorporates by reference the statement of issues on appeal in the Answer Brief of the City.

STATEMENT OF FACTS AND OF THE CASE

The League hereby adopts and incorporates by reference the statement of facts and of the case in the Answer Brief of the City.

SUMMARY OF ARGUMENT

In the case at bar, the trial court determined that the City made certain mistakes in its open meeting announcements prior to certain executive sessions of the City Council. As a consequence, the trial court ordered the City to pay Appellant's attorneys fees and costs associated with establishing these violations, and enjoined the City from any further violation of the announcement requirements.

The trial court refused, however, to penalize the City for its announcement mistakes by ordering release of the *entire* executive session record directly to Appellant. This decision of the trial court was correct and should be affirmed. The City made the executive session record at issue in this appeal in compliance with 2001 amendments to the Colorado Open Meetings Act. Release of the executive session record to Appellant under the facts in the present case would be directly contrary to the plain intent of the General Assembly in adopting the 2001 amendments, and would further be contrary to

Colorado' policy of safeguarding the prerogative of public bodies to deliberate on the public's business in private.

For these reasons, and for the reasons set forth in the Answer Brief of the City, the decision of the trial court should be affirmed.

ARGUMENT

The League hereby adopts and incorporates by reference the argument of the City in its Answer Brief, and submits the following additional argument.

I. Penalizing the City for its pre-executive session public announcement mistakes by forcing release of the entire executive session record would be contrary to Colorado public policy favoring the prerogative of public bodies to conduct pre-decisional deliberations in private, and would be contrary to the expressed intent of the General Assembly in requiring that such a record be made.

In this case, Appellant is suing the City in an effort to obtain access to certain executive session records of the City Council. The City made these records in compliance with the requirements of the Colorado Open Meetings Act, §24-6-401-402 C.R.S., (COMA).

In 2001, the General Assembly adopted amendments to COMA that required, for the first time, that state and local public bodies keep records of their executive sessions. By its history, and by its express terms, the 2001 legislation makes plain the intent of the General Assembly that executive session records are *not* public records and, absent permission from the public body itself, are *never* to be released directly to the public, or to litigants through discovery.

Consequently, Appellant seeks access to the City's executive session record by arguing that the Council's meeting wasn't really an executive session at all. Appellant should not be permitted by this device to neatly sidestep the fact that her object is directly

contrary to the intent of the General Assembly in enacting the law pursuant to which the City made the record here at issue.

Appellant focuses on City Council mistakes in announcements to the audience at the public meetings from which the executive sessions were convened. The trial court enjoined future violations by the City of these COMA announcement requirements and ordered the City to pay Appellant's attorneys fees and costs associated with establishing that announcement mistakes were made. The City is not appealing those rulings.

However, the trial court declined Appellant's invitation to treat the City's announcement mistakes as compelling release of the City's entire executive session record to Appellant. Appellant now extends the same invitation to this Court. The League respectfully urges this Court to decline. The decision of the trial court concerning the City Council's announcement mistakes was measured — and proportionate to the mistakes that were made. The trial court's decision to not penalize the City by forcing release of the entire executive session record is consistent with public policy of this state respecting the prerogative of public bodies to determine that it is in the public's interest that they deliberate on public business in private. The trial court's decision is also consistent with the express intent of the General Assembly in requiring the City to make the record that is the subject of this appeal.

For years, it has been well understood that the Colorado Open Meetings Act "reflects the considered judgment of the electorate that democratic government best serves the commonwealth if its decisional processes are open to public scrutiny." *Benson v. McCormick*, 578 P.2d 651, 653 (Colo. 1978).

However, both COMA and the Colorado Open Records Act, §24-72-201 – 206, C.R.S., (CORA) also reflect a determination by the General Assembly there are occasions when the public's interest is best served by pre-decisional, deliberative work of their public bodies occurring in private.

For example, in substantial amendments to CORA in 1996 (Colo. Sess. Laws 1996, Ch. 271 at 1479), the General Assembly provided that the "work product" correspondence of elected officials (including email), as well as any record that would qualify as "work product" that was prepared *for* elected officials, is not a "public record" and thus not subject to release under the Act. Section 24-72-202(6)(a)(II)(A) – 202(6)(b)(II), C.R.S. The intent of the General Assembly to shield deliberative, pre-decisional materials from release is apparent in the definition of "work product:"

"Work product" means and includes all intra- or inter-agency advisory or deliberative materials assembled for the benefit of elected officials, which materials express an opinion or are deliberative in nature and are communicated for the purpose of assisting such elected officials in reaching a decision within the scope of their authority. Such materials include, but are not limited to:

- I. Notes and memoranda that relate to or serve as background information for such decisions;
- II. Preliminary drafts and discussion copies of documents that express a decision by an elected official.

Section 24-72-202(6.5)(a), C.R.S.

Then, in 1998, the Colorado Supreme Court found that CORA's longstanding requirement that the public records custodian not release "privileged information," §24-72-204(3)(a)(IV), C.R.S., encompassed information covered by the common law "executive" or "deliberative process" privilege. *City of Colorado Springs v. White*, 967 P.2d 1042, 1050 (Colo. 1998) (*White*).

The deliberative process privilege shields from release pre-decisional and deliberative material where “public disclosure is likely in the future to stifle honest and frank communication” within the government. *White* 967 P.2d at 1052 (quoting *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (DC Cir. 1980)). The *White* Court described the common law privilege as rooted in “the recognition that the government cannot operate in a fishbowl.” *White*, 967 P.2d at 1048 (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1146 (DC Cir. 1975)). As the Court explained:

The primary purpose of the privilege is to protect the frank exchange of ideas and opinions critical to the government’s decision-making process where disclosure would discourage such discussion in the future:

[The privilege] serves to assure that subordinates within an agency will feel free to provide the decision maker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues in misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency’s action.

White, 967 P.2d at 1051 (quoting *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (DC Cir. 1980)).

Following the *White* decision, the General Assembly amended CORA in 1999 to expressly shield from release “records protected under the common law governmental or ‘deliberative process’ privilege, if the material is so candid or personal that public disclosure is likely to stifle honest and frank discussion within the government.” Section 24-72-204(3)(a)(XIII), C.R.S.; (Colo. Sess. Laws 1999, Ch. 73 at 207). In codifying the privilege, the General Assembly recognized that “in some circumstances, disclosure of

such records may cause substantial injury to the public interest.” Section 24-72-204(3)(a)(XIII), C.R.S.

Just as the General Assembly has sought to protect discussion of public business in pre-decisional, deliberative correspondence and other writings from release under CORA, Colorado’s open meetings laws have long authorized state and local public bodies to conduct their actual *deliberations* on certain topics in private. The authority of state and local public bodies in Colorado to deliberate in private, “executive sessions” was a feature of COMA’s predecessor statute, the Public Meetings Law, beginning in 1963. Colo. Sess. Laws 1963, Ch. 43 at 148; §3-19-1 C.R.S., 1963. In 1977, the General Assembly amended the “Sunshine Law;” initiated in 1972, (Colo. Sess. Laws 1972, Ch. 456 at 1666) to authorize deliberation under that law in executive sessions. Colo. Sess. Laws 1977, Ch. 300 at 1157.

COMA’s executive session provisions, section 24-6-402(3), C.R.S. for state public bodies and section 24-6-402(4), C.R.S. for local public bodies, reflect a recognition by the General Assembly that sometimes the public’s interest is best served by deliberation on the public’s business in private. For example, executive sessions are permitted to consider the purchase or lease of real property by the public entity. Section 24-6-402(4)(a), C.R.S. It is not difficult to imagine situations where it would be advantageous to the taxpayers, who, after all, will ultimately pay the property purchase or lease price, that discussion of certain aspects of the deal not occur in the presence of the seller/lessor. In today’s world, the importance of being able to privately discuss “specialized details of security arrangements or investigations, including defenses against terrorism” is obvious. Section 24-6-402(4)(d), C.R.S. Members of local public bodies

would be at a serious disadvantage, were they not permitted by COMA to conduct executive sessions for the purpose of “determining positions relative to matters that may be subject to negotiations; developing strategy for negotiations; and instructing negotiators.” Section 24-6-402(4)(e), C.R.S. The authority to discuss “personnel matters” in executive session, §24-6-402(4)(f), C.R.S., serves both moral and legal purposes. Public discussion of ultimately disproven allegations of misconduct concerning a public employee can cause permanent damage to the reputation of an otherwise fine public servant. Besides being simply wrong, such discussion may result in substantial legal liability for the public entity and thus, by extension, for its taxpayers. *See, e.g., Garcia v. City of Albuquerque*, 232 F.3d 760, 771 (10th Cir. 2000) (discussing the “well settled” validity of public employee liberty interest claims including those interests in “good name and reputation” as it affects a protected property interest in continued employment (citing *Workman v. Jordan*, 32 F.3d 475, 480 (10th Cir. 1994); quoting *Palmer v. City of Monticello*, 31 F.3d 1499, 1503 (10th Cir. 1994)).

CORA’s “work product” and “deliberative process privilege” provisions protect pre-decisional and deliberative records from release, but assure release of records reflecting *final* decisions.¹ Similarly, COMA’s executive session provisions provide an opportunity for private deliberation, while assuring that final decisions will be made in public. COMA has long provided that executive sessions, may be held:

. . . for the sole purpose of considering any of the matters [specified in the statute]; except that no adoption of any proposed policy, position, resolution, rule, regulation, or formal action, . . . shall occur at any executive session.

¹ As to “work product,” see section 24-72-202(6.5)(c) and (d), C.R.S. As to the deliberative process privilege, see *White*, 967 P.2d at 1051 (“explaining that post decisional documents, communications made after the decision and designed to explain it, are not protected by the privilege.”).

Section 24-6-402(4), C.R.S.² This longstanding limitation on local government executive sessions has been called the “no final action/stay on topics” rule, and will be referred to as such in this brief.

Thus, in both Colorado’s open meetings and open records laws, the General Assembly has sought to balance the public’s interest in permitting private discussion of certain public business with the parallel public interest that final decisions be made in public. Significant 2001 amendments to COMA imposing new requirements on executive sessions reflect a continuation of the General Assembly’s effort to maintain this important balance.

Prior to 2001, COMA did not require that a record of an executive session be kept, in order to police compliance with the “no final action/stay on topics” rule. Colorado courts addressed the rule in a series of cases where the facts indicated that the body had actually made its decision in the executive session. These decisions prohibit public bodies from simply “rubberstamping” such decisions in a subsequent open meeting. *See, e.g., Van Alstyne v. Housing Authority of the City of Pueblo*, 985 P.2d 97, 101 (Colo. App. 1999); *Hudspeth v. Board of County Comm’rs*, 667 P.2d 775, 778 (Colo. App. 1983); *Bagby v. School Dist. No. 1*, 528 P.2d 1299, 1302 (Colo. 1974).

In 2001, the General Assembly decided to provide a more structured, statutory approach to enforcing the “no final action/stay on topics” rule. In HB 01-1359 (Colo. Sess. Laws 2001, Ch. 286 at 1069; attached hereto as Appendix A), the General Assembly amended both COMA and CORA to this end.

² A similar limitation is imposed on executive sessions of state public bodies at section 24-6-402(3)(a), C.R.S.

This case involves the proper disposition of an executive session record made pursuant to the 2001 amendments to COMA. It is fundamental that when interpreting statutes such as the 2001 COMA amendments, courts' primary goal is to give affect to the intent of the General Assembly, (*People v. Mojica-Simental*, 73 P.3d 15 (Colo. 2003)) which, of course, includes avoiding interpretations of the statute that defeat the obvious legislative intent. *In Re: Water Rights of Double R.L. Co. in the Uncompahgre River, Ouray County*, 54 P.3d 908 (Colo. 2002); *Pediatric Neurosurgery, P.C., v. Russell*, 44 P.3d 1063 (Colo. 2002). In determining legislative intent, the contemporaneous statements of the prime sponsor of the legislation to members of the General Assembly are relevant. *Hylands Hills Park and Rec. Dist., Adams County v. Denver and Rio Grande Western Railway Co.*, 864 P.2d 569 (Colo. 1993); *TCI Satellite Entertainment Inc., v. Board of Equalization of Montezuma County*, 9 P.3d 1179 (Colo. App. 2000), *Cert. granted, aff'd. Huddleston v. Board of Equalization of Montezuma County*, 31 P.3d 155 (Colo. 2001).

During his presentation of HB 01-1359 in its first hearing before the House Information and Technology Committee, the prime sponsor of the legislation, Representative Shawn Mitchell (R-Broomfield), described the sort of situation that the legislation was intended to address:

There's - - just a couple of anecdotal examples, there was a case where a board of county commissioners went into executive session, ostensibly to discuss one subject, and then came out and immediately after the executive session, voted unanimously on a different subject.

That kind of thing raises questions. Was - - was the executive session really directed toward what it was supposed to be? Until now, there hasn't really been an honest way to verify that, unless someone who participated in executive session was willing to

come - - come clean and say something else actually happened behind close doors.

Hearing on House Bill 1359, Before the Committee on Information and Technology, 63rd General Assembly, 1st Regular Session (March 28, 2001, statement of Rep. Mitchell, page 4, line 25- page 5, line 12 (attached hereto as Appendix B (Committee Hearing)).

The 2001 amendments provide a process for policing compliance with the “no final action/stay on topics” rule. Central to the legislative scheme was a requirement that state and local public bodies begin making a record of their executive sessions. Indeed, as noted above, it was in compliance with this relatively new statute that the City of Sterling made the record that Appellant is attempting to obtain through this litigation. Rep. Mitchell summarized the object of HB 01-1359 to the full House of Representatives, during second reading:

In the past, citizens have simply had to take it on faith that once the door closes, what happened in executive session was exactly what was called for in the notice, and that everyone was aware of the rules and laws and policies they were supposed to follow.

This bill says that the public bodies, whether state or local, should keep a record of their executive sessions so that if a citizen has good evidence or reason to cause a judge to believe that maybe this discussion went off the subject, in a substantial way - - the bill says if there was substantial discussion of matters outside of the call for executive session, then the judge will make those matters public.

That is the significant improvement of this bill over current law. It doesn't change what's public and what's private, but it gives citizens a way to have confidence that that can be monitored and policed.

Members, most governments, like most citizens, want to do the right thing and want to follow the law, and do it properly. Sometimes there are big mistakes, and sometimes there are people whose intent isn't as honorable as everyone else is, and there's never really been a way to police abuse of executive session until

now. This bill provides the way to police that abuse of executive session.

Hearing on House Bill 1359, Before the Committee of the Whole, 63rd General Assembly, 1st Regular Session (April 5, 2001, comments of Rep. Mitchell, page 13, line 13 – page 14, line 12 (attached hereto as Appendix C (Committee of the Whole)).

Both the history and the language of HB 01-1359 illustrate the intent of the General Assembly that the new requirement to make an executive session record would not jeopardize the confidentiality of the executive session, potentially chilling the free exchange of ideas that executive sessions are intended to facilitate.

For example, in describing HB 01-1359 to members at the Colorado House of Representatives, prime sponsor, Rep. Mitchell repeatedly described the executive session record as “confidential.” In describing the purpose of HB 01-1359 to the Information and Technology Committee, Rep. Mitchell said, “We have tried to get to the issue of executive session, and preserve the confidentiality that needs to be there, but at the same time, create a better mechanism to help the governments - - to keep governments honest.” *Committee Hearing, supra*, page 7, line 10-15 (see Appendix B). Referring specifically to the executive session record, Rep. Mitchell emphasized that this record is “[n]ot a public record. It will be confidential, and privileged, just like any other executive session, but you have to keep a record of your executive session.” *Id.* at page 7, line 24 – page 8, line 2. Rep. Mitchell then begins his explanation of the process for *in camera* review of the executive session record by again pointing out that this “new record. . . will remain confidential.” *Id.* at page 8, line 8. Rep. Mitchell goes on to detail the private and limited nature of any possible court review of the executive session record: “The court will review the record in chambers; not publicly, but in chambers and just make sure that they stay on the subject.” *Id.* at page 8, lines 18 – 20.

During presentation of the bill to the entire House of Representatives, sitting as a Committee of the Whole during second reading, Rep. Mitchell again described the executive session record as “confidential, just like [the] executive session is,” *Committee of the Whole, supra*, page 5, line 1 (see Appendix C) and subject to review only “in the privacy of the Court’s own chambers.” *Id.* at page 8, line 4.

Rep. Mitchell’s continual references to the confidentiality of the executive session record are not surprising. The defining characteristic of an executive session, after all, and thus of the executive session record, must be that it is *private*. If the record of an executive session is available to the public, to say nothing of litigants, losing bidders, unsuccessful job applicants, aggrieved former employees and the myriad of other persons with some grievance against a public entity, this privacy is lost and members of local public bodies will no longer speak freely in executive session. This would defeat the public purpose that executive sessions serve.

The General Assembly obviously recognized this fact. The General Assembly included language in HB 01-1359 that makes their intent to protect the privacy of the executive session record unmistakable:

No portion of the record of an executive session of a local public body shall be open for public inspection or subject to discovery in any administrative or judicial proceeding, except upon the consent of the local public body or as provided [pursuant to the procedure for in camera review established in HB 01-1359].

Section 24-6-402(2)(d.5)(II)(D), C.R.S. (Emphasis added).³

Plainly, it was the General Assembly’s intent that the records of executive sessions would never be directly released to the public, absent consent of the public body.

³ The General Assembly was careful to provide identical protection for the executive session records of state public bodies at §24-6-402(2)(d.5)(I)(D), C.R.S.

Such records are simply not public records. Indeed, under the procedure for *in camera* review of an executive session record set forth in HB 01-1359, the judge is the *only* person, outside the municipality, who gets to examine the full record of the session.

In expressly precluding access to these sensitive records through discovery, the General Assembly was presumably trying to prevent releases such as that approved in *Martinelli v. District Court*, 612 P.2d 1083 (Colo. 1980), wherein the Court held certain records discoverable, even when they are subject to mandatory non-disclosure under CORA. As representative Mitchell explained (referring to a Committee amendment) during markup of HB 01-1359 before the House Information and Technology Committee:

On the top of page two, we got to the issue where the record that the public body makes of its executive session, we don't want it to be discoverable for other purposes.

We want it to exist only for judicial monitoring of whether the executive session was properly conducted. But we don't want to tie the local government hands or the state government hands if they have other usage for those minutes.

So we just clarify that they won't be available or subject to discovery, except upon the consent of the public body. And that makes it clear that it's their privilege, and they can waive the privilege if they want to waive it.

Committee Hearing, supra, at page 75, line 17 – page 76, line 4 (see Appendix B). (Emphasis added). *See also, id.* at page 42, line 16 – page 43, line 19 (statement of Mr. Wilson).

Beyond the express provision that no part of the executive session record shall be open for public inspection, the entire legislative scheme evident in HB 01-1359 reflects the intent of the General Assembly that the full record of an executive session would be used *only* for policing compliance with the “no final action/stay on topics” rule.

In the first place, nobody, including the judge, gets access to any part of an executive session record unless the party urging review shows “grounds sufficient to support a reasonable belief” that the body got substantially off topic or took some form of prohibited final action. Section 24-72-204(5.5), C.R.S. Under this objective standard, it’s not enough that the party urging review “really believes” that the public body did something wrong. This sensible provision enables judges across Colorado to minimize the occasions on which they will be obliged to join aggrieved parties, on fishing expeditions, spending hour after hour reviewing executive session records, in a quest to discover if something untoward might have occurred. Under the General Assembly’s objective standard, court review of the record is reserved for those occasions where there is a more substantial indication that the body violated the “no final action/say on topics” rule.

If this substantial threshold showing is made, the Court’s *in camera* review of the executive session record is limited to determining:

Whether the state public body or local public body engaged in substantial discussion of any matters not enumerated in §24-6-402(3) or (4) or adopted a proposed policy, position, resolution, rule, regulation, or formal action in the executive session in contravention of §24-6-402(3)(a) or (4).

Section 24-72-204(5.5)(b)(I), C.R.S. Unless the Court finds violations of the specific provisions cited, *no part* of the executive session record is made public.

If the judge does find an indication in the record that the public body violated the “no final action/stay on topics” rule, *only* that portion of the record showing violation of these longstanding requirements is made public. Section 24-72-204 (5.5)(b)(II), C.R.S. It is noteworthy that even in the case where a court finds unlawful conduct within the actual executive session itself, the General Assembly did not provide that the *entire*

record becomes public. Indeed, the General Assembly sought to assure that, in such cases, the untainted portion of the record of the body's executive session deliberations would continue to be shielded from release.

It was in HB 01-1359 that the General Assembly first added to COMA the requirement that public bodies publicly announce, prior to their executive sessions, the actual citation to the section or sections of COMA that authorize the executive session. In the case at bar, the trial court determined that the City failed to include this citation in its pre-session announcement. The General Assembly might have decided to penalize public bodies, such as the City, that failed to recite this citation, or make other announcements required by HB 01-1359, by providing that the entire executive session record would be made public. Significantly, the General Assembly did not do so. Indeed, although the General Assembly imposed a variety of new announcement and record keeping requirements relating to executive sessions in HB 01-1359, the General Assembly nowhere provided for automatic release of the *entire* executive session record, as a penalty for noncompliance, or otherwise.

It is understandable why the General Assembly would not consider a failure to announce a statutory citation as an omission sufficient to automatically warrant disclosure of the entire executive session record. Announcement of statutory citations from COMA would probably be meaningless to most of members of the audience at a public meeting from which an executive session is convened. Doubtless, the principle reason for including the citation in the announcement (and thus, presumably, in the minutes of the meeting) is so that a judge later listening to the tapes of the executive

session *in camera* can compare what was discussed with what was announced, in order to determine if the body got substantially “off topic.”

In the case at bar, while the trial court found that the Sterling City Council failed to announce the *citation* to the section of the Colorado Revised Statutes that authorized their executive session, Council did announce the actual, substantive *language* from those authorizing statutes. As a practical matter, this announcement provides at least as much meaningful notice to a lay audience of the authority for the session as would a statutory citation. Furthermore, any judge conducting a subsequent *in camera* review of the executive session record would have no difficulty determining whether or not the executive session discussion strayed substantially from the declared topics of the session,

The trial court found, and the City has not appealed the finding, that the City’s pre-executive session announcements were deficient. (Findings of Fact and Conclusions of Law, Conclusions of Law ¶¶ 10-12 (Appendix D)). In connection with this finding, the City was ordered to pay reasonable attorneys fees and costs to the Appellant. *Id.* at ¶ 13. The City was enjoined from conducting future executive sessions without getting its announcements correct. *Id.* During the course of this case, the City’s COMA compliance has been the focus of substantial local newspaper coverage. *See e.g.*, Sterling Journal-Advocate Headlines Concerning Gumina Matter (Appendix E).

The League does not minimize the announcement omissions of the City identified by the trial court. The League respectfully urges, however, that in paying attorneys fees and costs to Appellant in connection with those violations, being enjoined from future violations, and in having its COMA compliance a major focus of local media attention, the City has suffered precisely the consequence that the General Assembly could

reasonably believe would cause this City Council, and indeed any local public body, to mend its ways. Doubtless, the City has been scrupulously compliant with COMA's executive session announcement requirements since the occurrence of the omissions that are the basis of this effort to gain access to the City's executive session record.

Experience with this relatively new law may one day cause the General Assembly to conclude that the prospect of payment of attorney's fees and costs, together with the political cost and public embarrassment to local officials associated with mistakes in COMA executive session announcements, is no longer sufficient to motivate local compliance. At that point, the General Assembly might decide on a course that focuses more on penalizing the offending jurisdiction, rather than simply encouraging future compliance. Indeed, the General Assembly might decide that all or a portion of the executive session record for a session following a defective announcement may be made public by the judge, following *in camera* review.

That day has not arrived, however. To order release of the City's executive session record under these facts and under the present law would be contrary to the obvious intent of the General Assembly to balance the public's interest in private deliberation and the free exchange of ideas in executive session with the narrow purpose of creating a record for the sole purpose of enforcing the "no final decision/stay on topics" rule.

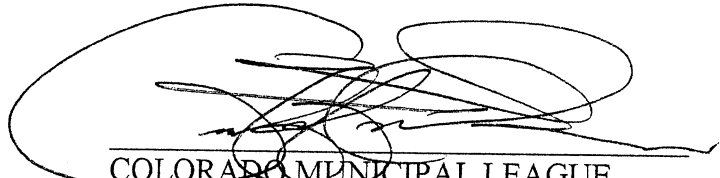
CONCLUSION

CORA and COMA reflect an effort by the General Assembly and the courts to balance the public's twin interests in permitting private deliberation on public business and requiring public decision making. In HB 01-1359, the General Assembly required

public bodies to make a record of their executive sessions for the *sole purpose* of policing the well established “no final decision/stay on topics” rule for such sessions. The General Assembly went to considerable lengths to make it clear that, absent permission from the public body itself, this record was not to be released directly to the public *under any circumstances*. In particular, the General Assembly did not provide that release of the executive session record would be the penalty for a jurisdiction’s failure to make certain pre-session announcements that are also required as part of the 2001 legislation.

WHEREFORE, for the reasons stated herein and in the Brief of the City, the League urges that the decision of the Trial Court be affirmed.

Dated this 29th day of March 2004.



COLORADO MUNICIPAL LEAGUE
Geoffrey T. Wilson, General Counsel, #11574
1144 Sherman Street
Denver, Colorado 80203
303.831.6411

CERTIFICATE OF MAILING

I hereby certify that on this 29th day of March 2004, I deposited a true and complete copy of the foregoing **Answer Brief of the Colorado Municipal League as *Amicus Curiae*** in the U.S. Mail, postage prepaid, addressed as follows:

Thomas B. Kelley, Esq.
Steven D. Zansberg, Esq.
Christopher P. Beall, Esq.
Faegre & Benson LLP
1700 Lincoln Street, Suite 3200
Denver, CO 80203

Carmen Danielson, Esq
Kathleen E. Haddock, Esq.
Jill Z. Zender, Esq.
Dietze and Davis, P.C.
2060 Broadway, Suite 400
Boulder, CO 80302

Kathleen K. Harrington, Esq.
Michelle C. Carmody, Esq.
Steven J. Dawes, Esq.
1512 Larimer Street, Suite 550
Denver, CO 80202

Kathleen M. Harrington

CHAPTER 286

GOVERNMENT - STATE

HOUSE BILL 01-1359

BY REPRESENTATIVE(S) Mitchell, Grossman, Lawrence, Plant, Romanoff, Cloer, and Weddig;
also SENATOR(S) Matsunaka, Andrews, Dyer (Arapahoe), Dyer (Durango), Evans, Fitz-Gerald, Gordon, Hagedorn, Hanna,
Hernandez, Hillman, McElhany, Musgrave, Nichol, Owen, Pascoe, Takis, Tate, Teck, Tupa, and Windels.

AN ACT

CONCERNING PUBLIC ACCESS TO INFORMATION, AND, IN CONNECTION THEREWITH, PROVIDING FOR
PUBLIC ACCESS TO INFORMATION DISCUSSED IN CERTAIN MEETINGS OF PUBLIC BODIES AND PROVIDING
REMEDIES AND PENALTIES FOR VIOLATIONS OF THE OPEN MEETINGS LAW AND THE OPEN RECORDS ACT.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. 24-6-402 (2), Colorado Revised Statutes, is amended BY THE
ADDITION OF A NEW PARAGRAPH to read:

24-6-402. Meetings - open to public. (2) (d.5) (I) (A) DISCUSSIONS THAT
OCCUR IN AN EXECUTIVE SESSION OF A STATE PUBLIC BODY SHALL BE RECORDED
- IN THE SAME MANNER AND MEDIA THAT THE STATE PUBLIC BODY USES TO RECORD
THE MINUTES OF OPEN MEETINGS. A STATE PUBLIC BODY MAY SATISFY THE
RECORDING REQUIREMENTS OF THIS SUB-SUBPARAGRAPH (A) BY MAKING ANY FORM
OF ELECTRONIC RECORDING OF THE DISCUSSIONS IN AN EXECUTIVE SESSION OF THE
STATE PUBLIC BODY. EXCEPT AS PROVIDED IN SUB-SUBPARAGRAPH (B) OF THIS
SUBPARAGRAPH (I), THE RECORD OF AN EXECUTIVE SESSION SHALL REFLECT THE
SPECIFIC CITATION TO THE PROVISION IN SUBSECTION (3) OF THIS SECTION THAT
AUTHORIZES THE STATE PUBLIC BODY TO MEET IN AN EXECUTIVE SESSION, THE
ACTUAL CONTENTS OF THE DISCUSSION DURING THE SESSION, AND A SIGNED
STATEMENT FROM THE CHAIR OF THE EXECUTIVE SESSION ATTESTING THAT ANY
WRITTEN MINUTES SUBSTANTIALLY REFLECT THE SUBSTANCE OF THE DISCUSSIONS
DURING THE EXECUTIVE SESSION. FOR PURPOSES OF THIS SUB-SUBPARAGRAPH (A),
"ACTUAL CONTENTS OF THE DISCUSSION" SHALL NOT BE CONSTRUED TO REQUIRE THE
MINUTES OF AN EXECUTIVE SESSION TO CONTAIN A VERBATIM TRANSCRIPT OF THE
DISCUSSION DURING SAID EXECUTIVE SESSION. THE PROVISIONS OF THIS
SUB-SUBPARAGRAPH (A) SHALL NOT APPLY TO DISCUSSIONS OF INDIVIDUAL

*Capital letters indicate new material added to existing statutes; dashes through words indicate deletions
from existing statutes and such material not part of act.*

STUDENTS BY A STATE PUBLIC BODY PURSUANT TO PARAGRAPH (b) OF SUBSECTION (3) OF THIS SECTION.

