DISTRICT COURT, COUNTY OF JEFFERSON, COLORADO 100 Jefferson County Parkway Golden, Colorado 80401 303-271-6215 **Plaintiffs:** FREE SPEECH DEFENSE COMMITTEE, an unincorporated association, BEN SCRIBNER, in his individual capacity, and TARYN BROWNE, in her individual capacity **Defendants:** DAVID J. THOMAS, as District Attorney for the First Judicial District, and CITIZENS ADVISORY BOARD FOR THE OFFICE OF THE DISTRICT ATTORNEY, FIRST JUDICIAL DISTRICT Attorney/Party Without Attorney: Name(s): Marc D. Flink #12793 Holli L. Hartman #31558 Address: Baker & Hostetler LLP 303 E. 17th Ave., #1100 Denver, Colorado 80203 Phone Number: 303-861-0600 Fax Number: 303-861-7805 Email: mflink@bakerlaw.com hhartman@bakerlaw.com Name(s): Mark Silverstein, Legal Director Address: American Civil Liberties Union Foundation of Colorado 400 Corona Street Denver, Colorado 80218 Phone Number: 303-777-5482 Fax Number: 303-777-1773 Email: msilver2@worldnet.att.net	**▲COURT USE ONLY▲** Case No. Div: Ctrm:

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

Plaintiffs Free Speech Defense Committee ("FSDC"), Ben Scribner, in his individual capacity, and Taryn Browne, in her individual capacity (collectively, "Plaintiffs"), through

counsel Baker & Hostetler LLP in cooperation with the American Civil Liberties Union Foundation of Colorado, respectfully submit this Brief in Support of their Motion for Injunctive Relief.

I. INTRODUCTION

The Citizens Advisory Board of the Office of District Attorney, First Judicial District, ("Advisory Board") was founded by District Attorney David J. Thomas ("District Attorney") in 1993. The District Attorney formed the Advisory Board so that he could meet with a select group of citizens to discuss issues important to the Office of District Attorney and the community. The Advisory Board's meetings have never been opened to the public. The Advisory Board is a state body or local public body that is subject to the Colorado Open Meetings Law, Colo. Rev. Stat. § 24-6-401 et seq. (2001) ("Open Meetings Law"), and, therefore, its meetings must be held open to the public. Plaintiffs have made requests to attend and observe the meetings but have been turned away each time. By this Motion, Plaintiffs seek injunctive relief pursuant to Colo. Rev. Stat. § 24-6-402(9) and request that Defendants be restrained and ordered to hold meetings of the Advisory Board only in full compliance with all provisions of the Open Meetings Law.

II. FACTUAL BACKGROUND

A. The Parties

1. The Free Speech Defense Committee ("FSDC") is a nonprofit organization whose members live in the Denver, Colorado metropolitan area. Ben Scriber and Taryn Browne, both residents of Denver, Colorado, are members of the FSDC. See Exhibit 1 (Affidavit of Ben Scriber) at ¶ 1; Exhibit 2 (Affidavit of Taryn Browne) at ¶ 1.

2. Mr. Thomas, as District Attorney for the First Judicial District ("District Attorney"), is an elected official who serves as District Attorney pursuant to Colo. Rev. Stat. § 20-1-101 et seq.

3. The Citizens Advisory Board for the Office of the District Attorney, on information and belief, is an entity formed in 1993 by District Attorney David J. Thomas. Mr. Thomas formed the Advisory Board for the purpose of meeting with a select group of Jefferson and Gilpin County residents to discuss issues and programs of interest to the Office of the District Attorney and the community. Advisory Board members are selected at the District Attorney's discretion. The District Attorney solicits input from members of the Advisory Board on matters relating to decisions and policies considered by the Office of the District Attorney. The Advisory Board meets once a month at the Office of the District Attorney, located at 500 Jefferson County Parkway, Golden, Colorado 80401. See Exhibit 3 (District Attorney Website).

B. Plaintiffs' Attempts to Attend Advisory Board Meetings

4. Mr. Scribner learned about the existence of the Advisory Board via a website posted by the Office of the District Attorney. See Exhibit 1 at ¶ 2; Exhibit 3. Mr. Scribner learned from the website that the Advisory Board meets on the second Tuesday of every month at the District Attorney's office. See Exhibit 1 at ¶ 3; Exhibit 3. Mr. Scribner also learned via the website that the Advisory Board had been formed in 1993 as a tool for Mr. Thomas to "keep in touch with the needs and concerns of the community." See Exhibit 1 at ¶ 4; Exhibit 3.

