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Open Meetings and Open Records Laws: A Primer for Colorado Water Conservancy Districts

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OPEN MEETINGS AND OPEN RECORDS LAWS: A PRIMER FOR COLORADO WATER CONSERVANCY DISTRICTS

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Acting in conformity with Colorado's Open Meetings Act[1] and Open Records Act,[2] the so-called "government in the sunshine laws," provides the best defense to claims of improper conduct brought against water conservancy district boards, an important protection against unnecessary litigation. The laws are also important for the simple, every-day dealings of local water conservancy districts: the Water Conservancy Act expressly subjects water conservancy districts to these two laws.[3]

In the post-*Watergate* era, many Americans are suspicious of the workings of all levels of government. Challenges to and efforts to change the method of selecting water conservancy district board members demonstrate the increased public interest in the decisions of local water conservancy districts. The introductory note to a 1993 publication discussing Colorado's Open Meetings and Open Records Acts illustrates the general suspicion with which many Americans, including members of the news media, treat government decision-making. The introductory note states: "Officials are a tricky bunch and you have to watch them all the time. They will disregard the law, disobey the law, look for loopholes, or push new laws that favor secrecy."[4]

A water conservancy district that conducts its affairs in the open and readily provides documents it is obligated by law to provide eliminates the intrigue for the reporter or citizen activist, and, simply put, removes the fun from the investigation, causing a loss of interest. Additionally, the district limits its exposure to litigation, and, if sued, eliminates some often-used procedural challenges to its actions. This article will discuss the legal requirements regarding public access to water conservancy district board meetings and records.

I. OPEN MEETINGS ACT

A. WHAT IS A MEETING AND WHO MAY ATTEND?

Most business conducted by a water conservancy district begins at a district's board of directors meeting. Colorado case law makes clear that under the Open Meetings Act, "citizens,"[5] including the media,[6] may

1. Open Meetings Act, COLO. REV. STAT. §§ 24-6-401 to -402 (1999).

2. Open Records Act, COLO. REV. STAT. §§ 24-72-201 to -206 (1999).

3. *See* Water Conservancy Act, COLO. REV. STAT. § 37-45-116(1) (1999) (requiring the boards of directors of water conservancy districts to comply with the Open Meetings and Open Records Acts); COLO. REV. STAT. § 24-6-402(1)(a) (1999) (defining local public body as any board "delegated a governmental decision-making function"); COLO. REV. STAT. § 24-72-202(6)(a)(1) (1999) (defining public records as any writing "made [and] maintained . . . by any local government-financed entity for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.").

4. T.B. KELLEY & J.R. MANN, TAPPING OFFICIALS' SECRETS: THE DOOR TO OPEN GOVERNMENT IN COLORADO iii (Reporters Comm. for Freedom of the Press 1993). *See also* Miller, *supra* note ‡.

5. *See generally* Littleton Educ. Ass'n v. Arapahoe County Sch. Dist., No. 6, 553 P.2d 793, 798 (Colo. 1976).

6. *See* Gosliner v. Denver Election Comm'n, 552 P.2d 1010 (Colo. 1976).

attend water conservancy district meetings. A "meeting" occurs any time three or more district board members (or a quorum of the board, whichever number is fewer)[7] gather for the purpose of discussing public business[8] or public employment.[9] The Open Meetings Act makes no distinction between regular and special meetings of the district.[10]

B. EXEMPTIONS TO THE DEFINITION OF MEETING

1. Social Gathering Exemption

The Open Meetings Act provides a number of exemptions to the definition of a "meeting." Colorado Revised Statute section 24-6-402(2)(e) exempts "social gathering[s]."[11] For many, if not most, water conservancy districts' board members, participation on the district board is simply one of many activities in which they engage with the neighbors or colleagues with whom they share their responsibility. Board members and potential board members may feel constrained by the Open Meetings Act, wrongly believing that they will no longer be able to engage in social activities with friends who also serve on the board. This simply is not the case. However, board members do need to understand the limited nature of the social gathering exemption. The mere labeling an event a social gathering does not ensure compliance with the exemption where the intent or the result of the gathering is that board members carry on district business.[12] When labeling an event a social gathering, the responsibility rests on all board members in attendance to ensure that social activities are the order of the day.

