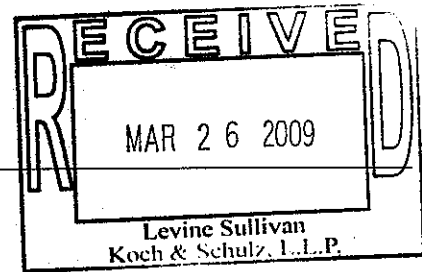


COLORADO COURT OF APPEALS



file
CPB

Court of Appeals No.: 07CA1104
Routt County District Court No. 07CV16
Honorable Thomas W. Ossola, Judge

Worldwest Limited Liability Company, d/b/a The Steamboat Pilot & Today, a
Kansas limited liability company, and Bryna Larsen,

Plaintiffs-Appellants and Cross-Appellees,

v.

Steamboat Springs School District RE-2, Board of Education,

Defendant-Appellee and Cross-Appellant.

JUDGMENT REVERSED AND CASE REMANDED

Division VII
Opinion by: JUDGE METZGER*
Graham, J., concur
Carparelli, J., specially concurs

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

Announced: March 26, 2009

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Kathleen A. Sullivan, Denver, Colorado, for Amicus Curiae Colorado
Association of School Boards

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art.
VI, § 5(3), and § 24-51-1105, C.R.S. 2008.

Plaintiffs, WorldWest Limited Liability Company, d/b/a *Steamboat Pilot & Today*, and its publisher Bryna Larsen (collectively, the Pilot), appeal the district court's judgment dismissing their amended complaint, which sought access to the record of a closed-door executive session held by defendant, Steamboat Springs School District Board of Education (Board). The Board cross-appeals as to the Pilot's standing to bring this action under the Open Meetings Law. We reverse and remand.

I. Background

In 2006, the Superintendent of the School District asked all teachers in the District to fill out surveys regarding the performance of the District's administrators and instructional support specialists. The Superintendent assured the teachers the surveys would be confidential. When Board members demanded to see the surveys, the Superintendent refused.

On January 8, 2007, the Board convened a regular meeting with an agenda that stated, as pertinent here, that the Board intended to conduct an executive session for "the purposes of discussing personnel matters involving access to information."

Administrators in attendance at the meeting believed the item referenced the controversy surrounding the surveys, and requested then that any discussion be public.

Despite the request, the Board voted to go into executive session. The Board, with the exception of one member who had objected, went into executive session with the Superintendent for approximately thirty minutes, and engaged in consultations with its legal counsel. It then returned to public session.

The Board immediately voted to go into a second executive session specifically to seek legal advice. The Superintendent did not attend this session. The Board returned to public session after this second executive session. According to the minutes of the meeting, the Board chairwoman read the following:

This is a directive to [the Superintendent] from the school board, in accordance with access statute 22-33-103, the legal interpretation of this by our board attorney . . . , and a directive given in Executive Session during the December 18th board meeting, please give a copy of the recent survey results to all of the board members.

The Board took no public vote and did not discuss the directive in public session.

The Pilot requested access to the recording of the first executive session pertaining to “access to information,” but this request was denied by the Board. The Board’s counsel, apparently referring to section 24-6-402(2)(d.5)(I)(C), C.R.S. 2008], wrote:

[T]here was neither a “substantial discussion of any matters not enumerated” in the motion, nor was any action taken concerning any “proposed policy, position, resolution, rule, regulation, or formal action” during such sessions.

The Pilot then filed a complaint in district court, alleging violation of the Colorado Open Meeting Law, section 24-6-402, C.R.S. 2008 (OML), and seeking an order directing disclosure of the tape recording of that first executive session.

After a hearing, the district court conducted an in camera review of the Board’s transcript of the recording of the challenged executive session, which had been redacted to remove all attorney-client consultation. The court concluded the Board had not engaged in a substantial discussion of a non-exempt topic and had not adopted any formal action in that executive session. The court dismissed the complaint and awarded attorney fees to the Board.

However, in response to a C.R.C.P. 59 motion from the Pilot, the district court reversed its award of attorney fees.

