DISTRICT COURT, BOULDER COUNTY, COLORADO Boulder County Combined Court 1777 6th St. Boulder, Colorado 80302	
Plaintiff: DEMANDING INTEGRITY IN GOVERNMENT SPENDING, a Colorado nonprofit corporation, v. **Defendants:** BOULDER COUNTY, a county of the State of Colorado; BOARD OF COUNTY COMMISSIONERS, COUNTY OF BOULDER; MATT JONES, CLAIRE LEVY, and MARTA LOACHAMIN, in their official capacity as members of the Boulder County Board of County Commissioners.	
Attorneys for Plaintiff: Chad Williams, #30917 Mark Champoux, #40480 Molly Kokesh, #51179 DAVIS GRAHAM & STUBBS LLP 1550 Seventeenth Street, Suite 500 Denver, CO 80202 Telephone: (303) 892-9400 Facsimile: (303) 893-1379 E-mail: chad.williams@dgslaw.com E-mail: mark.champoux@dgslaw.com E-mail: molly.kokesh@dgslaw.com	**▲ COURT USE ONLY ▲** Case No. 22CV30101

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Defendants' violations of the Open Meetings Law ("OML") are straightforward and indefensible. They know this. That is why they center their defense on the additional delay a Court ordered, law compliant, and transparent bidding process would cause, asserting it will result in "a heavy blow to more than 1,084 households whose homes were tragically burned in the Marshall Fire." Resp. at 2.

Despite Defendants' violations of Colorado law, no injunction has been issued in this

case and no order of this Court or any court has stopped Defendants from beginning its cleanup of fire debris in Boulder County. Even Defendants have let slip, on and off the record, that they, not Plaintiff, are the sole reason for delay of this cleanup work. Indeed, Plaintiff did not even file this lawsuit until 50 days after the fires were extinguished. But the facts have not stopped Defendants from continuing its full court press to falsely blame Plaintiff for delay of the debris cleanup project. They have beaten this drum privately and publicly, prompting media sensationalism and the false storyline that Plaintiff is causing and will continue to cause cleanup delay.

This sideshow must end: *DIGS will no longer seek an order from this Court directing Defendants to rebid its contract in a Colorado law compliant bidding process.* Defendants, and Defendants alone, should be accountable for delaying the start of this important cleanup, without the convenience or ability to claim this case is somehow responsible.

Defendants argue in their Response: "[T]he Court has discretion to craft a remedy that addresses its concerns without impacting Marshall Fire survivors." Resp. at 20. Plaintiff agrees. In lieu of a rebidding process, Plaintiff now seeks much narrower relief that is finely tailored to remedy the law violations Defendants committed: brief depositions of the Commissioners and Evaluation Committee (3.5 hours each) and 10 requests for production to Defendants.[1] While not a perfect solution, such court-supervised discovery is a sensible remedy that will provide some level of transparency to Defendants' bidding and selection process, effect the policies that underpin the OML, and substitute for statutory remedies that are unavailable due to Defendants' noncompliance with the OML. This remedy will also inarguably permit Defendants to continue

[1] On March 14, 2022, undersigned counsel conferred with counsel for Defendants concerning this relief. Defendants object to it.

to plod along in their now 75-day effort to begin the cleanup of debris that covers approximately 6,000 acres in Louisville and Superior, Colorado.

ARGUMENT

The Colorado Supreme Court recognizes the OML is "clearly intended to afford the public access to a broad range of meetings at which public business is considered," *Town of Marble v. Darien*, 181 P.3d 1148, 1152 (Colo. 2008), and attaches importance to the legislative intent of the OML "that citizens be given a greater opportunity to become fully informed on issues of public importance so that meaningful participation in the decision-making process may be achieved." *Cole v. State*, 673 P.2d 345, 347 (Colo. 1983). This did not happen relative to Defendants' many meetings during the last 60 days to discuss its most important business in the last 25 years.