2. Executive Session Exemption

Another Open Meeting Act exemption provides for holding discussions in an "executive session."[13] Generally, an executive session is a closed meeting attended by the water conservancy district board. In some cases, the district's attorney, staff members, witnesses offering relevant

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7. COLO. REV. STAT. § 24-6-402(2)(b) (1999).

8. *Id.* § 24-6-402(1)(b). Meeting is defined as "any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication." *Id.*

9. *Id.* § 24-6-402(4)(f).

10. *Id.* § 24-6-402(1)(b). *See supra* note 8.

11. *Id.* § 24-6-402(2)(e). "This part 4 does not apply to any chance meeting or social gathering at which discussion of public business is not the central purpose." *Id.*

12. *Id.*

13. COLO. REV. STAT. § 24-6-402(3) (1999).

> The members of a state public body . . . upon the announcement by the state public body to the public of the topic for discussion in the executive session and the affirmative vote of two-thirds of the entire membership of the body 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 matters enumerated in . . . this subsection . . . except that no adoption of any proposed policy, position, rule, regulation, or formal action shall occur at any executive session that is not open to the public[.]

Id.

information for the board's consideration, persons who are the subject of the executive session or action to be taken by the board, or other individuals invited by the board may attend executive sessions.[14] The holding of an executive session requires a two-thirds vote of the quorum present.[15] The water conservancy district must announce the general topic for discussion before convening the executive session.[16]

Although statute permits the water conservancy district board to hold discussions and deliberations in an executive session, the board must make final decisions in an open session, not in an executive session.[17] Holding an executive session is an exception to the general rule that meetings will be open; therefore, only business specified in the statute may be conducted in an executive session. The water conservancy district board may meet in an executive session only to consider: (1) the purchase or sale of property; (2) legal advice; (3) matters required to be kept confidential by federal or state law or rules; (4) security information; (5) employment negotiations; and (6) documents prohibited from disclosure by the Open Records Act.

a. Purchase or Sale of Public Property

Discussions regarding the purchase or sale of public property may be held in an executive session if the premature disclosure of information gives an unfair advantage to any person whose private interest is adverse to the interests of the district.[18] For example, suppose the water conservancy district negotiated the purchase of land to construct a new office building. The potential seller attended the district's board meeting and discovered that the district was willing to pay an amount up to $50,000 for the property. The seller previously considered $35,000 a princely offer. The seller would gain an advantage by attending the meeting and learning of the district's negotiation strategy. The developer might then ask for $50,000 for the land. While the statute permits holding such discussions behind closed doors in an executive session to avoid this type of situation, no board member may request an executive session for the purpose of concealing the member's personal interest in the transaction.[19] Further, the district risks litigation if it uses, or is perceived as using, an executive session as a way of funneling inside information to particular prospective buyers or sellers.[20]

14. *See, e.g.*, Hudspeth v. Board of County Comm'rs, 667 P.2d 775, 777-78 (Colo. Ct. App. 1983); Einarsen v. City of Wheat Ridge, 604 P.2d 691, 693 (Colo. Ct. App. 1979).

15. COLO. REV. STAT. § 24-6-402(3)(a) (1999). *See supra* note 13.

16. *Id.* § 24-6-402(4).

17. *Id. See also Hudspeth*, 667 P.2d at 778.

18. *Id.* § 24-6-402(4)(a).