On appeal, the Pilot asserts the Board failed to comply with OML requirements for advance public disclosure of the topic of the first executive session, the Board improperly adopted a policy position at that session, and the remedy for the Board's failure to comply with the OML is public disclosure of the entire recording of the first executive session. The Board asserts it complied with the OML, and any error by the district court was invited by the Pilot. Moreover, it asserts on cross-appeal that the Pilot lacks standing to bring the action. We will first consider the issues of standing and invited error before turning to the substantive legal issues.

II. Standard of Review

In this case, both the procedural posture and legal issues presented call for de novo review.

A. Summary Judgment

The Pilot asserts that we should apply a de novo standard of review for a sua sponte dismissal of a complaint. We agree.

“Dismissal may be proper even in cases where no motion requesting dismissal has been filed.” *ISG, LLC v. Arkansas Valley Ditch Ass’n*, 120 P.3d 724, 730 (Colo. 2005).

A summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” C.R.C.P. 56(c).

Here, both parties submitted briefs and supplemental materials, the district court heard the arguments of counsel, and it had the transcript of the executive session before it. Therefore, the dismissal of the present case is akin to an entry of summary judgment. *See ISG*, 120 P.3d at 730 (reviewing sua sponte dismissal as a summary judgment).

“We review summary judgment de novo, resolving all doubts as to the existence of a genuine issue of material fact in favor of the nonmoving party.” *Id.*

B. Statutory Interpretation

“Statutory interpretation is a question of law that we review de novo.” *Wolf Creek Ski Corp. v. Bd. of County Comm’rs*, 170 P.3d 821, 825 (Colo. App. 2007). “Statutes should be interpreted to effect the General Assembly’s intent, giving the words in the statute their plain and ordinary meaning.” *Id.* “A statute should be interpreted as a whole, giving effect to all of its parts.” *Id.* “If the statutory language unambiguously sets forth the legislative purpose, we need not apply additional rules of statutory construction to determine the statute’s meaning.” *Allely v. City of Evans*, 124 P.3d 911, 913 (Colo. App. 2005). “In assessing the plain language, the court should not read a statute to create an exception that the plain language does not suggest, warrant, or mandate.” *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 35 (Colo. 2000).

Therefore, we will conduct a de novo review.

III. Standing

The Board contends the Pilot lacks standing to bring this action under the OML because that statute does not confer standing on the general public. We disagree.

“In order for a court to have jurisdiction over a dispute, the plaintiff must have standing to bring the case. Standing is a threshold issue that must be satisfied in order to decide a case on the merits.” *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004).

“To establish standing to sue, the plaintiff must show (1) an injury in fact (2) to a legally protected interest.” *Barber v. Ritter*, 170 P.3d 763, 767 (Colo. App. 2007)(citing *Wimberly v. Ettenberg*, 194 Colo. 163, 570 P.2d 535 (1977)), *aff'd in part and rev'd in part*, 196 P.3d 238 (Colo. 2008).

“An interest is legally protected if the constitution, common law, or a statute, rule, or regulation provides the plaintiff with a claim for relief.” *Reeves v. City of Fort Collins*, 170 P.3d 850, 851 (Colo. App. 2007). The legally protected interest may be something intangible such as an interest in having a governmental body act

within the boundaries of our state constitution. *Ainscough*, 90 P.3d at 856.

“A plaintiff establishes an injury in fact by alleging facts that show the defendant caused harm to the plaintiff’s legally protected interest.” *Reeves*, 170 P.3d at 851. A government’s violation of legally created rights may be sufficient. *Barber*, 170 P.3d at 768.

Section 24-6-402(9), C.R.S. 2008, provides rights under the OML to any citizen of the state, stating in pertinent part:

The courts of record of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state. In any action in which the court finds a violation of this section, the court shall award the citizen prevailing in such action costs and reasonable attorney fees.

We conclude from the plain language of the statute that it confers certain legally protected interests on all citizens of the state.

Section 24-6-402(4), C.R.S. 2008, provides the precise manner in which a local public body may meet in executive session:

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 . . . shall occur at any executive session that is not open to the public: [listing matters that may be addressed in an executive session].