I. DEFENDANTS HAVE *NO* DEFENSE ON THE MERITS

Defendants' violations of the OML are straightforward and provable by judicially noticeable facts. The Evaluation Committee met for over sixteen hours with no notice to the public, no claim of executive session, no access for the public to observe it, no ability of the public to participate in the meetings or to make comment, and no recordings of the sessions. These facts are immutable. Thus, because they must, Defendants argue the Evaluation Committee is not a "local public body" to which the OML applies. Not so. The law is plainly that a committee like the Evaluation Committee is a "local public body."

A. The Evaluation Committee Is a "Local Public Body" and therefore Subject to the Requirements of the OML.

Defendants first argue that unless a committee has been delegated "a governmental decision-making function," it is not a "local public body" and the OML does not apply to it. Resp. at 9. They then conflate the word "function" with the word "authority," which is not the

language of the statute. Colo. Rev. Stat. § 24-6-402(1)(a)(I). They argue that because the Defendants did not delegate "governmental decision-making authority" to the Evaluation Committee,[2] the committee "merely had the ability to make a recommendation, which the Board . . . could accept or reject." Resp. at 10. From this, Defendants claim the Evaluation Committee is not a "local public body" subject to the OML. This argument is fraught with problems.

First, the delegation of a "governmental decision-making function" is not necessary for a "committee . . . of [a] political subdivision" to be designated a "local public body," as Defendants claim. Resp. at 9. As a "committee . . . of [a] political subdivision" the Evaluation Committee is subject to the OML regardless of whether Defendants delegated a "governmental decision-making function" to it. As Defendants concedes, the OML applies to any "local public body." Colo. Rev. Stat. § 24-6-402(b). A "local public body" is

> *any* board, *committee*, commission, authority, or *other advisory*, policy-making, rule-making, or formally constituted body of any political subdivision of the state
>
> and
>
> any public or private entity to which a political subdivision, or an official thereof, has delegated a governmental decision-making function but does not include persons on the administrative staff of the local public body.

Colo. Rev. Stat. § 24-6-402(1)(a)(I) (formatting and emphasis added).[3] A "political subdivision

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[2] Understanding the applicability of the OML to committees of a county, Defendants refer to the Evaluation Committee as "the Team" throughout their response. But it was Defendants, not Plaintiff, that first called this committee of the board the "Evaluation Committee."

[3] Law Summary, Office of the Legislative Legal Services, Open Meeting Requirements of the Sunshine Law (November 29, 2021) https://leg.colorado.gov/sites/default/files/open-meeting-requirements-of-the-colorado-sunshine-law.pdf (defining "local public body" as "[a]ny board, commission, or other advisory decision-making body of a political subdivision of the state; or any entity that has been delegated the governmental decision-making function") (emphasis added).

of the state" includes "any county, city, and city and county." *Id.* As explained in *Free Speech Def. Comm. v. Thomas*, 80 P.3d 935, 937 (Colo. App. 2003), "the first part of the definition of 'local public body' *includes any advisory body* 'of any political subdivision of the state,'" and "[t]he second part of the definition of 'local public body' includes any 'entity to which a political subdivision, or an official thereof, has delegated a governmental decision-making function.'" (Emphasis added.) An entity can be considered a "local public body" under *either* part. A committee of Boulder County, the Evaluation Committee constitutes a "local public body" under the first part of the definition without regard to whether it has any "governmental decision-making function." It is therefore subject to the OML.[4]

Second, even if a committee only becomes a "local public body" if it *has been* delegated a "governmental decision-making function," Defendants obviously delegated such a function to the Evaluation Committee. "Decision-making" is "the act or process of deciding something especially with a group of people." https://www.merriam-webster.com/dictionary/decision-making. And a "function" is "any of a group of related actions contributing to a larger action." https://www.merriam-webster.com/dictionary/function. The County assembled the Evaluation Committee to evaluate proposals submitted in response to RFP #7301-22 and to recommend a contractor that should be awarded the $52 million contract contemplated by RFP #7301-22, a sum equal to 11% of the County's budget.[5] After meeting for over sixteen hours,

[4] Defendants point to *Free Speech Defense Committee* as support for its argument that the Evaluation Committee is not a local public body. But that case suggests that the Evaluation Committee *is* a local public body. In *Free Speech Defense Committee*, the court held that an advisory board formed by a district attorney was not a local public body only because the person that formed it—the district attorney—was not a "political subdivision of the state." The County is inarguably a political subdivision of the state.