19. *Id.* § 24-6-402(4)(a). A water conservancy district may hold an executive session to discuss "[t]he purchase, acquisition, lease, transfer, or sale or any real, personal, or other property interest; except that no executive session shall be held for the purpose of concealing the fact that a member of the [water conservancy district] has a personal interest in such purchase, acquisition, lease, transfer, or sale[.]" *Id.*

20. *Id.* § 24-6-402(3)(a)(I).

b. Legal Advice

The water conservancy district board may meet with its attorney in an executive session for the purpose of receiving legal advice on specific legal questions.[21] Therefore, the board is on equal footing with private individuals in its right to the attorney-client privilege.[22] However, the mere presence or participation of the district's attorney at an executive session does not validate the executive session if the discussion in that session should appropriately be held in an open session.[23] For example, if a district board considers a special assessment for unanticipated operations and maintenance costs and knows that the special assessment proposal will be unpopular with the public, it is inappropriate conduct for the board to invite legal counsel to an executive session in order to hold the initial discussions in private. In this situation, legal counsel's participation would not validate the executive session.

c. Matters Required to Be Kept Confidential by Federal or State Law or Rules

A water conservancy district board may meet in an executive session to discuss matters required by federal or state law or rules to be kept confidential.[24] The National Historic Preservation Act ("NHPA") provides a good example of a statute potentially necessitating the water conservancy district's reliance upon this exemption.[25] The NHPA prohibits publicizing or releasing information regarding the specific site of archeological artifacts when a federal agency deems such a prohibition appropriate.[26] For example, in efforts to expand or repair an existing facility, the district may discover Native American artifacts during construction. The board may need to hold discussions of alternatives for addressing the implications of the discovery in an executive session to avoid disclosing the specific location.[27] The board may address the specific issues regarding the facility construction affected by the historic resource in an executive session; however, the board may not continue holding all discussions regarding the facility construction in an executive session. Discussion of those matters not affected by the NHPA considerations must continue in an open session, unless another exemption applies.[28]

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21. COLO. REV. STAT. § 24-6-402(4)(b) (1999).

22. *See* Denver Post Corp. v. University of Colo., 739 P.2d 874, 880 (Colo. Ct. App. 1987) (holding that Colorado's Open Records Act incorporates the attorney-client privileges).

23. COLO. REV. STAT. § 24-6-402(4)(b) (1999).

24. *Id.* § 24-6-402(4)(c). "The local public body shall announce the specific citation of the statutes or rules that are the basis for such confidentiality before holding the executive session." *Id.*

25. National Historic Preservation Act, 16 U.S.C. §§ 470 to 470mm (1994).

26. *See id.* § 470w-3(a).

27. See, *e.g.*, Gillies v. Schmidt, 556 P.2d 82, 84-85 (Colo. Ct. App. 1976).

28. *Id.*

d. Security Information

A water conservancy district board may meet in an executive session to discuss specialized details of security arrangements that, if revealed, could be used to violate the law.[29] At first blush, security arrangement considerations do not seem to be an area of major concern for the average water conservancy district. However, with the increased computerization of district operations and the integration of information into network systems accessible from remote locations, this exemption may become an important tool for protecting the district's resources.

e. Employment Negotiations

A water conservancy district board may discuss positions or strategies regarding negotiations with employees or an employee organization in an executive session.[30] However, the statute limits this exemption to the board's position in an employment negotiation and permits the discussion of other employee matters in an open session.[31]

f. Documents Prohibited From Disclosure by the Open Records Act

The water conservancy district board may hold an executive session to discuss documents that the mandatory non-disclosure provisions of the Open Records Act protect.[32]

C. MEETING NOTICE

According to the Open Meetings Act, a water conservancy district board must give "full and timely" notice of a meeting.[33] As a local governmental entity, the water conservancy district provides full and timely notice of its meeting if the district posts notice of the meeting in a designated place within the boundaries of the district no less than twenty-four hours before the meeting.[34] The district must designate the place for posting its meeting notices annually at the first regular board meeting of each calendar year.[35] To be valid, the posting place must be open to public view.[36]

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29. COLO. REV. STAT. § 24-6-402(4)(d) (1999).

30. *Id.* § 24-6-402(4)(e).

31. *Id.* § 24-6-402(4)(f). A water conservancy district board involved in an issue regarding the conduct or actions of a district employee, may discuss the matter in an executive session unless the employee who is the subject of the session has requested an open meeting. *Id.* The provision appears to presume that the district will notify the employee that he or she will be the subject of the executive session, so that the employee may exercise his or her right to request an open meeting. *Id.*

32. *Id.* § 24-6-402(4)(g). *See* discussion *infra* Part II.