The legally protected interests asserted by the Pilot in the present action are two. The first is the right to be notified of the particular matter to be discussed in an executive session in as much detail as possible. The second is the right that no adoption of any formal action should occur at any executive session that is not open to the public. § 24-6-402(4). The “following matters” under discussion here are “[p]ersonnel matters” and “[c]onferences with an attorney for the local public body for the purposes of receiving legal advice on specific legal questions.” § 24-6-402(4)(b) & (f)(I), C.R.S. 2008. The alleged injury to the Pilot is the Board’s violation of its legally created rights under the OML. We reject the Board’s

contention that, because the “personnel matters” exception creates standing in the employee who is the subject matter of the executive session, it excludes standing for other citizens. Section 24-6-402(4)(f)(I) allows executive sessions as to “[p]ersonnel 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.” That particular subsection provides that an employee who is to be discussed has the statutory right to demand a public session. However, nothing in that subsection limits the standing of other citizens to allege an injury in fact for improper application of this exception, such as lack of notice. *See Telluride*, 3 P.3d at 35 (we do not read the statute to create an exception the plain language does not suggest).

We reject the Board’s reliance on *Pueblo School District No. 60 v. Colorado High School Activities Ass’n*, 30 P.3d 752, 753-54 (Colo. App. 2000), for the proposition that the OML does not confer standing on the general public. The narrow holding of *Pueblo* is

that lack of notice creates no injury in fact where there has been actual notice. *Id.*

We therefore conclude the Pilot had standing.

IV. Invited Error

The Board argues that the Pilot cannot argue on appeal whether the topic for the executive session was properly announced because it invited any error by the district court. We are not persuaded.

“The invited error doctrine prevents a party from inducing an erroneous ruling and then seeking to benefit by appealing that error. A party’s affirmative action during litigation triggers this doctrine and usually bars appellate review of alleged error arising from such action.” *Vista Resorts, Inc. v. Goodyear Tire & Rubber Co.*, 117 P.3d 60, 65 (Colo. App. 2004). The doctrine is an application of the estoppel principle, but must be triggered by action taken by a party in the course of litigation. *Horton v. Suthers*, 43 P.3d 611, 618 (Colo. 2002). “The doctrine applies where one party expressly acquiesces to conduct by the court or the opposing party.” *Id.* at 619.

At the hearing, after some discussion by counsel for the Pilot concerning the issues before the district court, the court inquired:

Let me interrupt you and ask you whether I need to even reach these issues if I determine there is a reasonable belief that a policy or action is taken to support an in camera review?

Counsel for the Pilot responded:

No, you do not need to reach these decisions if Your Honor concludes under the provisions for in camera review that a sufficient showing has been made, Your Honor can order that in camera review on that basis. They are independent remedies. They are, in fact, not exclusive of each other. And Your Honor, in the exercise of your discretion can sequence the remedies however you wish.

We think that as a facial matter looking — without even looking at the transcript of the closed session, there has been — there is sufficient basis to conclude that there is a violation of the topic announcement requirement. But if Your Honor is not convinced or chooses just to avoid that because of the difficulty of the statutory construction in this regard, certainly within your discretion to focus on the in camera review.

The court next inquired:

And just to complete the inquiry, if in an in camera review I determined that there was an

action or policy taken or approved, can I stop there and declare the action taken immediately after the open meeting or the executive session to be void and not publish the executive meeting?

Counsel responded:

Your Honor, I think the answer to the question is, at a minimum you must declare the action taken, if that action was taken behind closed doors, to be invalid, in the words of the statute. But — and that's the statute, the Open Meetings Law, and that's the provision in subsection 402(8) of the statute.

But Your Honor, I believe, cannot stop there because the plaintiffs here have made a request for release of the record. And the Court, based on its in camera review, if it concludes that there has been a violation of the statute must, under the statute — under the Open Records Act provision release the portion of the recording that reflects the improper conduct.

While the Board argues that the Pilot's counsel stated that the district court need not rule on its first and third claims, we do not read the discussion as going so far. It is unclear whether the court was discussing simply a review of the transcript, or a final resolution of all the Pilot's claims. Most of the discussion was about what the court should do if it determined there had been a

policy decision by the Board, but counsel for the Pilot also referred to “sequencing” remedies, and reiterated his belief that there had been a violation of the topic announcement requirement.

Invited error requires affirmative action or express acquiescence, and the exchange between the court and counsel here is not sufficiently definite to provide either. *See Horton*, 43 P.3d at 618.