[5] https://www.bouldercounty.org/news/boulder-county-adopts-549-8-million-budget-for-2022-corrected-overview-and-highlights/.

the Evaluation Committee reached a "recommendation decision," and recommended the County award the contract "in its entirety" to DRC Emergency Services, LLC ("DRC"). The Evaluation Committee undisputedly decided what it would recommend and fulfilled its "decision-making function."

The County cannot honestly claim this work did not serve any part of the "decision-making function." Especially when it accepted this $52 million dollar recommendation in an 11-minute meeting.

B. The Evaluation Committee is Not the "Administrative Staff" of Defendants.

Defendants next argue that the Evaluation Committee is merely their "administrative staff," suggesting its function was somehow clerical or organizational, and that it was therefore not subject to the OML. Resp. at 11. This position is glaringly wrong and internally inconsistent with Defendants' other efforts to tout the substance of the work of the Evaluation Committee. The Evaluation Committee did *far more* than even the elected board itself to select a contractor as the winning bidder. This work was not administrative, it was substantive: they received, reviewed, and evaluated "Best and Final Offer" responses from the bidders; they solicited information from bidders about past performance and quality of service delivery; they met to evaluate the proposals as a group; they compiled, analyzed, and agreed upon a single Score Sheet and Rate Sheet; they met for sixteen hours to discuss the bidders, and they reached a decision to recommend to Defendants. Resp. at 4-5.

There was nothing "administrative" about those efforts. Defendants accepted the Evaluation Committee's recommendation, wholesale, after listening to a five-minute presentation from a member of the Evaluation Committee, asking one question, and making

comments to thank the Evaluation Committee for its efforts.[6] This was a proverbial "rubber stamp" of the decision of the Evaluation Committee. If anything, *Defendants* served in an administrative role vis-à-vis the bidding process. One remarked, "I think the [Recommendation] pretty much speaks for itself . . . and why the decision is being made," confirming that Defendants' only role in selecting its contractor was to formally accept the Evaluation Committee's decision.

There can be no doubt the Evaluation Committee's role was substantive. Its very job was to evaluate. It was not "administrative staff" for Defendants. This carve-out from the OML does not apply.

C. The OML Provides for the Safeguard of Confidential and Commercially Sensitive Information.

Finally, Defendants claim the OML must not apply to the Evaluation Committee because, if it did, "confidential information could not be reviewed or discussed [as] much of the information submitted . . . is proprietary trade or financial information." Resp. at 11. They argue that open meetings at which such proprietary data is in view of the public would be in conflict with other statutes, like Colo. Rev. Stat. § 24-72-204(3)(a)(IV), the provision of the Colorado Open Records Act ("CORA") prohibiting disclosure of such information in response to open records requests. *Id.*

But the OML offers the same language as CORA to protect highly sensitive commercial data. In fact, it is directly tied to the provision of CORA cited by Defendants in their Response. *Id.* A local public body may go into "executive session" (a non-public meeting) for

[6] Feb. 10, 2022 Meeting of Board of Cty. Comm'rs at 2:27:15, retrieved from https://pub-bouldercounty.escribemeetings.com/Meeting.aspx?Id=df663f8c-ae0d-420d-add4-74fcf9108f0a&lang=English (Evaluation Committee presentation begins at 2:29:40 and the meeting ends at 2:36:30).

"[c]onsideration of any documents protected by the mandatory nondisclosure provisions of the 'Colorado Open Records Act,' part 2 of article 72 of the title . . . ." Colo. Rev. Stat. § 24-6-402(4)(g). Information within bid proposals that is truly commercially sensitive and proprietary would fall within such an OML exception and could be discussed in executive session outside of the public view. All that is required for such a session is proper notice with an adequate description of the topic of the session and a proper session record.