5. On June 12, 2001, Mr. Scribner called the District Attorney's office to inquire whether he or another member of the FSDC could attend that evening's Advisory Board meeting. See Exhibit 1 at ¶ 5. A representative from the District Attorney's office told him neither he nor any other member of the FSDC could attend the meeting that evening. See id.

6. Ms. Browne on the evening of June 12, 2001 went to the District Attorney's office and made a request in person to attend the Advisory Board's meeting. See Exhibit 2 at ¶¶ 2, 3. A representative from the Advisory Board told Ms. Browne that she could not attend or observe the Advisory Board's meeting that evening. See id. at ¶ 3.

7. On June 14, 2001, Mr. Scribner called the District Attorney's office and again asked to attend the meetings of the Advisory Board. See Exhibit 1 at ¶ 6. A representative of the District Attorney's office again told him that neither he nor any other member of the FSDC could attend the Advisory Board meetings. See id.

8. On June 22, 2001, Mr. Scribner wrote a letter on behalf of the FSDC to Aura Leigh Ferguson, Community Program Director for the Office of District Attorney, who, on information and belief, organizes the Advisory Board's meetings. See Exhibit 4 (Letter dated June 22, 2001). In the letter, Mr. Scribner asked whether the Advisory Board's meetings were open to the public and whether members of the FSDC could attend, observe, or ask questions at the meeting. See id.

9. Ms. Ferguson responded to Mr. Scribner's letter in a letter dated July 2, 2001. See Exhibit 5 (Letter dated July 2, 2001). In the July 2, 2001 letter, Ms. Ferguson wrote as follows:

> The District Attorney's Citizens Advisory Board meeting is not a "public meeting". The District Attorney created the board when he took office in 1993 as a tool to help him and his office stay in touch with Jefferson and Gilpin County citizens. Members meet with the District Attorney to learn about issues and programs of interest to the DA and Board and to engage in frank and candid discussions regarding the same. The Board has no legal authority and serves completely at the pleasure of the District Attorney. Members of the Board are chosen through a process of written application, telephone interview and background screening. The District Attorney strives to have a board representing diverse points of view, while at the same time discouraging single-issue advocates. The board does not create policy or make decisions. Therefore we do

> not believe it to be a meeting that falls under the purview of the [sic] any laws governing open meetings.

Id. The July 2, 2001 letter also stated that, because the Advisory Board is an "unofficial board," Mr. Scribner or members of the FSDC would not be able to attend any Advisory Board meetings without an invitation. See id. Ms. Ferguson stated that she relayed Mr. Scribner's and the FSDC's request to attend the meetings to the Advisory Board and to Mr. Thomas, but they declined to extend an invitation. See id. She invited members of the FSDC who are citizens of the First Judicial District to apply to become members of the Advisory Board during the next application process, expected to occur in early 2002. See id.

C. Advisory Board's Response to Open Records Act Request

10. On January 8, 2002, the FSDC, through its attorneys and pursuant to Colo. Rev. Stat. §§ 24-72-201 to 205, submitted a Colorado Open Records Act request to the Advisory Board and the District Attorney requesting to inspect and copy documents relating to the Advisory Board. See Exhibit 6 (Letter dated January 8, 2002).

11. The Advisory Board and the District Attorney responded to the request and allowed inspection of records relating to the Advisory Board, including minutes of meetings, applications from citizens, and correspondence between the District Attorney's office and Advisory Board members. Through the inspection of the documents, the FSDC learned that the Advisory Board consists of about 20 to 25 members who submit applications to the District Attorney's office and are hand-picked by Mr. Thomas to serve two-year terms. The terms are staggered so that half the Advisory Board is replaced each year.[1]

[1] Holli Hartman, an attorney at Baker & Hostetler LLP, on February 5, 2002 went to the District Attorney's office on behalf of Plaintiffs to inspect the documents. Although copies of the documents were requested and produced for inspection pursuant to the Colorado Open Records Act, Colo. Rev. Stat. § 24-72-201 et seq., the county attorney representing the District Attorney's office asserted they were criminal justice records pursuant to Colo. Rev. Stat. § 24-72-301 et seq. In purported reliance on that records law, the county attorney sought to impose a retrieval fee of

12. An Advisory Board meeting summary dated July 13, 1993 reflects that Mr. Thomas stated during a meeting on that date that he sees the Advisory Board as a means to facilitate two-way communication with the community and as a means for getting input from the community on issues important to the office.