Moreover, in its order of dismissal, after reviewing the transcript of the executive session, the district court discusses the bases for the Pilot’s claims for relief, including the alleged lack of detail in the announcement of the topic of the executive session. This indicates the court did not believe the Pilot had waived those claims.

Accordingly, we reject the Board’s assertions that invited error occurred.

We now turn to the substantive issues of whether (1) the Board properly announced the topic for its executive session, and (2) the Board made a policy decision in the executive session.

V. Notice of Topic

The Pilot contends the Board failed to comply strictly with its obligation to identify with as much detail as possible two of the matters discussed during the first executive session: (1) the Superintendent's refusal to provide Board members with access to the confidential survey results; and (2) discussions with the Board's attorney related to this. We disagree.

The OML states as its underlying policy that "the formation of public policy is public business and may not be conducted in secret." § 24-6-401, C.R.S. 2008; *see Town of Marble v. Darien*, 181 P.3d 1148, 1152 (Colo. 2008). "If an executive session is not convened properly, then the meeting and the recorded minutes are open to the public." *Gumina v. City of Sterling*, 119 P.3d 527, 531 (Colo. App. 2004).

A local public body must comply strictly with statutory requirements to convene an executive session. *Id.* at 532. The statute provides the members of a local public body may hold an executive session

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.

§ 26-4-402(4).

Thus, the statute requires a public body to meet the following requirements to announce an executive session: (1) state a topic; (2) cite the subsection of the statute relevant to the topic; and (3) identify the matter to be discussed in as much detail as possible without compromising the purpose for the session.

A. Notice of Personnel Matters Discussion

The Pilot contends that the announcement made by the Board did not meet the statutory requirements. We agree.

The agenda provided:

Executive Session . . . Section 24-6-402(4)(f)
for purposes of discussing personnel matter
involving access to information

The motion to the floor for the executive session was taken verbatim from the School Board agenda. It stated a permissible executive session topic, "personnel matter," cited to the correct subsection of

the statute, and identified the matter as “access to information.”

The Pilot disputes only whether the identification of the matter was given in sufficient detail.

We conclude the motion here did not provide sufficient notification as required by the personnel exception under the statute. The announcement informed the public that “personnel matters involving access to information” would be discussed in the executive session. Even though an open public discussion had just taken place about the survey, the notice was deficient in failing to state that the executive session would concern the release of the survey results. In addition, the notice was deficient in not identifying that the “personnel matter” was specifically the performance of the Superintendent.

It would not have compromised the purpose of the executive session to go into that amount of detail. Attendees at the meeting were well aware of the Superintendent’s refusal to provide survey results to the Board. Therefore, we conclude that the notice of the executive session did not satisfy the statutory requirement to identify the matter being discussed in as much detail as possible

without compromising the purpose of the executive session. See *Gumina*, 119 P.3d at 532 (exceptions to the executive session requirements in the Open Meetings Law are to be strictly construed).

While there is no specific requirement in the statute that personnel to be discussed be publicly identified by either name or employment category, under the circumstances here identification of the Superintendent by title would have furthered the purpose of the OML. Indeed, we note that the Board announced the topic for its third closed session of the night as “accepting personnel evaluation of the [S]uperintendent.”

Because the notice here was inadequate, the executive session was not convened properly. Thus, the minutes should have been released and the court erred in ruling otherwise. See *Gumina*, 119 P.3d at 531.

B. Discussion with Legal Counsel

The Pilot next contends the Board violated the statute by failing to announce its intention to confer with its attorney during the first executive session. Again, we agree.

The attorney conferences exception in section 24-6-402(4)(b) provides that an executive session may be held for

[c]onferences with an attorney for the local public body for the purposes of receiving legal advice on specific legal questions. Mere presence or participation of an attorney at an executive session of the local public body is not sufficient to satisfy the requirements of this subsection (4).

While these conferences may be conducted in private, they are subject to the requirements of public notice and approval in section 24-6-402(4). See *Gumina*, 119 P.3d at 532; *Zubeck v. El Paso County Retirement Plan*, 961 P.2d 597, 600 (Colo. App. 1998).