33. *Id.* § 24-6-402(2)(c). "Any meetings at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or at which a majority or quorum of the body is in attendance, or is expected to be in attendance, shall be held only after full and timely notice to the public." *Id.*

34. *Id.*

35. COLO. REV. STAT. § 24-6-402(2)(c) (1999).

36. Hyde v. Banking Bd., 552 P.2d 32, 33 (Colo. Ct. App. 1976). "At the very

Although notice under the Open Meetings Act must be full, this does not require that the notice designate with specificity the precise agenda for each meeting.[37] However, the posting must include specific agenda information where possible.[38] Posting of specific agenda information includes items that the board intends to discuss in an executive session, where the board knows the agenda advance.

In addition to the public posting, individuals or entities may request that the secretary or clerk of the board notify them of all of the district's board meetings where the board will discuss certain specified issues or policies.[39] The lists of individuals or entities the board must notify are sometimes referred to as "sunshine lists."[40] The secretary or clerk must provide reasonable advance notification to all individuals or entities on the list.[41] It is important to note that the notification of individuals or entities on the sunshine list does not replace the requirement for a public posting.[42] The failure to give full and timely notice of a meeting, including the failure to provide reasonable advance notification to the sunshine list, renders any action taken by the board at that meeting invalid.[43]

D. MEETING MINUTES

The Open Meetings Act and the Water Conservancy Act both govern the preparation of meeting minutes following a board meeting. The Open Meetings Act provides some specific guidelines regarding the preparation of the minutes, while the Water Conservancy Act provides the legal effect of the minutes.[44]

The Open Meeting Act requires that the board "promptly" prepare meeting minutes and make the minutes open to public inspection.[45] Neither the statute nor case law specifically defines promptly. Common sense requires preparation of minutes to occur in time for adequate review by the board so that it may approve the minutes at the next board meeting.

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minimum, full and timely notice to the public requires that notice of the meeting be posted within a reasonable time prior to the meeting in an area which is open to public view." *Id.*

37. Benson v. McCormick, 578 P.2d 651, 653 (Colo. 1978).

38. COLO. REV. STAT. § 24-6-402(2)(c) (1999).

39. *Id.* § 24-6-402(7).

40. *See, e.g.*, *Hyde*, 552 P.2d at 33.

41. COLO. REV. STAT. § 24-6-402(7) (1999).

> The secretary or clerk of each state public body or local public body shall maintain a list of persons who, within the previous two years, have requested notification of all meetings when certain specified policies will be discussed and shall provide reasonable advance notification of such meetings, provided, however, that unintentional failure to provide such advance notice will not nullify actions taken at an other wise properly published meeting.

Id.

42. *Hyde*, 522 P.2d at 33.

43. COLO. REV. STAT. § 24-6-402(8) (1999); *see also Hyde*, 522 P.2d at 33.

44. Water Conservancy Act, COLO. REV. STAT. § 37-45-116(3) (1999); COLO. REV. STAT. § 24-6-402(2)(d) (1999).

45. COLO. REV. STAT. § 24-6-402(2)(d)(II) (1999). "Minutes of any meeting of a local public body a at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or could occur shall be taken and promptly recorded, and such records shall be open to public inspection." *Id.*

Executive session minutes shall reflect the general topic of the executive session.[46]

The Water Conservancy Act provides that the minutes, as approved by the board, shall constitute *prima facie* evidence of the acts of the board.[47] When properly certified by the president or secretary of the board, a court must receive copies of the minutes as evidence of the acts of the board.[48]

E. RECORDING AND BROADCASTING OF MEETINGS

In general, the particular water conservancy district has the discretion to determine whether a meeting is capable of being recorded or broadcast, and by whom. The Open Meetings Act contains no guarantee or prohibition regarding the recording or broadcast of public meetings. With regard to the media, the United States Court of Appeals for the Tenth Circuit has held that neither the Open Meetings Act nor the First Amendment of the United States' Constitution guarantees the media any right to broadcast a public meeting.[49]