(B) IF, IN THE OPINION OF THE ATTORNEY WHO IS REPRESENTING THE STATE PUBLIC BODY AND IS IN ATTENDANCE AT THE EXECUTIVE SESSION, ALL OR A PORTION OF THE DISCUSSION DURING THE EXECUTIVE SESSION CONSTITUTES A PRIVILEGED ATTORNEY-CLIENT COMMUNICATION, NO RECORD SHALL BE REQUIRED TO BE KEPT OF THE PART OF THE DISCUSSION THAT CONSTITUTES A PRIVILEGED ATTORNEY-CLIENT COMMUNICATION. ANY ELECTRONIC RECORD OF SAID EXECUTIVE SESSION DISCUSSION SHALL REFLECT THAT NO FURTHER RECORD WAS KEPT OF THE DISCUSSION BASED ON THE OPINION OF THE ATTORNEY REPRESENTING THE STATE PUBLIC BODY, AS STATED FOR THE RECORD DURING THE EXECUTIVE SESSION, THAT THE DISCUSSION CONSTITUTES A PRIVILEGED ATTORNEY-CLIENT COMMUNICATION. ANY WRITTEN MINUTES SHALL CONTAIN A SIGNED STATEMENT FROM THE ATTORNEY REPRESENTING THE STATE PUBLIC BODY ATTESTING THAT THE PORTION OF THE EXECUTIVE SESSION THAT WAS NOT RECORDED CONSTITUTED A PRIVILEGED ATTORNEY-CLIENT COMMUNICATION IN THE OPINION OF THE ATTORNEY AND A SIGNED STATEMENT FROM THE CHAIR OF THE EXECUTIVE SESSION ATTESTING THAT THE PORTION OF THE EXECUTIVE SESSION THAT WAS NOT RECORDED WAS CONFINED TO THE TOPIC AUTHORIZED FOR DISCUSSION IN AN EXECUTIVE SESSION PURSUANT TO SUBSECTION (3) OF THIS SECTION.

(C) IF A COURT FINDS, UPON APPLICATION OF A PERSON SEEKING ACCESS TO THE RECORD OF THE EXECUTIVE SESSION OF A STATE PUBLIC BODY IN ACCORDANCE WITH SECTION 24-72-204 (5.5) AND AFTER AN IN CAMERA REVIEW OF THE RECORD OF THE EXECUTIVE SESSION, THAT THE STATE PUBLIC BODY ENGAGED IN SUBSTANTIAL DISCUSSION OF ANY MATTERS NOT ENUMERATED IN SUBSECTION (3) OF THIS SECTION OR THAT THE BODY ADOPTED A PROPOSED POLICY, POSITION, RESOLUTION, RULE, REGULATION, OR FORMAL ACTION IN THE EXECUTIVE SESSION IN CONTRAVENTION OF PARAGRAPH (a) OF SUBSECTION (3) OF THIS SECTION, THE PORTION OF THE RECORD OF THE EXECUTIVE SESSION THAT REFLECTS THE SUBSTANTIAL DISCUSSION OF MATTERS NOT ENUMERATED IN SUBSECTION (3) OF THIS SECTION OR THE ADOPTION OF A PROPOSED POLICY, POSITION, RESOLUTION, RULE, REGULATION, OR FORMAL ACTION SHALL BE OPEN TO PUBLIC INSPECTION PURSUANT TO SECTION 24-72-204 (5.5).

(D) NO PORTION OF THE RECORD OF AN EXECUTIVE SESSION OF A STATE PUBLIC BODY SHALL BE OPEN FOR PUBLIC INSPECTION OR SUBJECT TO DISCOVERY IN ANY ADMINISTRATIVE OR JUDICIAL PROCEEDING, EXCEPT UPON THE CONSENT OF THE STATE PUBLIC BODY OR AS PROVIDED IN SUB-SUBPARAGRAPH (C) OF THIS SUBPARAGRAPH (I) AND SECTION 24-72-204 (5.5).

(E) THE RECORD OF AN EXECUTIVE SESSION OF A STATE PUBLIC BODY RECORDED PURSUANT TO SUB-SUBPARAGRAPH (A) OF THIS SUBPARAGRAPH (I) SHALL BE RETAINED FOR AT LEAST NINETY DAYS AFTER THE DATE OF THE EXECUTIVE SESSION.

(II) (A) DISCUSSIONS THAT OCCUR IN AN EXECUTIVE SESSION OF A LOCAL PUBLIC BODY SHALL BE RECORDED IN THE SAME MANNER AND MEDIA THAT THE LOCAL PUBLIC BODY USES TO RECORD THE MINUTES OF OPEN MEETINGS. A LOCAL PUBLIC BODY MAY SATISFY THE RECORDING REQUIREMENTS OF THIS SUB-SUBPARAGRAPH (A) BY MAKING ANY FORM OF ELECTRONIC RECORDING OF THE DISCUSSIONS IN AN EXECUTIVE SESSION OF THE LOCAL PUBLIC BODY. EXCEPT AS PROVIDED IN SUB-SUBPARAGRAPH

(B) OF THIS SUBPARAGRAPH (II), THE RECORD OF AN EXECUTIVE SESSION SHALL REFLECT THE SPECIFIC CITATION TO THE PROVISION IN SUBSECTION (4) OF THIS SECTION THAT AUTHORIZES THE LOCAL PUBLIC BODY TO MEET IN AN EXECUTIVE SESSION, THE ACTUAL CONTENTS OF THE DISCUSSION DURING THE SESSION, AND A SIGNED STATEMENT FROM THE CHAIR OF THE EXECUTIVE SESSION ATTESTING THAT ANY WRITTEN MINUTES SUBSTANTIALLY REFLECT THE SUBSTANCE OF THE DISCUSSIONS DURING THE EXECUTIVE SESSION. FOR PURPOSES OF THIS SUB-SUBPARAGRAPH (A), "ACTUAL CONTENTS OF THE DISCUSSION" SHALL NOT BE CONSTRUED TO REQUIRE THE MINUTES OF AN EXECUTIVE SESSION TO CONTAIN A VERBATIM TRANSCRIPT OF THE DISCUSSION DURING SAID EXECUTIVE SESSION. THE PROVISIONS OF THIS SUB-SUBPARAGRAPH (A) SHALL NOT APPLY TO DISCUSSIONS OF INDIVIDUAL STUDENTS BY A LOCAL PUBLIC BODY PURSUANT TO PARAGRAPH (h) OF SUBSECTION (4) OF THIS SECTION.

(B) IF, IN THE OPINION OF THE ATTORNEY WHO IS REPRESENTING THE LOCAL PUBLIC BODY AND WHO IS IN ATTENDANCE AT THE EXECUTIVE SESSION, ALL OR A PORTION OF THE DISCUSSION DURING THE EXECUTIVE SESSION CONSTITUTES A PRIVILEGED ATTORNEY-CLIENT COMMUNICATION, NO RECORD SHALL BE REQUIRED TO BE KEPT OF THE PART OF THE DISCUSSION THAT CONSTITUTES A PRIVILEGED ATTORNEY-CLIENT COMMUNICATION. ANY ELECTRONIC RECORD OF SAID EXECUTIVE SESSION DISCUSSION SHALL REFLECT THAT NO FURTHER RECORD WAS KEPT 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 CONSTITUTES A PRIVILEGED ATTORNEY-CLIENT COMMUNICATION. ANY WRITTEN MINUTES SHALL CONTAIN A SIGNED STATEMENT FROM THE ATTORNEY REPRESENTING THE LOCAL PUBLIC BODY ATTESTING THAT THE PORTION OF THE EXECUTIVE SESSION THAT WAS NOT RECORDED CONSTITUTED A PRIVILEGED ATTORNEY-CLIENT COMMUNICATION IN THE OPINION OF THE ATTORNEY AND A SIGNED STATEMENT FROM THE CHAIR OF THE EXECUTIVE SESSION ATTESTING THAT THE PORTION OF THE EXECUTIVE SESSION THAT WAS NOT RECORDED WAS CONFINED TO THE TOPIC AUTHORIZED FOR DISCUSSION IN AN EXECUTIVE SESSION PURSUANT TO SUBSECTION (4) OF THIS SECTION.

(C) IF A COURT FINDS, UPON APPLICATION OF A PERSON SEEKING ACCESS TO THE RECORD OF THE EXECUTIVE SESSION OF A LOCAL PUBLIC BODY IN ACCORDANCE WITH SECTION 24-72-204 (5.5) AND AFTER AN IN CAMERA REVIEW OF THE RECORD OF THE EXECUTIVE SESSION, THAT THE LOCAL PUBLIC BODY ENGAGED IN SUBSTANTIAL DISCUSSION OF ANY MATTERS NOT ENUMERATED IN SUBSECTION (4) OF THIS SECTION OR THAT THE BODY ADOPTED A PROPOSED POLICY, POSITION, RESOLUTION, RULE, REGULATION, OR FORMAL ACTION IN THE EXECUTIVE SESSION IN CONTRAVENTION OF SUBSECTION (4) OF THIS SECTION, THE PORTION OF THE RECORD OF THE EXECUTIVE SESSION THAT REFLECTS THE SUBSTANTIAL DISCUSSION OF MATTERS NOT ENUMERATED IN SUBSECTION (4) OF THIS SECTION OR THE ADOPTION OF A PROPOSED POLICY, POSITION, RESOLUTION, RULE, REGULATION, OR FORMAL ACTION SHALL BE OPEN TO PUBLIC INSPECTION PURSUANT TO SECTION 24-72-204 (5.5).

(D) NO PORTION OF THE RECORD OF AN EXECUTIVE SESSION OF A LOCAL PUBLIC BODY SHALL BE OPEN FOR PUBLIC INSPECTION OR SUBJECT TO DISCOVERY IN ANY ADMINISTRATIVE OR JUDICIAL PROCEEDING, EXCEPT UPON THE CONSENT OF THE LOCAL PUBLIC BODY OR AS PROVIDED IN SUB-SUBPARAGRAPH (C) OF THIS SUBPARAGRAPH (II) AND SECTION 24-72-204 (5.5).

(E) THE RECORD OF AN EXECUTIVE SESSION OF A LOCAL PUBLIC BODY RECORDED PURSUANT TO SUB-SUBPARAGRAPH (A) OF THIS SUBPARAGRAPH (II) SHALL BE RETAINED FOR AT LEAST NINETY DAYS AFTER THE DATE OF THE EXECUTIVE SESSION.

SECTION 2. The introductory portions to 24-6-402 (3) (a) and (4) and 24-6-402 (3) (b) and (4) (f), Colorado Revised Statutes, are amended to read:

24-6-402. Meetings - open to public. (3) (a) The members of a state public body subject to this part 4, upon the announcement by the state public body to the public of the topic for discussion in the executive session, INCLUDING SPECIFIC CITATION TO THE PROVISION OF THIS SUBSECTION (3) AUTHORIZING THE BODY TO MEET IN AN EXECUTIVE SESSION AND IDENTIFICATION OF THE PARTICULAR MATTER TO BE DISCUSSED IN AS MUCH DETAIL AS POSSIBLE WITHOUT COMPROMISING THE PURPOSE FOR WHICH THE EXECUTIVE SESSION IS AUTHORIZED, and the affirmative vote of two-thirds of the entire membership of the body after such announcement, may hold an executive session only at a regular or special meeting and for the sole purpose of considering any of the matters enumerated in paragraph (b) of this subsection (3) or the following matters; except that no adoption of any proposed policy, position, resolution, rule, regulation, or formal action, EXCEPT THE REVIEW, APPROVAL, AND AMENDMENT OF THE MINUTES OF AN EXECUTIVE SESSION RECORDED PURSUANT TO SUBPARAGRAPH (I) OF PARAGRAPH (d.5) OF SUBSECTION (2) OF THIS SECTION, shall occur at any executive session that is not open to the public:

(b) (I) All meetings held by members of a state public body subject to this part 4 to consider the appointment or employment of a public official or employee or the dismissal, discipline, promotion, demotion, or compensation of, or the investigation of charges or complaints against, a public official or employee shall be open to the public unless said applicant, official, or employee requests an executive session. Governing boards of institutions of higher education including the regents of the university of Colorado may, upon their own affirmative vote, hold executive sessions to consider the matters listed in this paragraph (b). Executive sessions may be held to review administrative actions regarding investigation of charges or complaints and attendant investigative reports against students where public disclosure could adversely affect the person or persons involved, unless the students have specifically consented to or requested the disclosure of such matters. An executive session may be held only at a regular or special meeting of the state public body and only upon the announcement by the public body to the public of the topic for discussion in the executive session and the affirmative vote of two-thirds of the entire membership of the body after such announcement.

(II) THE PROVISIONS OF SUBPARAGRAPH (I) OF THIS PARAGRAPH (b) SHALL NOT APPLY TO DISCUSSIONS CONCERNING ANY MEMBER OF THE STATE PUBLIC BODY, ANY ELECTED OFFICIAL, OR THE APPOINTMENT OF A PERSON TO FILL THE OFFICE OF A MEMBER OF THE STATE PUBLIC BODY OR AN ELECTED OFFICIAL OR TO DISCUSSIONS OF PERSONNEL POLICIES THAT DO NOT REQUIRE THE DISCUSSION OF MATTERS PERSONAL TO PARTICULAR EMPLOYEES.

(4) The members of a local public body subject to this part 4, upon the announcement by the local public body to the public of the topic for discussion in the executive session, INCLUDING SPECIFIC CITATION TO THE PROVISION OF THIS SUBSECTION (4) AUTHORIZING THE BODY TO MEET IN AN EXECUTIVE SESSION AND

IDENTIFICATION OF THE PARTICULAR MATTER TO BE DISCUSSED IN AS MUCH DETAIL AS POSSIBLE WITHOUT COMPROMISING THE PURPOSE FOR WHICH THE EXECUTIVE SESSION IS AUTHORIZED, and the affirmative vote of two-thirds of the quorum present, after such announcement, may hold an executive session only at a regular or special meeting and for the sole purpose of considering any of the following matters; except that no adoption of any proposed policy, position, resolution, rule, regulation, or formal action, EXCEPT THE REVIEW, APPROVAL, AND AMENDMENT OF THE MINUTES OF AN EXECUTIVE SESSION RECORDED PURSUANT TO SUBPARAGRAPH (II) OF PARAGRAPH (d.5) OF SUBSECTION (2) OF THIS SECTION, shall occur at any executive session that is not open to the public:

(f) (I) Personnel matters except if the employee who is the subject of the session has requested an open meeting, or if the personnel matter involves more than one employee, all of the employees have requested an open meeting. With respect to hearings held pursuant to the "Teacher Employment, Compensation, and Dismissal Act of 1990", article 63 of title 22, C.R.S., the provisions of section 22-63-302 (7) (a), C.R.S., shall govern in lieu of the provisions of this subsection (4).

(II) THE PROVISIONS OF SUBPARAGRAPH (I) OF THIS PARAGRAPH (f) SHALL NOT APPLY TO DISCUSSIONS CONCERNING ANY MEMBER OF THE LOCAL PUBLIC BODY, ANY ELECTED OFFICIAL, OR THE APPOINTMENT OF A PERSON TO FILL THE OFFICE OF A MEMBER OF THE LOCAL PUBLIC BODY OR AN ELECTED OFFICIAL OR TO DISCUSSIONS OF PERSONNEL POLICIES THAT DO NOT REQUIRE THE DISCUSSION OF MATTERS PERSONAL TO PARTICULAR EMPLOYEES.

SECTION 3. 24-72-204 (3) (a) (XI) (A), (5), and (6) (a), Colorado Revised Statutes, are amended, and the said 24-72-204 is further amended BY THE ADDITION OF A NEW SUBSECTION, to read:

24-72-204. Allowance or denial of inspection - grounds - procedure - appeal.

(3) (a) The custodian shall deny the right of inspection of the following records, unless otherwise provided by law; except that any of the following records, other than letters of reference concerning employment, licensing, or issuance of permits, shall be available to the person in interest under this subsection (3):

(XI) (A) Records submitted by or on behalf of an applicant or candidate for an executive position as defined in section 24-72-202 (1.3) who is not a finalist. ~~if the applicant or candidate makes a written request that the records be kept confidential at the time of submission of the records.~~ For purposes of this subparagraph (XI), "finalist" means an applicant or candidate for an executive position AS THE CHIEF EXECUTIVE OFFICER OF A STATE AGENCY, INSTITUTION, OR POLITICAL SUBDIVISION OR AGENCY THEREOF who is chosen for an interview or who is still being considered for the position twenty-one days prior to making the appointment, whichever comes first; ~~except that, if six or fewer applicants or candidates are competing for the executive position, "finalist" means all applicants or candidates~~ A MEMBER OF THE FINAL GROUP OF APPLICANTS OR CANDIDATES MADE PUBLIC PURSUANT TO SECTION 24-6-402 (3.5), AND IF ONLY THREE OR FEWER APPLICANTS OR CANDIDATES FOR THE CHIEF EXECUTIVE OFFICER POSITION POSSESS THE MINIMUM QUALIFICATIONS FOR THE POSITION, SAID APPLICANTS OR CANDIDATES SHALL BE CONSIDERED FINALISTS.

(5) EXCEPT AS PROVIDED IN SUBSECTION (5.5) OF THIS SECTION, any person denied

the right to inspect any record covered by this part 2 may apply to the district court of the district wherein the record is found for an order directing the custodian of such record to show cause why ~~he~~ THE CUSTODIAN should not permit the inspection of such record; EXCEPT THAT, AT LEAST THREE BUSINESS DAYS PRIOR TO FILING AN APPLICATION WITH THE DISTRICT COURT, THE PERSON WHO HAS BEEN DENIED THE RIGHT TO INSPECT THE RECORD SHALL FILE A WRITTEN NOTICE WITH THE CUSTODIAN WHO HAS DENIED THE RIGHT TO INSPECT THE RECORD INFORMING SAID CUSTODIAN THAT THE PERSON INTENDS TO FILE AN APPLICATION WITH THE DISTRICT COURT. Hearing on such application shall be held at the earliest practical time. Unless the court finds that the denial of the right of inspection was proper, it shall order the custodian to permit such inspection and ~~upon a finding that the denial was arbitrary or capricious, it may order the custodian personally to pay the applicant's court costs and attorney fees in an amount to be determined by the court~~ SHALL AWARD COURT COSTS AND REASONABLE ATTORNEY FEES TO THE PREVAILING APPLICANT IN AN AMOUNT TO BE DETERMINED BY THE COURT; EXCEPT THAT NO COURT COSTS AND ATTORNEY FEES SHALL BE AWARDED TO A PERSON WHO HAS FILED A LAWSUIT AGAINST A STATE PUBLIC BODY OR LOCAL PUBLIC BODY AND WHO APPLIES TO THE COURT FOR AN ORDER PURSUANT TO THIS SUBSECTION (5) FOR ACCESS TO RECORDS OF THE STATE PUBLIC BODY OR LOCAL PUBLIC BODY BEING SUED IF THE COURT FINDS THAT THE RECORDS BEING SOUGHT ARE RELATED TO THE PENDING LITIGATION AND ARE DISCOVERABLE PURSUANT TO CHAPTER 4 OF THE COLORADO RULES OF CIVIL PROCEDURE. IN THE EVENT THE COURT FINDS THAT THE DENIAL OF THE RIGHT OF INSPECTION WAS PROPER, THE COURT SHALL AWARD COURT COSTS AND REASONABLE ATTORNEY FEES TO THE CUSTODIAN IF THE COURT FINDS THAT THE ACTION WAS FRIVOLOUS, VEXATIOUS, OR GROUNDLESS.

(5.5) (a) ANY PERSON SEEKING ACCESS TO THE RECORD OF AN EXECUTIVE SESSION MEETING OF A STATE PUBLIC BODY OR A LOCAL PUBLIC BODY RECORDED PURSUANT TO SECTION 24-6-402 (2) (d.5) SHALL, UPON APPLICATION TO THE DISTRICT COURT FOR THE DISTRICT WHEREIN THE RECORDS ARE FOUND, SHOW GROUNDS SUFFICIENT TO SUPPORT A REASONABLE BELIEF THAT THE STATE PUBLIC BODY OR LOCAL PUBLIC BODY ENGAGED IN SUBSTANTIAL DISCUSSION OF ANY MATTERS NOT ENUMERATED IN SECTION 24-6-402 (3) OR (4) OR THAT THE STATE PUBLIC BODY OR LOCAL PUBLIC BODY ADOPTED A PROPOSED POLICY, POSITION, RESOLUTION, RULE, REGULATION, OR FORMAL ACTION IN THE EXECUTIVE SESSION IN CONTRAVENTION OF SECTION 24-6-402 (3) (a) OR (4). IF THE APPLICANT FAILS TO SHOW GROUNDS SUFFICIENT TO SUPPORT SUCH REASONABLE BELIEF, THE COURT SHALL DENY THE APPLICATION AND, IF THE COURT FINDS THAT THE APPLICATION WAS FRIVOLOUS, VEXATIOUS, OR GROUNDLESS, THE COURT SHALL AWARD COURT COSTS AND ATTORNEY FEES TO THE PREVAILING PARTY. IF AN APPLICANT SHOWS GROUNDS SUFFICIENT TO SUPPORT SUCH REASONABLE BELIEF, THE APPLICANT CANNOT BE FOUND TO HAVE BROUGHT A FRIVOLOUS, VEXATIOUS, OR GROUNDLESS ACTION, REGARDLESS OF THE OUTCOME OF THE IN CAMERA REVIEW.

(b) (I) UPON FINDING THAT SUFFICIENT GROUNDS EXIST TO SUPPORT A REASONABLE BELIEF THAT THE STATE PUBLIC BODY OR LOCAL PUBLIC BODY ENGAGED IN SUBSTANTIAL DISCUSSION OF ANY MATTERS NOT ENUMERATED IN SECTION 24-6-402 (3) OR (4) OR THAT THE STATE PUBLIC BODY OR LOCAL PUBLIC BODY ADOPTED A PROPOSED POLICY, POSITION, RESOLUTION, RULE, REGULATION, OR FORMAL ACTION IN THE EXECUTIVE SESSION IN CONTRAVENTION OF SECTION 24-6-402 (3) (a) OR (4), THE COURT SHALL CONDUCT AN IN CAMERA REVIEW OF THE

RECORD OF THE EXECUTIVE SESSION TO DETERMINE WHETHER THE STATE PUBLIC BODY OR LOCAL PUBLIC BODY ENGAGED IN SUBSTANTIAL DISCUSSION OF ANY MATTERS NOT ENUMERATED IN SECTION 24-6-402 (3) OR (4) OR ADOPTED A PROPOSED POLICY, POSITION, RESOLUTION, RULE, REGULATION, OR FORMAL ACTION IN THE EXECUTIVE SESSION IN CONTRAVENTION OF SECTION 24-6-402 (3) (a) OR (4).

(II) IF THE COURT DETERMINES, BASED ON THE IN CAMERA REVIEW, THAT VIOLATIONS OF THE OPEN MEETINGS LAW OCCURRED, THE PORTION OF THE RECORD OF THE EXECUTIVE SESSION THAT REFLECTS THE SUBSTANTIAL DISCUSSION OF MATTERS NOT ENUMERATED IN SECTION 24-6-402 (3) OR (4) OR THE ADOPTION OF A PROPOSED POLICY, POSITION, RESOLUTION, RULE, REGULATION, OR FORMAL ACTION SHALL BE OPEN TO PUBLIC INSPECTION.

(6) (a) If, in the opinion of the official custodian of any public record, disclosure of the contents of said record would do substantial injury to the public interest, notwithstanding the fact that said record might otherwise be available to public inspection OR IF THE OFFICIAL CUSTODIAN IS UNABLE, IN GOOD FAITH, AFTER EXERCISING REASONABLE DILIGENCE, AND AFTER REASONABLE INQUIRY, TO DETERMINE IF DISCLOSURE OF THE PUBLIC RECORD IS PROHIBITED PURSUANT TO THIS PART 2, the official custodian may apply to the district court of the district in which such record is located for an order permitting him or her to restrict such disclosure OF FOR THE COURT TO DETERMINE IF DISCLOSURE IS PROHIBITED. Hearing on such application shall be held at the earliest practical time. IN THE CASE OF A RECORD THAT IS OTHERWISE AVAILABLE TO PUBLIC INSPECTION PURSUANT TO THIS PART 2, after a hearing, the court may, ~~issue such an order~~ upon a finding that disclosure would cause substantial injury to the public interest, ISSUE AN ORDER AUTHORIZING THE OFFICIAL CUSTODIAN TO RESTRICT DISCLOSURE. IN THE CASE OF A RECORD THAT MAY BE PROHIBITED FROM DISCLOSURE PURSUANT TO THIS PART 2, AFTER A HEARING, THE COURT MAY, UPON A FINDING THAT DISCLOSURE OF THE RECORD IS PROHIBITED, ISSUE AN ORDER DIRECTING THE OFFICIAL CUSTODIAN NOT TO DISCLOSE THE RECORD TO THE PUBLIC. In ~~such~~ AN ACTION BROUGHT PURSUANT TO THIS PARAGRAPH (a), the burden of proof shall be upon the custodian. The person seeking permission to examine the record shall have notice of said hearing served upon him or her in the manner provided for service of process by the Colorado rules of civil procedure and shall have the right to appear and be heard. THE ATTORNEY FEES PROVISION OF SUBSECTION (5) OF THIS SECTION SHALL NOT APPLY IN CASES BROUGHT PURSUANT TO THIS PARAGRAPH (a) BY AN OFFICIAL CUSTODIAN WHO IS UNABLE TO DETERMINE IF DISCLOSURE OF A PUBLIC RECORD IS PROHIBITED UNDER THIS PART 2 IF THE OFFICIAL CUSTODIAN PROVES AND THE COURT FINDS THAT THE CUSTODIAN, IN GOOD FAITH, AFTER EXERCISING REASONABLE DILIGENCE, AND AFTER MAKING REASONABLE INQUIRY, WAS UNABLE TO DETERMINE IF DISCLOSURE OF THE PUBLIC RECORD WAS PROHIBITED WITHOUT A RULING BY THE COURT.

SECTION 4. 24-72-202, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

24-72-202. Definitions. As used in this part 2, unless the context otherwise requires:

(8) FOR PURPOSES OF SUBSECTIONS (6) AND (6.5) OF THIS SECTION AND SECTIONS 24-72-203 (2) (b) AND 24-6-402 (2) (d) (III), THE MEMBERS OF THE COLORADO

REAPPORTIONMENT COMMISSION SHALL BE CONSIDERED ELECTED OFFICIALS.

SECTION 5. 24-4-103 (4) (a.5). Colorado Revised Statutes, is amended to read:

24-4-103. Rule-making - procedure. (4) (a.5) SUBJECT TO THE PROVISIONS OF SECTION 24-72-204 (3) (a) (IV), any study or other documentation utilized by an agency as the basis of a proposed rule shall be a public document in accordance with the provisions of part 2 of article 72 of this title and shall be open for public inspection. SUBJECT TO THE PROVISIONS OF SECTION 24-72-204 (3) (a) (IV), all information, including, but not limited to, THE CONCLUSIONS AND UNDERLYING research data FROM ANY STUDIES, REPORTS, published papers, and documents, used by the agency in the development of a proposed rule shall be a public document in accordance with the provisions of part 2 of article 72 of this title and shall be open for public inspection.

SECTION 6. Effective date. This act shall take effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly that is allowed for submitting a referendum petition pursuant to article V, section 1 (3) of the state constitution; except that, if a referendum petition is filed against this act or an item, section, or part of this act within such period, then the act, item, section, or part, if approved by the people, shall take effect on the date of the official declaration of the vote thereon by proclamation of the governor.

Approved: June 5, 2001

Small Claims County Court District Court
 Probate Court Juvenile Court Water Court
 Logan County, State of Colorado
 Court Address: P.O. Box 71
 Sterling, CO 80751

FILED IN DISTRICT COURT
LOGAN COUNTY CO

JUL 18 2003

DIANE J. SHULTZ, CLERK

PAMELA R. GUMINA, Plaintiff,

v.

CITY OF STERLING, COLORADO; THE CITY
 COUNCIL OF STERLING, COLORADO; JAMES
 THOMAS, individually and in his official capacity as City
 Manager; J. MICHAEL STEGER, individually and in his
 official capacity as City Council member and Mayor;
 CHARLES GILLESPIE, individually and in his official
 capacity as City Council member; and the employees of
 the City of Sterling, Colorado, Defendants.