Here, it is clear that the announcement of the first executive session did not contain any reference to a conference with the Board's attorney on any specific legal questions. Yet, as the court noted in its order, the transcript of that session contained a certification by the Board's attorney that portions of the transcript had been redacted and that "such [redacted] portions of the executive session were devoted to providing specific legal advice to the Board . . . regarding legal issues, and that such communications were privileged under applicable Colorado law, the

common law of attorney-client privilege, and [Colorado] Supreme Court rules.”

Because the proper announcement procedures were not followed here, we conclude the district court erred in not ordering the unredacted recording of the first closed session to be released. *See Gumina*, 119 P.3d at 532; *see also Zubeck*, 961 P.2d at 601.

VI. Attorney Fees

Because of our resolution of this case, the Pilot is entitled to an award of its reasonable attorney fees for the proceedings, both in the district court and on appeal. *See* § 24-6-402(9); *Gumina*, 119 P.3d at 530.

The judgment is reversed and the case is remanded for such further proceedings as may be necessary.

JUDGE GRAHAM concurs.

JUDGE CARPARELLI specially concurs.

JUDGE CARPARELLI specially concurring:

I concur in reversing the grant of summary judgment and in the majority's resolution of the issues of standing, invited error, discussion with legal counsel, and attorney fees. However, I do not concur with the majority's conclusions that the announcement of the purpose of the executive session was deficient because it did not state that the topic would be the release of the survey results and did not specify that the "personnel matter" was explicitly the performance of the superintendent." Instead, I conclude that there were three other infirmities: (1) the announcement of the purpose and authority for the executive session did not state that the topic of the session would be the *confidentiality* of the Board's debate about the access to the survey results; (2) the Board's discussion of that topic was a non-exempt matter; and (3) the Board adopted a policy or position during the closed session.

I. Law

Section 24-6-402(4), C.R.S. 2008, states that subject to certain requirements and exceptions, the members of a body subject to the Open Meetings Law (OML), section 24-6-402, C.R.S.

2008, may hold an executive session for the sole purpose of considering matters listed in subsections 4(a) through 4(h). Under subsection (4)(f)(I), it may hold an executive session to consider personnel matters. However, regardless of the purpose, such a body may not adopt any proposed position at any executive session not open to the public. § 24-6-402(4).

To conduct an executive session, the body must announce the topic for discussion in the executive session, identifying “the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized.” § 24-6-402(4). However, when the purpose is a personnel matter, if the employee who is the subject of the session requests an open meeting, the body may not conduct the discussion in executive session. § 24-6-402(4).

In *Gumina v. City of Sterling*, 119 P.3d 527, 532 (Colo. App. 2004), it was uncontested that the city council did not satisfy the requirements of the statute for convening the executive session, and a division of this court held that the improperly convened executive

session was an open meeting subject to the public disclosure requirements of section 24-6-402(2).

II. Facts

The agenda for the January 8, 2007, Board meeting stated that the Board intended to conduct three closed executive sessions, only one is at issue here. It stated that the Board would conduct closed executive session to discuss a "personnel matter involving access to information." At the meeting the Board conducted a public vote to go into executive session on this "personnel matter."

The Board provided the district court with a thirty-six page transcript of the first executive session, of which about twenty-two pages were redacted. Upon entering the executive session, before engaging in any substantive discussion, the Board placed a telephone call to its attorney and put him on the speaker. In the first five pages of the transcript, those present told the attorney their views of what needed to be discussed during the executive session, whether it would be protected by attorney-client privilege, and whether it needed to be recorded. These five pages are followed by eighteen pages of which the Board redacted more than seventeen

pages as privileged. This is followed by seven unredacted pages. The dialogue on these pages focuses on concerns that the Board wanted its efforts to obtain the survey results from the superintendent to be confidential, and that the superintendent and a board member had breached this confidentiality by informing the administrators that the Board had requested the results.

Although the transcript reflects disagreement between the Board and the superintendent regarding her position on the survey results and the fact that she told the administrators about the Board's request, the discussion on all but two of the unredacted pages concerns the Board's desire to keep its discussions about the survey results confidential, first based on attorney-client privilege and later as a matter of preference and informal agreement. In addition, a question is posed regarding whether the Board would protect the superintendent in the event of a lawsuit. There was no assertion that the superintendent's concerns about the propriety of releasing the survey results to the Board constituted insubordination. Although it is clear that the Board disagreed with the superintendent regarding the confidentiality of the survey

results, there is no mention of any personnel action of any sort against the superintendent. The focus throughout the unredacted transcript was the confidentiality of Board communications regarding its access to the survey results.