II. OPEN RECORDS ACT

While most of the work of a water conservancy district occurs at the district's board meetings, the district's records provide the history of the methods and reasons behind the work. The Open Records Act applies to any document maintained for the use of the district in the exercise of its functions required or authorized by law, required or authorized by administrative rule, or involving the receipt of public funds.[50] Some of the records that a water conservancy district likely maintains in its files include meeting minutes;[51] lobbyist disclosure statements;[52] and employment records concerning the terms of employment and employee compensation, including agreements made in the settlement of a disputed employment claim.[53]

As with the Open Meetings Act, the Open Records Act provides numerous exemptions. Exemptions from the Open Records Act occur in two forms: (1) documents for which withholding disclosure is mandatory; and (2) documents that the water conservancy district may withhold in its discretion to avoid "substantial injury to the public interest."[54] In applying these exemptions, it is important to remember the broad legislative

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46. *Id.*

47. Water Conservancy Act, COLO. REV. STAT. § 37-45-116(3) (1999).

48. *Id.* The statute provides in relevant part that copies of "minutes . . . duly certified by the board's president or . . . secretary . . . shall be received as evidence of the acts of the board in all courts." *Id.*

49. Combined Communications Corp. v. Finesilver, 672 F.2d 818, 821 (10th Cir. 1982).

50. COLO. REV. STAT. § 24-72-202(6)(a)(I) (1999).

51. Water Conservancy Act, COLO. REV. STAT. § 37-45-116(3) (1999).

52. COLO. REV. STAT. §§ 24-6-301, -302, -304 (1999).

53. Denver Publ'g Co. v. University of Colo., 812 P.2d 682, 684 (Colo. Ct. App. 1990).

54. *Id.*

declaration of the Open Records Act that all public records shall be open for inspection unless excepted by the statute itself or by other law,[55] and that "exceptions to the Act should be narrowly construed."[56]

Among the records that a water conservancy district typically maintains, it must not disclose: (1) personnel files; (2) trade secrets; and (3) any customer's personal information. A water conservancy district has discretionary authority to withhold: (1) documents containing real estate appraisals; (2) documents relating to the district's deliberative process on certain matters; and (3) documents whose disclosure might affect the public interest.

A. PERSONNEL FILES

The custodian of records of a water conservancy district may not release the "personnel file" of any employee to a requester.[57] The Open Records Act defines "personnel files" as files that include home addresses, telephone numbers, financial information, and other information maintained because of the employer-employee relationship, including other documents specifically exempt from disclosure by law.[58] Letters of reference are also exempt.[59] Personnel files, as defined in the Open Records Act, do not include employment applications of past or current employees,[60] performance ratings, and any records of the employee's compensation, benefits, expense allowances, and termination benefits.[61] Further, the exemption applies only to documents actually present in an employee's personnel file.[62] A district may not avoid disclosure to a requesting member of the public, however, by placing non-exempt documents in a personnel file.[63]

In a recent case, Commerce City asserted that public records relating to complaints of sexual harassment, gender discrimination, and retaliations were personnel files exempt from disclosure under the Act.[64] Commerce

55. *See* Daniels v. City of Commerce City, 988 P.2d 648, 650 (Colo. Ct. App. 1999) (citing Denver Publ'g Co. v. Dreyfus, 520 P.2d 104, 106 (1974)).

56. *Id.* at 650–51 (citing Freedom Newspapers, Inc. v. Tollefson, 961 P.2d 1150, 1154 (Colo. Ct. App. 1998)).

57. COLO. REV. STAT. §§ 24-72-202(4.5), -204(3)(a)(II)(A) (1999).

58. *Id.* § 24-72-202(4.5).

59. *Id.* § 24-72-204(3)(a)(III); *see* City of Westminster v. Dogan Constr. Co., 930 P.2d 585, 592 (Colo. 1997) (holding that the City could withhold, as statutorily exempt from disclosure, written results of telephone interviews memorialized in notes on preprinted questionnaire forms containing references to the bidder on a municipal construction project as "letters of reference concerning employment").