13. The July 13, 1993 meeting summary reflects that Mr. Thomas stated at the meeting that he would look to the Advisory Board to provide input on such issues as metro-wide policy on children and guns and, in the face of budget cuts, provide feedback on the value of community programs such as consumer fraud and diversion.

14. The meeting summaries and other documents reflect that Mr. Thomas uses the Advisory Board to test his public policy ideas and to help him make decisions about how to allocate his budget for community programs.

15. The documents also reflect that the Advisory Board has availed itself of public tax funds and facilities, and it operates under the seal of the District Attorney's office. For example, the Advisory Board meets at the District Attorney's office at 500 Jefferson County Parkway, Golden, Colorado. When on field trips to certain law enforcement facilities, Advisory Board members are told that they are to conduct themselves as representatives of the Office of District Attorney.

III. STANDARD FOR INJUNCTIVE RELIEF

Colorado courts have jurisdiction to issue injunctions to enforce the purposes of the Open Meetings Law "upon application of any citizen of this state." Colo. Rev. Stat. § 24-6-402(9); see

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$847, which she insisted be paid before any copies be taken away from the office. Ms. Hartman, on behalf of Plaintiffs, offered to pay $1.25 per page for copies desired after inspection, which is the maximum authorized under the Open Records Act. See § 24-72-205(1). That offer was declined. As such, copies of some documents described herein are not yet available to Plaintiffs. Information gleaned from the document review included in paragraphs 11-15 herein are derived from Ms. Hartman's review. Plaintiffs request that these documents be produced at the hearing without cost to Plaintiffs.

also Bagby v. School Dist. No. 1, 528 P.2d 1299, 1300 (Colo. 1974) (affirming grant of permanent injunction to enforce a different public meetings law that had applied to school districts and was repealed when the current Open Meetings Law was significantly amended in 1991).

IV. DISCUSSION

A. Defendants are Subject to the Open Meetings Law

1. The Colorado Open Meetings Law

The ultimate issue to be determined in this case is whether Defendants are subject to the Open Meetings Law, which would require that Advisory Board meetings be open to the public. The Open Meetings Law was enacted by Colorado voters in 1972 as part of the "Sunshine Act" with the stated declaration that it is "a matter of statewide concern and the policy of this state that ***the formation of public policy is public business and may not be conducted in secret***." Colo. Rev. Stat. § 24-6-401 (emphasis added). Colorado courts have interpreted this policy declaration to mean that the law "is to afford the public access to a broad range of meetings at which public business is considered." Van Alstyne v. Housing Auth. of Pueblo, 985 P.2d 97, 100 (Colo. Ct. App. 1999); see also Benson v. McCormick, 578 P.2d 651, 653 (Colo. 1978) (the Open Meetings Law "reflects the considered judgment of the Colorado electorate that democratic government best serves the commonwealth if its decisional processes are open to public scrutiny"); Cole v. State, 673 P.2d 345, 347 (Colo. 1983) (noting that public meetings laws have been broadly interpreted to further the legislative intent that "citizens be given a greater opportunity to become fully informed on issues of public importance so that meaningful participation in the decision-making process may be achieved").

Since its inception, lawmakers have aggressively expanded the reach of the Open Meetings Law. Indeed, when courts narrowly construed the Open Meetings Law to apply only to certain types of state entities, the Colorado General Assembly responded with amendments to broaden its scope and clarify its intent that public business may not be conducted in secret at any level of government. The statute as originally enacted stated that it was applicable only to a "state agency or authority." See James v. Board of Comm'rs of the Denver Urban Renewal Auth., 611 P.2d 976, 977 (Colo. 1980) (citing Colo. Rev. Stat. § 24-6-402 (1973)). Prior to amendments expanding the statute's language, Colorado courts held that, unless a board was specifically declared to be a state agency or authority by its organic legislation, it was not subject to the Open Meetings Law. See id. Thus, an urban renewal authority created by the General Assembly as a "body corporate and politic" was held not to be a state agency or authority. See id. School boards, which were merely "political subdivisions of the state," also were held exempt from the law, as well as the Board of Regents of the University of Colorado. See Bagby, 528 P.2d at 1302 (school boards); Associated Students v. Regents of Univ. of Colo., 543 P.2d 59 (Colo. 1975) (Regents). The legislature responded by making clear its intent that the statute encompasses any "local public body" or "state public body." See § 24-6-402(1)(a) & (d).

