DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way Castle Rock, Colorado 80109 (720) 437-6200	DATE FILED: March 9, 2022 3:14 PM CASE NUMBER: 2022CV30071
Plaintiff: ROBERT C. MARSHALL, v. **Defendants: DOUGLAS COUNTY BOARD OF EDUCATION; MICHAEL PETERSON, REBECCA MYERS, KAYLEE WINEGAR and CHRISTY WILLIAMS, in their official capacities as members thereof.**	**▲COURT USE ONLY▲** Case Number: 2022CV30071 Division: 5
ORDER RE: PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION	

THIS MATTER came before the court on February 25, 2022 for a hearing on Plaintiff's *Motion for Preliminary Injunction Prohibiting Further Violations of the Colorado Open Meetings Law* (hereafter "Motion"). At the conclusion of the hearing the court took its ruling under advisement. Now having considered the testimony of the witnesses, the exhibits, the statements of counsel and the applicable law, the court finds and orders as follows:

STATEMENT OF THE CASE

Plaintiff Robert C. Marshall (hereafter "Marshall") is a resident of Douglas County, Colorado. Defendant Douglas County Board of Education (hereafter "BOE") is a local public body subject to the provisions of the Colorado Open Meetings Law, § 24-6-401, et seq. (hereafter "COML"). [1] Michael Peterson (hereafter "Peterson"), Rebecca Myers (hereafter "Myers"), Kaylee Winegar (hereafter "Winegar") and Christy Williams (hereafter "Williams")(collectively "Individual Defendants") are four of the seven members of the BOE.

Marshall filed a Complaint[2] alleging the four Individual Defendants engaged in activity that violated the COML by discussing and deciding to terminate the employment of Corey Wise (hereafter "Wise"), superintendent of the Douglas County School District (hereafter "DCSD"), outside a public meeting of the BOE. The Complaint alleges three claims for relief: 1) Declaratory Relief for Past Violations of the Colorado Open Meetings Law; 2) Injunctive Relief

[1] The Open Meetings Law is part of the "Colorado Sunshine Act of 1972," § 24-6-101, et seq.
[2] The original complaint was superseded by a First Amended Verified Complaint.

Barring Further Violations of the Colorado Open Meetings Law; 3) A Declaration that the Decision to Terminate the Employment of Superintendent Wise is Null and Void.

Marshall also filed the Motion which is at issue here in which he requests a preliminary injunction prohibiting the Defendants from further violating the COML by engaging in discussion of public business by three or more members of the BOE through a series of gatherings by less than three members at a time.

LEGAL STANDARD

The declaration of policy which prefaces the COML provides:

> It is declared to be a matter of state wide concern and the policy of this state that the formation of public policy is public business and may not be conducted in secret. § 24-6-401, C.R.S.

The COML goes on to state:

> All meetings of a quorum or three or more members of any local public body, whichever is fewer, at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times. §24-6-402(2)(b), C.R.S.

"Meetings" are defined as:

> [A]ny kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication. § 24-6-402 (1)(b), C.R.S.

In discussing the purpose of the COML, the Colorado Court of Appeals has observed that it affords the public access to a broad range of meetings at which public business is considered; it gives citizens an expanded opportunity to become fully informed on issues of public importance; and it allows citizens to participate in the legislative decision-making process that affects their personal interests. *Walsenburg Sand & Gravel Co., Inc. v. City Council of Walsenburg*, 160 P.3d 297, 299 (Colo. App. 2007).

The COML has a broad enforcement provision and provides that, "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." § 24-6-402(9)(a).

Preliminary injunctive relief is an extraordinary remedy designed to protect a plaintiff from irreparable injury and preserve the court's power to render a meaningful decision following a trial on the merits. *Rathke v. MacFarlane*, 648 P.2d 648, 651 (Colo. 1982).

In order to obtain a preliminary injunction, the moving party must demonstrate: 1) a reasonable probability of success on the merits; 2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; 3) that there is no plain, speedy, and adequate remedy at law; 4) that granting a preliminary injunction will not disserve the public interest; 5) that the balance of equities favors the injunction; and 6) that the injunction will preserve the status quo pending a trial on the merits. *Id.* at pp. 653-54.