60. An employer cannot request an applicant to waive his or her rights to information concerning the denial of an employment application because employment applications are public records. *See* Carpenter v. Civil Serv. Comm'n, 813 P.2d 773, 777 (Colo. Ct. App. 1990).

61. COLO. REV. STAT. § 24-72-202(4.5) (1999).

62. *See* Daniels v. City of Commerce City, 988 P.2d 648, 651 (Colo. Ct. App. 1999) (citing Denver Post Corp. v. University of Colo., 812 P.2d 682, 684 (Colo. Ct. App. 1990)).

63. *Id.*

64. *Id.* at 650.

City asserted that, although it did not maintain the requested information in a specific personnel file, the records constituted personnel files exempt from disclosure because the city "maintained [the records] because of the employer-employee relationship."[65] The Colorado Court of Appeals rejected Commerce City's assertion, holding that the list of specific types of personnel information, such as addresses and telephone numbers, modified the phrase "maintained because of the employer-employee relationship."[66] The court concluded that the phrase at issue required the information to be of the same general nature as an employee's home address and telephone number or personal financial information.[67]

B. TRADE SECRETS

The custodian of a water conservancy district may not release to a requesting individual any confidential commercial, financial, geological, or geophysical data furnished by or obtained by any person; any trade secrets; or any privileged information.[68] The law appears to provide a relatively straightforward exemption. In actuality, however, this exemption is one of the most complex of all the exemptions to the Open Records Act.[69] While the Open Records Act provides no definition of a trade secret, Colorado statutes dedicate an entire section to the enforcement of trade secrets.[70] A water conservancy district custodian of records faced with a question of disclosing or withholding a document pursuant to this exemption should seek legal assistance before proceeding.

C. ANY CUSTOMER'S PERSONAL INFORMATION

Similar to the types of information withheld from disclosure in a personnel file, the custodian of records for the water conservancy district should not disclose records of addresses, telephone numbers, and personal financial information of past or present users of public utilities, public facilities, or recreational or cultural services owned and operated by the district.[71] However, a document that would otherwise be subject to disclosure but for the inclusion of some information that is exempt from disclosure under the Open Records Act may still be disclosed provided any exempt information is redacted.[72]

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65. *Id.* at 651.

66. *Id.*

67. *Id.*

68. COLO. REV. STAT. § 24-72-204(3)(a)(IV) (1999).

69. *See* OFFICE OF INFORMATION AND PRIVACY, U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 147-69 (1998) (discussing the definitions of trade secret and commercial or financial information under FOIA).

70. COLO. REV. STAT. §§ 7-74-101 to -110 (1999).

71. *Id.* § 24-72-204(3)(a)(XI).

72. A water conservancy district should redact information not subject to disclosure so that the information cannot be seen and then should copy and release the document to the requester. *Cf.* International Bd. of Elec. Workers Local 68 v. Denver Metro. Major Baseball Stadium Dist., 880 P.2d 160, 165-66 (Colo. Ct. App. 1994).

D. REAL ESTATE APPRAISALS

For reasons substantially similar to those discussed concerning executive sessions, the water conservancy district's custodian of records has the discretionary authority to deny inspection of real estate appraisals made for the water conservancy district concerning acquisition of property for public use until the title to the property has passed to the water conservancy district.[73] Public interest concerns provide the basis for the real estate appraisal exception.[74] One exception is that the contents of an appraisal are available to the property owner if the condemning authority determines that it intends to bring an eminent domain proceeding.[75] However, if the owner receives a copy of the appraisal, he or she must make available to the district a copy of any appraisals the property owner obtained relative to the proposed acquisition of property.[76]

