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April 16, 2009

**Via email**

Robert R. Gehler, Esq.  
City Attorney  
7887 E. 60th Ave.  
Commerce City, CO 80022

**Re: Records Request of Jim Benson**

Dear Mr. Gehler:

This law firm represents James R. Benson, Jr., in his individual capacity. On Mr. Benson's behalf, I write to request (1) that the City Council provide Mr. Benson access to two public records: the audio recordings of two closed-door meetings of the City Council of Commerce City convened on January 12, 2009 and January 26, 2009; and also(2) that the City Council acknowledge that its Resolution 2009-07 is null and void because it was adopted in violation of the Colorado Open Meetings Law ("COML").

**Audio Recordings of Unlawfully Closed Meetings are Public Records**

With respect to the meeting on January 12, 2009, the published agenda for the special meeting of the City Council stated only that there was to be an executive session "for a conference with the City Attorney for the purpose of receiving legal advice on specific legal questions under C.R.S. Section 24-6-402(4)(e)" (sic). The minutes of the January 12, 2009 special meeting also reflect that there was no announcement of any topic to be discussed, but merely a recitation of the statutory provision that authorized an executive session. No explanation of any kind of the *topic to be discussed* at that meeting was provided. Accordingly, the announcement of the topic of the executive session was inadequate, as a matter of law. See *Gumina v. City of Sterling*, 119 P.3d 527, 531-32 (Colo. App. 2004) (announcement only of statutory basis for executive session is legally insufficient for purposes of the COML); see also *Worldwest Limited Liability Company v. Steamboat Springs School District RE-2 Board of Education*, Case No. 07CA 1104 (Colo. App. Mar. 26, 2009) (same)(courtesy copy attached).

Binding judicial precedents in Colorado establish that the failure of a local public body to "strictly comply" with the procedural requirements for convening an executive session (including the specificity of topic announcement requirement) renders the entire closed door discussion *not* an "executive session," but an illegally convened closed public meeting, and the

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record (minutes) of such meeting is a “public record” subject to disclosure under the CORA. *See Gumina*, 119 P.3d at 532; *Zubeck v. El Paso Cty. Retirement Plan*, 961 P.2d 597, 600 (Colo. App. 1998). Because the City Council did not “strictly comply” with the statutory requirements for conducting a lawful executive session, the recording of the closed meeting is a public record subject to inspection under Colorado Open Records Act (“CORA”). *See Gumina*, 119 P.3d at 531-3; *Worldwest Limited Liability Company, supra*.

Accordingly, under the afore-cited precedents, the audio recording of the closed-door meeting of the City Council on January 12, 2009 from approximately 9:31 until 10:07 p.m. is a public record, to which Mr. Benson has a statutory right of access. This letter constitutes notice, pursuant to § 24-32-204(5), C.R.S., that unless the City Council provides access to that public record, within three business days of your receipt of this letter, Mr. Benson intends to file an Application with the District Court for an Order to Show Cause why the City Council should not disclose that public record to him for his personal use and dissemination to third parties. Mr. Benson will also seek an award of his reasonable attorneys fees, which are mandatorily to be awarded to a successful plaintiff under § 24-32-204(5), C.R.S.

With respect to the special meeting of January 26, 2009, the posted agenda stated that the executive session was to be convened for a conference with the City Attorney for purposes of receiving legal advice on specific legal questions “regarding the responsibilities and obligations of a City Councilperson as an individual to the City Council as an entire body.” In his capacity as a member of that City Council, Mr. Benson reviewed attended that closed-door meeting, and has informed us that he will sign a sworn affidavit that at most, two percent of the discussion involved any solicitation or receipt of any legal advice. (Having sat also listened to the audio recording of the first meeting of January 12, 2009, Mr. Benson will also attest that practically no legal advice was solicited or given during the January 12, 2009 closed meeting either.)

Thus, unless the City Council provides Mr. Benson with a copy of the audio recordings of the closed meetings on January 12 and January 26, 2009, for his personal use and dissemination, Mr. Benson shall also ask a District Court judge to conduct an *in camera* review of those two recordings, pursuant to § 24-6-204(5.5) and §24-6-402(d.5)(II)(C), C.R.S., and following such *in camera* review, to order released all portions of the tapes that reflect a substantial discussion of matters not identified in the announcement of the topic of those meetings. Attached for your convenience is a ruling entered by Judge Nancy Hopf in Arapahoe County in which she conducted an *in camera* review of an “executive session” recording and determined that, with minimal exception, the vast bulk of the discussion did not involve the receipt of legal advice on specific legal questions. Judge Hopf ordered the tape recording

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released and subsequently ordered the Board of County Commissioners to pay *The Denver Post* \$24,000 in its attorneys fees.)

**Resolution 2009-07 is Null and Void**

Finally, immediately following the completion of the closed-door meeting on January 26, 2009, the City Council approved Resolution No. 2009-07, removing Mr. Benson as the appointed City Council Representative or appointed Alternative City Council Representative on all committees, boards, commissions, and authorities to which he had been appointed by the City Council on behalf of the City of Commerce City. Notably, this official action was taken by the City Council *without any discussion in a public meeting*, and was voted upon immediately following the conclusion of the closed-door meeting. Thus, in his application to the District Court, Mr. Benson will also ask the Court to determine that the City Council violated the COML by “adopting a position” – that it would remove Mr. Benson from all City boards and commissions upon which he served – inside a closed meeting, in violation of § 24-6-402(4), C.R.S. See *Hanover Sch. Dist. No. 28 v. Barbour*, 171 P.3d 223, 228 (Colo. 2007). The fact that the City Council immediately thereafter convened an open meeting to create the false impression it had not yet “voted,” and proceeded to “rubber stamp” its earlier decision made behind closed doors, is precisely the type of hidden governmental action that the COML prohibits. See *Walsenburg Sand & Gravel Co. v. City Council of Walsenburg*, 160 P.3d 297, 300 (Colo. App. 2007); *Van Alstyne v. Housing Auth., City of Pueblo*, 985 P.2d 97, 101 (Colo. App. 1999); *Cole v. State*, 673 P.2d 345, 349 (Colo. 1983); see also *Bagby v. Sch. Dist. No. 1, Denver*, 528 P.2d 1299, 1302 (Colo. 1974) (“One has not participated in a public meeting if one witnesses only the final recorded vote. The statutes’ prohibition against making final policy decisions or taking formal action in other than a public meeting is not meant to permit ‘rubber-stamping’ previously decided issues.”).

Thus, unless the City Council acknowledges the above as we have requested herein, Mr. Benson shall also ask the Court to declare “null and void” the formal action that was taken in the illegal meeting – namely the passage of Resolution 2009-07. See §24-6-402(8), C.R.S.; *Van Alstyne v. Housing Auth., City of Pueblo*, 985 P.2d 97, 100-01 (Colo. App. 1999) (declaring null and void actions voted upon in a public meeting that had been determined in the course of an earlier executive session).

Thank you very much for your prompt attention to this matter. I look forward to hearing from you.

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Very truly yours,

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.



By \_\_\_\_\_  
Steven D. Zansberg

SDZ/cdh

cc: James R. Benson, Jr.