Accordingly, a "state public body" is now defined as:

> **Any** board, committee, commission, or other **advisory**, policy-making, rule-making, decision-making, or formally constituted **body** of any state agency, state authority, governing board of a state institution of higher education including the regents of the university of Colorado, a nonprofit corporation incorporated pursuant to section 23-5-121 (2), C.R.S., or the general assembly, and any public or private entity to which the state, or an official thereof, has delegated a governmental decision-making function but does not include persons on the administrative staff of the state public body.

Colo. Rev. Stat. § 24-6-402(1)(d) (emphasis added).

A "local public body" is defined as:

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

§ 24-6-402(1)(a) (emphasis added).

If a meeting of two or more members of any state public body "at which any public business is discussed" is convened, then the meeting is declared to be a public meeting that must be open to the public at all times. See § 24-6-402(2)(a). If a quorum or three or more members, whichever is fewer, of any "local public body" meet to discuss public business, then the meeting must be open to the public at all times. See § 24-6-402(2)(b).

The Open Meetings Law requires that a state public body or local public body provide full and timely notice to the public no less than 24 hours before a meeting is held. § 24-6-402(2)(c). The state public body also must take minutes during its meetings. § 24-6-402(2)(d)(I). A local public body must take minutes only if the body adopts any proposed policy, position, resolution, rule, regulation, or formal action. See § 24-6-402(2)(d)(II).

2. Based on the language of the Open Meetings Law, the Advisory Board is either a "state public body" or "local public body"

In construing the meaning of the statute at issue, the Court's obligation is to ascertain and to give full effect to the legislative intent. See Nicholas v. Colorado, 973 P.2d 1213, 1216 (Colo. 1999). Colo. Rev. Stat. § 2-4-201 et seq. mandates certain presumptions in determining legislative intentions in the enactment of statutes, including that the public interest is favored over any private interest. See § 2-4-201(1)(e). The statute also provides that "all general provisions, terms, phrases, and expressions, used in any statute, shall be liberally construed, in order that the true intent and meaning of the general assembly may be fully carried out." § 2-4-212.

Where the plain language of the statute is clear and unambiguous, the Court need not resort to rules of statutory construction. See Nicholas, 973 P.2d at 1216. When language is ambiguous, one of the best guides to intent is the declaration of policy, which forms the initial part of the enactment. See Walgreen Co. v. Charnes, 819 P.2d 1039, 1044 (Colo. 1991); Colorado for Family Values v. Meyer, 936 P.2d 631, 633 (Colo. Ct. App. 1997). A court must construe a statute so as to give effect to every word, and no term should be rendered superfluous. See Slack v. Farmers Ins. Exch., 5 P.3d 280, 284 (Colo. 2000).

The Advisory Board falls under either definition of state public body or local public body because it was created by a state agency or authority or by a political subdivision of the state. It was created solely by the District Attorney, who is paid by the state and Jefferson and Gilpin Counties to appear on behalf of the state and counties in all district court criminal proceedings and in certain civil litigation contexts. See Colo. Rev. Stat. §§ 20-1-102 & 301. As such, the District Attorney is a state officer and a member of the executive branch of state government. See People v. District Court, 527 P.2d 50, 52 (Colo. 1974) (district attorney is a member of executive branch); Johns v. Miller, 594 P.2d 590, 594 (Colo. Ct. App. 1979) (district attorney is a state officer). Although the District Attorney is not a governing board or commission that reaches decisions via majority vote at open public meetings, such heads of executive agencies are not expressly exempt from Colorado's Open Meetings Law when they do create committees or subcommittees to help them govern. Thus, the District Attorney is a "state agency" or "state authority" as contemplated in the definition for "state public body."

Because the District Attorney receives some of its funding from counties, it also falls under the Open Meetings Law's definition of a "political subdivision of the state." The definition of a "political subdivision of the state" "includes, *but is not limited to*, any county,

city, city and county, town, home rule city, home rule county, home rule city and county, school district, special district, local improvement district, special improvement district, or service district." Colo. Rev. Stat. § 24-6-402(1)(c) (emphasis added). District Attorneys are assigned to judicial districts, which are not enumerated in the definition. The definition, however, does not provide a complete list of governmental entities that could fall within the definition of "political subdivision of the state." That judicial districts are not listed within the definition is not the determining factor on whether the District Attorney is or is not a political subdivision of the state. Judicial districts are not expressly excluded and the language of the definition leaves room for additional entities. The District Attorney serves an electorate that pays county taxes to support his office and his activities, whether those activities are required by statute or initiated by the District Attorney to impact the public at large. Furthermore, district attorneys are elected officials. These characteristics are similar to the characteristics of the other entities enumerated within the definition of "political subdivision of the state."