E. DELIBERATIVE PROCESS PRIVILEGE

In 1999, the legislature enacted an additional exemption giving the water conservancy district's custodian of records the authority to deny inspection of records protected by the common law governmental or "deliberative process" privilege, "if the material is so candid or personal that public disclosure is likely to stifle honest and frank discussion within the government, unless the privilege has been waived."[77] The additional exemption represents a legislative reaction to *City of Colorado Springs v. White*,[78] decided by the Colorado Supreme Court on November 23, 1998. As a qualified privilege, the deliberative process privilege applies only to an action that furthers the purposes of the privilege.[79] The Colorado Supreme Court found that "[t]he primary purpose of the privilege is to protect the frank exchange of ideas and opinions critical to the government's decisionmaking process where disclosure would discourage such discussion in the future."[80] Furthermore, the court stated that "[t]he privilege rests on the ground that public disclosure of certain communications would deter the open exchange of opinions and recommendations between government officials, and it is intended to protect the government's decisionmaking process, its consultative functions, and the quality of its decisions."[81] The United States Court of Appeals for the District of Columbia, upon whose decisions the Colorado Supreme Court heavily relied in the *White* decision, held that the privilege stems from "the common sense-common law privilege, *i.e.*, the recognition that the Government cannot operate in a fish bowl."[82]

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73. COLO. REV. STAT. § 24-72-204(2)(a)(IV). *See also* discussion *supra* Part I.A.1.a.
74. *Id.* § 24-72-204(2)(a)(IV).
75. *Id.*
76. *Id.*
77. *Id.* § 24-72-204(3)(a)(XIII).
78. City of Colorado Springs v. White, 967 P.2d 1042 (Colo. 1998).
79. *Id.* at 1051.
80. *Id.*
81. *Id.* at 1047.
82. *Id.* at 1048 (quoting Vaughn v. Rosen, 523 F.2d 1136, 1146 (D.C. Cir. 1975)).

The deliberative process privilege protects only material that is "predecisional" and "deliberative." The Colorado Supreme Court defined predecisional as the generation of materials occurring prior to the adoption of an agency policy or decision being deliberated, and defined deliberative as "reflective of the give-and-take of the consultative process."[83] The privilege does not protect any document that is postdecisional, but material that is predecisional may retain its protection even after the water conservancy district makes its decision. The Colorado Supreme Court held "the government need not be able to point to a specific decision or policy in connection with which the material was prepared in order for the material to be considered predecisional."[84] However, even predecisional material can lose its protected status where the final decision refers to, or otherwise incorporates, the material.[85]

Courts distinguish between "advisory materials which truly reflect the deliberative or policy making processes of an agency" and "purely factual, investigative material" in determining whether materials are deliberative.[86] Advisory materials are deliberative, while factual materials are not. However, a water conservancy district should exercise care when applying this "advisory versus factual" test, because it is not always determinative.[87] For example, even factual material that is "so inextricably intertwined with the deliberative sections of the documents that its disclosure would inevitably reveal the government's deliberations" is protected as deliberative material.[88]

Courts have also drawn another distinction for determination of deliberative documents. For example, the Colorado Supreme Court has held that "[d]ocuments representing the ideas and theories that go into the making of policy, which are privileged, should be distinguished from 'binding agency opinions and interpretations' that are 'retained and referred to as precedent' and constitute the policy itself."[89] The identity and authority of a person issuing the material influences the determination as to whether the privilege protects a document.[90] For example, documents from a subordinate to a superior official are more likely to be predecisional, while documents from a superior to subordinates often contain instructions describing a decision previously made.[91] A final consideration under both case law and the statutory provision is whether a document "is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency."[92]

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83. *Id.* at 1051.

84. City of Colorado Springs v. White, 967 P.2d 1042, 1057 (Colo. 1998).

85. *Id.* at 1052.

86. *Id.* (quoting Environmental Protection Agency v. Mink, 410 U.S. 73, 89 (1973)).

87. *Id.* (citing Wolfe v. Dep't of Health & Human Servs., 839 F.2d 768, 774 (D.C. Cir. 1988)).

88. *Id.* (quoting *In re* Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997)).

89. City of Colorado Springs v. White, 967 P.2d 1042, 1052 (quoting Sterling Drug, Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971)).

90. *Id.*

91. *Id.*

92. COLO. REV. STAT. § 24-72-204(3)(a)(XIII) (1999); *White*, 967 P.2d at 1052-53

The privilege likely will protect a document meeting the above criterion.