In this case, such simple procedural safeguards would have been easy to implement. Defendants implement them all the time. However, there was no effort by Defendants or the Evaluation Committee to follow OML protocols in any way relative to the sixteen hours of closed-door meetings the Evaluation Committee held in the furtherance of its selection of a bid winner. They gave no notice the Evaluation Committee would meet in executive session to have these conversations in violation of Colo. Rev. Stat. § 24-6-402(4) (requiring notice and descriptions of executive sessions). They made no recording of the meetings in violation of Colo. Rev. Stat. § 24-6-402(2)(d.5)(II)(A) ("Discussions that occur in an executive session of a local public body shall be electronically recorded."). They did not retain such recordings in violation of Colo. Rev. Stat. § 24-6-402(2)(d.5)(II)(E) ("[T]he record of an executive session of a local public body . . . shall be for at least ninety days after the date of the executive session.").

Defendants are correct. Compliance with the OML is more cumbersome than noncompliance. But that does not justify the failure of a local public body to comply with even one of its several requirements. The legislature set this priority when it adopted the OML: "the formation of public policy is public business and may not be conducted in secret." Colo. Rev. Stat. § 24-6-401.

II. DIGS Has Standing to Bring this Lawsuit

DIGS has an injury-in-fact and constitutional standing to bring this case by operation of legislative rule. Plaintiff's injury is the impairment of the rights afforded to it under the OML. *See* Colo. Rev. Stat. § 24-6-402(9)(a) ("*Any person* denied or threatened with denial of any of the rights that are conferred on the public by this part 4 has suffered an injury in fact and, therefore, has standing to challenge the violation of this part 4.") (Emphasis added). Under the OML, all "courts of record . . . shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application *by any citizen of this state*." Colo. Rev. Stat. § 24-6-402(9)(b).

DIGS is a Colorado nonprofit corporation and a citizen of Colorado. Its incorporator, Michael Brown, is also citizen of Colorado. Compl. ¶¶ 12-13. Plaintiff alleges violations of the OML. Indeed, these allegations are the entire subject matter of this case. That is sufficient to establish standing. *Weisfield v. City of Arvada*, 2015 COA 43, ¶ 22, 361 P.3d 1069, 1073 ("Based on the plain language of the Open Meetings Law, we conclude that that statute creates a legally protected interest on behalf of Colorado citizens to have public business conducted openly in conformity with the statutory provisions.").

Defendants argue, when the government entity at issue is a "local public body," the Plaintiff must at least live in the jurisdiction in which the OML is being invoked. *See* Resp. at 15-16 (citing *Weisfield*, which left open whether the "language of section 24-6-402(9) should be read literally to allow *any* citizen of Colorado to challenge any violation of the Open Meetings Law even if . . . the citizen does not reside within the jurisdiction of the public body whose actions are being challenged."). But *Weisfield* construed an older version of the OML. It was *after* the *Weisfield* case, and in direct response to it, that the Colorado legislature brought clarity and finality to this issue. In 2014, to address the trial court's decision in *Weisfield*, the legislature

amended the OML to add the following language of subsection (9)(a) that is also quoted above: "*Any person* denied or threatened with denial of any of the rights that are conferred on the public by this part 4 *has suffered an injury in fact* and, therefore, *has standing* to challenge the violation of this part 4." The court of appeals in *Weisfield* acknowledged this change in law in a footnote. 361 P.3d 1072 n.1. However, because the change was not made retroactive, it did not affect the *Weisfield* decision. This broad statutory language that defines an injury-in-fact has been operative for many years. It certainly applies to Plaintiff in this case. Plaintiff easily hurdles the low bar to establish standing.

CONCLUSION

If Defendants had complied with the OML, the public could have accessed important information and discussion about its most important vendor selection in many years. The public could have attended the meetings. Or it could have reviewed the recordings memorializing them. But the public was not invited. And there are no recordings. Because Defendants did not comply with *any* of the OML's requirements. The modest discovery Plaintiff requests in resolution of this motion—and largely this case—is to create the record Defendants failed to create as they worked. The Court should issue an injunction requiring Defendants' participation in that discovery (*see supra* at p. 2) at this time.

Dated: March 15, 2022

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** by electronic service upon the following:

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