Attorney for Petitioner:
 Carmen S. Danielson
 Jill A Zender
 Dietze and Davis, P.C.
 2060 Broadway, Suite 400
 Boulder, Colorado 80302
 Phone Number: (303)447-1375
 Fax Number: (303) 440-9036

Attorney for Defendants:
 Light, Harrington & Dawes, P.C.
 Steven J. Dawes
 Michelle C. Carmody
 Kathleen K. Harrington
 1512 Larimer Street, Suite 550
 Denver, Colorado 80202
 Phone Number: (303)298-1601
 Fax Number: (303)298-1627

▲ COURT USE ONLY ▲
Case Number: 02 CV 153

Div.: D

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter is before this Court on (1) Plaintiff's application for Order to Show Cause
 Regarding Inspection of Records ("Application") requested by Plaintiff on September 12, 2002,
 (2) Defendants' Response to Plaintiff's Application for Order to Show Cause Regarding

Inspection of Records("Response"), and (3) Plaintiff's Reply in Support of Application for Order to Show Cause Regarding Inspection of Records ("Reply").

The plaintiff, Pamela Gumina ("Gumina"), is seeking access to the tape recorded minutes of two Sterling City Council meetings on August 15, 2002 and on August 27, 2002. The issue before the Court in this matter is whether Gumina has presented grounds sufficient to support a reasonable belief that the City Council engaged in substantial discussion of any matters not enumerated in section 24-6-402(4) or that the City Council adopted a proposed policy, position, resolution, rule, regulation, or formal action in the executive session in contravention of section 24-6-402(4).

After conducting a hearing, taking testimony, hearing arguments, reviewing briefs and applicable statutory provisions, and being fully advised in the matter, this Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The City of Sterling, Colorado, is a home-rule municipality. Pursuant to the Charter of the City of Sterling, Section 3-4, the city has delegated a governmental decision-making function to the elective city council ("City Council"). See Defendants' Response, Exhibit 1, admitted on May 5, 2003.
2. Gumina has been an employee of the City of Sterling since 1987. Gumina became the Assistant City Manager in June 2000. During her employment, Gumina complained of what she claimed to be sexual harassment by certain members of the City Council.
3. The Sterling City Council noticed its intention to convene for a "retreat" on August 15, 2002. The only call or posting made by the Sterling City Council relative to the August 15 meeting was by virtue of an agenda signed by J. Michael Steger, Mayor, dated August 13, 2002, which read as follows:

"CITY OF STERLING, COLORADO
CITY COUNCIL AGENDA
WORK SESSION
COUNCIL CHAMBERS
AUGUST 15, 2002
6:00 P.M.

CITY COUNCIL RETREAT IS CALLED FOR:
DISCUSSION OF 2003 BUDGET"

See, Exhibit A. admitted as evidence May 5, 2003.

4. On August 14, 2002, Gumina, along with other department heads of the City of Sterling, were advised that, although not prohibited, they did not need to attend the City Council's work session scheduled for August 15, 2002 at 6:00 p.m.
5. On August 15, 2002, a meeting was held at which the following persons attended: (1) City Council members Steger, Bowey, Gillespie, Gower, Hernandez, Roth, and Schneider; and, (2) City Manager Thomas, and City Attorney Asmus. The City Attorney did not attend the executive session.
6. The City Council's meeting on August 15, 2002 included all seven members of the City Council and was convened for the purpose of discussing public business..
7. The minutes of the City Council's special meeting of August 15, 2002 are set forth in Exhibit 2 to Defendants' Response and were admitted into evidence on May 5, 2003.
8. At the City Council's meeting on August 15, 2002, the City Council voted to go into "executive session."
9. As evidenced by the minutes of that meeting and by the testimony of Mayor Steger, the City Council voted to go into executive session on August 15, 2002. After the City Council voted to go into executive session, Mayor Steger handed out to Council members information and read into the record the following information on the executive session: "At this time it is the intent of the City Council to recess the public meeting currently in progress and convene an executive session which will be closed to the public. The topics for discussion in the executive session will be: The purchase, acquisition, lease, transfer, or sale of any real, personal or other property interest (except that no executive session shall be held for the purpose of concealing the fact that a member of the local public body has a personal interest in such purchase, acquisition, lease, transfer, or sale); determining positions relative to matters that may be subject to negotiations; developing strategy for negotiation; and instruction to negotiators; and personnel matters. However, no adoption of any proposed policy, position, resolution, rule, regulation or formal action shall occur at any executive session.'" See, Exhibit 2 to Defendants' Response.
10. Aside from its recitation of statutory language, including "purchase, acquisition, lease, transfer, or sale of any real, personal or other property interest (except that no executive session shall be held for the purpose of concealing the fact that a member of the local public body has a personal interest in such purchase, acquisition, lease, transfer, or sale); determining positions relative to matters that may be subject to negotiations; developing strategy for negotiation; and instruction to negotiators; and personnel matters," this Court finds that this was the only announcement the City Council made prior to or after its executive session and did not identify any "particular matter" to be discussed in any detail.
11. On August 15, 2002, the City Council went into executive session at 6:25 p.m., came out at 9:15 p.m. and immediately adjourned the Council meeting.

12. On August 16, 2002, the City Manager informed certain employees, including Gumina, that the City Council had decided that all employees being laid off, except Gumina, would be retained through December 31, 2002.
13. On August 27, 2002, the City Council convened for a regular meeting at 7:30 p.m. All seven Council members attended, including Mayor Steger, Bowey, Gillespie, Gower, Hernandez, Roth, and Schneider. The meeting was convened for the discussion of public business. See, Defendants' Response, Exhibit 2.
14. On August 27, 2002, the City Council unanimously voted to go into executive session. Only a general statutory announcement for discussion in the executive session was made prior to the vote. The minutes of this meeting establish that, after the vote, "Mayor Steger advised that at this time it is the intent of the City Council to recess the public meeting currently in progress and convene an executive session which will be closed to the public. The topic(s) for discussion in the executive session will be personnel matters, the purchase, acquisition, lease, transfer, or sale of any real, personal or other property interest (except that no executive session shall be held for the purpose of concealing the fact that a member of the local public body has a personal interest in such purchase, acquisition, lease, transfer or sale.) However, no adoption of any proposed policy, position, resolution, rule, regulation or formal action shall occur at any executive session."
15. Gumina was never informed that she would be a subject of an executive session of the City Council.
16. As established by the testimony of Mayor Steger, he advised counsel that he intended to discharge Ms. Gumina during the City Council's closed session on August 15, 2002. No further discussion or comments were made.
17. The City Council tape recorded its regular meetings, as well as its executive session meetings.
18. Pursuant to a letter dated September 12, 2002, Gumina served on the City of Sterling's records custodian a "Public Records Request" for, in pertinent part, records of the City Council's executive sessions at which Gumina was discussed, whether authorized or unauthorized, including, without limitation, minutes, recordings and electronic e-mail. See, application, Exhibit C thereto and admitted on May 5, 2003.
19. As evidenced by its response dated September 24, 2002, the records custodian, via counsel, declined to provide records of the City Council's executive sessions, writing: "We are sending you everything you requested with the exception of records from executive sessions. As you are aware, executive sessions are confidential, however, there is a process by which you may obtain those records that is found in Colorado Statutes. This office is, however, requiring a court order for the disclosure of any executive sessions, as well as a review by the

judge as to what would be relevant to your client." See, application, Exhibit D thereto and admitted on May 5, 2002.

20. This local public body's response dated September 24, 2002 did not deny access on the grounds that Gumina had not been discussed.
21. Pursuant to a Notice of Intent dated October 31, 2003 and received by the City of Sterling on November 4, 2002, Gumina served written notice that she intended to file an application with the district court relative to the denial of her request for the inspection of the subject public records, as required by Section 24-72-204, C.R.S. See, Application, Exhibit A thereto and admitted May 5, 2002.
22. During the executive sessions held on August 15, and August 27, 2002, the City Council did not make any final decisions regarding Gumina's employment. Rather, the decision to eliminate Gumina's position had already been made by the City Manager, and the City Manager during these executive sessions simply conveyed that information to the Council.
23. No testimony or other evidence was presented at the May 5, 2003 hearing to show the Sterling City Council engaged in substantial discussion of any matters not enumerated in C.R.S. 24-6-402(2).

CONCLUSIONS OF LAW

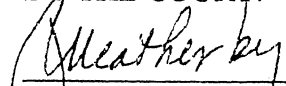
1. The City Council of the City of Sterling ("City Council") constitutes a "local public body" as defined under the Colorado Open Meetings Law. C.R.S. 24-6-402(1)(a).
2. The meetings convened by the City Council on August 15, and August 27, 2002 for the discussion of public business were attended by all seven members of that local public body. Accordingly, they were to have been public meetings open to the public at all times, unless the executive session exemption was applicable. C.R.S. 24-6-402(2)(b); 24-6-402(4).
3. Minutes of the meetings on August 15 and August 27 were required to be taken and promptly recorded and, except as provided for under Colorado law, are required to be open to public inspection. C.R.S. 24-6-402(d)(II).
4. The meetings of August 15 and August 27 were required to be preceded by full and timely notice to the public, by posting in a public place within the boundaries of the local public body no less than twenty-four hours prior to the meeting. C.R.S. 24-6-402(2)(c). "The meetings of August 15 and August 27 were each required to be preceded by full and timely notice to the public. In addition to any other means of full and timely notice, the City is deemed to have given full and timely notice if the notice of the meeting was posted in a designated public place within the boundaries of the City no less than twenty-four hours prior to the meeting." C.R.S. 24-6-402(2)(c).

5. Moreover, with respect to the meeting held on August 15, the Sterling City Code, Sec. 2-32, provides that, "only such business may be transacted at special meetings as may be listed in the call for said meeting or as incidental thereto."
6. Gumina sought access to the records of the subject meetings pursuant to a request dated September 12, 2002, citing the Open Records Act, Section 24-72-204, and the open Meetings Law, Section 24-6-402. This local public body denied access to those records on the grounds that the meetings were executive sessions authorized under the Colorado Open Meetings law, C.R.S. 24-6-402(4).
7. A local public body subject to the Open Meetings law may hold an executive session to consider matters required to be kept confidential by law, as long as such session is held in compliance with Colorado law, including section 24-6-2-402(4).
8. "Pursuant to C.R.S. 24-6-402(4), the Sterling City Council, upon announcement to the public of the topic for discussion in the executive session, including specific citation to the provision of this subsection (4) authorizing the body to meet in an executive session and identification of the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized, and the affirmative vote of two-thirds of the quorum present, after such announcement, the may hold an (4) executive session only at a regular or special meeting and for the sole purpose of considering any of [matters set forth in this subsection(4)]."
9. One of the matters listed in subsection (4) of section 24-6-402 includes "personnel matters," unless the employee "who is the subject of the session has requested an open meeting, or if the personnel matter involves more than one employee, all of the employees have requested an open meeting." C.R.S. 24-6-402(4)(f)(I).
10. As evidenced by the written minutes of the August 15, 2002 meeting and by the testimony of Mayor Steger, this Court concludes that the "announcement" of the Sterling City Council's executive session on August 15, 2002 was inadequate and did not satisfy the requirements of the Colorado Open Meetings Law, and specifically section 24-6-402(4), for the primary reason that this local public body did not adequately identify the "personnel matters" to be discussed.
11. For the same reason, the City Council's "announcement" for executive session on August 27, 2002 was also inadequate on the subject of "personnel matters."
12. Additional reasons which support this Court's conclusion that the Sterling City Council's announcements were legally inadequate are as follows:

- a. The local public body only mentioned "personnel matters," but did not make specific citation to the provision of subsection (4) authorizing the body to meet in an executive session as required by section 24-6-402(4): and,
 - b. As a result of the local public body's failure to make a proper announcement as required by law, any employee – including Gumina – who was a subject of the session, did not have an opportunity to exercise their statutory right to request an open meeting pursuant to section 24-6-402(4)(f)(I).
13. This Court concludes that the Sterling City Council did not follow the statutory requirements for holding an executive session, and that, therefore, penalties as set forth in the Open Meetings Law shall be imposed. The Sterling City Council is enjoined from conducting future "executive sessions" without adequately complying with the open Meetings law. This Court awards Gumina her court costs and reasonable attorneys' fees in an amount to be determined by the Court, pursuant to Sections 24-72-204(5) and 24-6-402(9), C.R.S. Gumina shall file a motion for attorneys' fees and costs, with any supporting documentation, in accordance with Rule 121, Section 1-22, within 15 days of the entry of these Findings of Fact and Conclusions of Law.
14. Based on the testimony and other evidence presented at the May 5, 2003 hearing, the Court finds Plaintiff has failed to show grounds sufficient to support a reasonable belief that the Sterling City Council engaged in substantial discussion of any matters not enumerated in C.R.S. 24-6-402(4) or that the Sterling City Council adopted a proposed policy, position, resolution, rule, regulation, or formal action in the executive session in contravention of C.R.S. 24-6-402(4). Therefore, Plaintiff's Application for Order to Show Cause Regarding Inspection of Records is DENIED.

DONE THIS 18 day of July, 2003.

BY THE COURT:



Joseph J. Weatherby
District Judge

Sterling Journal-Advocate Headlines Concerning Gumina Matter

Source: <http://www.journal-advocate.com>

City files response to Gumina lawsuit; refutes all charges

Author: Kathleen Stinson

Date: December 30, 2003

Publication: Journal-Advocate (Sterling, CO)

Journal-Advocate Staff Writerreporter1@journal-advocate.com

The city of Sterling recently filed a sweeping denial to various allegations raised by a former assistant city manager in a lawsuit filed in U.S. District Court. Former Sterling assistant city manager Pam Gumina filed the lawsuit against the city of Sterling in November, basing her case on the protections against sex discrimination in Title VII of the Civil Rights Act of 1964, as well as Section 1983 of the same act, which ...

Gumina appealing court ruling on tapes

Author: Kathleen Stinson, Journal-Advocate Staff Writer

Date: September 20, 2003

Publication: Journal-Advocate (Sterling, CO)

Former Sterling assistant city manager Pam Gumina has filed an appeal of the decision in her application to show cause against the city of Sterling on August 29 with the Colorado Court of Appeals. Meanwhile, Curtis Long, personnel director and chairman of Sterling's risk management committee, said the city has decided not to appeal the open meetings law portion of the decision in which the city was unsuccessful. In the application to show cause, Gumina unsuccessfully tried to obtain tapes...

Judge: Sterling violated open meetings law

Author: Darla Bartos, Journal-Advocate Staff Writer

Date: July 23, 2003

Publication: Journal-Advocate (Sterling, CO)

The Sterling city council will have to pay Pam Gumina's court costs, now that a district judge has ruled the council violated the state's open meetings law. The ruling was handed down by Judge Joseph J. Weatherby on July 18 regarding the lawsuit Gumina brought against the city and numerous city officials, claiming harassment and sexual discrimination. The former assistant city manager had tried to obtain tapes of several executive sessions...

Time to settle

Date: July 1, 2003

Publication: Journal-Advocate (Sterling, CO)

We think it's time former assistant city manager Pam Gumina and the city council settled their differences and moved on. It's time to settle. Gumina's attempt to sue certain city officials for harassment is now awaiting a ruling from a district court judge as to whether the city must release tapes of executive sessions Gumina claims will help prove her case. We think, given the amount of turmoil surrounding Sterling's attempts to find a new city manager...

Council to prepare legal strategy for lawsuit

Author: Rebecca Dudley, Journal-Advocate News Editor

Date: April 5, 2003

Publication: Journal-Advocate (Sterling, CO)

Sterling city council will set a special closed-door meeting April 15 to map out its strategy for a May 5 show cause hearing in the Pam Gumina vs City of Sterling lawsuit. Lawyers on both sides of former assistant city manager

Gumina's legal action are slated to face off in District Judge Joseph Weatherby's court at 10 a.m. May 5 to argue the judge's Dec. 4 order instructing the city to either turn over tapes of Aug. 15 and Aug. 27 executive sessions...

Judge to consider whether to release city meeting tapes

Author: Beata Mostafavi, Journal-Advocate Staff Writer

Date: May 6, 2003

Publication: Journal-Advocate (Sterling, CO)

Judge Joseph Weatherby has taken under advisement whether to accept a request that the city turn over tapes of two executive sessions from former assistant city manager Pam Gumina - who says the tapes are vital to her civil lawsuit against the city. Both Gumina and Mayor Chip Steger testified in a two-hour hearing Monday, in which Gumina's attorneys tried to show cause why the tapes should be disclosed and the city's legal team stood by their assertion that the city must leave the...

Sterling may have to surrender tapes of executive sessions

Author: Rebecca Dudley, Journal-Advocate News Editor

Date: December 10, 2002

Publication: Journal-Advocate (Sterling, CO)

Closed-door meetings may not be so secret after all - or so says District Court Judge Joseph Weatherby in a Dec. 4 order giving Sterling city clerk Debra Forbes and city attorney Douglas Asmus 30 days to either turn over tapes of Aug. 15 and Aug. 27 executive sessions, or show cause why the tapes should not be released. The judge's order is the latest development in a lawsuit filed earlier this fall by former assistant city manager Pam Gumina...

Gillespie threatens lawsuit against former assistant city manager

Author: Darla Bartos, Journal-Advocate Staff Writer

Date: November 14, 2002

Publication: Journal-Advocate (Sterling, CO)

City council member Charlie Gillespie is mad and he's not going to take it anymore. He took out an ad earlier this week, which reads, "I intend to file a lawsuit against Pam Gumina refuting all her allegations defaming my character, signed Charlie Gillespie." Gumina, the former assistant city manager, wrote the city council in a letter dated Oct. 28, stating she intends to sue. She also raised allegations of sexual harassment...

Gumina prepares to sue city, claims wrongful dismissal

Author: Forrest Hershberger, Journal-Advocate News Editor

Date: October 31, 2002

Publication: Journal-Advocate (Sterling, CO)

The city of Sterling has received a notice of intent to sue from former assistant city manager Pam Gumina. City attorney Doug Asmus stressed this morning that the letter is only signals the intent to file a lawsuit; no claim has been received by the city as of today. The letter, dated Oct. 28 and stamped received by the city on Oct. 30...

Thomas - Gumina is gone, Gumina - I have yet to resign

Author: Forrest Hershberger, Journal-Advocate News Editor

Date: August 21, 2002

Publication: Journal-Advocate (Sterling, CO)

Sterling's assistant city manager Pam Gumina has resigned, according to new city manager Jim Thomas - but Gumina says she has yet to tender her resignation. Thomas said at a press briefing Tuesday that Gumina's resignation becomes effective Sept. 20. Gumina told the Journal-Advocate this morning that Thomas does not have her resignation letter yet. Rumors have been circulating throughout city hall and the community at large on what the proposed budget cuts will do to the city's...

COURT OF APPEALS, STATE OF COLORADO

Court Address: 2 E. 14th Ave.
Denver, CO 80203

FILE
MAR 29 2004

Clerk, Court of Appeals

Appeal from Logan County District Court
The Honorable Joseph J. Weatherby
Case No. 2002CV153

▲ COURT USE ONLY ▲

Appellant: PAMELA R. GUMINA

Appellees: CITY OF STERLING, COLORADO; THE CITY COUNCIL OF STERLING, COLORADO; JAMES THOMAS, individually and in his official capacity as City Manager; J. MICHAEL STEGER, individually and in his official capacity a City Council member and Mayor; CHARLES GILLESPIE, individually and in his official capacity as City Council member; and the employees of the City of Sterling, Colorado.

Case Number 03-CA-1709

Attorney for Amicus Curiae:

Geoffrey T. Wilson, #11574
COLORADO MUNICIPAL LEAGUE
1144 Sherman Street
Denver, CO 80203-2207
Telephone: 303.831.6411
Telefax: 303.860.8175
E-mail: gwilson@cml.org

**APPENDIX "B" AND C" TO
ANSWER BRIEF
OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE**

CERTIFICATE OF MAILING

I hereby certify that on this 29th day of March 2004, I deposited a true and complete copy of **Appendix "B" and "C" to Answer Brief of the Colorado Municipal League as *Amicus Curiae*** in the U.S. Mail, postage prepaid, addressed as follows:

Thomas B. Kelley, Esq.
Steven D. Zansberg, Esq.
Christopher P. Beall, Esq.
Faegre & Benson LLP
1700 Lincoln Street, Suite 3200
Denver, CO 80203

Carmen Danielson, Esq.
Kathleen E. Haddock, Esq.
Jill Z. Zender, Esq.
Dietze and Davis, P.C.
2060 Broadway, Suite 400
Boulder, CO 80302

Kathleen K. Harrington, Esq.
Michelle C. Carmody, Esq.
Steven J. Dawes, Esq.
1512 Larimer Street, Suite 550
Denver, CO 80202

Kathleen Haddock

STATE OF COLORADO
HOUSE COMMITTEE ON INFORMATION AND TECHNOLOGY
March 28, 2001

Discussion/action on House Bill 1359-2001

TRANSCRIPT OF TAPE RECORDED COMMITTEE PROCEEDINGS

REP. MARK PASCHALL, Chairman

REP. SHAWN MITCHELL, Sponsor

COMMITTEE ATTENDANCE

REP. FRAN COLEMAN REP. TIM FRITZ REP. ALICE MADDEN

REP. MARY HODGE REP. ROSEMARY MARSHALL

REP. JOYCE LAWRENCE REP. VALENTIN VIGIL

REP. GREGG RIPPY REP. BILL CADMAN

SPEAKING TO THE BILL

"CHIP" TAYLOR, Legislative Counsel, Colorado
Counties Incorporated.

GEOFF WILSON, General Counsel, Colorado
Municipal League.

KEN AMUNDSON, President, Colorado Press
Association.

NORM SHERBERT, Partner, Beacon Public Affairs,
representing Kraft Foods.

1 [The tape recorded committee meeting, House
2 Committee on Information and Technology, March 28, 2001,
3 is transcribed as follows:]

4 MR. CHAIRMAN: We have House Bill 1359, by Rep.
5 Mitchell. Rep. Mitchell, you have the floor.

6 REP. MITCHELL: Thank you, Mr. Chairman and
7 members of the Committee.

8 Members, the Colorado Statutes regarding open
9 meetings and open records declare that it's the public
10 policy of the State of Colorado that public business
11 should be conducted in public. And that's what this bill
12 is about, is making sure that the work we do on behalf of
13 the State of Colorado is visible to the citizens of the
14 State of Colorado.

15 Let me tell you that this bill that's before you
16 is the result of the -- I don't know if I should say
17 lengthy -- a continuing series of discussions between
18 different interested parties, and supporters, and
19 opponents, and other people who are affected by the bill.

20 There's been a lot of compromise, and thoughtful
21 and deliberate discussion that has gone into the product.
22 There are amendments before you, and I'm sure there will
23 yet be amendments in the process, as we roll forward.

24 But the spirit in which all interested parties
25 have approached the bill is that public business should be

1 done in public. The public business should also be
2 reasonable, and efficient, and manageable for the public
3 servants who are involved in that business.

4 Let me also tell you that there is actually less
5 to the 13 pages in this bill than meets the eye. There
6 were some constraints involved in fitting new policy in to
7 the open meetings and open records law. And let me explain
8 to you a couple of those constraints.

9 Whether it was the most efficient or artful way
10 to design things in the first place, the -- the law --
11 existing law separates out open meetings into one category
12 of statutes, and open records into another category of
13 statutes.

14 It also treats state governments in one section
15 of statutes and local governments in another section of
16 statutes. So even if you're only talking about one
17 general kind of policy, it often touches four places in
18 the law -- two to four places in the law.

19 So there will be some apparent redundancy in
20 this bill, but it's not really redundant. There's a
21 section governing local public bodies and there's a
22 section governing state public bodies. And that's just
23 because that's the structure of the existing Colorado Open
24 Meetings Law, and Open Records Law.

25 And I needed to tell you that, to let you know

1 that the most efficient way to describe this bill won't be
2 to walk by section through section, but instead it will be
3 just to tell you what its major provisions and mechanisms
4 are, and then let you know that they're all plugged in
5 appropriately to the two to four sections of state law
6 that they apply to.

7 Now, one more word, before I sort of give you a
8 walk-through of what the bill does. And that is that
9 the need for this bill is not an indication of a short
10 failing on the part of governments generally, or local
11 governments generally.

12 In fact, just like most citizens who have good
13 will, and do their best to honor and sustain and uphold
14 the law, local government officials have good will and do
15 their best to honor and uphold and sustain the law.

16 However, there are pockets of problems. There
17 are folks who aren't as aware of their duties as they
18 should be. There are other folks, just like in the
19 population at large, that aren't as interested in doing
20 their duty as maybe they should be.

21 And so we've had a series of experiences that
22 have indicated that perhaps the law needs to be a little
23 more clearly enforced, and the policies more uniformly
24 applied.

25 There's -- just as a couple of anecdotal

1 examples, there was a case where a board of county
2 commissioners went into executive session, ostensibly
3 to discuss one subject, and then came out and immediately
4 after the executive session, voted unanimously on a
5 different subject.

6 That kind of thing raises questions. Was -- was
7 the executive session really directed towards what it was
8 supposed to be? Until now, there hasn't really been an
9 honest way to verify that, unless someone who participated
10 in executive session was willing to come -- come clean and
11 say that something else actually happened behind closed
12 doors.

13 There are examples of local governments denying
14 plainly proper open-records requests about people
15 incarcerated currently in the city jail, or the number of
16 employees in a city department.

17 There are numerous instances where local
18 governments didn't quite do what they were supposed to,
19 regarding a meeting that should be open to the public, or
20 regarding records that should be open to the public.

21 And so just as we have laws and enforcement in
22 society at large for the problem cases, but not as an
23 indictment on all of us, we have to -- we have to move on
24 some of these issues to better enforce the policies for
25 some of the concern areas; not for everyone at large.

1 Now, the final point I'll make before the walk-
2 through is that just because a law gets violated, doesn't
3 mean that you need to change the law. If cars are going
4 80 miles an hour, that doesn't suggest that you should
5 lower the 65-mile-per hour speed limit.

6 That might suggest better enforcement of the
7 speed limit. And I want to tell you that spirit, also, is
8 incorporated into this bill.

9 This bill does not, in general, change
10 substantive standards for what's public and what's not
11 public. What it does do is, provide better accountability
12 and enforcement so that the policy that Colorado long ago
13 adopted, which is public business should take place in
14 public, we can live out and honor that policy.

15 It creates accountability for local government
16 and public -- excuse me, and state governments, so that
17 there is a better way to make sure that executive session
18 was tied to the purposes for which it was supposed to be
19 tied.

20 There is a shift in incentives and attorneys
21 fees clause that we'll get to, and I'll explain, that
22 provides a greater incentive for governments to know and
23 precisely follow the law, and make information available
24 when it should.

25 But the point I want to make is just because

1 there have been problems, doesn't mean that we make the
2 law tighter or stricter. It means that we make it clearer
3 and easier and to enforce and easier to hold government
4 accountable.

5 Now, the description of what the bill itself
6 does will actually be fairly brief. There are a couple
7 different provisions.

8 But I suppose among the most important and
9 perhaps subject to most interest and comment by the
10 affected parties, is that we have tried to get to the
11 issue of executive session, and preserve the
12 confidentiality that needs to be there, but at the same
13 time, create a better mechanism to help the governments --
14 to help keep governments honest. And here's now the bill
15 proposes to accomplish that.

16 Right now, the law says when a local body, or
17 state body -- any public body goes into executive session,
18 they have to state the reason. But some of them are very
19 general.

20 We're going in under state law that allows
21 executive session -- period. The bill says, Well, you
22 need to be more specific than that.

23 But then it also says "And you have to keep a
24 record of your executive session." Not a public record.
25 It will be confidential, and privileged, just like any

1 other executive session, but you have to keep a record of
2 your executive session.

3 And it has to be kept in the same form as you --
4 the record of your open session. If you take minutes of
5 your open session, then you have to take minutes of your
6 executive session. If you record your open session, you
7 have to record your executive session.

8 That new record, which will remain confidential,
9 is the important check and safeguard, because the next
10 thing the bill does is, it allows a mechanism where if
11 anyone has reasonable cause to believe that the government
12 body departed from the subject matter of the executive
13 session, then they can go to a court and apply for a
14 review of that record of the executive session.

15 And if a judge considering the motion or the
16 application thinks there's reasonable cause to believe
17 that the public body didn't stick on the subject it was
18 supposed to, then the court will review the record in
19 chambers; not publicly, but in chambers and just make sure
20 that they stay to the subject.

21 If there is substantial discussion -- that's the
22 standard -- if there is substantial discussion of areas
23 that were not properly within executive session, then the
24 court will order that those parts of the record be made
25 public. That's the new mechanism.

1 We haven't changed what should be public or what
2 should be private, but we've created a way to hold
3 governments accountable for -- for following those
4 standards themselves.

5 They create a record. A person can bring an
6 application. If the court finds reasonable cause to
7 believe there's an issue, the court will review the
8 record, and then will either say, "No, everything was just
9 as it should be, tied to the executive session," or the
10 court will say, "There was substantial discussion of two
11 or three subjects that had nothing to do with the purpose
12 for the executive session," those records have to be made
13 public. That's one of the main guts of the bill.