The water conservancy district asserting the deliberative process privilege has the initial burden to assert the privilege and the burden of proof to demonstrate that the privilege applies to requested documents.[93] Somewhat similar to the procedural requirements of other privileges, the technical requirements are intended to: "(1) assure that the party's interest in the information is not 'submerged beneath governmental obfuscation and mischaracterization,' and (2) allow the courts to effectively and efficiently evaluate the nature of the disputed documents."[94] Specifically, the district must assert the privilege in the form of a sworn affidavit describing each document claimed as privileged and asserting why disclosure would cause substantial injury to the public interest.[95] The description should include each document's author, recipient, and subject matter, and should explain why each document qualifies for the privilege.[96] The explanation should also include a description of the deliberative process to which the document is related and the role the document played in that process.[97] For large documents, the government must identify those portions, which are capable of disclosure, and those portions that are not[98]

The statute provides that the party requesting information may require the custodian to apply to the district court for an order permitting the custodian to restrict disclosure of the documents.[99] The board must give notice to all persons entitled to claim the privilege with respect to the records in issue, who then have the right to appear and be heard at the district court hearing.[100] "In determining whether disclosure of the records would cause substantial injury to the public interest," the statute requires the court to weigh, "based on the circumstances presented in the particular case, the public interest in honest and frank discussion within government and the beneficial effects of public scrutiny upon the quality of governmental decision-making and public confidence therein."[101] Due to the complicated nature of this exemption, a water conservancy district faced with a question of disclosing or withholding a document pursuant to this exemption should seek legal assistance before proceeding.

F. PUBLIC INTEREST PERMISSIVE WITHHOLDING

A water conservancy district may withhold documents in its discretion to avoid "substantial injury to the public interest," in addition to those

(quoting Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980)).

93. *White*, 967 P.2d at 1053.

94. *Id.* (quoting Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973)).

95. COLO. REV. STAT. § 24-72-204(3)(a)(XIII) (1999).

96. *White*, 967 P.2d at 1053.

97. *Id.*

98. *Id.* "[E]specially in the case of a large document, the government should distinguish between those portions of the document that are disclosable (such as purely factual data) and those that are allegedly privileged." *Id.*

99. COLO. REV. STAT. § 24-72-204(3)(a)(XIII).

100. *Id.*

101. *Id.*

documents the district must withhold.[102] However, it is unlikely that a situation will arise where a water conservancy district will be involved in a situation where it may withhold a document to avoid substantial harm to the public interest.

The decision to withhold a document based upon public interest concerns is driven by a fact-specific analysis. The district is required to weigh the Open Records Act's general presumption in favor of public access against the privacy interests at stake.[103] An agreement made by a water conservancy district that information in public records will remain confidential is insufficient to transform a public document into a private one.[104]

In *Daniels v. City of Commerce City*, Commerce City asserted that public records relating to an employment dispute were exempt from disclosure under the public interest exception.[105] Commerce City relied on the fact that a confidential reporting system for "the [] fact-finding and investigation of complaints" had been implemented for City employees.[106] The Colorado Court of Appeals found this reason insufficient to overcome the general presumption to release public documents.[107] Given the uncertainty of the application of this exception, a water conservancy district faced with a question of disclosing or withholding a document pursuant to this exemption, again, should seek legal assistance before proceeding.

III. CONCLUSION

The most cost-effective method for water conservancy district boards to avoid litigation and adverse publicity concerning the handling of its affairs is to ensure that board members and staff are familiar with the Open Meetings and Open Records Acts. The district should consult with legal counsel when difficult questions concerning the Acts' provisions arise. While the district will not avoid every problem, it will at least limit the number and types of problems the district faces.

102. *Id.* § 24-72-204(6)(a).
103. Daniels v. City of Commerce City, 988 P.2d 648, 651 (Colo. Ct. App. 1999).
104. *Id.* at 651 (citing Denver Post Corp. v. University of Colo., 739 P.2d 874, 879 (Colo. Ct. App. 1987)).
105. *Daniels*, 988 P.2d at 651; *see also* discussion *supra* Part II.
106. *Id.* at 651.
107. *Id.*