ANALYSIS

Reasonable Probability of Success

The first criteria for a preliminary injunction requires a plaintiff to establish a reasonable probability of success on the merits. Here the evidence demonstrates that, separately from a public meeting, the Individual Defendants engaged in discussions among themselves and reached agreement that Wise should not continue as the DCSD superintendent. Without notifying the three board members not named as Individual Defendants, Peterson and Williams then met with Wise and presented him with alternatives regarding his departure, either that he could do so voluntarily or he would be terminated. When he refused to leave voluntarily, he was terminated at a public meeting held on February 4, 2022. At that meeting, the four Individual Defendants voted in favor of discharge and the other three members of the BOE voted against it.

Marshall does not contend that three or more members of the board met at one time, discussed discharge, and reached an agreement to terminate Wise, but instead he argues that the four Individual Defendants engaged in these activities serially, two members at a time, in order to avoid the three member prohibition of § 24-6-402(2)(b). Defendants contend that because no more than two members at a time met and communicated about these issues, they complied with the law.

There is a lack of appellate decisions in Colorado regarding whether serial communications violate the COML. Other states, however, have addressed this issue. *In Right to Know Committee v. City Council, City and County of Honolulu,* 175 P.3d 111,122 (Hawaii App. 2007) the court held that when city council members engaged in a series of one-on-one conversations relating to an item of Council business, the spirit of the open meeting requirement was circumvented and the strong policy of having public bodies deliberate and decide business in view of the public is thwarted and frustrated.

Colorado's open meeting law is similar to that of Hawaii and, in support of its decision in *Right to Know Committee,* the Hawaii court cited a number of decisions from states with similar laws. *State ex rel. Cincinnati Post v. City of Cincinnati,* 76 Ohio. St. 3d 540, 544, 668 N.E.2d 903, 906 (1996)(The Ohio Sunshine law cannot be circumvented by scheduling back-to-back meetings which, taken together are attended by a majority of a public body.); *Booth Newspapers, Inc. v. Wyoming City Council,* 168 Mich. App. 459, 471, 425 N.W.2d 695, 700 (1988)(Open Meetings Act was violated where council members met privately in separate meetings because

total number of participating members constituted a quorum even though less than a quorum participated in each meeting.); *Del Papa v. Bd. of Regents of the University and Community College System of Nevada*, 114 Nev. 388, 400, 956 P.2d 770, 778 (1998)(holding that serial electronic communications used to deliberate toward a decision violated open meetings law and "if a quorum is present or is gathered by serial electronic communications, the body must deliberate and actually vote on the matter at a public meeting"); *Stockton Newspapers, Inc. v. Members of the Redev. Agency of Stockton*, 171 Cal. App. 3d 95, 98, 214 Cal. Rptr. 561, 562 (1985)(a series of telephone contacts constitutes a meeting within California's public meeting law and "the concept of 'meeting' under the [California open meeting law] comprehends informal sessions at which a legislative body commits itself collectively to a particular future decision concerning the public business"); *Blackford v. Sch. Bd. of Orange County*, 375 So.2d 578, 580 (Fla. Dist. Ct. App. 1979)(holding that "the scheduling of six sessions of secret discussions, repetitive in content, in rapid-fire seriatim and of such obvious official portent, resulted in six de facto meetings by two or more members of the board at which official action was taken," and "[a]s a consequence, the discussions were in contravention of the Sunshine Law"); *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 263 Cal. App. 2d 41, 50, 69 Cal. Rptr. 480, 487(1968)("An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose in a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices").[3]

These decisions are consistent with the position that Colorado has taken with regard to the conduct of public business. The COML declaration of policy provides that even "the *formulation* of public policy…may not be conducted in secret." § 24-6-401(emphasis supplied). And, meetings regarding public business must be public not only when decisions are made, but also in situations where "public business is *discussed*." § 24-6-402(2)(b)(emphasis supplied). Statutes such as the COML are to be interpreted most favorably to protect the ultimate beneficiary, the public. *Cole v. State*, 673 P.2d 345, 349 (Colo. 1983). Circumventing the

[3] Plaintiff has provided the court with several other authorities in support of this position that the court finds instructive. *Harris v. City of Fort Smith*, 197 S.W.3d 461, 467 (Ark. 2004)("an informal meeting subject to the [open meetings law] was held by way of" one-on-one meetings); *Wood* v. *Battle Ground Sch. Dist.,* 27 P.3d 1208, 1216 (Wash. Ct. App. 2001)("the [Open Public Meetings Act] does not require the contemporaneous physical presence of the members to trigger its provisions" and concluding that a *prima facie* case of a meeting by e-mail was established when a quorum of school board members "exchanged mail (e-mail) messages about Board business"); *Handy v. Lane County*, 362 P.3d 867, 881 (Or. Ct. App. 2015), *aff'd in part on other grounds*, 385 P.3d 1016 (Or. 2016)("the Public Meetings Law…contemplates something more than just a contemporaneous gathering of a quorum. A series of discussions may rise to the level of prohibited 'deliberation' or 'decision'; the determinative factors are whether a sufficient number of officials are involved, what they discuss, and the purpose for which they discuss it—not the time, place and manner of their communications.")

statute by a series of private one-on-one meetings at which public business is discussed and/or decisions reached is a violation of the purpose of the statute, not just its spirit.