Whether the District Attorney is a state agency, state authority, or a political subdivision, the Advisory Board serves in an advisory capacity to the District Attorney in a way that the Open Meetings Law is meant to encompass. "Advisory" means "advising or given the power to advise." Webster's New World Dictionary 20 (3d ed. 1994). One of the purposes of the Advisory Board is to allow the District Attorney to get input from citizens on issues important to the District Attorney. Such "input" is advice from select citizens on how the District Attorney should form his policies and shape programs that are paid with taxpayer dollars.

3. Other criteria for determining whether a body is subject to the Open Meetings Law

The plain language of the Colorado Open Meetings Law includes governmental **advisory boards** as state or local public bodies, and the statute means what it says. See Nicholas, 973

P.2d at 1216 (holding that provision of Children's Code "means what it says" and does not permit reading exception into the statute); see also Showpiece Homes Corp. v. Assurance Co. of Am., 38 P.3d 47, 51 (Colo. 2001) (courts must give words and phrases their "plain and ordinary meaning" (citing Moody v. Corsentino, 843 P.2d 1355, 1370 (Colo. 1993)).

Even if there is a question as to whether the plain language of the Open Meetings Law means what it says, the analysis applied to determine whether a board or committee created by a government entity falls within the definition of a state or local public body supports Plaintiffs' position as to this Advisory Board. In Zubeck v. El Paso County Retirement Plan, 961 P.2d 597, 600 (Colo. Ct. App. 1998), the Colorado Court of Appeals considered the following factors in determining that an entity established by the El Paso County Board of Commissioners to administer a retirement system fell within the purview of the statute:

1. whether the entity received tax benefits or public money;
2. whether the entity used public facilities or operates under an official "seal;" and
3. whether the entity's budget is factored into the budget of the state agency or political subdivision that created it.

See id. at 599-600.

Under the Zubeck test, the Advisory Board at issue here is subject to the Open Meetings Law. The activities of the Advisory Board appear to be supported by taxpayer dollars as part of the District Attorney's budget. Advisory Board documents reflect that the District Attorney and his staff tell Advisory Board members that they are representatives of the District Attorney's office. This directive puts the imprimatur of the District Attorney's "seal" on its existence and activities. The Advisory Board also uses the District Attorney's facilities to meet on a regular

basis. The Advisory Board, like the entity created to operate the county retirement plan in Zubeck, should be required to open its meetings to the public.

4. The District Attorney's arguments that the Advisory Board is not an "advisory body" are without merit

The District Attorney denies that his Advisory Board, despite its name, is "advisory" in any way. The District Attorney's office in its letter to Mr. Scriber states that (1) the Advisory Board does not make specific policy recommendations or vote on any issues put before it; and (2) any advice proffered by the Advisory Board can be ignored entirely by the District Attorney. The District Attorney argues the Advisory Board does not fall within the purview of the Open Meetings Law because he asserts that it has no policy-making function. These arguments, however, are defective in three ways.

a. Open Meetings Law requirements extend to "advisory" bodies

The statute specifically expresses that an "advisory body" of the state or a political subdivision is encompassed by the Open Meetings Law. The District Attorney meets with the Advisory Board on a monthly basis not only to provide educational presentations to handpicked citizens, but also to test community reaction to his public policies and ideas for community programs. It is clear that "public business" – how the District Attorney functions, community programs he sponsors and operates, policies he implements, and the allocation of limited budget funds among many public programs – is discussed at the meetings. While the Advisory Board may not pass resolutions or prepare written recommendations, it still serves to provide advice that the District Attorney relies upon to help him make decisions and implement policies that affect the broader public. This sort of "advisory body" clearly falls within the plain, unambiguous language of the Open Meetings Law.

