

Colorado Town Council Violated State's Open Meetings Law

By Steve Zansberg

On June 11, Colorado's Court of Appeals held that the Town Council for Basalt, Colorado (a mountain town near Aspen) violated the Colorado Open Meetings Law (COML) when it met on four occasions in 2016 to discuss public business outside of public view – supposedly in statutorily authorized “executive sessions” – but failed to announce the particular topic that was to be discussed. Accordingly, the appeals court remanded the case to the trial judge with instructions to order the release of the recording of the illegally conducted meetings, and to award the plaintiff his reasonable attorney's fees.

Citizen Challenges Flouting of Sunshine Laws

Theodore Guy is an architect and resident of the town of Basalt. For months, he was frustrated by a series of practices in which his town government had engaged that thwarted transparency. Among the transgressions were discussions of public business (including decision-making) by a quorum of the Town Council via emails and texts, the routine deletion and expungement of emails and text messages exchanged between the Mayor and Town Council members, and the Town Council's regular practice of convening “executive session” meetings without notifying the public, in advance, what topics were to be discussed behind closed doors. In December 2016, Guy filed suit alleging multiple violations of the Colorado Open Records Act (CORA) and COML.

Following an evidentiary hearing in December 2017, the district court judge entered his findings and conclusions, in which he determined that the CORA had not been violated by the Mayor's and Town Clerk's routine destruction of emails and texts in which they discussed public business. Judge Russell Granger found that the Town Council had violated the COML in some of the four meetings challenged in the suit, because they had not announced with the requisite degree of specificity, the “particular topic” that was to be discussed in executive session concerning a proposed real estate transaction. Thus, he ordered the Town to disclose to Mr. Guy a copy of the audio recording of that portion of that closed-door meeting.

However, Judge Granger found that on three other occasions the Town Council had not violated the COML when it announced only the statutory basis (including citation) for an authorized executive session, but failed to disclose any topic, whatsoever, indicating the subject matter of the planned closed door meeting. Moreover, because there were only audio recordings available for two of the four Town Council meetings Guy's complaint challenged, Judge Grainger repeatedly stated his views, from the bench and in his ruling, that the lawsuit was a waste of the parties' and the court's time and resources. He characterized the plaintiff's efforts to use the COML merely to “create an income stream for attorneys,” and opined that his lawsuit “will likely cause more harm to the public than good.”

In a subsequent ruling, Judge Granger granted summary judgment to Guy on his independent claim that the Town Council also violated the COML when they discussed public business via

emails exchanged between all members of the Town Council without providing the requisite advance public notice and right of contemporaneous observation of those “meetings.”

Guy chose to appeal only the portion of the trial court’s order finding that the Town Council had not violated the COML when it failed to publicly identify *any* “particular topic” in advance of its closed door meetings.

Court of Appeals Vindicates Citizen’s Efforts

In a scathing rebuke of the trial court’s ruling, Colorado’s Court of Appeals held, in an opinion designated for official publication (and presently available at [2020 COA 93](#) and Bloomberg’s Media Law Reporter at 2020 BL 216514) that Basalt’s Town Council violated the following portion of the COML:

The members of a local public body . . . upon the announcement . . . to the public of [1] the topic for discussion in the executive session, including [2] specific citation to this subsection . . . authorizing the body to meet in an executive session and [3] *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 . . .

Colo. Rev. Stat. § 24-6-402(4)(f) (2020) (emphasis added). Notably, subsection [3] above was added to the COML in 2001 as a third requirement.

The Court of Appeals found that the undisputed evidence at the Show Cause hearing showed that the Town Council, as a matter of policy and practice, *never* announced *any* “particular matter” that was to be discussed in its executive sessions; instead, the Council merely cited the statutory provision and recited the statutory text, e.g., “personnel matters,” or “conference with the attorney for the Council to receive legal advice.” Thus, the appeals court held, there was no issue presented about the *degree of specificity* required by COML (“in as much detail as possible”) because the Town had conceded it had provided *no notice whatsoever* of “the particular topic” that would be discussed.

Following the Show Cause hearing, the trial court had found the Town Council had satisfied requirement [3] above on all occasions when it met behind closed doors to receive legal advice from the Town Attorney. The trial court found that to provide any detail, whatsoever, about the topic of those discussions would run the risk of waiving the Town’s attorney-client privilege.

The Court of Appeals flatly rejected this argument, noting that under the federal Freedom of Information Act, an agency withholding records under a claim of attorney-client privilege must produce a *Vaughn* index that must include (in all but the rarest of circumstances) a general description of the topic of the communication at issue. Similarly, privilege logs exchanged in the context of civil discovery must also identify the topic of a claimed privileged communication. Thus, the Court of Appeals ruled, there was no justification for the Basalt

Town Council's failure to identify, in general terms, what topic the Council was to be discussing with its attorney behind closed doors.

The Court of Appeals found the Town Council also had no justification for failing to announce that the performance of the Town Manager, Mike Scanlon, was to be the subject of three of its closed-door meetings. The Town had defended its failure to do so on grounds that the Town Manager's employment contract committed the Town Council not to discuss his performance reviews in a meeting open to the public. Thus, the Town argued, merely to notify the public that it would be conducting such discussion in an executive session could potentially expose the Town to a breach of contract claim from Scanlon. Also, the Town argued, such an announcement could potentially violate his constitutional right of privacy.

Although the trial court had accepted both of those arguments, the Court of Appeals rejected them. First, a government employee, like the Town Manager, has a diminished expectation of privacy, generally, and no legitimate such expectation with respect to how he performs his official duties. Second, a government body cannot commit, by contract, to violate the state's transparency laws; any such agreement would be void and unenforceable as "against public policy." Thus, the Basalt Town Council had not shown that it could not comply with COML by publicly announcing that the Town Manager's performance was to be discussed in an executive session.

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Remedies for Court's Findings of Violations

Under Colorado law, when a public body fails to "strictly adhere" to all of the statutory prerequisites for convening an executive session – including, here, the requirement that it publicly announce "the particular matter" to be discussed behind closed doors – its subsequent meeting is not an "executive session" at all; instead, it is an *unlawfully closed* public meeting. Thus, the recording (minutes) of that public meeting are a public record that must be disclosed upon request. Accordingly, the Court of Appeals ordered the Town of Basalt to make available to Guy a copy of the audio recording of the Town Council's closed-door meeting on April 26, 2016, in its entirety.

In addition, the COML mandates that any person who obtains an order finding that a public body has violated that statute is entitled to recover his or her attorney's fees. Guy had asked the Court of Appeals to reassign the case on remand to a different trial court judge, in light of his repeated comments disparaging Guy's litigation as a waste of judicial and public resources. The Court of Appeals declined that request, finding the judge had not demonstrated any personal bias against Guy or his counsel. However, the Court of Appeals noted that its decision reversing several of Judge Granger's findings and conclusions should suffice to disabuse the judge of his views about the benefit to the public interest of Guy's successful litigation.

Steven D. Zansberg, Ballard Spahr, Denver, represented plaintiff together with Thomas Kelley, Killmer, Lane & Newman; and Katayoun A. Donnelly, Azizpour Donnelly.