14 Another mechanism that the bill creates is a
15 shift in the way attorneys fees work. Right now, if a
16 citizen asks a public body for access to public records,
17 and the public body denies it, the citizen has to go fight
18 and litigate against the state, or the city, or whomever,
19 and spend it on money to conduct that litigation, even if
20 they win.

21 The only exception to that would be, if the
22 court finds that the custodian's denial of access to the
23 records was arbitrary or capricious -- you know, just
24 completely unreasonable -- then the court can make a
25 custodian personally pay those attorney fees for the side

1 that had to challenge. That's existing law. That hasn't
2 proved very satisfactory, and we're not really very
3 interested in holding custodians personally liable.

4 The new principle will be this: if a citizen
5 requests records, and the local government denies access
6 to those records, then the citizen has to challenge and
7 goes to court and wins access to those records.

8 If the citizen wins, then the court will award
9 the citizen his or her attorneys fees.

10 I think the principle behind that is fair and
11 common sense. It is simply that a citizen shouldn't have
12 to pay their fortune to get the government to follow the
13 law. The government that authors the law and enforces
14 the law should follow the law, and it should be at the
15 government's expense, if the government made the wrong
16 call and didn't release records that should have been
17 released.

18 It shouldn't be your expense to win a fight to
19 get information that, by our policy adopted in this body,
20 you should have had access to. So that's how the
21 attorneys fees mechanisms work.

22 MR. CHAIRMAN: I wanted to ask --

23 REP. MITCHELL: Rep. Paschall.

24 MR. CHAIRMAN: -- inter- --

25 REP. MITCHELL: Excuse me. Mr. Chairman.

1 MR. CHAIRMAN: Very good. Well, I'm glad that
2 you recognize that anyway, Rep. Mitchell.

3 Is a citizen defined as a natural person, or
4 could it be a corporation? Could it be association?

5 REP. MITCHELL: "Person" is defined -- my
6 understanding, and I'll have to double check on this is,
7 I think a person is anyone who makes the request.

8 MR. CHAIRMAN: Okay. Continue. I'll ask you
9 more about it later.

10 REP. MITCHELL: Okay. Thank you.

11 Now, there are a couple other parts to the bill.
12 One of them is actually something -- an incentive for
13 government bodies. As I told you, this bill has been in
14 the process of long and ongoing discussions back and
15 forth. And it's substantially different from the way it
16 was first introduced, or first drafted or proposed.

17 One of the issues is that public bodies have a
18 hard time on hiring searches, because people have to
19 expose themselves to vulnerability in their home town to
20 participate in a search in another town, if their
21 application is going to be made public.

22 And that was pretty broad, and it gave reporters
23 an incentive to try and ferret out, you know, who are all
24 the finalists, and then go back to their home town and
25 stir up trouble, "Did you know that Joe Blow was looking

1 to leave the waterworks department?" what have you.

2 There is value in the public policy of letting
3 folks know who the leading contenders are for the job, and
4 who the government body is really considering, and we
5 tightened up that definition so that anyone still being
6 considered 14 days from the -- from the final appointment
7 will be a finalist, and they will be made public. But
8 anyone not being considered at that point need not be
9 disclosed.

10 It does one other thing, which is -- the
11 current -- under the old law, if you weren't subject to
12 public disclosure, you still had to make the request. All
13 applicants would be disclosed, unless they requested in
14 writing not to be-disclosed.

15 This new bill will take that burden off of the
16 applicants, and say just the finalists are disclosed, and
17 the people who aren't finalists are not disclosed. And
18 that's the way the law works, whether there's a written
19 request or not.

20 That should considerably ease the executive
21 search of local governments because then only the final --
22 the final three applicants are likely to be revealed, and
23 everyone else can operate at security and confidentiality.

24 There are a couple other provisions I should
25 comment on. Well, that's about it.

1 Let me talk about a couple safe- -- safeguards
2 for local government quickly -- or any public body, and
3 then I conclude my presentation.

4 When I said that the public body has to make a
5 record of its executive session that's in the same form
6 as it's record of its public session, there are still
7 concerns about sensitive public business, and
8 attorney/client communications. Do you really want to
9 record those, or what if we're discussing individual
10 students, do you really want to record those? Couldn't
11 that be damaging if that information gets out?

12 And again, in collaboration with the affected
13 public bodies, we've inserted some safeguards for those
14 bodies, so that if you're going to record your executive
15 session, you still don't have to record attorney/client
16 communications.

17 If you're going to record executive sessions,
18 you still don't have to record discussion of individual
19 students, for example. That tape can be turned off, and
20 then the minutes can keep a general record of what's
21 discussed. That's to avoid overly sensitive information
22 and that's to avoid the chilling effect on some of those
23 key communications that need to be frank and open and
24 full.

25 One other I mentioned. Clarification in the law

1 is that regarding personnel issues, some public bodies
2 were taking personnel broadly to mean if we discuss
3 personnel policy we can go into executive session, when
4 it's pretty clear that the intent of the personnel matters
5 was to allow discussion of individuals.

6 So this bill clarifies that you can't just go
7 and talk about policies and pay and rank, or anything
8 else. That's not personnel. Personnel means you have to
9 be talking about an individual employee of the public
10 body, and it makes that clarification.

11 That's in essence the bill. There are other
12 details and nuances, but that's what the bill does. And
13 there are some amendments that will be proposed as well.

14 MR. CHAIRMAN: Rep. Mitchell, I was looking
15 through -- on page three, when it talks about the -- in
16 the opinion of the attorney representing the state public
17 body, that it shouldn't be -- then it's not recorded, and
18 then on page 4 it says, "No portion of the minutes of the
19 executive session of state public policy shall be open to
20 public inspection, or available for use in judicial
21 proceeding."

22 So is there a possibility that you could have
23 now the way to work around this is to say, "Okay, we're
24 going to have an attorney come in on every one of our
25 executive sessions," and basically find themselves as

1 being subject to this attorney/client privilege?

2 Therefore, no information is available, nor is it subject
3 to use in any judicial proceeding.

4 And how can then a person find and actually
5 apply to paragraph C on page 4, if they can't even
6 discover the information?

7 REP. MITCHELL: Mr. Chairman, thank you for
8 noticing that and pointing it out. I will try and say
9 three quick things about that.

10 First of all, this section will be amended to
11 clarify that the privilege still belongs to the public
12 body, and it can make this information available if it
13 wants. So it's not a state mandate that it has to remain
14 confidential; it's just a state protection of the
15 privilege that the local body, or the public body, enjoys.

16 Number two, you notice that it's not open for
17 use in any judicial proceeding, except as provided in
18 sub-paragraph C. Sub-paragraph C is the one that calls
19 for court review, so a court can conduct it's review, to
20 determine whether or not they complied.

21 But to your broader point, isn't there some
22 incentive to have your attorney come in and make
23 everything attorney/client privilege?

24 Number one: all laws are subject to manipulation
25 and abuse.

1 Number two: attorney/client communications are
2 part of executive session law right now, in that same
3 loophole opportunity is there.

4 But number three: if a pattern emerges where
5 every executive session seems to be entirely
6 attorney/client communication, that might be grounds for
7 someone to go to the court and say, "Would you check this
8 and see if it's all really truly legal business, because
9 by gosh, everything they do seems to be covered by
10 attorney/client privilege." And this bill is the one that
11 creates the mechanism for the court to police that.

12 MR. CHAIRMAN: I noticed you were looking
13 through -- did you find out whether or not -- you know,
14 what's the definition of a "person?" Rep. Madden.

15 REP. MADDEN: (Inaudible) change. It does
16 include corporations, limited by (inaudible) --

17 MR. CHAIRMAN: Okay. So if we're going to -- if
18 we're going to go to a loser-pay kind of scenario here,
19 what's the limitation?

20 You can have a high-priced, you know, panel of
21 attorneys that, you know, are 400 or 1,000 bucks an hour
22 in some cases. And they go in there and they have the
23 power and the ability and the resource to be able to
24 discover and get information.

25 And then -- I mean, the poor schlepp that's a

1 normal citizen barely can afford a hundred dollar an hour
2 attorney, to be able to get information. And they lose,
3 and the corporations win.

4 REP. MITCHELL: A valid concern, Mr. Chairman.
5 A corporation is also a private party with rights provided
6 by law, and if they're engaging in some kind of
7 development or public work, or even public reporting, in
8 which the public has an interest, number one, there's no
9 principle or philosophical reason they should be treated
10 differently from anyone else.

11 But number two: when courts award attorney
12 fees, it's always subject to a standard of reasonableness.
13 And if with authority to award fees, courts are often
14 skeptical of inflated fee claims. And so if it's a
15 question of something as trivial as "Give me the
16 maintenance records on parking meters for the last month,"
17 and it turns out to be a fight over that, the court would
18 cast a jaundiced eye on five high-powered attorneys
19 billing thousands of hours, trying to ferret that out.

20 There's the safeguard of the court applying the
21 law, and determining what a reasonable attorney fee is.

22 MR. CHAIRMAN: Okay. Further questions from the
23 committee? Rep. Rippy.

24 REP. RIPPY: Thank you, Mr. Chairman. Rep.
25 Mitchell, you discussed 14 days being the trigger for

1 hiring of an executive. Is that covered in amendment,
2 'cause I don't find that in the bill its- --

3 MR. CHAIRMAN: Rep. Mitchell.

4 REP. MITCHELL: Mr. Chairman, and Rep. Rippy,
5 that one I may have to stand corrected on. This is one
6 provision of the bill that I don't have quite as clearly
7 wired in as the rest.

8 And I'm taking the 14 days from the sections --
9 Section 3 of the bill on page 9 says that "Executive
10 position" is any non-elective, employment position --
11 well, I'm sorry. You don't have an amendment in front of
12 you that's going to be proposed.

13 And the amendment refers to the finalists that
14 are made public pursuant to a section of existing law.
15 That section of existing law is -- well, I'll find it in
16 a minute -- 24-6-402 (3.5.)

17 That paragraph says that "A state or local
18 public body shall make public the list of all finalists
19 under consideration for the position of chief executive
20 officer no later than 14 days prior to appointment."

21 That's in the state code right now. 24-6-402
22 subparagraph (3.5) And it talks about making finalists
23 public after 14 days.

24 If I've botched that portion, and then one of
25 the experts that come behind me will correct that.

1 MR. CHAIRMAN: Thank you, and that clarifies it.
2 But is -- and I understand that it's in statute now. But
3 how do you know when 14 days is, that you don't really
4 know when you're going to make it official, or if that
5 date moves?

6 REP. MITCHELL: Because that becomes a
7 requirement; you can't make it official until the required
8 time period after they go public.

9 MR. CHAIRMAN: So as -- as a candidate thinking
10 they're under the 14 days, and therefore have some
11 protection, but have no control over the people that are
12 making the decision, and you thought you were outside the
13 14 days, but now all of a sudden because of their timing
14 you're within the 14 days, and therefore disclosed. Is
15 that the way it would work?

16 REP. MITCHELL: I don't have a good answer for
17 that, and I'll have to hope that someone behind me can
18 clarify it, and if they can't, then I'll get the answer
19 and get it to you before we're done.

20 MR. CHAIRMAN: Thank you. Rep. Coleman.

21 REP. COLEMAN: Thank you, Mr. Chair. Rep. --

22 MR. CHAIRMAN: "...man."

23 REP. COLEMAN: -- Mitchell -- "Chairman," excuse
24 me. You can call me a Coleperson. How's that?

25 On page 10, lines 4 through 11, is this 14 day

1 thing going to be the replacement of what's crossed out
2 here, or is this two entirely different things?

3 REP. MITCHELL: Mr. Chairman. Actually, there
4 was some conflict in the law, because this -- this
5 crossed-out language is existing law, and it refers to 21
6 days. There's another section that refers to 14 days. And
7 it's not going to replace it, but it is going to remain in
8 effect while the 21 days goes away.

9 So it's going to clear up an ambiguity that
10 currently exists. It wasn't clear whether the lists went
11 public at 21 or 14, under particular circumstances.

12 REP. COLEMAN: Thank you.

13 MR. CHAIRMAN: Rep. Vigil.

14 REP. VIGIL: Thank you, Mr. Chairman. Rep.
15 Mitchell, on page four you make reference to an in-camera
16 review. Would you remind me as to what -- what do you
17 mean by "in-camera review?"

18 REP. MITCHELL: Rep. Vigil, "in-camera" is fancy
19 speak for in the judges chambers. It won't be in public
20 or open court, but in private. And that's where the judge
21 will conduct the review to determine if the public body
22 kept to the proper subjects in executive session.

23 REP. VIGIL: It'd be nice if the attorney spoke
24 English.

25 MR. CHAIRMAN: Any other questions, before we go

1 to witnesses? We have three signed up that are in favor
2 of the bill. One which has no position, and one that's
3 against. Would you have any preference, Rep. Mitchell?

4 REP. MITCHELL: I would like to hear from the
5 opponents first, and then from the supporters.

6 MR. CHAIRMAN: Rep. Coleman?

7 REP. COLEMAN: Mr. Chairman, I do -- I do have
8 one question, but if it comes up in testimony, Rep.
9 Mitchell, feel free to say so.

10 But when you first started out your testimony,
11 and you talked about the same form of the record when you
12 go into executive session, will be the same form as in
13 open session, will there be testimony that tells us the
14 reason why you're choosing not to just have minutes?

15 REP. MITCHELL: I'm not sure whether that'll be
16 covered in testimony, so I'll cover it now.

17 REP. COLEMAN: Thank you.

18 REP. MITCHELL: And that is that the purpose
19 here is to hold accountable maybe some of the problem
20 areas not everyone else, who in good faith, is following
21 and complying with the law.

22 And if you're dealing with the problem area, it
23 might be someone who's inclined to fudge on the minutes,
24 or just simply ignore improper discussion.

25 And so it's only fair that if a public body has

1 the resources and the equipment, and so forth, to tape its
2 meetings -- it can tape its private session, too, and that
3 is a reliable record, rather than a subjective record.

4 MR. CHAIRMAN: Continue.

5 REP. COLEMAN: Thank you, Mr. Chairman. The
6 reason I asked the question is, because I would imagine
7 that sometimes executive meetings aren't necessarily in
8 the same room and the same recording ability may not be
9 there, and that's why I asked the question.

10 MR. CHAIRMAN: (Inaudible)

11 REP. MITCHELL: Thank you, Rep. Coleman. There
12 will be an amendment to clarify that it doesn't have to be
13 exactly the same. If there's a big, fancy hearing room,
14 with a digital recording session, when the public body
15 retires to its private room, it can just lay down a
16 cassette tape player. Any kind of electronic recording
17 will satisfy the requirement, and it doesn't have to be
18 identical to the large public one.

19 MR. CHAIRMAN: Rep. Mitchell, are you going to
20 pass out the amendments for us to review now, or --

21 REP. MITCHELL: Sure.

22 MR. CHAIRMAN: -- do you want to wait? Rep.
23 Cadman.

24 REP. CADMAN: Thank you. Hey, Rep. Mitchell,
25 what -- what prompted your sponsoring of this legislation?

1 Or who?

2 REP. MITCHELL: Two or three things, Rep.
3 Cadman. I believe strongly in the policies behind the
4 open-meetings, open-records law. Often you hear about
5 ideas, and you know, lobbyists or interested parties
6 bringing this up, and --

7 REP. CADMAN: Yeah?

8 REP. MITCHELL: -- and I think it's important
9 that our business be open and accountable to the public.

10 There were representatives of the media that
11 came to me, and shared concerns about challenges that --
12 not only members of the media had had but also information
13 they got from members of the public, and small towns and
14 elsewhere about some of the problem situations where local
15 government didn't follow the law. And I thought that was
16 compelling that we should do something to make it clearer
17 and more enforceable.

18 REP. CADMAN: Did they bring any specific
19 evidence of things, or are these just allegations that
20 haven't been substantiated?

21 REP. MITCHELL: Two comments. They did bring
22 specific evidence. There was a series of articles in the
23 paper this summer about kind of a statewide project that
24 they did to go into different towns and make requests for
25 records that were clearly covered by open records. And in

1 many cases they were denied. But when --

2 REP. CADMAN: Specifically pertaining to
3 executive session?

4 REP. MITCHELL: Records, in general. And they
5 also brought stories about executive session.

6 Now, I've talked to someone, a citizen recently,
7 who was participating in a local meeting, and had to leave
8 for the executive session. And after the session, members
9 talked to him about things that they'd discussed. They
10 didn't realize that they were revealing wrongdoing -- not
11 necessarily malicious wrongdoing.

12 But they talked to him about things in the
13 executive session that had nothing to do with the call for
14 executive session. And they weren't even aware that they
15 were breaking the law.

16 And I guess -- and one final point, when you
17 say, "Is it stories or is it specific evidence," we don't
18 have proof beyond a reasonable doubt court of law standard
19 in this body, to receive information to find that
20 something is worth acting on. And they brought information
21 that I found credible, and that I thought should be
22 responded to.

23 REP. LAWRENCE: Mr. Chairman?

24 MR. CHAIRMAN: Rep. Lawrence.

25 REP. LAWRENCE: Thank you, Mr. Chairman. If

1 this is an open meeting, and I think Rep. Cadman asked you
2 who asked you to carry the legislation?

3 REP. MITCHELL: Oh, I said members of the media.
4 Do you want me to say --

5 REP. LAWRENCE: Yeah.

6 REP. MITCHELL: -- the Press Association?

7 REP. LAWRENCE: No.

8 REP. CADMAN: Would it be helpful, Rep. -- oh,
9 Mr. Chairman?

10 MR. CHAIRMAN: Oh. Rep. Cadman.

11 REP. CADMAN: Would it be helpful, Rep.
12 Mitchell, if under our committee rules we use Section 5,
13 and requested an executive session of this committee?

14 REP. MITCHELL: I don't think it would fall
15 under one of the enumerated reasons for going into
16 executive session.

17 REP. LAWRENCE: Excuse me, M- --

18 REP. CADMAN: You wouldn't know that till we
19 were in the executive session, though, would you?

20 REP. LAWRENCE: This is not an unusual request.
21 We have asked (inaudible) --

22 REP. MITCHELL: Oh, no, no. I told you. The
23 Press Association. Do you want --

24 REP. LAWRENCE: You mean, there un- --

25 REP. MITCHELL: -- specific names?

1 REP. LAWRENCE: Yes.

2 REP. MITCHELL: Oh, Originally it was Joanie
3 Ringo and Greg Romberg who came to me and said that their
4 clients, and their "clients" being the press association,
5 had concerns. I've since heard from members of the
6 broadcast media as well, speaking in strong support.

7 And then I heard from citizens, once the bill
8 got a little bit of public notice. I've gotten calls
9 and e-mails from citizens saying, "Thank you. I have
10 government that won't -- won't give me what they're
11 supposed to give me."

12 REP. LAWRENCE: Thank you.

13 MR. CHAIRMAN: Rep. Mitchell, on page 5, that
14 refers to discussions of individual students by local
15 public body pursuant to Paragraph H of subsection 4, of
16 this section. And I would -- I didn't find that. Can you
17 help me out here? Paragraph H of subsection 4, of this
18 section. I didn't see it.

19 REP. MITCHELL: Mr. Chairman, please direct me
20 to the --

21 MR. CHAIRMAN: At page 5, line 13 through 15,
22 and it refers to parts of this section, which I would
23 presume is section 1, paragraph 4 of subsection 4, of this
24 section. And I can't find it, and I was wanting to do --

25 REP. MITCHELL: Yeah. The difficulty there, Mr.

1 Chairman, is that's referring to a section of existing law
2 and not a section of the bill, so we'll have to go to the
3 state code.

4 MR. CHAIRMAN: I see. All right. Why don't you
5 just make a note of that, while this is --

6 REP. MITCHELL: Okay.

7 MR. CHAIRMAN: -- moving forward. Are there any
8 other questions of the sponsor, before we go to -- Rep.
9 Madden?

10 REP. MADDEN: Mr. Chairman, you want me to read
11 you that section?

12 MR. CHAIRMAN: Sure.

13 REP. MADDEN: "H" refers to discussion of
14 individual students where public disclosure would
15 adversely affect the person or persons involved.

16 MR. CHAIRMAN: Okay. Rep. Rippy.

17 REP. RIPPY: Thank you, Mr. Chairman. Rep.
18 Mitchell, excuse me for -- maybe this is covered somewhere
19 else in the statutes that I don't know about.

20 But first of all, is e-mail communications
21 covered by all this, if members of a body are
22 communicating via e-mail for what may be construed as part
23 of their regular business? And are those e-mails to be
24 held in abeyance for inspection?

25 MR. CHAIRMAN: Rep. Mitchell.

1 REP. MITCHELL: Mr. Chairman, and Rep. Rippy, my
2 understanding of existing open records law is that e-mails
3 on public resources or laptops, for example, are public
4 records to the extent they exist, and they're in the
5 system. This bill doesn't affect one way or the other
6 what is a public record, but if you're asking what is
7 currently included, my understanding is that e-mails are
8 there.

9 The only effect that this bill would have on it
10 is again if someone makes a request for any public record
11 of any kind, and is denied, and then they have to go to
12 court to get access to those records, they get their
13 attorneys fees paid by the government, if they win, and it
14 turns out that the government's position was wrong.

15 MR. CHAIRMAN: Why don't we start with Chip
16 Taylor. Welcome to IT Committee.

17 MR. TAYLOR: Thank you, Mr. Chairman. My name
18 is Chip Taylor. I'm here on behalf of Colorado Counties
19 Incorporated.

20 I knew checking that "opposed" box would get me
21 in trouble at some point here along the way. CCI is, in
22 fact, opposed to House Bill 1359.

23 We discussed this with the commissioners
24 extensively at our general government steering committee
25 meeting last Friday, and I think that they are

1 appreciative of the amendments that have already been made
2 to the bill, as it was introduced, and also of the
3 amendments that will be offered today to make the bill
4 more workable.

5 But they continue to be concerned about how the
6 bill impacts their ability to use executive sessions
7 effectively. From their perspective, the executive
8 session option is intended for very limited circumstances,
9 where privacy and confidentiality is actually in the
10 public interest.

11 And it's also their belief that the executive
12 session option hasn't been widely abused at the county
13 level, and so they have some questions about the need for
14 these statutory changes.

15 At the same time, the commissioners also
16 recognize that there's no means of checking compliance
17 with the executive sessions law. And they understand that
18 this is one of the primary purposes of House Bill 1359.

19 When they look at the bill in that light, what
20 the instructions they gave to me on Friday were, to
21 continue to oppose the bill, but at the same time,
22 continue to work with the bill's sponsor, and other
23 folks who are interested in the bill, to insure that
24 the creation of this enforcement process doesn't destroy
25 their ability to use executive sessions when the

1 circumstances warrant it.

2 Just by way of illustration, a couple of the
3 things that have happened to the bill, as it's come along.
4 One of the original concepts was just to require that all
5 executive sessions be taped, and not everybody taped the
6 public portions of their meetings, very rarely go into
7 executive session, and the question was raised, "Geez, do
8 we have to tape?"

9 Ultimately, as the bill has been introduced, it
10 also allows minutes to be taken, if that's the way you
11 record the public portions of your meeting.

12 We had extensive conversations about the
13 announcement of the topic, and what -- what kind of
14 announcement would have to be made, in order to go into
15 an executive session. And I think the language that you
16 see in the bill reflects something of a compromise on that
17 as well.

18 The commissioners were very appreciative of the
19 provisions in the bill that preserve attorney/client
20 privilege conversations, and don't require minutes of
21 those portions of the discussions with an attorney -- with
22 the county attorney -- as well as the executive search
23 provisions.

24 I might add that the amendment L.001 that I
25 think will be offered later, contains several provisions

1 that also we feel enhance the bill. And I guess I'd ask
2 the chairman, is it appropriate for me to speak to the
3 amendment, or should I try to do that just generally, at
4 this point?

5 MR. CHAIRMAN: Go ahead.

6 MR. TAYLOR: A couple of things that the
7 amendment would do is, one, allow any form of electronic
8 recording. We had some concerns about the language that
9 says that the recording has to happen in the same manner
10 and media that the public meeting is recorded in,
11 particularly in the circumstance, I think Rep. Coleman
12 referred to, where you have a built-in, digital recording
13 system in your courthouse. And it appeared that we were
14 going to have to clear the public hearing room, in order
15 to do the executive session, because that's the only way
16 to record in the same manner and media.

17 The amendment contains language on page 2 that
18 says any form of electronic recording is acceptable. And
19 it also insures that counties can take minutes, that
20 counties that do already currently take minutes of their
21 public sessions, can also record their executive sessions,
22 in order to avoid some of the issues associated with
23 bringing somebody new into the executive session, in order
24 to take the minutes.

25 There's language on page 3, lines 2 to 4, that

1 relate to a question, I think, the chairman had earlier,
2 concerning the use of executive session minutes. And that
3 language clarifies that the local public body is able to
4 use its own executive session minutes, and we felt like
5 that was a positive change.

6 The records retention schedule. There's a
7 provisions on page 3 of the amendment, lines 6 through 9,
8 that say that a local -- whoops -- that a local public
9 body can -- has to maintain the records for at least 180
10 days after the executive session.

11 We really appreciate having the definite time
12 frame. Obviously we were interested in a shorter time
13 frame, much more like 30 or 60 days.

14 I think that the proponents of the bill, wished
15 an even longer time period, then came into the amendment.
16 So while we would rather see it shorter, we do like having
17 a definite time frame, and know when these records are
18 okay to be destroyed.

19 The last one I guess I want to mention is the
20 one that's at the very end of the amendment, on page 4,
21 line 16 through 20, that are Notice Provisions that say,
22 "If you're going to make one of these open records
23 requests, if you're going to file suit..." or "...file a
24 lawsuit..." in order to have these records released to the
25 public, but you have to give the local public body three

1 days notice before you can do that."

2 We felt like this was an important change for a
3 couple of reasons. One is, one of the other changes
4 that's made in the bill, on page -- on page 10 of the
5 bill, down at the bottom, there is existing law that says
6 that "...if a custodian arbitrarily and capriciously
7 denies access to open records, that the custodian would be
8 personally responsible for paying the applicants costs and
9 attorney fees."

10 With that language being stricken, then we felt
11 like it was important to make sure that notice got kicked
12 up to somebody who was going to be responsible to pay the
13 bills. And so this notice provision would insure that the
14 local public body actually got notice that somebody had
15 requested records, and that they would have an opportunity
16 then to say "Well, we think you ought to release those
17 records anyways, because it's not worth us going through a
18 lawsuit over whatever the record happens to be."

19 I guess the only other things I'd like to
20 mention is, there are some additional provisions in the
21 amendment that are new, that we haven't had a chance to
22 review. I think Rep. Mitchell will address at least one
23 of those.

24 The attestation provisions that are on page 2 of
25 the amendment, lines 16 through 19, and also page 20 -- on

1 lines 24 through 30, are new attestation provisions.

2 At this point, I can't really express objection
3 or acceptance of that language; only that we haven't had a
4 chance to look at it and consider what the ramifications
5 of that might be, so I would draw your attention to those
6 as well.

7 I think the bottom line for the county
8 commissioners is that they don't -- they don't want to
9 have to -- they don't understand the need for the bill at
10 this point, but they also recognize that there is an
11 absence of enforcement provisions, and they feel like the
12 amendment helps the bill substantially, and would ask for
13 your support.

14 MR. CHAIRMAN: Rep. Marshall?

15 REP. MARSHALL: Thank you, Mr. Chairman. As
16 long as you're explaining the amendment, I would like to
17 understand what you're trying to get accomplished on page
18 4, lines 3 through 7.

19 MR. CHAIRMAN: Continue.

20 MR. TAYLOR: Mr. Chairman. That's some of the
21 new -- Rep. Marshall, that's some of the new language that
22 we haven't had a chance to review at this point. We just
23 saw this for the first time yesterday afternoon, and the
24 sponsor may want to address that.

25 REP. MARSHALL: Okay.

1 MR. CHAIRMAN: Rep. Mitchell.

2 REP. MITCHELL: Mr. Chairman. Rep. Marshall,
3 that is a clarification of existing law, regarding
4 executive session. As you know, the open -- or the
5 default provision is, all meetings of public bodies
6 are public.

7 There are certain limited purposes for which a
8 body can go into executive session. And they're set forth
9 at 24-6-402, subparagraph (4), and it lists several
10 reasons. A, B, C, D, E, F, G, H, I.

11 One of the authorized reasons for going into
12 executive session is, to determine positions relative to
13 matters that may be subject to negotiations, and
14 developing strategy for negotiations, and instructing
15 negotiators.

16 The obvious purpose behind a negotiation part of
17 executive session is to allow a public body to formulate
18 its plan, and to negotiate. If that were public, if we
19 had to say right up front how much we would be willing to
20 pay for a piece of property, that would not serve the
21 public interest, if the owner knew what the government's
22 bottom line was.