The hiring and firing of a school district's superintendent is clearly a matter of public business. It is a subject that can generate strong feelings and it is a matter on which the public can expect to be fully informed. Discussion by members of the BOE, let alone ultimate decisions on this subject should be conducted at meetings open to the public. The evidence indicates that four members of the board collectively committed, outside of public meetings, to the termination of Wise's employment. That decision was then formalized at an official meeting on February 4th. The fact that no public comment was permitted at the February 4th meeting is additional evidence of the Individual Defendants' commitment to their course of action.

Marshall has shown a reasonable probability of success on the merits, namely that a series of private meetings took place between various combinations of the Individual Defendants and that they reached and communicated agreement regarding Wise's termination. Marshall has, therefore, met the first requirement for a preliminary injunction.

Danger of Real, Immediate and Irreparable Injury

The COML acknowledges that the denial or threatened denial of the rights conferred by it on the public constitutes an injury in fact. § 24-6-402(9)(a). As discussed above, Marshall has shown a reasonable probability of success on the merits and since even a threatened denial constitutes an injury, Marshall has met this criteria for a preliminary injunction.

No Plain, Speedy and Adequate Remedy at Law

Once again, the COML provides guidance on this requirement. Colorado courts have jurisdiction to issue injunctions "to enforce the purposes of this section upon the application by any citizen of this state." § 24-6-402(9)(b). A proceeding under this statue implicates the interests of the general public and not just the interests of the person bringing the action. Injunctive relief rather than money damages is the only practical remedy for a violation.

No Disservice to the Public Interest

The statute furthers transparency in the conduct of public decision making. The legislature has determined that the formation of public policy may not be conducted in secret, therefore, the granting of a preliminary injunction that requires discussion and decision making to occur at public meetings would not disserve the public interest.

The Balance of Equities Favors an Injunction

The Defendants suggest this criteria disfavors the requested injunction. They argue that the Board has a strong interest in conducting operations without ongoing judicial supervision and a preliminary injunction would hamper their ability to react quickly to changed circumstances.

The court has no interest in engaging in ongoing supervision of the BOE. The preliminary injunction requested here does not imply such supervision. The requested relief is that the board do what the statute requires. To the extent that statutory compliance results in an inability to react quickly to changed circumstances, that is not the fault of the injunction. Instead it is the natural outcome of a law that circumscribes governmental decision making and insures that decisions on public matters be made in the open and not behind closed doors. The BOE is the governing body of the DCSD, it is composed of seven members who have a responsibility to work together in the public business of providing educational services in Douglas County and to do so in a way that enables the public to view the process. For the reasons discussed above, the court finds that the equities favor the preliminary injunction.

Preservation of the Status Quo Pending a Trial on the Merits

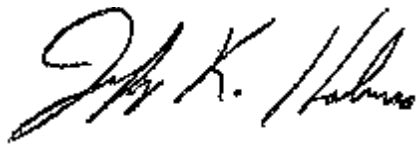
It is unclear whether there has been a past practice of conducting a series of one-on-one or two-on-one meetings that involved board members and the superintendent, followed by communicating the discussions to absent board members at similar meetings. The possibility of a "status quo" that involved an improper practice designed to circumvent the COML, however, does not argue against a preliminary injunction which is consistent with practices required by statute. The court finds that a preliminary injunction would preserve the status quo pending a trial on the merits.

CONCLUSION

The Court finds that the criteria for issuance of a preliminary injunction has been met. The Motion is GRANTED as set forth below.

The Defendants are enjoined from engaging in discussions of public business or taking formal action by three or more members of the BOE either as a group or through a series of meetings by less than three members at a time, except in public meetings open to the public. This order does not preclude the BOE from conducting executive sessions as permitted by statue.

DONE AND SIGNED this 9th day of March, 2022.



Jeffrey K. Holmes, District Court Judge