The statute does not exclude certain types of advisory boards. To hold that some, but not all, "advisory bodies" are subject to the Open Meetings Law runs afoul of the letter and spirit of the Open Meetings Law. Selective application of the law to some "advisory bodies" is not a liberal interpretation of a specific term in the statute and would give the term a meaning contrary to the legislature's clear intent that public business not be conducted in secret. To hold that all advisory bodies are excluded from the provisions of the Open Meetings Law would render the term "advisory" superfluous.

b. The Advisory Board is a governmental entity subject to the Open Meetings Law even if it does not formally set public policy

Second, contrary to the District Attorney's position, the Colorado Open Meetings Law does **not** require that an advisory board "create policy or make decisions" in order for its meetings to be open to the public. The Colorado Court of Appeals ruled in Zubeck that a governmental entity need not establish public policy to be subject to the Open Meetings Law. See Zubeck, 961 P.2d at 600. The court held that "although the Plan . . . does not establish public policy, it operates as an agency or instrumentality of the County, and is thereby subject to the [Open Meetings Law] . . . ." Id. The court determined that other factors, as discussed in Section II.A.3, *supra*, must be considered when evaluating whether an entity is an agency or instrumentality that falls within the purview of the Open Meetings Law. Whether an entity has a role in establishing public policy is not the dispositive factor.

c. By closing Advisory Board meetings, the public business is being conducted in secret

To allow the Advisory Board to shut out the general public would violate the General Assembly's policy behind the Open Meetings Law, which is to prevent government from conducting its business in secret. Colo. Rev. Stat. § 24-6-401. If elected officials, state agencies,

or local government entities are allowed to test their public policy ideas with a select group of citizens behind closed doors, then the rest of the public is left in the dark as to the processes their public officials use to reach decisions and conduct public business. Without an opportunity to observe in person, the public would have no way of knowing to what degree the advisory board or committee was influencing the public official or public body.

A decision that the District Attorney may form an Advisory Board and conduct meetings outside the public eye presents a slippery slope for other public bodies that may, in turn, form their own advisory panels. What would be discussed at these meetings may never be fully disclosed if the entities are not required to conform to the provisions of the Sunshine Act. The Open Meetings Law is meant to be a check on this behavior, not a loophole for the formation of a secret government society or shadow agencies.

Given the plain meaning of the statute and the public policy behind it, the Advisory Board is subject to the Open Meetings Law.

5. Courts in other jurisdictions with similar open meetings laws hold that advisory boards are subject to open meetings laws

Statutes and court decisions in other states support the determination that the Advisory Board is subject to the Open Meetings Law.

In Florida, an advisory committee that helps a governing body winnow a list of candidates or policy options is subject to open meetings laws. In Krause v. Reno, 366 So.2d 1244 (Fla. Ct. App. 1979), the court held that a citizens' board formed to help the Miami city manager eliminate applicants for the chief of police position must have open public meetings. The committee, established by the city manager, was formed to review 165 applications, recommend elimination of those who did not meet qualifications, conduct interviews of the fifteen best-qualified, and then recommend four or five finalists from which the city manager

could choose. See id. at 1246. The court found these tasks to have a direct influence on the city manager's decision-making authority. See id. at 1252. The court was unfazed that the city manager, rather than the city commission, created the board. It held that the nature and characteristics of the board created, not the source of the board, is more determinative of whether its meetings must be open. See id. at 1252-53. Although the city manager may not have been subject to the open meetings law had he winnowed the candidates for chief of police by himself, he became an agency subject to the open meetings law when he created the advisory group to handle some of the responsibilities. See id. at 1252; see also MacLachlan v. McNary, 684 S.W.2d 534, 537 (Mo. Ct. App. 1984) (governmental "body of one" is subject to open meetings law because it falls within the statute's definition of "governmental entity").

The Missouri Court of Appeals in MacLachlan, 684 S.W.2d at 538, noted that Missouri's Open Meetings Law, as amended, "is devoid of any requirement that the committee have the power to govern or the power to formulate public policy." Id. The statute defined a public meeting as:

> Any meeting of a governmental body subject to this act at which public business is discussed, decided, or public policy formulated . . . .

Mo. Rev. Stat. § 610.010 (Supp. 1982). The statute defined "public governmental body" to include:

> Any committee appointed by or under the direction or authority of any of the above-named entities [those created by statute, order, or ordinance of any political subdivision] and which is authorized to report to any of the above-named entities.