23 So we can formulate negotiating strategy in
24 private. That's existing law, and that's the purpose of
25 the law.

1 The problem, and what this amendment is designed
2 to correct is that there are government bodies that have
3 stretched that to conduct actual negotiations in private.
4 That's not what this is about. This is about allowing the
5 government to prepare its negotiating position, to
6 instruct its negotiators.

7 But once you bring in the third party, the arms-
8 length party that you're negotiating with, that's no
9 longer confidential. You're not keeping anything secret
10 because you're giving it to your adversary in the process.

11 That information should go out to the public.
12 And this amendment is designed to clarify any actual
13 negotiations between a public body, and a third party,
14 can't remain private. They are open.

15 Now, it's -- you know, if we draft it, because
16 it refers only to collective bargaining units, and I would
17 suggest that it would be better if it just referred to
18 "any third party, any actual negotiation" between the
19 public body and the third party, is a public meeting; not
20 an executive session.

21 MR. CHAIRMAN: Further questions of Chip? Thank
22 you, Chip.

23 MR. TAYLOR: Thank you, Committee.

24 MR. CHAIRMAN: Rep. Coleman.

25 REP. COLEMAN: Thank you, Mr. Chairman. Rep.

1 Mitchell, I know you gave a long dissertation about why
2 you can have 3 through 7, but it's still not clear to me
3 where this is coming from. Was this just on your part to
4 clarify how collective bargaining is done, or is there a
5 driving force behind this amendment in your negotiation?

6 REP. MITCHELL: It comes from two experiences.
7 I was thinking about the issue myself, because I was once
8 involved in negotiations with a school district, on behalf
9 of a charter school, and the school district invited us
10 into a negotiating session, and then told us that it was
11 executive session and confidential, and we were obligated
12 to keep the negotiations secret.

13 And I thought, "That doesn't sound right. The
14 district can't bargain with us, and then tell us we have
15 to keep secret what they tell us." So I was looking for
16 an opportunity to clarify that.

17 When another legislator noticed that I had this
18 bill, they said, "Hey, what about collective bargaining
19 negotiations, too? I've heard that they often do that in
20 secret, and that doesn't seem to fit under the law," and
21 it doesn't fit under the law." And so between my idea and
22 the other legislator's idea, that sprouted this paragraph.

23 MR. CHAIRMAN: Continue.

24 REP. COLEMAN: Thank you, Mr. Chairman. And I
25 guess having worked in a company that did collective

1 bargaining, at least every three or four years, I guess
2 I'd rather be bothered with the resulting (sic) of all of
3 that negotiation, versus the back and forth.

4 And I also understand that it's very heated.
5 Both sides have their position, the corporate side as well
6 as the collective bargaining. But in the end, you know,
7 they come up with something.

8 And so I guess I would like to understand what
9 your position was in those negotiations? Were you acting
10 as an attorney, and -- or were you acting as a school
11 board member? I'm not sure that I understood what you
12 meant by that -- when you were asked to keep that secret?

13 REP. MITCHELL: Rep. Coleman, I was acting as
14 an attorney for a charter school. And the district
15 negotiated with us, and then told us we were required to
16 keep those negotiations secret, the district school board.

17 MR. CHAIRMAN: Rep. Marshall.

18 REP. MARSHALL: Thank you, Mr. Chairman.

19 MR. CHAIRMAN: Okay. Jeff Wilson -- George
20 Wilson.

21 MR. WILSON: Good morning, Mr. Chairman, and
22 members of the Committee. I'm Geoff Wilson. I'm general
23 counsel of the Colorado Municipal League.

24 I believe a formal position on this bill is
25 neutral. We have had extensive discussions about this

1 bill, both in our policy committee and numerous times
2 before our executive board.

3 The -- as Rep. Mitchell pointed out, the
4 Colorado Open Meetings Act reflects public policy that
5 local and state public bodies are engaged in doing the
6 public's business, and that that business ought to be done
7 in public.

8 The Act also reflects, however, that certain
9 narrow classes of discussion, certain topics, are best
10 discussed in private; that the public interest is best
11 served by those discussions occurring in private.

12 Our goal in the discussions that have taken
13 place in connection with this bill has been to assure that
14 the mechanism that is developed to police compliance with
15 the existing requirements of the Open Meetings Act -- and
16 I agree with Rep. Mitchell, that's the focus of this
17 bill -- that the mechanism developed to do that is not so
18 burdensome or cumbersome that it frustrates the public
19 interest behind the executive session authority by making
20 those sessions less effective.

21 I suspect that all of us that have been involved
22 with this bill would agree that the abuses of the
23 executive session procedure reflected in current law are
24 the exception, rather than the rule, among state and local
25 government entities. So our goal, again is -- in these

1 discussions, has been to make sure that the cure is not
2 worse than the disease.

3 The bill is still a work in progress. Chip
4 Taylor went through some of the efforts that have been
5 made so far on this bill. I'm not going to repeat all
6 of those.

7 He also alluded to the amendment that we
8 received late yesterday. We were aware of various
9 provisions of that amendment, and I must say that I want
10 to complement both the Press Association and Rep. Mitchell
11 for the course of discussions on this bill that's been
12 very open.

13 Fairly recently here, we've received some new
14 language that we haven't had a complete chance to analyze,
15 but, in general, the level of communication has been very
16 open on this bill.

17 I want to highlight one other provision of the
18 bill that I think Chip referred to, but I want to
19 emphasize it as an important development that has been
20 made in drafting the bill. That's on page 11, at lines
21 18 and 19.

22 This is the provision where the complainant, the
23 person who believes something has gone wrong in the
24 executive session, has to present the judge with grounds
25 sufficient to support a reasonable belief that something

1 went awry.

2 We were very anxious to make sure that the bill
3 included an objection person standard for the judge to
4 have to find, rather than a subjective belief on the part
5 of the complainant.

6 We have people in our communities, of course,
7 who believe that any executive session indicates that
8 something untoward is going on. And this language will
9 make sure that that sort of fear is not alone sufficient
10 to trigger an in-camera review of the minutes.

11 Discussions are continuing on various aspects of
12 this bill. And we look forward to continuing to refine
13 this legislation as it goes through the process.

14 I'm here beyond those introductory remarks
15 primarily as a resource, Mr. Chairman.

16 MR. CHAIRMAN: Any questions from the Committee?

17 Geoff, I also wanted to ask you what I asked
18 Rep. Mitchell about the way that this thing is constructed
19 on subparagraph B of page 3, and then paragraph D on page
20 4 and 5, and then how it relates to paragraph C?

21 I'm just wondering if there is any -- the way
22 that this is -- the language is worded here, if
23 subparagraph B was implemented by -- by the government
24 body, whether or not there would be sufficient discovery
25 to be able to substantiate a claim?

1 MR. WILSON: Well, I would -- I would echo what
2 Rep. Mitchell said earlier. My understanding is the same
3 as his of the interplay between these two sections.

4 I really viewed the subsection D -- and this is
5 part of the bill on page 4, beginning on line 26, and then
6 going over to the top of page 5 -- this is a part of the
7 bill dealing with state public bodies, but as Rep.
8 Mitchell mentioned earlier, there are parallel provisions
9 for local public bodies.

10 There is, at the top of page 5, the exception
11 for the procedure provided for in this bill. So the --
12 the procedure for the complainant to go to the judge, so
13 grounds sufficient to support a reasonable belief that the
14 body either got off topic, or made an improper decision in
15 executive session. You could still do that.

16 This language is -- is to serve another purpose,
17 Mr. Chairman. There is a court case -- there was a court
18 case issued a few years ago that held that even though a
19 record -- a particular type of record -- in that case it
20 was a personnel file, is not discloseable under the Open
21 Records Act, that record may, nonetheless, be discovered
22 in ordinary civil litigation.

23 We wanted to make sure in this bill that the
24 minutes made of executive session were preserved for the
25 purpose for which they're created in this bill; that is,

1 policing compliance with the Open Meetings law.

2 The purpose of making this record is not to
3 provide a discoverable record for somebody suing the
4 state, or a local public body over, let's say, a real
5 estate deal that went south. So that's the purpose of
6 this language.

7 MR. CHAIRMAN: So -- I mean, it's almost like
8 going -- looking through glass, and seeing the puppy in
9 the window, but not being able to touch it. You can see
10 it, but you can't use it, you can't touch it. Is that
11 what it -- is that what the purpose is?

12 MR. WILSON: The judge will look through the
13 glass, and be able to touch the puppy.

14 [General laughter.] And that's what we're
15 intending with this bill.

16 MR. CHAIRMAN: They get all the perks.

17 MR. WILSON: And to the extent the puppy is
18 misbehaving, the puppy's misbehavior may then be made
19 public by the judge, to torture the metaphor even further.

20 MR. CHAIRMAN: Rep. Mitchell.

21 REP. MITCHELL: Two quick points, Mr. Chairman.
22 Oh, by the way, I apologize for calling on the chairman
23 earlier. I just realize I only did it because you raised
24 your hand.

25 I'm not sure I understand your concern about

1 putting this information off limits, because the part that
2 says you can't discover it in litigation has a very clear
3 exception, except as provided in subparagraph C.

4 Subparagraph C is the one that provides for the court
5 review if someone challenges the public body's handling of
6 it's executive session.

7 I guess there is one other issue you raised,
8 which is what about the attorney/client part, where they
9 don't have to record it? That might be abused, and all I
10 can say is -- repeat what I said earlier.

11 If the pattern emerges that everything in
12 executive session turns out to be attorney/client, that in
13 itself might be grounds to have a court review the
14 minutes, or to even examine participants in the meetings.

15 MR. CHAIRMAN: Okay. I guess maybe that's just
16 the way I'm reading the subparagraph C, because it appears
17 to me that one potential application of this could be that
18 there isn't an -- there isn't an avenue available when you
19 exclude judicial proceedings if this -- it's considered a
20 judicial proceeding, is it?

21 REP. MITCHELL: It's excluded from judicial
22 proceedings, except as provided in subparagraph C. That
23 judicial proceeding, to review the record of the executive
24 session is permitted. It's excluded from other judicial
25 proceedings.

1 MR. CHAIRMAN: So then if I was concerned about
2 what happened with the oral board, or some board, okay?
3 And I said, "I think something is going on," so then
4 during that in camera review, all of that information
5 would go through, and the judge would allow that to
6 happen?

7 REP. MITCHELL: The puppy would come right into
8 the judges chamber.

9 MR. CHAIRMAN: Right. Thank you. Rep. Madden?

10 REP. MADDEN: I'm okay. Thanks.

11 MR. CHAIRMAN: Okay. Any other questions?

12 Thanks, Geoff. Okay. Rep. Coleman?

13 REP. COLEMAN: Thank you, Mr. Chairman. If we
14 can have the witness come back, I'd like to ask one more
15 question regarding the attests -- I can't say the word,
16 the "attesting," on page 2 of the amendment, 16 through
17 23.

18 Should the person not attest accurately that the
19 recording doesn't reflect the minutes, or vice versa, or
20 whatever, and then somebody can prove differently, what,
21 in your opinion, is the consequence, should that person
22 not have attested fairly? Attested accurately, is what
23 I'm trying to say. What is that -- what do you think the
24 consequences --

25 MR. CHAIRMAN: Go ahead.

1 MR. WILSON: Perhaps Rep. Mitchell could better
2 respond than I. This is -- Chip Taylor referred to some
3 language that we have only recently seen. While I heard
4 about this concept earlier, Rep. Coleman, and have
5 actually seen the language, and consequently I haven't
6 farmed it out to our people to ask them what the
7 consequence would be.

8 REP. COLEMAN: Thank you.

9 MR. CHAIRMAN: Thank you. Rep. Mitchell.

10 REP. MITCHELL: Thank you, Mr. Chairman. Rep.
11 Coleman, there is no penalty or consequence provided for
12 the minute taker if the attestation is inaccurate.

13 However, this is still a matter of public
14 visibility and public accountability. The consequence
15 for the public body, if the judge finds out that there is
16 discussion going on, is that the record gets made public.
17 The consequence for the individual is that they are then
18 publicly held to certify a false statement.

19 MR. CHAIRMAN: Continue.

20 REP. COLEMAN: Thank you, Mr. Chairman. And
21 Rep. Mitchell, it does bother me, because most school
22 boards in the State of Colorado are unpaid members. I
23 don't know of any that are paid.

24 And I have to tell you that if indeed it gets
25 reported in the press -- because I've not known too

1 many -- every story to be exactly accurate as you were
2 quoted, you know, it can ruin a person's, you know,
3 career, or their reputation. And I'm really concerned
4 about this sort of language in this sort of bill.

5 I mean, already it happens, even though, you
6 know, those of us who were elected every time we get
7 quoted, there's always that chance that they're going to
8 use a word that means something else and you're misquoted.
9 So I'm really concerned about this language on line 16 to
10 23 of the amendment, page 2.

11 MR. CHAIRMAN: (Inaudible), Rep. Mitchell.

12 REP. MITCHELL: Thank you, Mr. Chairman. First
13 a general observation, Rep. Coleman.

14 One of the benefits of serving in the public is
15 that you can do things that have a public impact. One of
16 the challenges of public service is that the public can do
17 things that have an impact on you, but that's just
18 reciprocal responsibility that we accept when we put
19 ourselves forward into policy making roles.

20 All I can say is, at least the language is
21 measured and does not impose any penalty, as you first
22 asked about. There is no penalty.

23 And I don't think it's a heavy burden to ask
24 someone to say "Yes, this is accurate. We know that we've
25 conducted a meeting in secret and we're only providing

1 minutes of this meeting," so we should ask someone to
2 certify that this is an accurate reflection of those
3 minutes.

4 MR. CHAIRMAN: Rep. Madden, then Marshall.

5 REP. MADDEN: Thank you, Mr. Chairman. You mean
6 to say, and excuse my ignorance, but there's no liability
7 for someone who falsifies an affidavit that they know
8 might be used in court? I would think that that does open
9 them up to personal liability, maybe not for the state
10 employee.

11 REP. MITCHELL: There are legal documents like
12 notarized documents or sworn statements that you can be
13 charged with perjury.

14 The issue hadn't occurred to me, and I don't
15 believe that this fits into that category of document that
16 would constitute perjury.

17 So I'm forgetting right now if there's some
18 other consequence in the overall public meetings and Open
19 Records Act that imposes some personal consequence, but I
20 don't believe there is any kind of punishment for the
21 individual, at least as to this requirement.

22 MR. CHAIRMAN: Just have to pass a flat bill,
23 and it will be settled, right? Rep. Madden.

24 REP. MADDEN: When we get to this, I'm going to
25 move to strike this language on page one and page two that

1 make -- the first attestation.

2 Not -- I don't care if the attorney signs
3 something, 'cause that's part of their job, and that
4 portion of -- is not recorded. And we don't know if
5 there's personal liability for this person.

6 And I feel very uncomfortable putting this
7 burden on someone, plus it's something the judge can tell.
8 They look at the minutes, they look at the recording. It
9 just takes a little longer.

10 MR. CHAIRMAN: Rep. Mitchell.

11 REP. MITCHELL: Thank you. Rep. Madden, to -- I
12 think we have a misunderstanding. The person doesn't have
13 to -- if there is an electronic recording made, that
14 satisfies the requirement. And someone doesn't have to
15 prepare handwritten minutes of an electronic recording,
16 then that'll need to be clarified.

17 But the minutes that are made are of those
18 portions that don't have to be recorded. In fact, I think
19 it does say that to if -- recall that we impose a general
20 requirement of recording, but then we say, if it's
21 attorney/client, you don't have to record it. The
22 attorney prepares a record.

23 If it's discussion of individual students, you
24 don't have to record it. Someone will take minutes of the
25 discussion.

1 The other part about the minute taking is for
2 those jurisdictions that don't record their sessions.
3 They only take minutes. And then we say, if that's the
4 path you're going to take, then you have to certify the
5 accuracy of those minutes.

6 We don't ever try and set up a circumstance
7 where we're comparing a tape recording with minutes. We
8 don't care about minutes, if there's a tape recording.

9 MR. CHAIRMAN: Rep. Marshall.

10 REP. MARSHALL: Thank you, Mr. Chairman. Rep.
11 Mitchell, my comments actually are questions along the
12 same lines as Rep. Madden's.

13 I would really be concerned about the person
14 having the responsibility for this kind of certification,
15 and what kind of liability that may mean for that
16 individual. I can just see that this individual may
17 not be a person that is in a high level position in the
18 organization who is recording these minutes.

19 And I think it's a tremendous responsibility to
20 give to that particular individual. So I too would
21 disagree with this language.

22 MR. CHAIRMAN: I think I want to move back to
23 the public testimony on the bill, and we'll talk about
24 these amendments when we get to that. Let's see.

25 Ken, do you have any preference on the order of

1 those who are proponents?

2 REP. MITCHELL: Actually, if it's all right, I'd
3 like Steve Zansburg and Ken Amundson to come up at the
4 same time.

5 MR. CHAIRMAN: Okay. Steve and Ken. Rep.
6 Cadman, then Rep. Mitchell. How did you get (inaudible)--

7 REP. CADMAN: Rep. Mitchell, how does this have
8 no fiscal impact either on the judicial system or on local
9 governments that are going to now be required to maintain
10 records, or keep something you weren't in the past
11 required to do?

12 REP. MITCHELL: Rep. Cadman, I'd like to take
13 credit for extensive arm-twisting and influence with the
14 various government agencies that reviewed this, but I
15 didn't say a word to anyone. I was just pleased by the
16 fiscal note.

17 The judicial department reviewed it, and didn't
18 think there would be a high volume of review required, and
19 gave no fi- -- no fiscal note. And fiscal analysts
20 concluded that in most cases public bodies will be
21 following the law, and it won't -- it won't lead to
22 substantial litigation.

23 MR. CHAIRMAN: Ken, Steve, if you could
24 introduce yourselves.

25 MR. AMUNDSON: Mr. Chairman, and members of the

1 Committee, my name is Ken Amundson. In my professional
2 life I'm the assistant to the publisher of Lehman
3 Communications, which publishes newspapers in Loveland,
4 Longmont, Canon City, and Lafayette, Louisville and Erie,
5 all in Colorado.

6 I'm also currently the president of the Colorado
7 Press Association. And I'm pleased to have this
8 opportunity to speak with you today concerning the
9 Colorado Press Association's support for House Bill 1359.

10 I have made the public access my highest
11 priority during my year as president of this organization,
12 and this bill is the cornerstone of our legislative
13 priorities for this session of legislature.

14 We believe adamantly that the biggest threat to
15 representative government is when people don't have access
16 to the actions of their government, and we believe that
17 this bill will provide citizens with additional insight
18 into those actions.

19 As most of you know, and as has been explained
20 earlier, the CPA, in conjunction with the Associated Press
21 and the Freedom of Information Council conducted an
22 experiment earlier -- or rather last summer -- about the
23 open records law.

24 We visited every one of the 63 counties and
25 asked cities, counties, school districts for information

1 that was clearly under the law to be available under the
2 open records law.

3 And we were alarmed to find that in a third of
4 the cases, those records were denied. This bill will give
5 the public necessary tools to get records to which they
6 are already presently legally entitled to.

7 We have also heard concerns from our member
8 newspapers about numerous problems with likely abuses of
9 the executive session provision of the open records --
10 excuse me -- open meetings law, and we've included in some
11 packets, I think that were passed out the beginning of the
12 session, some samples of governmental bodies going into
13 executive session for one announced purpose, and then
14 coming out later and taking action on a totally different
15 topic without any discussion, and so forth. And there's
16 numerous examples in that packet.

17 And based on these concerns, we approached Rep.
18 Mitchell, and representatives of a number of governmental
19 organizations, and the result is the bill that you have in
20 front of you today.

21 While provisions of the bill do not go as far as
22 we would like to have, in some areas, we believe that HB
23 1359 will provide valuable tools to address the important
24 issues that have come to light.

25 The bill makes two revisions to the executive

1 session requirements. First, it establishes a requirement
2 that there be a record of what happens in executive
3 session. And then if a judge determines that parts of a
4 discussion in that session were improper, the judge may
5 order that part of the record to be made public.

6 This mechanism allows the public to have access
7 to the information that it was originally entitled to have
8 in the first place. Any part of an executive session that
9 was conducted properly remains closed to public view under
10 this bill.

11 Similarly the bill requires more disclosure as
12 to why public bodies are going into executive session.
13 Rep. Mitchell's bill will require public bodies to provide
14 greater specificity about why they are going into the
15 session, and then there is a caveat there that they not
16 compromise the reason for the executive session in the
17 first place. So there is a protection as well.

18 And then to address the issue of public records
19 being refused, the bill establishes that if a public
20 record is denied, and that a court, if it ultimately rules
21 that the record should have been made public, the
22 government, which improperly denied access to the record,
23 will have to pay the attorney fees for the person who
24 requested the record.

25 This change mirrors the existing provisions in

1 the open meetings law; puts them on the same basis. It
2 will ensure that when a member of the public fights for a
3 record which by law must be made available to the public,
4 and wins, he or she will not be unduly burdened by having
5 to pay the legal fees necessary to get something that
6 should have been handed over in the first place.

7 The bill also contains a provision which
8 clarifies requirements to name finalists for executive
9 positions, and limits the requirements to agency heads.
10 The change was requested by representatives of school
11 districts and local governments, and it's intended to
12 address concerns with the current law by keeping good
13 candidates from applying for positions in Colorado,
14 because of public disclosure requirements.

15 I frankly have some concerns about that
16 provision of the bill. But I understand that the
17 amendment that -- that you are seeing addresses some of
18 those concerns.

19 I want to thank you very much for your
20 consideration of this bill. Public trust in government is
21 a cornerstone of successful democracies, and this bill
22 will provide the public with tools to grant that trust.
23 Thank you very much.

24 MR. CHAIRMAN: We'll finish both the
25 testimonies, and then we'll take questions.

1 REP. (?): Okay.

2 MR. ZANSBURG: Good morning, Mr. Chairman and
3 members of the Committee. I'm Steve Zansburg. I'm an
4 attorney at Faegre and Benson here in Denver, and I
5 specialize in issues related to the first amendment and to
6 open government.

7 And I'm here today representing both the
8 Colorado Press Association, as well as the Colorado
9 Freedom of -- Freedom of Information Council, whose member
10 organizations include Colorado Common Cause, the League of
11 Women Voters, the Colorado Bar Association, the Library
12 Association, as well as the Broadcasters Association.

13 I should point out that the Freedom of
14 Information Council Board has authorized me to voice their
15 support for HB 1359, but that the member organizations
16 have not formally and independently taken a position on --
17 this bill.

18 Mr. Amundson has made most of the points that I
19 believe are the most salient. I just wanted to reinforce
20 a couple of them.

21 First, with respect to the recording of what
22 transpires in the executive session. When we receive a
23 complaint about violations of executive sessions, there's
24 virtually nothing that can be done to right that wrong.
25 It's difficult to prove that a violation has occurred, and

1 there's no way to provide the public with access to the
2 deliberations that took place.

3 Rep. Mitchell's bill rights these wrongs. It
4 establishes a requirement that records be kept, and allows
5 for those records to be made available to the public, if
6 necessary and appropriate, and upon a finding by a judge.

7 Executive sessions serve an important service
8 when they are utilized as intended and as allowed under
9 the law. However, when executive sessions are misused,
10 they cast doubt on the credibility of decision makers,
11 and on the decisions that they make. We believe these
12 provisions will help to insure that executive sessions are
13 utilized properly.

14 The second provision I wanted to discuss is the
15 attorneys fees provisions, which brings the Open Records
16 Act into conformity with the Open Meetings Law. We have
17 found that attorney fees are an important tool in
18 enforcing Colorado's Open Meetings Law, and we expect
19 similar success with the Open Records Act.

20 It usually takes nothing more than a letter of
21 reminder to a governmental entity, about the provisions of
22 the open meetings law, including reference to the
23 attorneys fees provision, to settle a dispute.

24 And I'm optimistic that enactment of this
25 provision in the open records law will not result in added

1 expenses to government, but instead will result in quick
2 resolution of disputes about whether to provide public
3 records to members of the public.

4 And in that respect, the three-day notice
5 provision that is part of the amendment offered today will
6 also help ensure that legal actions aren't instituted
7 before governmental entities are given the opportunity to
8 decide whether or not they want to re-visit a decision not
9 to provide records.

10 I thank you for your consideration of the bill,
11 and on behalf of both the Press Association, and the
12 Freedom of Information Council, I urge your support for
13 House Bill 1359.

-14 MR. CHAIRMAN: Rep. Coleman.

15 REP. COLEMAN: Thank you, Mr. Chairman. Ken,
16 regarding your comments of having gone through 63 counties
17 and discovered that records are closed or not as
18 available, why would you believe that the -- the press
19 would be able to dig up more than, say, a concerned parent
20 who's having an issue with the school board?

21 And believe me, I've been a concerned parent,
22 and a mighty mad one at times, and I dug until I got my
23 answers. So usually that is the tenacity of most parents
24 and most of the public regarding particular issues that
25 may happen with school boards. That's just one example

1 I'm using.

2 Why do you believe that you would dig more than
3 a tenacious parent?

4 MR. AMUNDSON: I don't. I believe very strongly
5 that these laws are here not for the press; they're for
6 the public. And frequently when the public is attempting
7 a -- a common, ordinary Joe Citizen is attempting to get
8 information, they might not have the resources to press a
9 case, and this particular provision with the Open Records
10 Law would place them on the same footing as the
11 governmental entity that they're attempting to get the
12 record from.

13 MR. CHAIRMAN: Further questions from the
14 Committee.

15 REP. COLEMAN: Yes.

16 MR. CHAIRMAN: Continue.

17 REP. COLEMAN: Thank you, Mr. Chairman. And so
18 you're responsible for killing this tree?

19 MR. AMUNDSON: My organization is, I guess, yes.

20 REP. COLEMAN: I have one more question.

21 MR. CHAIRMAN: Continue.

22 REP. COLEMAN: Thank you, Mr. Chairman. And
23 Steve, you made remark about the attorneys fees. I'm
24 trying to understand your line of reasoning there, so
25 could you put it in a little more layman's language on

1 that?

2 MR. ZANSBURG: Yeah. Currently, as Rep.
3 Mitchell pointed out, there's a disparity in how attorneys
4 fees are treated under the Open Records Act, and the Open
5 Meetings Law.

6 Under the Open Meetings Law, as it currently
7 stands, if a court finds that a governmental body
8 conducted a meeting in violation of the Open Meetings Law,
9 the plaintiff, the party bringing the legal challenge, is
10 entitled to collect his or her attorneys fees as a matter
11 of course, upon finding of a violation of the law.

12 The Open Records Act, as it currently stands,
13 places a much higher burden upon a party challenging
14 governmental bodies refusal to disclose records. So that
15 if the court finds that the records were improperly
16 withheld, the party, though successful in the litigation,
17 which frequently takes a year or two through appeals, et
18 cetera, nevertheless can't recover his or her attorneys
19 fees, unless the court finds that the refusal to disclose
20 the records was arbitrary and capricious. A fairly high
21 standard that is rarely, if ever, met.

22 So the bill would essentially treat open records
23 requests identically for attorneys fees purposes, to the
24 Open Meetings Law. But if the court finds that a record
25 was improperly withheld and should have been disclosed,

1 the prevailing party, the person who obtained disclosure
2 of the record, would be entitled to recover his or her
3 attorneys fees for bringing that action.

4 MR. CHAIRMAN: You have the floor.

5 REP. COLEMAN: Thank you, Mr. Chairman. So
6 basically you're saying that this would occur, if the
7 opening of -- you know, what did the records -- or the
8 executive session should have happens to be -- when you're
9 in litigation? So you're putting this up front to warn
10 people that if you choose to go this route, then -- and
11 should we turn up -- and so should it turn out that the
12 attorney is correct, and you know, all of those things
13 about releasing the information, then the fees would be
14 greater, is what you're saying? But it would be
15 litigation, and be two or three years down proving this?

16 MR. ZANBURG: Yeah. The two or three years is
17 a typical experience for fully litigating an Open Records
18 Act request. But essentially that is the point.

19 It is only -- attorneys fees are only
20 recoverable for litigation that's filed in court. And
21 my -- my -- the point of my remarks is that we have found
22 that the -- the provision in the Open Meetings Law that
23 provides for automatic attorneys fees to prevailing
24 parties has often been an additional incentive, or a
25 removal of a disincentive, really, from a governmental

1 body from deciding to conduct a meeting contrary to the
2 Open Meetings Law.

3 And we believe and hope that it will have the
4 same effect, with respect to open records, with a three-
5 day notice provision, provided to the governmental body
6 that we intend to initiate a lawsuit over a dispute over
7 records, unless you reconsider your position.

8 That will give the governmental body the
9 opportunity to decide whether or not they want to stick to
10 their guns and litigate it, or say, "It's not worth it.
11 Let's -- on further reflection, let's produce the records"

12 REP. COLEMAN: Thank you.

13 MR. CHAIRMAN: Further questions? Rep. Rippy.

14 REP. RIPPY: Thank you, Mr. Chairman. And for
15 anyone at this table, understand this is a subjective
16 question, but --

17 MR. CHAIRMAN: Thank you. Vice-chair is good
18 for something.

19 REP. (?): Very good.

20 REP. RIPPY: If this legislation was implemented
21 in the last year, how many times do you think it would
22 have been used? The point of the question is the
23 compelling need for it.