Upon returning from the session, the Board voted and agreed to return to executive session to consult with its attorney. Upon returning from that session, the Board President announced that, based on the legal advice it had received, the Board wanted to state “that the survey was directed by the school board for the purpose of supervisory and evaluative assessment,” and that the survey “is a confidential document to be viewed solely by the evaluatee, the superintendent and the school board.” The Board President then read a precisely worded directive stating that, in accordance with statute and the legal interpretation of its attorney, the superintendent was directed to give a copy of the survey results to all Board members. The announcement regarding the Board’s position regarding the survey and the directive to the superintendent were not preceded by a public vote of the Board.

III. Court’s Findings

After conducting its *in camera* review of the transcript of the executive session, the district court concluded that the Board did not engage in a substantial discussion of non-exempt matters and did not adopt a proposed policy or position in violation of the OML.

The court denied the motion, ruling that, under the circumstances, the Board's consultation with its attorney did not violate the OML.

IV. Analysis

I conclude that the district court erred when it concluded that the Board did not violate the OML by failing to make an adequate announcement of the topic and specific citation to the statutory provision authorizing an executive session, did not engage in a substantial discussion of non-exempt matters, and did not adopt a policy or position.

The transcript shows that the Board did not discuss a personnel matter regarding any employee. Instead, it contains a discussion about the Board's desire that its past and current discussions of the survey results be *confidential*. There were no comments that the superintendent's failure to provide copies of the

results to the Board constituted insubordination or that the superintendent should be disciplined in any way. This constitutes two violations of the OML. First, the announcement of the purpose and authority for the executive session did not reflect the topic actually discussed, and the topic discussed was not exempt from the OML.

Moreover, immediately upon returning to open session after its second consultation with its attorney, and without voting, the Board President announced the Board's position regarding the survey results and read the Board's directive to the superintendent. There is no evidence that the Board had discussed and voted on its position or the directive in an open session. Thus, the Board violated the OML by adopting a position in closed session.

Accordingly, I conclude that the district court erred and that the summary judgment must be reversed.

I concur in all aspects of the majority's opinion except its determinations that the announcement of the purpose of the executive session was deficient because (1) it did not state that the topic would be the release of the survey results, that the closed

session was about a personnel matter, and (2) it did not specify that the superintendent was the subject of that a personnel matter to be discussed.

In my view, the transcript of the open meeting of the Board demonstrates that the agenda announcement that the topic of the executive session would include "access to information" was successful in communicating to the administrators and teachers that the Board intended to talk about its access to the survey results. Indeed, a cadre of school administrators and staff attended the Board meeting and objected to the discussion of that issue in closed session and a letter signed by all district administrators was read. To the extent that the Board discussed the survey results in the executive session, the announcement was sufficient. However, as noted above, I have concluded that the transcript of the executive session demonstrates that the most discussed topic in the executive session was the Board's desire that the debate about its access to the survey results should be confidential and this topic was neither announced nor exempt.

I do not concur with the majority's conclusion that the announcement was deficient because it did not identify the topic to be the performance of the superintendent because, in my view, the transcript of the executive session does not include a discussion about the performance of the superintendent. Even were I to conclude that the Board discussed a personnel matter pertaining to the superintendent, I would not concur because (1) unlike the employee in *Gumina*, the superintendent had notice of the subject to be discussed; (2) the superintendent had an opportunity to request that the matter be discussed in an open meeting and did not do so; and (3) the superintendent was present during the closed session.

Court of Appeals

STATE OF COLORADO
2 EAST FOURTEENTH AVENUE, SUITE 355
DENVER, COLORADO 80203
(303) 861-1111

JANICE B. DAVIDSON
CHIEF JUDGE

February 2, 2009

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41 (b), the mandate of the Court of Appeals may issue forty-six days after entry of the judgment. In workers' compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment.

Filing a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b) will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT:

Janice B. Davidson
Chief Judge
Colorado Court of Appeals