Id. § 610.030. The court broadly interpreted the statute to include any entity that affects "the entire administrative decision-making process, not just the formal act of voting for the formal execution of an official document." MacLachlan, 684 S.W.2d at 538. Thus, an annexation study commission formed by a St. Louis County executive was subject to the law even though it had

no duty to report its findings. "A committee will not be excused from the ambit of the Sunshine Law because it fails to disclose its intention of making a report or recommendation." Id. at 539. The court gave little credence to the County executive's argument that the commission was nothing more than a "think tank." Because it discussed public business, the commission fell within the purview of the open meetings law. See id.

Other jurisdictions also follow the Missouri court's broad interpretation of their open meetings laws. See, e.g., Thomas v. White, 620 N.E.2d 85, 85 (Ohio Ct. App. 1992) (citizens' advisory committee of county children services board, though having no decision-making authority, is public body subject to open meetings law because it made recommendations that were part of decision-making process); South Harrison Township Comm. v. Board of Chosen Freeholders, 510 A.2d 42, 45-46 (N.J. Super. Ct. App. Div. 1986) (solid waste advisory council held subject to open meetings law despite its purpose being limited to discussion of possible landfill sites).

The Advisory Board in the present case has characteristics similar to the advisory committees in Krause and MacLachlan. It is a "think tank" of sorts which provides advice that can be accepted or rejected in whole or in part by the District Attorney. Though it may not issue formal written reports or take votes on what to recommend to the District Attorney, the Advisory Board discusses public business and such discussion may bear on the District Attorney's decision-making process. The District Attorney's decision-making process, when done alone as a "body of one," may not be subject to the Open Meetings Law. When, however, the District Attorney aids his decision-making process by seeking advice from a select group of citizens formed to discuss public business, then Colorado's Open Meetings Law requires that the Advisory Board meetings be open to the public.

B. Defendants Have Violated the Open Meetings Law

The District Attorney and the Advisory Board violated the provisions of the statute when they did not admit Plaintiffs and the public to its meeting on June 12, 2001, at other meetings thereafter, and when Defendants stated that future meetings would be closed. See Colo. Rev. Stat. 24-6-402(2)(a) & (b). The Advisory Board also did not provide public notice at least 24 hours in advance of each of its past meetings with postings of specific agenda information. See § 24-6-402(2)(c). Defendants also are in violation of the minute's provision of the law, which requires that minutes of any meeting of a state public body shall be taken. See § 24-6-402(2)(d)(I). An inspection of the documents produced by Defendants showed that minutes of meetings were taken for the first few years after the Advisory Board was formed, but the practice was dropped after some time in about 1995.

These violations can be prevented in the future only through the grant of Plaintiffs' request for injunctive relief. The Advisory Board should no longer be allowed to conduct its meetings in secret.

C. Plaintiffs are Entitled to Costs and Reasonable Attorney Fees

The Open Meetings Law provides that in any action in which a court finds a violation of the statute, the citizens prevailing in such action shall receive costs and reasonable attorneys fees. See § 24-6-402(9). Such an award is mandatory. In Zubeck, the Colorado Court of Appeals upheld a district court's award of costs and fees to the plaintiff because it had found a violation of the statute. The defendant challenged the award on the basis that it did not knowingly violate the statute. The appellate court rejected this argument, holding that the statute does not impose an intent element. See Zubeck, 961 P.2d at 601-02. The plaintiff need only prove a violation of

the Open Meetings Law to trigger entitlement to costs and fees under § 24-6-402(9). See id. at 602.

In Van Alstyne v. Housing Auth. of Pueblo, 985 P.2d 97, 100 (Colo. Ct. App. 1999), the court upheld an award of costs and fees even after the defendant had attempted to correct its prior notice violation by re-staging the meeting and issuing notice beforehand. The court held that such an attempt did not erase its prior violations and that the General Assembly established the "mandatory consequences" of awarding costs and reasonable attorney fees to the plaintiff who proves a defendant has violated the statute. See id. Van Alstyne implicitly holds that a judge has no discretionary authority in awarding costs and fees when a violation of the Open Meetings Law is found.

In this case, Plaintiffs are entitled to their costs and reasonable attorneys' fees.

IV. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court enter an injunction restraining and enjoining the Advisory Board and District Attorney from excluding members of the FSDC or other members of the public from attending and observing Advisory Board meetings and requiring that the Advisory Board and District Attorney shall fully comply with all requirements of the Colorado Open Meetings Law, Colo. Rev. Stat. § 24-6-401 et seq., including those provisions that require posting of notices and agenda items and the recording of minutes of the meetings.