24 I see the tree that you've killed here, and I
25 see a baseball team in Hayden, that seems to get a lot of

1 press going back to 1999. I see some Plan and Review in
2 Basalt in the Roaring Fork Valley. And then I see a
3 problem down in Pagosa.

4 All in all, in what you've given us in your
5 anecdotal evidence about open records, doesn't lead to a
6 whole lot of abuse of the current open meetings law.

7 MR. AMUNDSON: I do know from experience of
8 attending a lot of governmental meetings over the past
9 couple of decades that -- that with the current status of
10 Colorado law, it becomes virtually impossible to show that
11 there has been a violation, because there is no evidence,
12 no record of it, which is the purpose of this particular
13 bill.

14 We believe fairly strongly that the existence of
15 this bill may eliminate the need for any litigation.
16 Those governments who are -- who are inclined to follow
17 the open meetings law will see this, and make it
18 unnecessary to have any legal action on it.

19 I can't answer your question in terms of how
20 many incidents there have been. I hear numerous incidents
21 almost weekly of things, that we suspect might be, but we
22 don't have -- have any evidence of it.

23 MR. CHAIRMAN: Rep. Mitchell.

24 REP. MITCHELL: Thank you, Mr. Chairman. I'll
25 defer to the witness, and then I have a (inaudible) --

1 MR. ZANSBURG: Rep. Rippy, I would say on the
2 order of a couple dozen instances, but -- with respect to
3 executive sessions.

4 The bill covers a great number of matters, and
5 the attorneys fees provision I mentioned covers all Open
6 Records Act requests, and I think it may in fact either
7 incentivize people, or more importantly not disincentivize
8 public bodies from turning over records.

9 I know of a number of cases just within the past
10 year that I fielded. Another aspect of the bill requires
11 specificity to declaring the purposes for which an
12 executive session is held.

13 And I would say every week or two we get calls
14 from our member newspapers that a governmental body has
15 simply said, "We're meeting to have a discussion with an
16 attorney," or "We're meeting to discuss real estate
17 transactions," or "We're meeting to have personnel
18 matters." But that's the sum total of what is disclosed.

19 No discussion of what type of litigation, which
20 pending case which is a matter of public record they're
21 discussing, or any other greater specificity.

22 I've also heard recently of cases within the
23 past year of a city body meeting for a conference with an
24 attorney, only no attorney was present. That has happened
25 actually more than one occasion in the past few years.

1 And they've also had recently another city
2 council restructure government positions, and eliminated a
3 position of government, and re-characterized a different
4 department, and all of that was done in an executive
5 session, which it seemed to be a formal action contrary to
6 the law.

7 So it's difficult to have an actual number. But
8 I do receive a good number of calls on a weekly basis
9 about the specificity of topics for an executive session,
10 and types of questions about whether or not executive
11 session provisions were adhered to.

12 MR. CHAIRMAN: Rep. Mitchell.

13 REP. MITCHELL: Thank you, Mr. Chairman. Rep.
14 Rippy, I'll just make two quick comments.

15 One: five or six reported instances in the
16 press is a completely different proposition from how many
17 citizens out there might have difficulty with their local
18 government. And just because something doesn't get to the
19 media doesn't mean that it -- it didn't fall -- the tree
20 didn't fall in the forest in the first place.

21 And the second proposition is, it's also hard to
22 predict how many times it'll be used, because this bill is
23 intended to make it less necessary. Passing this, you're
24 likely to change the incentives and the response of the
25 local government so that these kinds of litigations need

1 not occur.

2 REP. RIPPY: If I may I continue, Mr. --

3 MR. CHAIRMAN: You have the floor.

4 REP. RIPPY: The other part we haven't talked
5 about is, if somebody brings these allegations forward, if
6 they do go to a judge and the judge says, "No, there's no
7 basis for it. We've reviewed it," the casting of
8 aspersions is out there.

9 And whether it be a school board, whether it be
10 a county board, I'm worried about those unintended
11 consequences that we cast the net out there to see what we
12 can catch, and it doesn't matter what we rein in. The
13 fact that we cast the net --

14 REP. MITCHELL: There is provision that if an
15 application is frivolous or vexatious, the court can award
16 attorneys fees against the applicant and to the
17 government. So these people can't be scatter shooting
18 these kinds -- these kinds of applications without any
19 basis, or they face consequences, also.

20 MR. CHAIRMAN: Rep. Rippy, questions --

21 REP. MITCHELL: Oh, Mr. Chairman, can I add one
22 other thought? And I understand, Rep. Rippy, that raising
23 a challenge and if the challenge isn't successful, well,
24 someone was challenged, and that might be some kind of
25 issue in their public service or their public record.

1 That's an unfortunate consequence that is a
2 problem or a difficulty. We're trying to solve another
3 problem or difficulty which I think is greater, which is
4 the absolute lack of any means to hold governments
5 accountable for their use of executive session.

6 REP. RIPPY: Thank you.

7 MR. CHAIRMAN: Rep. Vigil. Rep. Fritz. I think
8 that's your name, right?

9 REP. FRITZ: Yeah, that's -- you got it right.
10 Thank you, Mr. Chairman. This is probably more for the
11 bill sponsor. I'm just looking for an assurance or a
12 reassurance, I suppose. But I have to lay out a scenario.

13 Imagine an executive session is called in a
14 local government body, and they are discussing say a
15 pending case where there may be negligence or something
16 liable to the local government. It's not uncommon in
17 certain particularly egregious crimes for the names of the
18 victims to be kept private by a court order. Maybe this
19 is covered by attorney/client privilege. I'm not sure.

20 I guess I would just like to see some assurance
21 that the judge presiding over the executive session
22 decision must also be fully cognizant of all other pending
23 court action, which may involve someone's privacy in such
24 a case. So is there anything in this bill that would
25 instruct that judge to be fully cognizant of all other

1 pending court action?

2 REP. MITCHELL: Mr. Chairman, I had a mental
3 blink toward the beginning of your question, Rep. Fritz,
4 and then I didn't follow through to the end -- I mean, at
5 the end I couldn't grasp the question.

6 REP. FRITZ: Sure.

7 REP. MITCHELL: Can you please --

8 REP. FRITZ: Let me rephrase it.

9 REP. MITCHELL: Yes, please do.

10 MR. CHAIRMAN: You might try putting -- call it
11 a "senior moment." "Blink." I'll have to remember that.

12 REP. FRITZ: Okay. So here's a scenario. An
13 executive session's been called. They want to discuss,
14 - say, a (inaudible) case that could be against the
15 locality, the municipality -- say if it's a local
16 government.

17 In a certainly particularly egregious crime,
18 such as a crime of rape, or something like that. The name
19 of the victim may be ordered to not be disclosed, okay?
20 That happens, it seems. So I just want --

21 REP. MITCHELL: May I interrupt for further
22 clarification?

23 REP. FRITZ: Please.

24 REP. MITCHELL: Sexual assault issues can be
25 ordered sealed in court records. And I don't know if you

1 were referring to that.

2 But with -- in your scenario, I'm now in
3 executive session of a public body. What are you talking
4 about, if something is "...ordered not to be disclosed..."

5 REP. FRITZ: Okay. We've taken the root of the
6 sexual assault crime now. So let's say that the victims
7 names are not to be disclosed, but yet --

8 REP. MITCHELL: You mean that are mentioned in
9 the executive session?

10 REP. FRITZ: Yes.

11 REP. MITCHELL: Okay.

12 REP. FRITZ: So if the public officials in the
13 executive session are discussing this potential liable
14 case, or negligence of, say, the municipality, is there
15 anything that suggests that the judge presiding over the
16 executive session decision, the disclosure of the minutes
17 of that session, has to defer to all other pending cases?

18 REP. MITCHELL: Oh, okay.

19 REP. FRITZ: To protect the identity of that
20 individual, or whatever, so --

21 REP. MITCHELL: Okay. Let me see if I've got
22 the hypothetical. A public body discusses something that
23 is outside of its call for executive session, so that when
24 the court reviews it, it's going to make it public.

25 But that information itself is supposed to be

1 kept confidential for other reasons, protecting victims of
2 sexual assault, or what have you.

3 No, there is nothing in this bill that addresses
4 that scenario, but there are other laws that apply to
5 disclosing the names of sexual assault victims, and so a
6 judge should be cognizant of all applicable law, when he's
7 reviewing the case beforehand.

8 REP. FRITZ: Mm-hmm.

9 REP. MITCHELL: And if he says, "Lines 12
10 through 23 of the executive session minutes should be made
11 public," he should be aware, or an interested party might
12 raise the -- the local body that knows this issue is under
13 review before the court, could also raise the body, "By
14 the way, Your Honor, lines 12 through 23 include reference
15 to confidential victims of crime, who were ordered not
16 disclosed under the privacy of records act."

17 REP. FRITZ: So I understand that he should be
18 cognizant, but there's nothing in the bill that really
19 instructs him that he must be fully aware of any pending
20 court action, or --

21 REP. MITCHELL: Nothing in the bill that
22 anticipates that kind of hypothetical.

23 REP. FRITZ: Okay.

24 REP. MITCHELL: But I would welcome your
25 participation in an amendment to that effect.

1 REP. FRITZ: Maybe we don't need to draft that
2 here, but I would welcome the opportunity to work with you
3 off line here.

4 REP. MITCHELL: Yes.

5 MR. CHAIRMAN: Further questions? Thank you.
6 Norm Sherbert.

7 MR. SHERBERT: Rep. Mitchell, Mr. Chairman,
8 members of the Committee. My name is Norm Sherbert,
9 Beacon Public Affairs Group, and I'm here representing
10 Kraft Foods.

11 Mr. Chairman, I signed up only to speak about
12 L.002. Would you allow me to do that?

13 MR. CHAIRMAN: Sure. Go ahead.

14 MR. SHERBERT: My comments in this amendment are
15 only a small portion of the total bill, but we look at
16 this as an opportunity to ask for policy to be developed
17 at the state level.

18 Kraft Foods is part of a national movement,
19 which is looking at good science -- as part of the Good
20 Science Foundation and Organization out of Washington,
21 D.C.

22 This particular section of the bill, page 13,
23 line 1, paragraph 24-4-103, is defined as the rulemaking
24 procedure. And if you'll look at the language in bold
25 letters, it talks about conclusions in underlying research

1 from studies and reports.

2 As a case in point, several years ago you may
3 have remembered -- may remember the scare about alar.
4 It's the substance that was used to clean and treat
5 apples. A report was -- was released that I think was
6 unfortunate for both the business community and the
7 general public.

8 It sent a scare through people who were
9 purchasing and eating apples, and had a negative economic
10 effect on the apple industry. And that's the type of
11 thing that we're concerned about in this particular
12 foundation, is that we want to see all reports.

13 In that particular case, it's my belief that
14 - there was one report that was released, but there were
15 several reports that were underlying reports that would
16 have negated that report that was released.

17 And in this particular case, we're asking for
18 all underlying studies to be included as part of the
19 available information. I think it's a fairly simple
20 amendment, and would stand the right to answer questions,
21 and ask for your support.

22 MR. CHAIRMAN: Any questions of Norm? Thank
23 you, Norm.

24 MR. SHERBERT: Thank you.

25 MR. CHAIRMAN: Is there anybody else in the room

1 that would like to testify on Senate -- on House Bill
2 1359? Seeing none, the testimony is closed.

3 Committee, we're going to take a ten minute
4 recess. I want to talk with the sponsor a little bit to
5 see if he's ready, and whether or not the other committee
6 members want to have more time to maybe work on
7 amendments. So we're going to take a ten minute recess.

8 [Recess taken.]

9 MR. CHAIRMAN: Committee will come back to
10 order. All right. The bill is on the table for
11 amendment. Rep. Mitchell.

12 REP. MITCHELL: Thank you, Mr. Chairman. If
13 it's all right, I'd like to start with the easy one. I
14 move .002.

15 REP. COLEMAN: Second.

16 MR. CHAIRMAN: Any discussion. Seeing no
17 discussion, opposition? Seeing no opposition, staff will
18 record .002 is unanimous.

19 REP. MITCHELL: Mr. Chairman. I move .001, and
20 I should explain to members -- I apologize, I thought that
21 we might be hearing testimony only and not taking action.
22 Apparently we're moving forward and taking action.

23 The process here might have been a little
24 confusing. I probably should have described the amendment
25 at the same time I described the bill, so that references

1 to it would have some context, but --

2 MR. CHAIRMAN: Why don't you go ahead, and I'll
3 second it for discussion. And why don't you go ahead and
4 go through the amendment.

5 REP. MITCHELL: Thank you, Mr. Chairman. The
6 amendment addresses many of the issues that we've
7 discussed already. The first section clarifies that a
8 local body, or any public body, can satisfy its duty to
9 keep a record of the executive session by making any form
10 of electronic recording, even if -- right now, the bill
11 says it has to be in the same manner and media as their
12 open session.

13 Well, if they have a fancy digital recorder in
14 their public hearing room, they can still just put a
15 cassette player on the table in their other room.

16 Also, there are some counties that make minutes
17 of their meetings by having a clerk listen to a tape of
18 the meeting, and then take minutes. Well, we don't want
19 them to have to make minutes of an existing tape
20 recording, so the purpose of this first section is to say
21 that you satisfy the requirement by making any form of
22 recording. You don't have to take minutes of a recording.

23 The next sections recall that there are
24 particular parts of executive sessions that don't have to
25 be recorded. Attorney/client communications, discussion

1 of individual students. And we have a series of
2 paragraphs that apply to the different places in the bill
3 where we exempt state bodies, or local bodies from tape
4 recording their executive sessions.

5 But we want some kind of statement of accuracy,
6 so the minutes have -- require a signed statement from the
7 person responsible for recording the executive session,
8 and attesting that the minutes accurately reflect the
9 substance of the discussions of the part that wasn't tape
10 recorded.

11 But actual content -- and it requires that they
12 reflect the actual content. Some people were concerned
13 that that might require a verbatim transcript. So we
14 clarified that it did not require a verbatim transcript,
15 as an accurate reflection of the substance.

16 Parallel provision in the next big paragraph.
17 On the top of page 2, we got to the issue where the record
18 that the public body makes of its executive session, we
19 don't want it to be discoverable for other purposes.

20 We want it to exist only for judicial monitoring
21 of whether the executive session was properly conducted.
22 But we don't want to tie the local government hands or the
23 state government hands if they have other usage for those
24 minutes.

25 So we just clarified that they won't be

1 available or subject to discovery, except upon the consent
2 of the public body. And that makes it clear that it's
3 their privilege, and they can waive the privilege if they
4 want to waive it.

5 Next section: the record that's kept of
6 executive session, some of the governments were concerned
7 that they didn't want it hanging around forever, so they
8 proposed some kind of stale date by which they could
9 discard.

10 They originally suggested 30 days. We discussed
11 60 days. There was feeling on the part of some to make it
12 longer. Right now it's at 180 days. That will continue
13 to be discussed. But this amendment wouldn't say they
14 have to keep the record for 180 days and then discard it.

15 Next paragraph is parallel. You can satisfy by
16 recording for local bodies, as the same as on the first
17 page for state bodies, and so on. More parallel paragraphs
18 for attestations of accuracy for local bodies, the same as
19 previously for state bodies.

20 Page 3, line 6 through 9, same thing: 180 day
21 hold period for local public bodies, the same as we did
22 for state public bodies.

23 Now, there is a section of the bill -- this is
24 new language. Most of these refinements, some of the
25 witnesses you heard expressed concern that they were

1 seeing new things, but my view of it is, they were all
2 things we've been discussing, and you know, there might be
3 a new wrinkle or a new refinement.

4 This is new substance on page 3, line 16 through
5 the bottom, and on page 4, lines 1 through 7. And that's
6 the part we discussed about clarifying the negotiating
7 section of executive session. That means preparing for
8 negotiations. That does not include negotiating with
9 third parties.

10 I told some concerned entities that I would
11 agree to sever this off, and not vote on this today, but
12 to deal with it later. Just offer that to the Committee,
13 because I made that representation.

14 Final page, page 4, we're clarifying in the
15 executive search provision, where we allow just a little
16 more flexibility on who gets named a finalist, and
17 clarifies the date by which that information has to be
18 made public.

19 We're clarifying that the executive officer is
20 the head of any institution or political subdivision, or
21 agency thereof, because we thought that it was appropriate
22 not just to go to the top officer of a city or of a
23 county, but also like to the chief of police, or the
24 manager of public works, or other important officers
25 within the city.

1 And then the final paragraph, lines 16 through
2 22, indicate that an interested party who's going to sue
3 to get the records, has to give three business days notice
4 before they file a suit. And that gives -- because right
5 now, the custodian can reject, but that word might not
6 filter up to the city council.

7 Well, if you send the city a three-day notice,
8 "I'm thinking of suing you," that gives the city council,
9 or whoever, whatever body is involved, opportunity to
10 confer and consider whether or not they want to produce
11 the records, or whether they want to stand pat and face
12 litigation. So this just gives a notice requirement that
13 you have to give them three days notice before you sue.

14 That is the amendment, and I would ask the
15 committee to address separately the section on third party
16 negotiations from the rest of it.

17 MR. CHAIRMAN: I want the .001 to be voted on in
18 its entirety, so I'm not going to allow it to be severed.
19 So is there further discussion on .001?

20 REP. MADDEN: I (inaudible) --

21 MR. CHAIRMAN: Rep. Madden.

22 REP. MADDEN: Thank you, Mr. Chairman. Mr.
23 Chairman, I have an amendment to the amendment.

24 MR. CHAIRMAN: Okay.

25 REP. MADDEN: And it's something that the

1 sponsor concurs with to straighten out some language we
2 discussed earlier.

3 MR. CHAIRMAN: What sub- -- what area does it --

4 REP. MADDEN: Page one, line 7 through 14. And
5 the similar language on page 2.

6 MR. CHAIRMAN: Okay. All right. Why don't you
7 go ahead and move what you plan to do?

8 REP. MADDEN: Thank you, Mr. Chairman. On page
9 one, line 8, strike "...the person responsible for
10 recording..." and insert "...a participant in..."

11 Line 9, strike "the" after -- in between
12 "...that the minutes..." and so it would read that any
13 written -- insert "...any written..."

14 Line 9, again, delete the word "accurately," and
15 replace it with "substantively" -- "substantively." So it
16 would read that the statement --

17 MR. CHAIRMAN: "As we requested" that would --

18 REP. MADDEN: Yes. Thank you.

19 MR. CHAIRMAN: Okay.

20 REP. MADDEN: So it would read "...a signed
21 statement from a participant in the executive session
22 attesting that any written minutes substantially reflect
23 the substance of..."

24 MR. CHAIRMAN: Rep. Mitchell.

25 REP. MITCHELL: I'm -- I think the amendment is

1 friendly, members. Rep. Madden, when we discussed this
2 with Rep. Marshall we also discussed it being "the
3 chairman" of the body, rather than just a participant. I
4 don't know if that matters to you.

5 MR. CHAIRMAN: Rep. Madden.

6 REP. MADDEN: That's -- that's fine with me.
7 On line 8 it would read, "...a signed statement from the
8 chairman of the executive session..."

9 REP. MITCHELL: Although, I guess it would also
10 have to say "Chairman," or "Acting Chair," in case it's a
11 meeting that takes place when the formal chair is not
12 present.

13 REP. COLEMAN: Mr. Chairman.

14 MR. CHAIRMAN: Rep. Coleman.

15 REP. COLEMAN: Thank you. I guess I just kind
16 of want to clarify, when she said "...the chairman at the
17 executive session..." that can say that it's either a
18 vice-chairman or whatever --

19 REP. (?): Whoever is chairing the proceedings.

20 REP. COLEMAN: Whoever is chairing the
21 proceedings, and the way she said it, I think says that --

22 REP. MITCHELL: Fine.

23 MR. CHAIRMAN: Okay. So re-word -- re-state
24 your amendment.

25 REP. MADDEN: The line 8 would read,

1 "...statement from the chairman of the executive session."

2 MR. CHAIRMAN: And you said you had something on
3 page 2 as well?

4 REP. MADDEN: And it's the same language, Mr.
5 Chairman. On lines 17 and 18. The exact same language.

6 MR. CHAIRMAN: Okay. Rep. Marshall.

7 REP. MARSHALL: I'm sorry. Well, you can ask on
8 that. No comments.

9 MR. CHAIRMAN: Okay. Is there a second for that
10 motion?

11 REP. MARSHALL: I second it.

12 MR. CHAIRMAN: Okay. Is there further
13 discussion on that amendment?

14 REP. (?): NO.

15 MR. CHAIRMAN: Is there opposition to the
16 amendment? Rep. Coleman.

17 REP. COLEMAN: Thank you, Mr. Chairman.
18 Actually I had a question before we moved into the actual
19 vote for this amendment. Is that -- is that okay?

20 MR. CHAIRMAN: That's fine.

21 REP. COLEMAN: Okay. Rep. Mitchell, when you
22 talked about the third party, both in the bargaining
23 areas, could you help me with that? I'm still having a
24 problem understanding --

25 REP. (?): Point of order.

1 MR. CHAIRMAN: Is it regarding this amendment?

2 REP. COLEMAN: Yes -- well, no. I thought we
3 were done.

4 MR. CHAIRMAN: No, no. We're not done with that
5 amendment.

6 REP. COLEMAN: Excuse me.

7 MR. CHAIRMAN: Is there further discussion on
8 the Madden Amendment to the .001? Seeing none, staff will
9 record that as unanimous. Or is there any opposition to
10 the amendment? Seeing none, staff will record that as
11 unanimous. All right. Now, Rep. Coleman.

12 REP. COLEMAN: Thank you, Mr. Chairman. Sorry
13 for getting ahead of us.

14 -- -- On -- regarding the third-party negotiation,
15 where you talk about it, Rep. Mitchell, on page 3, I think
16 it is, and also on page 4, could you help me with what
17 you're getting -- are you saying that the exec- --

18 Say, for example, a school board is getting
19 ready -- they're talking to their administrative staff
20 about coming negotiations with the teachers, or whatever.
21 Is that what you're saying that that -- is that what
22 you're getting at?

23 And then when you turn -- when you go on to have
24 the negotiation with the CEA, or whatever it's called --

25 REP. MITCHELL: Take a random example.

1 REP. COLEMAN: Yeah. Okay. Go for it. I think
2 you know what I mean.

3 REP. MITCHELL: Yes. I think that's precisely
4 what I'm getting at, Rep. Coleman. The exception is
5 obviously designed to provide some confidentiality and
6 strategizing room for the public body to form its
7 position. It's not designed to keep secret conversations
8 directed to outside parties.

9 It says, "...determine positions relative to
10 matters that may be subject to negotiations developing
11 strategy for negotiations, instructing negotiators..."
12 that's kind of internal to the organization, their work
13 product, if you will.

14 Once they bring that third party in, and they're
15 negotiating, that's no longer confidential to the public
16 body. That's being disclosed to the third party, and
17 there's no basis in the Open Meetings or Open Records law
18 to keep the public in the dark on those kinds of
19 discussions.

20 The current state of the law is, all meetings
21 are public, except for some executive session exceptions,
22 and one of the exceptions is to allow them to prepare for
23 negotiations; not to conduct negotiations.

24 MR. CHAIRMAN: Rep. Madden.

25 REP. MADDEN: Thank you, Mr. Chairman. And a

1 further question on that.

2 So the current state of the -- you're just re-
3 stating the current state of the law, and it's one of
4 those, "we really, really mean it?"

5 REP. MITCHELL: I haven't researched case law.
6 I don't know if there is case law on this section. I'm
7 stating the way the text of the open records, and Open
8 Meetings law, of the Colorado Sunshine law provides.

9 I'm also aware that there are jurisdictions that
10 have, I think, abused or neglected that text by trying to
11 conduct secret negotiations under this exception, which
12 clearly doesn't contemplate real negotiations.

13 It's talking about preparing for matters that
14 may be subject -- that they may, at some point, be
15 negotiating with outside parties.

16 MR. CHAIRMAN: Rep. Vigil.

17 REP. VIGIL: Thank you, Mr. Chairman. I'd like
18 to make an amendment to the amendment, also. Amend page
19 3, strike lines 15 through 23, and page 4, strike lines 1
20 through 7.

21 MR. CHAIRMAN: I'm not -- you're basically
22 severing the --

23 REP. VIGIL: I'm not asking for severance. I'm
24 asking for amending the amendment.

25 MR. CHAIRMAN: No, you're severing, as far as

1 I'm concerned. And I'm not allowing that. So -- is there
2 further discussion?

3 REP. VIGIL: I guess then my votes will get no
4 vote, Rep. Mitchell, on it. I can't vote on a bill that
5 brings in, at the last minute, stuff that was not shared
6 with us, and not held for public -- held for public input
7 on that. So -- and it's a whole different bill.

8 MR. CHAIRMAN: Further discussion on the
9 amendment? Rep. Marshall.

10 REP. MARSHALL: I'm just curious. He can't vote
11 to strike that language? Is that what I --

12 MR. CHAIRMAN: That's what I rule.

13 REP. MARSHALL: Okay.

14 MR. CHAIRMAN: That's tantamount to severing,
15 and I've already said that we're not going to sever it.
16 Rep. Marshall.

17 REP. MARSHALL: Thank you, Mr. Chairman. I'd
18 like to amend the amendment on page 3. The sponsor of the
19 bill mentioned, and I also heard testimony, and several
20 members of the audience have a concern about the 180 days.
21 A number of people wanted to reduce it to 60. I'd like to
22 move to change 180 days to 90 days.

23 MR. CHAIRMAN: Where at?

24 REP. MARSHALL: For the retention of records.
25 I'm sorry. Page 3, lines -- it begins on lines 8 -- 8 and

1 9, so it would be 90 days after the date of the executive
2 session.

3 MR. CHAIRMAN: Is there a second?

4 REP. (?): (Inaudible)

5 MR. CHAIRMAN: Okay. It is properly before us.
6 Rep. Mitchell, do you have any comments about the
7 amendments?

8 REP. MITCHELL: Members, I like 180 degrees
9 better -- excuse me, 180 days better.

10 MR. CHAIRMAN: (Inaudible) swapping.

11 REP. MITCHELL: It all gets into an exercise
12 about line-drawing. And I don't have specific arguments
13 about why 90 is insufficient.

14 I can tell you that part of the reason for
15 keeping it out a little longer was to allow for a pattern.
16 If there's a pattern of conduct, then the court might want
17 to go back and review a longer period than one or two
18 meetings. And so it needs to be long enough to allow for
19 a pattern. I think 180 days would better serve that
20 purpose.

21 MR. CHAIRMAN: Rep. Rippy, then Cadman, then
22 Fritz, then Marshall.

23 REP. RIPPY: Rep. Marshall, on your amendment,
24 if you're changing to 180 days on page 3, to be
25 consistent, wouldn't you want to also change page 2, line

1 9, to 90 days for retention of minutes?

2 MR. CHAIRMAN: Rep. Marshall.

3 REP. MARSHALL: Thank you, Mr. Chairman. Yes, I
4 was going to comment it was also on page 2 that we would
5 have to change the language.

6 MR. CHAIRMAN: So you're amending your amendment
7 to the amendment to also include page 2?

8 REP. MARSHALL: And I just saw that it's
9 somewhat of a compromise, since there was discussion by
10 the witnesses, and also several representatives of
11 associations had that discussion with me.

12 Also Denver being another one, that they had a
13 concern about the length of time, and just through
14 administrative ease, instead of the 60 days, I was
15 suggesting we do 90 days as a compromise.

16 MR. CHAIRMAN: Ninety days. Rep. Cadman.

17 REP. CADMAN: Thank you, Mr. Chairman. Rep.
18 Mitchell, you just mentioned that the 180 days was so that
19 the -- the courts could then address other sessions, or
20 try to establish a pattern, so this now -- 'cause I didn't
21 catch that in the whole testimony we had.

22 I thought it was if a person came and challenged
23 an executive session, then that what was being determined
24 by the court, whether they had violated this new law. But
25 now you're -- are you saying that if they see an executive

1 session violation, that the court can now subpoena records
2 beyond what was actually brought to them by the plaintiff?

3 MR. CHAIRMAN: Rep. --

4 REP. MITCHELL: Thank you. Rep. Cadman, the
5 bill refers to specific meetings and specific allegations
6 of violation. But the standard for the court to look at
7 those meetings and allegations is reasonable cause to
8 believe.

9 It may be the case that a person can show a
10 pattern over three meetings that would -- each individual
11 case has to be raised in the motion. But if the court
12 sees the pattern, he can conclude there is reasonable
13 cause to believe there might be a problem as to all three
14 meetings, when he can see all three meetings next to each
15 other.

16 But nothing relieves the applicant of the burden
17 of showing reasonable cause to believe as to any meeting,
18 and all meetings, that the court would look at. It just
19 might take looking at two or -- it might take considering
20 circumstances surrounding two or three, to see the
21 reasonable cause to believe. Once you see the reasonable
22 cause to believe, it could exist as to all -- two or three
23 of the meetings.

24 REP. CADMAN: So in a situation where the 90 day
25 was the window, obviously they would have no further

1 access beyond?

2 REP. MITCHELL: That's correct.

3 MR. CHAIRMAN: So you're opposing the amendment?
4 Is that --

5 REP. MITCHELL: Yes. But not with all my heart
6 and soul.

7 MR. CHAIRMAN: Oh. Just with your head, right?
8 Okay. Rep. Fritz.

9 REP. FRITZ: Thank you, Mr. Chairman.

10 MR. CHAIRMAN: For the members of the press,
11 that was an executive (inaudible)---

12 REP. FRITZ: Rep. Mitchell, what is the duration
13 for record retention for open public meetings?

14 REP. MITCHELL: I don't know that, but my guess
15 is that Mr. Zansburg will.

16 MR. CHAIRMAN: Mr. Zansburg, will you come
17 forward?

18 MR. ZANSBURG: (Speaking away from microphone.)
19 I believe it varies. I like it (inaudible) --

20 MR. CHAIRMAN: Geoff, do you want to come on up
21 and answer the question?

22 MR. WILSON: Mr. Chairman, members of the
23 Committee, Geoff Wilson from the Municipal League, again.
24 I concur with Mr. Zansburg.

25 [General laughter.]

1 It's true, the records retention schedules do
2 vary. There's a statute that requires that the records
3 retention schedules be worked out with the record of the
4 State Department of Personnel, and I believe the State
5 Archivist is involved, but there's no statutory end date
6 that I'm aware of.

7 REP. MITCHELL: Can you speculate to some
8 average for municipalities around the state? What's your
9 experience?

10 MR. WILSON: I'm sorry. I can't speculate.

11 MR. CHAIRMAN: Okay. Rep. Marshall, do you have
12 any -- or Madden, do you have --

13 REP. MADDEN: I (inaudible) --

14 MR. CHAIRMAN: Rep. Vigil.

15 REP. VIGIL: Thank you, Mr. Chairman. And I
16 guess in lieu of the discussion that we won't now -- are
17 we now then going to be, by inserting this, in conflict
18 with another section in the law that allows municipalities
19 to negotiate the record retention?

20 MR. CHAIRMAN: Rep. Mitchell?

21 REP. MITCHELL: I believe not, Rep. Vigil,
22 because this is a specific new record that isn't covered
23 by any other provision of law, because the bill is
24 creating this record, and creating the time that it needs
25 to be kept.

1 MR. CHAIRMAN: Well, Committee, I -- is there
2 any other discussion from the Committee. I'm going to
3 follow the sponsor, with his stating "...not his heart and
4 soul..." on this, because I think there might be reason to
5 allow for more information on a pattern of behavior,
6 because of some of the provisions that are set forth on
7 page one.

8 REP. FRITZ: Mr. Chairman.

9 MR. CHAIRMAN: Rep. Fritz.

10 REP. FRITZ: Just a follow up. It would seem to
11 me that it's not necessarily arbitrary. We can't point to
12 any real reference, and so therefore, how do we claim that
13 90 is better than 120, is better than 240 --

14 MR. CHAIRMAN: 180.

15 REP. FRITZ: 180. Who knows? So I'm inclined
16 to do the same thing. We have no justification for
17 changing it, if we don't know what the state is.

18 MR. CHAIRMAN: Okay. Your opposition to the
19 amendment. Staff, take the roll.

20 STAFF: Rep. Coleman - no; Fritz - no; Hodge -
21 no; Lawrence - no; Madden - yes; Marshall --

22 REP. MARSHALL: Can I withdraw the amendment at
23 this point -- no.

24 REP. (?): If you have an executive session.

25 STAFF: Rep. Mitchell - yes; Rippy - yes;

1 Vigil - no; Cadman - yes; Mr. Chairman - no.

2 MR. CHAIRMAN: Oh, I'm sorry. We're putting on
3 the (inaudible) -- I was confused. That's all right. It
4 failed anyway.

5 REP. (?): There's another TIA.

6 REP. COLEMAN: Your heart and soul --

7 MR. CHAIRMAN: That motion failed on a 7 to 4.

8 REP. MITCHELL: That was beyond a blink,
9 members. That was a mental nap.

10 MR. CHAIRMAN: Okay. We're back to .001. Is
11 there further discussion on .001. Staff, please take
12 the roll.

13 STAFF: Rep. Coleman - no; Rep. Fritz - yes;
14 Hodge - no; Lawrence - no; Madden - no; Marshall - no;
15 Mitchell - yes; Rippy - yes; Vigil - no; Cadman - yes;
16 Paschall -- Rep. -- Mr. Chairman --

17 MR. CHAIRMAN: Boy, I'm Rodney Dangerfield in
18 here. I get no respect. Just trying to (inaudible) one.
19 That motion fails on a five to six vote. We are back to
20 the original bill. Rep. Mitchell.

21 REP. MITCHELL: I move House Bill 1359 to the
22 Committee of the Whole, and request a favorable vote.

23 MR. CHAIRMAN: Further discussion.

24 REP. LAWRENCE: Mr. Chairman?

25 MR. CHAIRMAN: Rep. Lawrence.

1 REP. LAWRENCE: Thank you, Mr. Chairman. I just
2 want to make a statement.

3 I do support the bill, and I didn't vote on the
4 amendment, because I think we need to discuss some of the
5 other things that were added, and I think (inaudible) some
6 work on that on the floor.

7 But I think most of us know where elected
8 officials are on the totem pole of confidence and trust,
9 in this whole arena, and this just gives that level of
10 enforcement, which I think is a very important piece. And
11 I'd like to see the bill go forward, and to see you move
12 the amendment when we get to the floor.

13 I served on city council, and I know that when
14 we went into executive session, that there were times when
15 after we had discussed the substance of what we went into
16 the executive session for, it's very easy to start talking
17 about something else.

18 And it's up to the city attorney, or the city
19 manager, you know, would say, "You know, you shouldn't be
20 discussing something else." I think that when they are
21 hired by you, that puts them in a very difficult position.

22 And I think if you have this enforcement piece
23 in there, everybody knows what's being recorded. And so I
24 applaud you for bringing this forward.

25 I do think the public will have more confidence

1 in us, knowing that any executive session can come under
2 this kind of scrutiny and check.

3 MR. CHAIRMAN: Rep. Lawrence, do you have any
4 specific amendments that you have in mind for House Bill
5 1359?

6 REP. LAWRENCE: Thank you, Mr. Chairman, no, I
7 don't. I think that on second reading, that we can
8 discuss the amendments that the sponsor, I'm sure, will
9 bring back.

10 MR. CHAIRMAN: Rep. Rippy.

11 REP. RIPPY: Thank you, Mr. Chairman. I believe
12 the discussion here today is not whether we believe in
13 open government. And I believe that the discussion is,
14 does this allow more open government to the citizens of
15 the state? I'm not certain that it does.

16 That being said, I also cannot support this bill
17 without the amendment .001. I'm also not confident that
18 on second reading we would get all of .001 back on it on
19 the floor of the House.

20 I could, in theory, support this bill with .001
21 back on. But -- with that being said, without .001, I'm
22 unwilling to pass it to the Committee of the Whole with
23 favorable recommendation as going forward.

24 MR. CHAIRMAN: Further comments from the
25 Committee? Is there a second to the motion?

1 REP. COLEMAN: To the floor?

2 MR. CHAIRMAN: To the floor?

3 REP. LAWRENCE: Second.

4 MR. CHAIRMAN: Okay. Rep. Lawrence seconds.

5 Staff, take roll.

6 STAFF: Rep. Coleman --

7 REP. COLEMAN: No, with comment. I -- I am also
8 with Rep. Rippy, and that is that I believe in open
9 meetings and open records to the extent that they ought to
10 be. But this -- this bill needs work, and it doesn't make
11 sense to do the work on the second floor, 'cause it needs
12 more work than that, than second reading. So my answer
13 for now is no.

14 MR. CHAIRMAN: Go ahead.

15 STAFF: Rep. Fritz - yes; Hodge - yes;
16 Lawrence - yes; Madden - yes; Marshall --

17 REP. MARSHALL: Mr. Chairman.

18 MR. CHAIRMAN: Rep. Marshall.

19 REP. MARSHALL: I'm going to vote yes on this
20 bill, but I would hope that we could -- that the sponsor
21 would entertain some suggestions for amendments on second
22 reading.

23 REP. MITCHELL: The sponsor has and will
24 continue to entertain lots of suggestions for amendments.

25 REP. MARSHALL: And would be considerate of

1 those. Thank you.

2 STAFF: Rep. Mitchell - yes; Rippy - no; Vigil -
3 no; Cadman - yes; Mr. Chairman - no.

4 MR. CHAIRMAN: That motion passes on a 7 to 4
5 vote. And the Committee is in recess.

6 [End of discussion/action on House Bill 1359-2001.]

7 C E R T I F I C A T E

8 STATE OF COLORADO)
9) ss
10 COUNTY OF ARAPAHOE)
11

12 I, Laura M. Machen, an independent
13 transcriber and notary public within and for the State of
14 Colorado, certify the foregoing transcript of the tape/CD
15 recorded proceedings, In Re: discussion/action on House
16 Bill 1359-2001, House Committee for Information and
17 Technology, and as further set forth on page one. The
18 transcription, dependent upon recording clarity, is
19 true/accurate with special exceptions(s) of any or all
20 precise identification of speakers, and/or correct
21 spelling or any given/spoken proper name or acronym.

22 Dated this 10th day of February 2004.

23 _____
Laura M. Machen

24 My commission expires May 23, 2004

25 ORIGINAL ()
26 CERTIFIED COPY ()

Final
STAFF SUMMARY OF MEETING

HOUSE COMMITTEE ON INFORMATION & TECHNOLOGY

Date: 03/28/2001

ATTENDANCE

Time: 10:01 AM to 12:28 PM

Place: HCR ~~011~~ 107

This Meeting was called to order by
Representative Paschall

This Report was prepared by
Joy Allen

Coleman	X
Fritz	X
Hodge	X
Lawrence	X
Madden	X
Marshall	X
Mitchell	X
Rippy	X
Vigil	X
Cadman	X
Paschall	X

X = Present, E = Excused, A = Absent, * = Present after roll call

Bills Addressed:	Action Taken:
HB01-1359	Amended and Referred to the Committee of the Whole

10:02 AM -- House Bill 01-1359

The chairman opened the meeting and made announcements. Representative Mitchell, prime sponsor, introduced his bill regarding the expansion of the Open Records Act. He responded to questions from committee members.

10:36 AM -- Mr. Chip Taylor, Legislative Counsel, Colorado Counties Incorporated (CCI), spoke against the bill. He responded to questions from committee members.

10:48 AM -- Mr. Geoff Wilson, General Counsel, Colorado Municipal League (CML), spoke about the bill. He responded to questions from committee members. Representative Mitchell responded to questions regarding the bill's fiscal impact.

11:05 AM -- Mr. Ken Amundson, President, Colorado Press Association, and Mr. Steve Zansburg, Colorado Freedom of Information Council and Colorado Press Association, spoke in favor of the bill. Packets, which included articles on executive sessions, were distributed to committee members (Attachment A). Each witness responded to questions from committee members.

11:33 AM -- Mr. Norm Sherbert, Partner, Beacon Public Affairs, representing Kraft Foods, testified regarding Amendment L.002 (Attachment B).

11:33 AM

The committee recessed.



STATE OF COLORADO
HOUSE OF REPRESENTATIVES COMMITTEE OF THE WHOLE

April 5, 2001

Discussion/action on House Bill 1359-2001

Second Reading

TRANSCRIPT OF TAPE RECORDED LEGISLATIVE PROCEEDINGS

HOUSE SPEAKER, REP. DOUGLAS DEAN

REP. SHAWN MITCHELL, Sponsor

SPEAKING TO THE BILL

REP. DAN GROSSMAN

REP. LYNN HEFLEY

REP. RICHARD DECKER

REP. JOYCE LAWRENCE

REP. FRAN COLEMAN

REP. JOE STENGEL

REP. AL WHITE

REP. ROSEMARY MARSHALL

REP. MARK PASCHALL

REP. VALENTIN VIGIL

REP. MARK CLOER

1 [The tape recorded legislative committee
2 proceedings, as set forth on page one, are transcribed as
3 follows:]

4 MR. CHAIRMAN: Will the Clerk please read the
5 title of House Bill 1359.

6 CLERK: House Bill 1359, by Representatives
7 Mitchell and Sen. Matsunaka, concerning the --
8 (unintelligible) Open Meetings Law and Open Records Act.

9 MR. CHAIRMAN: Rep. Mitchell.

10 REP. MITCHELL: Thank you, Mr. Chairman.
11 Members, I move House Bill 1359. I move the Information
12 and Technology Committee Report, and I move .007 to the
13 Information and Technology Committee Report, and ask that
14 .007 be displayed on the screen.

15 MR. CHAIRMAN: As to the amendment.

16 REP. MITCHELL: Thank you. Members, House Bill
17 1359 regards open meetings and open records, and it
18 regards providing for greater accountability and
19 enforcement of the policy that all of Colorado's public
20 business should be conducted in public.

21 The committee report deals with a rather narrow
22 subject, which just clarifies that whenever an agency
23 passes a rule or a regulation, it has to make open to the
24 public any of the data that it relied on from many studies
25 on which it bases it's rule or its regulation.

1 .007 to the Committee Report just clarifies that
2 anything that's protected by state law as confidential or
3 proprietary is not required to be made open. I ask that
4 the body adopt .007 to the Committee Report.

5 MR. CHAIRMAN: Is there any further discussion?
6 Seeing no further discussion, the motion before us is the
7 adoption of Amendment .007 to the Committee Report. All
8 those in favor say "Aye."

9 VOICES: Aye.

10 MR. CHAIRMAN: All those opposed say, "No."

11 VOICES: No.

12 MR. CHAIRMAN: The "Ayes" have it. The
13 amendment passes.

14 REP. MITCHELL: Thank you, Mr. Chairman. On the
15 Committee Report, members, as I mentioned, this is -- this
16 is kind of a minor, subsidiary part of the bill.

17 It just clarifies that whenever an agency passes
18 a rule or a regulation, not only is the study or any
19 information that they relied on subject to public
20 disclosure, but also any underlying data on which the
21 study was based is a public record and has to be made
22 available to the public. I ask you to adopt the IT
23 Committee Report.

24 MR. CHAIRMAN: Is there any further discussion?
25 Seeing no further discussion, the motion before us is the

1 adoption of the Committee Report. All in favor say "Aye."

2 VOICES: Aye.

3 MR. CHAIRMAN: All opposed, say "No."

4 (No audible response.)

5 MR. CHAIRMAN: The "Ayes" have it. The
6 Committee Report is adopted. To the bill, Rep. Mitchell.

7 REP. MITCHELL: Thank you. Members, House Bill
8 1359, as I said, is an effort to honor the public policy
9 selected by this body that public business should be
10 conducted in public.

11 It addresses mainly the subject of privacy in
12 executive session, but also addresses the subject of open
13 records, and records that members of the public should
14 have access to. It does not, in general, change the law
15 regarding what is public and what may be held confidential
16 in executive session.

17 But what it does do is create a better yardstick
18 to measure, a better way to help governments know what
19 their obligations are, and to help citizens have
20 confidence that all governments, state and local, are
21 following the law, as we intend it to be followed.

22 It does this by creating a record-keeping
23 device. It says when a public body goes into executive
24 session they need to keep a record of that executive
25 session.

1 But also, it's confidential, just like executive
2 session is, and it needs to be recorded in the same form
3 as they record their open session. If they tape record
4 their open session, they need to tape record their
5 executive session. If they take minutes of their open
6 session, they need to take minutes of their executive
7 session.

8 There's one other policy shift in the bill, and
9 that has to do with the rights of citizens that have to
10 challenge a government to get access to records that
11 should be made public. And that is that if a citizen asks
12 for records, and the custodian of the records denies the
13 citizen the right to access them, and they have to go to
14 court to win that right, and they win, if they're the
15 prevailing party in the litigation, then they can recover
16 their attorneys fees from the government.

17 Now, the reason I have to tell you at some
18 length about what the bill does, before I can discuss an
19 amendment, is that the amendment that I'm about to move --
20 in fact, I'll do it right now.

21 Mr. Chairman, I move .005, and ask that it be
22 displayed on the screen.

23 MR. CHAIRMAN: To the amendment.

24 REP. MITCHELL: Thank you. Members, as you
25 might imagine, this bill has been the subject of lengthy

1 and comprehensive -- and I think cooperative negotiations,
2 between the advocates of greater openness, and open
3 records, and media access, and public access, and the
4 representatives of local government that have concerns for
5 the efficiency and the reasonableness of the process.

6 There's been a lot of give and take. The bill
7 looks considerably different from it did (sic) when it was
8 originally drafted, and we have an amendment that reflects
9 these continuing negotiations.

10 This amendment refines some of the -- the new
11 record keeping responsibilities that are established for
12 government, and it strikes some compromises on areas
13 where -- where the debating parties thought it might have
14 gone too far.

15 Rather than walk through it line by line, I
16 think I'll just leave the description of that, and respond
17 to particular questions, if there are any. But I renew my
18 motion to adopt .005.

19 MR. CHAIRMAN: Rep. Grossman.

20 REP. GROSSMAN: Thank you, Mr. Chairman. And
21 Rep. Mitchell worked very hard, and -- with all the groups
22 that were involved in this, to get this amendment in
23 place. I think that the way that it stands right now it's
24 a very good amendment. It makes the bill better.

25 It represents a compromise by a bunch of the

1 stakeholders that were involved in this discussion, and I
2 support it wholeheartedly as it is currently drafted, and
3 I would urge a "Yes" vote on .005.

4 MR. CHAIRMAN: Is there any further discussion
5 about the amendment? Seeing no further discussion, the
6 motion before us is the adoption of Amendment .005. All
7 those in favor say "Aye."

8 VOICES: Aye.

9 MR. CHAIRMAN: All those opposed say "No."

10 VOICES: No.

11 MR. CHAIRMAN: The "Ayes" have it. The motion
12 passes -- or is adopted. To the bill, Rep. Mitchell.

13 REP. MITCHELL: Thank you, Mr. Chairman.
14 Members, as I described to you in brief, House Bill 1359
15 just provides a way for the public to have greater
16 confidence that public business is being conducted
17 publicly. And anything that happens in executive session
18 actually belongs there, and is appropriately there.

19 The way it does that is by creating the record
20 keeping device that I described to you. And the bill
21 provides that if a citizen has reason to believe that a
22 government body went beyond the subject of executive
23 session or discussed things or took actions that weren't
24 authorized, they can make an application to a court.

25 And if the court concludes, upon the citizens

1 motion, that there is reasonable cause to believe the
2 local government body went too far, or the state public
3 body went too far, then the court will review the record
4 in the privacy of the court's own chambers, and make a
5 determination.

6 And if it finds that parts of the meetings
7 weren't su- -- weren't related to the subject of the
8 executive session, the court will order that that
9 information be made public.

10 There's also the shift in attorney fees that I
11 described to you, and one other provision that might be
12 worth mentioning to you is actually something that will
13 help local governments in their employment searches. It
14 clarifies the requirements for executive searches, and who
15 finalists are, and when they need to be made public.

16 And this is something that representatives of
17 the school district asked for that -- if you've been
18 following the news lately, you're aware of the scrutiny
19 that falls upon applicants for public jobs, and how that
20 might create problems for them, back in their home
21 district, and it still requires finalists for jobs to
22 be made public, but it clarifies more tightly who the
23 finalists are and gives people reasonable notice whether
24 or not they will be in the group that's disclosed to
25 the public.

1 I ask you to adopt House Bill 1359 as not a
2 perfect work, but a very good work, involving compromise
3 between many affected interests going through long
4 discussions. I --

5 MR. CHAIRMAN: Rep. Hef- --

6 REP. MITCHELL: -- renew my motion.

7 MR. CHAIRMAN: Rep. Hefley.

8 REP. HEFLEY: Thank you, Mr. Chairman. Well, I
9 have some concerns about this, Rep. Mitchell. I was not
10 in committee, but as you know, when you discuss at local
11 governments, whether it's city council, county commission,
12 whatever, by imposing this new taping or electronic
13 devices that then, in executive session, could be
14 challenged in court, and this is taxpayer dollars. Am I
15 not correct?

16 MR. CHAIRMAN: Rep. Mitchell.

17 REP. MITCHELL: I'm not sure what you're
18 referring to when you say it's "taxpayer dollars," Rep.
19 Hefley. The recording only has to be by whatever means
20 the public body already records its public session.

21 So if they record, then they can record their
22 executive session. If they take notes or minutes, then
23 they can take notes or minutes of their executive session.
24 So I don't see a significant cost there. So I'm not sure
25 what public dollars you're talking about.

1 MR. CHAIRMAN: Rep. Hefley.

2 REP. HEFLEY: The bill states that it will be
3 done electronically now. The current law is that they can
4 do notes. That's the way it's been done for years.

5 I find that this could be a problem for some
6 smaller areas of local government trying to deal with
7 this. Because what has happened is, quite frankly, the
8 press often gets left out. And when we have a public
9 hearing, press is supposed to be included.

10 And this, I think, is the real issue here. And
11 I believe that we already have the law in place, and we
12 don't have to do electronic devices to do it. They just
13 need to know that they need to follow the law.

14 I looked at this section yesterday to see what
15 was different about it, or why it was that it couldn't be
16 implemented, and why we're unable to get local governments
17 to be able to allow the press in, when the press is
18 supposed to be in.

19 MR. CHAIRMAN: Rep. Mitchell.

20 REP. MITCHELL: Thank you. Rep. Hefley, I think
21 we might have one basic misunderstanding.

22 This bill does not require anyone to tape
23 record, or to record electronically that doesn't already
24 have the means to do that. It says that they have to
25 record the executive session by the same means that they

1 record the open session.

2 So if they electronically record the open
3 session, then they can do the same thing for the executive
4 session. If they take minutes by hand for the open
5 session, then that's how they can record the meeting for
6 the executive session.

7 There is one section that refers to electronic
8 recording, but that's just to give the local government
9 the option. It says that no matter how you record your
10 meetings, you can tape record your executive session if
11 you want, and then you will have complied with the law.

12 If you want to bring in a cassette player and
13 pop it on the table to record to record your executive
14 session, then you've complied with the law. But there's
15 no requirement that anyone start a new way of recording
16 their meetings.

17 MR. CHAIRMAN: Rep. Hefley.

18 REP. HEFLEY: Thank you. I'm sorry, then, that
19 I didn't interpret this as saying that. I thought that
20 they had to record executive sessions now.

21 But you're saying, if they do it by hand, they
22 still can do it by hand, and still they do not have to
23 tape it?

24 MR. CHAIRMAN: Rep. Mitchell.

25 REP. MITCHELL: That is correct, Rep. Hefley.

1 REP. HEFLEY: Well, I need to --

2 MR. CHAIRMAN: Rep. Hefley.

3 REP. HEFLEY: -- maybe learn how to read this,
4 again, because that is not the way I interpret it. Thank
5 you.

6 MR. CHAIRMAN: Rep. Decker.

7 REP. HEFLEY: That's all that it said.

8 REP. DECKER: Thank you, Mr. Chairman. Rep.
9 Hefley alluded to my question.

10 I was under the understanding that entities that
11 have these executive sessions are now required to keep the
12 record, whether it be written or by electronic purposes,
13 but they were not obligated to divulge this information to
14 the media or other public.

15 They were supposed to be kept secret, and the
16 only exception is when -- when there is a court case going
17 on, the judge can order the release of these tapes. And
18 I've seen that happen. That's what I think is current
19 law. Am I correct?

20 MR. CHAIRMAN: Rep. Mitchell.

21 REP. MITCHELL: ...republicans and democrats.
22 I'll talk to you in a minute.

23 REP. DECKER: Did you hear my question?

24 REP. MITCHELL: I heard part of it. Could
25 you give me the closing punch line on your question,

1 Rep. Decker?

2 REP. DECKER: Okay. Are local governments now
3 already required to keep either written or taped
4 recordings of their executive sessions, and release only
5 to a judge in a court case? I --

6 MR. CHAIRMAN: Rep. Mitchell.

7 REP. DECKER: -- think that has happened in the
8 past. I just want to know if its current law.

9 MR. CHAIRMAN: Rep. Mitchell.

10 REP. MITCHELL: Thank you, Mr. Chairman. Rep.
11 Decker, they are not currently required to do that, and
12 that is the major innovation of this bill.

13 - In the past, citizens have simply had to take it
14 on faith that once the door closes, what happened in
15 executive session was exactly what was called for in the
16 notice, and that everyone was aware of the rules and laws
17 and policies they were supposed to follow.

18 This bill says that the public bodies, whether
19 state or local, should keep a record of their executive
20 session so that if a citizen has good evidence or reason
21 to cause a judge to believe that maybe this discussion
22 went off the subject, in a substantial way -- the bill
23 says if there was substantial discussion of matters
24 outside of the call for executive session, then the judge
25 will make those matters public.

1 That is the significant improvement of this bill
2 over current law. It doesn't change what's public and
3 what's private, but it gives citizens a way to have
4 confidence that that can be monitored and policed.

5 Members, most governments, like most citizens,
6 want to do the right thing and want to follow the law, and
7 do it properly. Sometimes there are big mistakes, and
8 sometimes there are people whose intent isn't as honorable
9 as everyone else is, and there's never really been a way
10 to police abuse of executive session until now. This bill
11 provides the way to police that abuse of executive
12 session.

13 MR. CHAIRMAN: Rep. Decker.

14 REP. DECKER: I think it should be done that
15 way, and I would like to support this bill. I just
16 understood that that law was already in place. Thank you.

17 MR. CHAIRMAN: Rep. Mitchell. Rep. Lawrence.

18 REP LAWRENCE: Thank you, Mr. Chairman. We
19 heard this bill in committee, and of course the concern --
20 we all had the concern about the form of recording. And
21 so that was amended, so that you had that flexibility.

22 I don't think the major concern was that. It
23 was for anyone out in the public being able to have that
24 ability to find out what went on in the executive session
25 if they felt something substantive had been discussed, not

1 relevant to what they were going into the executive
2 session for.

3 And having served on city council, I know that
4 that's really very important. You go into executive
5 session, you discuss what you're supposed to discuss, and
6 then pretty soon you're off discussing something else.

7 If you have a good city manager or city
8 attorney, they will say, "This is inappropriate. The
9 meeting is adjourned and you're out." But if that doesn't
10 happen, there is no way for anyone to know what else has
11 been discussed.

12 And it certainly does not instill confidence or
13 trust in our elected officials, when they go into
14 executive session on one issue, and come back out and then
15 vote on something, when it certainly sends the signal that
16 something else has indeed gone on in there. And that's
17 why I have supported this.

18 The other point is that many times, as an
19 elected official, you may have hired some of these people
20 who sit in executive session with you, and it's very
21 difficult for them to challenge you and say, "Excuse me,
22 but, you know, you're off course and you shouldn't be
23 doing this."

24 This will come under the scrutiny of a judge, if
25 someone challenges the executive session. And there were

1 a lot of assurances in this that nothing would be released
2 that had to do with, if it were a personnel matter, if it
3 had to do with economic development, et cetera, that
4 information should be kept privileged.

5 So it's difficult, sometimes, to get all of that
6 out of that, when you just read the bill. But I think
7 that this is a bill that helps us, as elected officials,
8 on -- reestablish that trust and confidence that the
9 public should have in us, when we say we're going into
10 executive session, we mean what we say. Thank you.

11 MR. CHAIRMAN: Rep. Mitchell.

12 REP. MITCHELL: I appreciate Rep. Lawrence's
13 strong explanation of the major effect of the bill. I
14 think I'm figuring out what the source of confusion is for
15 people that think that we're requiring an electronic
16 recording. Rep. Hefley, I'm trying to answer your
17 question here.

18 Some folks are concerned that this imposes a new
19 requirement that all executive sessions be electronically
20 recorded, even if that's not how the local government has
21 record- -- has done things in the past. And I'm
22 understanding where the confusion arises, and it'll take a
23 minute of explanation, but bear with me.

24 What the bill says is that discussions that
25 occur in an executive session of a local public body,

1 shall be recorded in the same manner and media that the
2 local public body uses to record the minutes of open
3 meetings. So that's clear enough.

4 If you record your open session by smoke
5 signals, you can record your executive session by smoke
6 signals. If you record your open session by shorthand
7 stenographers, then you can record your executive session
8 by shorthand stenographers.

9 But there's -- there are a couple of wrinkles
10 and complications. Some public bodies have a fancy,
11 digital recording system in their public hall. When they
12 retire to executive session they don't have that same
13 fancy digital recording system.

14 And they said, "Well, if the bill says it has to
15 be the same manner and same media, are we going to break
16 the law by just tape recording it? Are we going to break
17 the law by doing something else?"

18 The answer is no. Our amendment says that a
19 public body may satisfy the recording requirements of this
20 subparagraph, by making any form of electronic recording
21 of the discussions in an executive session.

22 So it doesn't have to be exactly the same
23 digital form. Any kind of recording will satisfy the
24 requirement. But a recording is not required if you don't
25 make a recording of your public session. Whatever you do

1 in public is all that you're required to do in executive
2 session.

3 MR. CHAIRMAN: Rep. Mitchell, just for
4 clarification sake, smoke signals were for communication,
5 not for recording events. Thank you. Rep. Coleman.

6 REP. COLEMAN: Thank you, Mr. Chair. We'll wait
7 until the discussion ends here.

8 MR. CHAIRMAN: Rep. Coleman. Go ahead.

9 REP. COLEMAN: Thank you, Mr. Chair. My
10 statements are particularly for Rep. Hefley, as well as
11 Rep. Decker and Rep. Lawrence and Rep. Mitchell.

12 See, my problem, Rep. Mitchell, with this whole
13 recording and taking minutes issue is if, for example, you
14 take this body, this body is recorded, we have to stand
15 here in order to be recorded.

16 Rep. Mace got a special dispensation; has her
17 own microphone. I'm jealous, but, you know she gets
18 recorded.

19 If you and I step into the next room, and we
20 have a discussion, that cannot be recorded. And I say
21 that as long as we are following the rules of the -- you
22 know, the Sunshine rules in that, that -- that should be
23 acceptable, as long as we can write them down.

24 I disagree with having to use another electronic
25 form, even though I'm not using this system, to go and

1 find myself a tape recorder before I can talk to you in
2 the next room. I have a problem with that.

3 As long as I have an attorney, as long as -- as
4 long as we stay on the subject that we went into executive
5 session for, I think that minutes, as long as we're honest
6 about it and can hold up the scrutiny of the court, then I
7 say I ought to have the latitude of either written
8 minutes, recorded minutes, or whatever -- digital burned
9 CD or whatever.

10 But what I'm saying is, you need to give us
11 latitude. You made this amendment better. I agreed with
12 you on the amendment, but I still have problems that
13 you're still requiring me to record.

14 MR. CHAIRMAN: Rep. Mitchell.

15 REP. MITCHELL: Thank you, Mr. Chairman. Well,
16 Rep. Coleman, if you and I stepped off to the hall outside
17 the floor, we would not be a quorum of this body, and we
18 would not be in executive session. And there would be no
19 requirement that we record our discussion.

20 It's only public bodies that are meeting in
21 executive session with at least a quorum, and can conduct
22 official business. And if they're in that setting, then
23 pretty sure bet they're not huddling in a cloak room
24 somewhere in secret.

25 They're sitting down in an official room. They

1 can put a tape recorder on the table, or whatever they
2 want. If the executive council, or the executive
3 committee of the Legislature went into executive session,
4 they would be in a hearing room, and they would be sitting
5 around the tables that have the tape devices.

6 So it's not that we have to follow people into
7 their offices, or into their closets or into the bathroom;
8 it's when the body is officially meeting, it needs to make
9 a record of its meeting.

10 MR. CHAIRMAN: Rep. Coleman.

11 REP. COLEMAN: Thank you, Mr. Chair, for letting
12 me respond.

13 Again, let's not get technical. Three or more
14 makes a group, and then, you know, we can go to the next
15 room.

16 But the issue is, Rep. Mitchell, is that you're
17 requiring me to record with something different, because
18 for whatever reason, I can't take this recording system
19 and put it in the next room.

20 And what I'm saying is, part of the testimony
21 that took place in committee, that I had a lot of problems
22 with was that this -- this legislation is coming from the
23 Press Association. The Press Association was miffed
24 because the selection for the university president was not
25 known to them in enough time to sell headlines.

1 REP. MITCHELL: Mr. Chairman.

2 REP. COLEMAN: That's the truth of the matter.

3 REP. MITCHELL: Point of order, Mr. Chairman.

4 MR. CHAIRMAN: Rep. Mitchell.

5 REP. MITCHELL: I would request that the
6 discussion be directed to the merits of this bill; not to
7 the motives of anyone supporting this bill.

8 MR. CHAIRMAN: Rep. Coleman.

9 REP. COLEMAN: Thank you, Mr. Chair. What I am
10 conveying to folks is the testimony that took place, is
11 the persons in the Press Association said that they went
12 to 36 counties, searched records to see how minutes are
13 kept, and --

14 MR. CHAIRMAN: Rep. Coleman.

15 REP. COLEMAN: -- how executive sessions happen.

16 MR. CHAIRMAN: Rep. Coleman, I would ask that
17 you keep it strictly to the actual merits of the
18 amendment, please. Representative --

19 REP. (?): Mr. Chairman, I believe that the
20 affairs presented before a committee are appropriate to be
21 discussed in this body, and I disagree with your ruling.

22 REP. MITCHELL: Mr. Chairman?

23 MR. CHAIRMAN: Rep. Mitchell.

24 REP. MITCHELL: The issues that Rep. Coleman was
25 bringing up the second time was in fact testimony that

1 occurred in committee.

2 MR. CHAIRMAN: Okay.

3 REP. MITCHELL: I was objecting to the line she
4 was going on before that. But she changed subjects. When
5 she changed subjects, it was testimony directed to the
6 bill, and to committee testimony.

7 MR. CHAIRMAN: I apologize. Rep. Coleman.

8 REP. COLEMAN: Thank you, Mr. Chair. My point
9 is, how serious is the infractions of executive session?
10 I say, from what I heard in testimony, that they're not
11 that serious, and that minutes will do, or if you do have
12 a recording, you can use either/or.

13 What I'm asking for, Rep. Mitchell, is the
14 latitude of either/or.

15 MR. CHAIRMAN: Rep. Mitchell. Rep. Stengel.

16 REP. STENGEL: Thank you, Mr. Chairman. Rep.
17 Mitchell, my granddaddy had a saying, "If it ain't broke,
18 don't fix it." And I've yet to hear what is broken that
19 this bill needs to repair, and I need this for my own
20 education so that I'll be able to decide whether to vote
21 Aye or Nay.

22 MR. CHAIRMAN: Rep. Mitchell.

23 REP. MITCHELL: Thank you. Okay, members, the
24 question is, if it ain't broke, don't fix it. What broke?

25 You may have been aware of a series of articles

1 in the summer about a public access project that went to
2 different towns and asked for public records. And many of
3 those town denied access to those public records, even
4 though they clearly fell under the Open Records Law. And
5 the towns had the obligation to give them, they didn't.

6 And what this bill fixes is that it cre- -- two
7 things. Number one: it creates a greater incentive on
8 government to get the law right, and not to make a citizen
9 go to court to get public records. And it does that by
10 telling a government that if a citizen has to come after
11 you and they win, then you'll have to pay their legal
12 expenses.

13 But the other thing that's broke, Rep. Stengel,
14 is that right now the public has no means to verify that
15 executive session discussion was properly directed.

16 We've all been in groups, and I've participated
17 in executive session discussions in school districts and
18 in other public bodies. It's easy to naturally drift, and
19 there's no check on that. And there's no incentive for
20 people to say, "Oops, we need to be on task and we need to
21 be on subject, not discussing other matters."

22 We have all heard anecdotally of problems where
23 local governments will go into executive session on one
24 subject and then come out and vote unanimously on a
25 different subject.

1 We heard in committee testimony of various
2 citizens that tried to get information about what
3 happened, or had reason to believe that executive session
4 was abused, and there was no way to verify it.

5 So "what's broke?" is that we have something
6 happening behind closed doors, with absolutely no way to
7 hold it accountable or keep it honest. That's what's
8 broke.

9 How this bill fixes it is by creating a way to
10 keep it honest and to hold it accountable. Thank you.

11 MR. CHAIRMAN: Rep. White.

12 REP. WHITE: Thank you, Mr. Chairman. Rep.
13 Mitchell, I applaud and appreciate what it is you're
14 attempting to accomplish here. But I have grave concerns
15 for the potential, unintended consequences of what might
16 ultimately be accomplished.

17 There are over 2,000 governmental entities in
18 the State of Colorado, and on each of those governmental
19 entities, there are fine, honorable, well-intentioned
20 individuals that on occasion make unintentioned missteps.

21 And I am very concerned that as a result of
22 this, those fine, honorable, well-intentioned people might
23 give second thought to serving on public entities, if they
24 feel that they might be putting themselves in harms way,
25 unintentionally by creating a technical misstep, if you

1 will, as regards your amendment -- or your bill.

2 If these people do something in executive
3 session that causes them to break the law, I can see any
4 number of people saying, "Why should I serve on this water
5 and sewer board?" "Why should I serve on this recreation
6 district board?"

7 "There is nothing in it for me, other than the
8 potential of breaking the law, and the consequences that
9 go along with that." So I have to oppose this bill on
10 those reasons.

11 MR. CHAIRMAN: Rep. Marshall.

12 REP. MARSHALL: Thank you, Mr. Chairman. Rep.
13 Mitchell, I just need to clarify a question related to
14 some of Rep. Coleman's remarks.

15 Is it -- is it your intention that minutes can
16 be in any format, written or electronic? They're not
17 mandating in some instances that they have to be
18 electronic?

19 MR. CHAIRMAN: Rep. Mitchell.

20 REP. MITCHELL: Thank you, Mr. Chairman.
21 Minutes have to be in the same manner and media as the
22 open session. If the open session is electronic, then it
23 has to be an electronic recording in executive session,
24 with the flexibility that any form of electronic recording
25 will work.

1 So if you -- if you take notes in open, then you
2 can take notes in executive. But if you record in open,
3 then you have to record by some means in executive.

4 MR. CHAIRMAN: Rep. Marshall.

5 REP. MARSHALL: I'm still a little bit confused.
6 You're saying that they can have an open meeting, and use
7 either/or written or electronic. I'm not sure why the
8 same format has to be used in executive session. What --
9 what difference does it make? I'm just not clear about
10 that.

11 MR. CHAIRMAN: Rep. Mitchell.

12 REP. MITCHELL: Thank you. It came through the
13 negotiation between the advocates of the bill and the
14 people that were affected by the bill.

15 The original idea, Rep. Marshall, was to record
16 executive session. Some towns and governments said, "We
17 don't record our public session. We don't want to go buy
18 new equipment to record executive. Why are you making us
19 do that?"

20 So then the idea behind the bill said, "All
21 right. We don't mean to make you do anything new. You
22 can go ahead and record your executive session or keep a
23 record of it the same way you do of your open session.
24 Take minutes, if you want."

25 But if you're already making electronic

1 recordings, then you have to keep just as reliable a
2 record of your executive session. That's why the
3 either/or, to let the town respect its own customs and
4 policies.

5 MR. CHAIRMAN: Is there any further discussion?
6 Rep. Paschall.

7 REP. PASCHALL: Thank you, Mr. Chairman. I
8 move .010.

9 REP. MITCHELL: (Inaudible)

10 MR. CHAIRMAN: Amend .010 is on the screen.
11 Rep. Paschall, to your amendment.

12 REP. PASCHALL: Thank you. Members, what this
13 does is -- it says that first of all, the way the bill is
14 set up right now, if they go into executive session and
15 the attorney says that its private, then that's going to
16 be privileged information under the attorney/client
17 communication.

18 And what we are trying to do with this one is to
19 say that if they're going to be representing third parties
20 on behalf of employees, that that is not -- they should
21 not be doing those execu- -- in executive session. Those
22 should be fully disclosed to the public during those --
23 because it is on behalf of the public that they are
24 negotiating, and they should be made available for public
25 scrutiny at that time. So I would ask for an "Aye" vote.

1 MR. CHAIRMAN: Rep. Mitchell.

2 REP. MITCHELL: Thank you. Members, while I
3 support the policy in Rep. Paschall's amendment, I ask you
4 to oppose this amendment for the reason that it's kind of
5 a mixed coalition that will support this bill for passage,
6 and I think a different coalition that would vote for that
7 amendment.

8 And I will be probably unreasonably frank here
9 by saying that I suspect there are the votes to pass the
10 amendment, but then I suspect there are not the votes to
11 pass the bill. And I would rather see the policy in the
12 bill enacted than have it sacrificed on the altar of this
13 one amendment.

14 So I'm asking you to reject the amendment,
15 because I think what I'm trying to accomplish with the
16 bill is the subject here; not the amendment that will kill
17 the bill.

18 MR. CHAIRMAN: Rep. Paschall.

19 REP. PASCHALL: Well, we're setting public
20 policy here. Do you want these negotiations to go on
21 behind closed doors, and be subject to attorney/client
22 privilege? I don't think that that's right.

23 I think it's bad public policy for us to pass
24 laws down here that say, you know, even though the public
25 is at stake here, and what -- and the negotiations are --

1 directly affect them, we're just going to -- we're going
2 to keep it protected under attorney/client privilege.

3 I don't think that's right. And I'm asking for
4 an "Aye" vote, because I think it's good public policy for
5 these negotiations.

6 Now the strategy that these organizations will
7 be involved in, I think that's fine for them to be doing a
8 strategy session. But when they get to the actual
9 negotiations of those -- of those contracts, they ought to
10 be open to the public. And I ask for an "Aye" vote.

11 MR. CHAIRMAN: Rep. Grossman.

12 REP. GROSSMAN: Thank you, Mr. Chairman. Well,
13 folks, there are a bunch of reasons to vote against this
14 amendment. Rep. Mitchell gave you a couple. I'll give
15 you a couple more.

16 Under current law, executive session are the
17 exception. They are not the rule. And you can only go
18 into executive session in very limited circumstances, such
19 as when you are discussing a specific personnel matter
20 dealing with an employee, and that employee requests an
21 executive session.

22 There is nothing in current law, and I defy Rep.
23 Paschall to point at anything in current law that would
24 allow a school board or any other local public body to
25 have negotiations in executive session. There's nothing in

1 law that permits that. This amendment is, at best,
2 unnecessary.

3 Second point, the point that Rep. Paschall
4 brought up about attorney/client privilege, is absolutely
5 ludicrous, folks. We're talking about negotiations
6 between two arms-length parties in dealing with collective
7 bargaining. There is no attorney/client privilege that
8 could even remotely be asserted to try to protect that
9 from disclosure.

10 This amendment does threaten the coalition that
11 put this bill together. And you'll notice, my name is
12 both on the amendment that Rep. Mitchell drafted, and the
13 bill. And I not only will oppose the bill if this needless
14 amendment gets on, I will also work for it's defeat. I
15 urge a "No" vote on the Paschall Amendment.

16 MR. CHAIRMAN: Rep. Mitchell.

17 REP. MITCHELL: Thank you, Mr. Chairman. I
18 appreciate Rep. Grossman's words. While he's here, I'd
19 like to lay a little record.

20 Rep. Grossman, is it your understanding, then,
21 that this amendment is unnecessary because the Open
22 Records Law already bars government bodies from
23 negotiating in secret with third parties?

24 MR. CHAIRMAN: Rep. Grossman.

25 REP. GROSSMAN: Thank you, Mr. Chairman. Yes,

1 absolutely. The provisions that you're pointing to don't
2 create the exception that Rep. Paschall says exists.

3 MR. CHAIRMAN: Rep. Mitchell.

4 REP. MITCHELL: ...negotiation line.

5 MR. CHAIRMAN: Rep. Paschall.

6 REP. PASCHALL: Thank you, Mr. Chairman, and
7 members. With this bill -- if this bill is passed exactly
8 what I said will occur, because that's what the bill does.
9 It's changing the law to give them the ability to say that
10 this is protected under attorney/client privilege.

11 If it's in the opinion of the attorney who is
12 representing the state public body should be, that's what
13 this bill does. And if we -- if we do not include this
14 amendment, we are allowing those negotiations to go on
15 behind closed doors, without proper public scrutiny.

16 And I -- again, I think Rep. Grossman, you're
17 wrong on that, because that's what we're doing with this
18 bill. We are changing the law.

19 And once this law is changed, and if this bill
20 does pass, if we don't pass this amendment we're going to
21 allow those negotiations to go on behind closed doors.
22 And it gives them that ability, 'cause that's what we're
23 doing.

24 We're changing the Colorado Revised Statutes,
25 and if that goes on, again, we're just saying it's okay to

1 do these negotiations behind closed doors, and I say
2 that's not good policy. Ask for an "Aye" vote.

3 MR. CHAIRMAN: Rep. Mitchell.

4 REP. MITCHELL: Thank you, Mr. Chairman. With
5 respect and appreciation to my good friend Rep. Paschall,
6 the argument that he just made is based on a flat-out
7 misunderstanding.

8 The protection of the bill provides for
9 attorney/client privilege, does not expand or contract the
10 definition of attorney/client privilege. Attorney/client
11 privilege applies only when a person or a body is talking
12 directly to their own lawyer.

13 If an outside party comes into that discussion,
14 the privilege is waived; there is no more attorney/client
15 privilege. So by recognizing attorney/client privilege in
16 the bill, we are not -- I repeat, we are not authorizing
17 attorneys to shelter and make secret negotiations with
18 third parties, because the minute a third-party comes into
19 the room that we're negotiating with, there is no
20 attorney/client privilege and the other provision of the
21 bill that Rep. Paschall is concerned about, doesn't apply.

22 But one more thing to clarify with Rep.
23 Grossman. He said that he's not aware of anything -- he's
24 not aware of anything in existing law that would allow a
25 government body to negotiate with anyone else. But there

1 has been some argument that -- that -- darn it, I keep
2 losing it. Thank you.

3 There has been some argument by some public
4 bodies that paragraph E, in the Open Meetings Law,
5 regarding negotiations, authorizes secret negotiations.
6 And what that says is, that you can go into executive
7 session for determining positions relative to matters that
8 may be subject to negotiations, developing strategy for
9 negotiations, and instructing negotiators.

10 Now, Rep. Grossman, Rep. Paschall's amendment
11 would have said, "No third-party negotiations." But you
12 say that's not necessary because this section clearly
13 doesn't apply to that, right? It only applies to the body
14 itself forming its own negotiating strategy; not actually
15 bringing in someone else to conduct negotiations.

16 MR. CHAIRMAN: Rep. Grossman.

17 REP. GROSSMAN: Thank you, Mr. Chairman. And
18 Rep. Mitchell, that's exactly right. And I've actually
19 had the experience of conducting negotiations on behalf of
20 school districts.

21 In my former life, I represented approximately
22 15 school districts throughout the state, many of whom had
23 collective bargaining negotiations with teachers unions.

24 And at the time we were completely clear with
25 what the requirements of the Open Meetings Law are. And

1 the requirements are that when you're conducting
2 negotiations, those are in public, and anybody can come be
3 a party to that.

4 And that the only time that executive session
5 with regard to negotiations is appropriate is when you are
6 caucusing; exactly what Rep. Paschall referred to.

7 So when the parties are caucusing, obviously
8 executive session would be appropriate for the school
9 board. Obviously not the unions, because they are not
10 public bodies.

11 But the only protections that executive session
12 lends to the school board with regard to negotiations, is
13 when they are caucusing, and deciding what their positions
14 are going to be. In the negotiations, there is no
15 argument -- I think there's no color of argument under the
16 current statute that the actual negotiations could be
17 conducted in executive session.

18 MR. CHAIRMAN: Rep. Paschall.

19 REP. PASCHALL: Well, thank you, Rep. Mitchell
20 for clarifying that for me. And if that is in fact the
21 case, then really what is the opposition then to the
22 amendment? Because if they can't negotiate right now,
23 under law -- this one is just clarifying that, making sure
24 that they can.

25 In other words, if they are going to be going

1 into those executive sessions, then the public is just
2 going to be going right with them. And all I'm -- and
3 that's just clarifying it.

4 So if that's the case, that if they're involved
5 with more than just their client, and somebody else is
6 going into the room, then those at executive session
7 shouldn't even be -- well, it really isn't an executive
8 session because the public is allowed to go in, if what
9 Rep. Mitchell just said is true.

10 And then there shouldn't be an opposition to
11 this. We're just clarifying, then, that you shouldn't go
12 into executive session.

13 MR. CHAIRMAN: Rep. Mitchell, I remind you of
14 the time. Rep. Vigil.

15 REP. VIGIL: Thank you, Mr. Chairman. Colleagues,
16 we heard this argument in committee.

17 When this section of the Paschall Amendment in
18 here was inserted into the floor amendment, and that was
19 issued by Rep. Mitchell, the -- that was died. It died
20 specifically because of this issue here. Okay?

21 And I think that we need to take a look past
22 the -- the issue and the arguments of what's legal, what's
23 legal. Need to take a look at the motive of what's coming
24 along here.

25 The motive was very clear in committee that

1 should this section be inserted in there, you lose all the
2 opposition, or you lose -- increase the opposition for the
3 bill itself. I think Rep. Mitchell stated that clearly a
4 little while ago.

5 If this thing gets on the bill, the bill is
6 dead. And there's a motive in there stating that the only
7 reason they can kill the bill, and the only way they can
8 kill the bill is by getting this in there. So be careful
9 what you do.

10 MR. CHAIRMAN: Rep. Grossman.

11 REP. GROSSMAN: Just very briefly. You know, I
12 think it was Rep. Stengel who was up here just a few
13 moments ago saying "If it ain't broke, don't fix it."
14 There's nothing here that's unclear in the current law.
15 There's nothing that needs to be clarified by the Paschall
16 Amendment.

17 The Paschall Amendment is -- is just sort of an
18 assault, a collective bargaining, and an assault on
19 teachers union, and therefore would threaten the coalition
20 that's put this bill together. For that reason alone, I
21 would urge a "No" vote.

22 There is no policy reason to adopt this. No
23 policy reason whatsoever.

24 MR. CHAIRMAN: Rep. Mitchell.

25 REP. MITCHELL: Question on the amendment.

1 MR. CHAIRMAN: Is there any further discussion
2 on the amendment?

3 REP. MITCHELL: A "No" vote.

4 MALE VOICE: Division.

5 MR. CHAIRMAN: A division has been called. All
6 those not allowed to vote, please be seated. All those in
7 favor -- I'm sorry. The motion before us is the adoption
8 of amendment .010. All those in favor please stand, or
9 rise -- if you are in favor of the amendment?

10 Please be seated. Those opposed, please rise.

11 [Off microphone discussion - inaudible.]

12 MR. CHAIRMAN: The chair is not in doubt. The
13 motion is lost. Back to the bill. Rep. Mitchell.

14 REP. MITCHELL: Thank you. Members, I suspect
15 we've heard enough. I ask you to adopt House Bill 1359.

16 It is the product of lengthy negotiation,
17 accommodation and cooperation among the affected parties.
18 The major affected parties are not opposing this bill.
19 They have come to an uneasy peace with it.

20 Now, CML has sort of a formal opposition, but
21 appreciate the cooperation they've received. CCI is
22 neutral on the bill. School districts, to my knowledge,
23 are neutral on the bill. I ask you to support it.

24 MR. CHAIRMAN: Seeing no further discussion, the
25 motion is the adoption of House Bill 1359. All those in

1 favor say "Aye."

2 VOICES: Aye.

3 MR. CHAIRMAN: All those opposed, say "No."

4 VOICES: No.

5 MR. CHAIRMAN: The Chair is not in doubt. The
6 "No's" have it. The bill fails. All right.

7 [End of discussion/action on House Bill 1359-2001 on
8 April 4, 2001, at 11:43 a.m..]

9 * * * * *

10 [House of Representatives Committee of the Whole
11 reconvenes, April 4, 2001, at 12:13 p.m.]

12 MR. CHAIRMAN: Rep. Cloer.

13 REP. CLOER: (Speaking away-from microphone.)
14 Mr. Speaker, would that be adopted through the floor
15 report?

16 MR. CHAIRMAN: You heard the motion. There are
17 amendments on the desk. Will the Clerk please read the
18 title of the Mitchell Amendment to the Report of the
19 Committee of the Whole.

20 CLERK: Rep. Mitchell and Grossman, moved
21 amendment before the Committee of the Whole, shows that
22 House Bill 1359, as amended did pass.

23 MR. CHAIRMAN: Rep. Mitchell.

24 REP. MITCHELL: Thank you, Mr. Chairman. I move
25 the Mitchell Grossman Amendment to the Report of the

1 Committee of the Whole, and ask that it be displayed on
2 the screen.

3 Members this amendment will reflect that House
4 Bill 1359 regarding open meetings and open records did in
5 fact pass. You heard plenty of discussion of the bill,
6 because it's a rather lengthy bill.

7 I'm afraid there were a lot of details and maybe
8 there was some confusion about those details. In essence,
9 the bill does two things.

10 Number one: it creates a way for citizens to
11 have more confidence that government bodies are following
12 the law on executive session. It creates a way to verify
13 and hold accountable a government. A way that hasn't
14 existed in the past.

15 And I don't understand how folks that talked
16 about smaller government and closer to the people can be
17 against making that process more open. I think that this
18 is an important innovation.

19 The second thing it does, it says that if a
20 citizen has to challenge a government denial of access to
21 records, and they win, then the government will have to
22 pay that citizens attorney fees.

23 And members, this is only fair, because if you
24 have a right to records, and the government gets the law
25 wrong and says you can't have them, it shouldn't cost you

1 your money when you win that fight.

2 If you say, "No, government, give me these
3 records. It's public information." And you have to go to
4 court to win that fight, then it's only fair that if you
5 win, you get those expenses paid.

6 There might be -- I don't know if there will be
7 other speeches, and if there are, then I'll respond to a
8 couple points. But I'd like to respond to only one right
9 now, and that's the question that Rep. White raised.

10 And that is, there are a lot of well-intentioned
11 citizens who participate out of good will in government,
12 and this bill might put them in harm's way. And Rep.
13 White, I share your value and your concern, and that's why
14 this bill is drafted, precisely not to put any individual
15 citizen in harm's way.

16 There is no penalty. There is no fine. There
17 is no individual consequence. There is only the public
18 consequence that information that should be public is made
19 public.

20 If a judge reviews the record, and finds out
21 that something that's not supposed to be part of executive
22 session was discussed in executive session, he makes that
23 information public. That's the only consequence.

24 Might a citizen be embarrassed that that
25 happens? Yes, they might be embarrassed.

1 But I submit to you, members, that it's a better
2 consequence that the public information is made public.
3 That's more important than avoiding embarrassment to the
4 citizen that accidentally kept it private.

5 Making the law work, and making public process
6 public is the way that we need to go. I request your
7 support for House Bill 1359.

8 MR. CHAIRMAN: Discussion?

9 REP. MITCHELL: And for the --

10 MR. CHAIRMAN: Rep. White?

11 REP. WHITE: Thank you, Mr. Speaker. Rep.
12 Mitchell, I think that the perception of being in harm's
13 way can oftentimes be as bad as the reality of being in
14 harm's way, and it will have the unintended consequence,
15 as I said, of reducing public participation in these many,
16 many, many government entities that exist throughout our
17 state. And as a result, I ask for your -- I ask the body
18 to refuse this amendment.

19 MR. CHAIRMAN: If this passes, your amendment is
20 moot. Rep. Lawrence.

21 REP. LAWRENCE: Thank you, Mr. Speaker. And I
22 ask for your support of the Mitchell Amendment. I think a
23 comment made by Rep. White is really quite important.

24 The perception is many times that the public is
25 questioning why you are going into executive session, and

1 having served on city council I know that people expect
2 that when you go into executive session that you discuss
3 only the matter at hand, and nothing else.

4 If you have a good city/county attorney,
5 manager, et cetera, they will make sure that as soon as
6 you wave off from the discussion that you are in there
7 for, they will ask you not to go any further with that.

8 Remember, many times you have appointed or hired
9 these people, and that puts them in a difficult position
10 to keep you in line, if you will. For the public to have
11 recourse, I think is extremely important.

12 Remember, if you're doing what you're supposed
13 to do in executive session, you won't come under any
14 scrutiny. But at least the public knows that if there is
15 anything substantive that they should not be discussing,
16 that this will be -- go before a judge who will take a
17 look at this and decide whether or not you have violated
18 an executive session law.

19 And what -- just think about, as elected
20 officials, where you are on the totem pole, if you will,
21 in terms of confidence and trust from the public. And I
22 don't think it's very high.

23 And if there's anything you can do to improve
24 that and reenforce that, I think this is one mechanism
25 to do that. So I again would ask you to support the

1 The House will be in recess for one minute.
2 Rep. Grossman, Paschall and Mitchell, could I see you up
3 here for a moment?

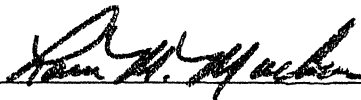
4 [End of discussion/action on House Bill 1359-2001.]

5 C E R T I F I C A T E

6
7 STATE OF COLORADO)
8) ss
9 COUNTY OF ARAPAHOE)
10

11 I, Laura M. Machen, an independent
12 transcriber and notary public within and for the State of
13 Colorado, certify the foregoing transcript of the tape/CD
14 recorded proceedings, In Re: discussion/action on House
15 Bill 1359-2001, House of Representatives Committee of the
16 Whole, April 4, 2001, and as further set forth on page
17 one. The transcription, dependent upon recording clarity,
18 is true/accurate with special exceptions(s) of any or all
19 precise identification of speakers, and/or correct
20 spelling or any given/spoken proper name or acronym.

21 Dated this 13th day of February 2004.

22
23 

24 My commission expires May 23, 2004

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