

DISTRICT COURT, CITY AND COUNTY OF
DENVER, COLORADO
Court Address: 1437 Bannock Street
Denver, Colorado 80202

In the Matter of the Application of COLORADO
INDEPENDENT ETHICS COMMISSION

AND

Plaintiff: COLORADO ETHICS WATCH

v.

Defendant: COLORADO INDEPENDENT
ETHICS COMMISSION

▲ **COURT USE ONLY** ▲

Case No. 2008CV7995
Consolidated with Case No.
2008CV8857

Division 19

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND JUDGMENT

These consolidated cases were tried to the Court on May 12, 2009. Based on the parties' stipulations, trial briefs, and evidence presented at trial, the Court makes the following findings of fact and conclusions of law, and enters its Order and Judgment as stated herein:

I. FINDINGS OF FACT

1. The Independent Ethics Commission ("IEC"), Applicant in No. 2008CV7995 and Defendant in No. 2008CV8857, is an independent commission created by the provisions of Article XXIX of the Colorado Constitution.

2. Colorado Ethics Watch ("Ethics Watch"), Plaintiff in No. 2008CV8857, is a nonprofit corporation.

3. The Court has jurisdiction over the parties and venue is proper in the City and County of Denver.

4. On August 27, 2008, Ethics Watch made a Colorado Open Records Act ("CORA") request on the IEC. Trial Exhibit A. Ethics Watch's request sought the following documents:

Any and all requests for letter rulings, complaints and requests for advisory opinions, including any and all related responses and correspondence (non-privileged) from or on behalf of the IEC or any of its commissioners.

5. By letter dated September 1, 2008, the IEC exercised its statutory right to extend the deadline to respond to a CORA request due to its need to devote all or substantially all of its resources to meeting other deadlines. Trial Exhibit B.

6. On September 1, 2008, the Rules of Procedure of the IEC went into effect. Among other things, the rules govern the IEC's handling of complaints, requests for advisory opinions, and requests for letter rulings.

7. The IEC responded to Ethics Watch's CORA request by letter dated September 8, 2008 from its executive director, Jane Feldman. Trial Exhibit C. With respect to complaints requested, the letter advised that the IEC had not yet determined whether the complaints in its custody were not frivolous, and that therefore the complaints requested were confidential under Article XXIX, section 3(b) of the Colorado Constitution. The letter also advised Ethics Watch that "[a]lthough Advisory Opinions and letter rulings are public records, it is the [IEC]'s position that releasing these documents could have a chilling effect on persons who are considering requesting advisory opinions or letter rulings. The [IEC] has therefore decided to request order [sic] from Denver District Court permitting the [IEC] to withhold disclosure of the contents of Requests for Advisory Opinions and Requests for Letter Rulings. See 24-72-204(6)(a), C.R.S." *Id.*

8. Ms. Feldman's letter identified two principal reasons why documents constituting or related to requests for advisory opinions and letter rulings should not be subject to inspection under CORA. First, based on one phone call from an individual who "implied" that he would not seek formal advice from the IEC if the IEC could not assure him that his request would be held confidential, she asserted that confidentiality would make it more likely that government employees and officials would seek ethics advice. Second, she asserted that the IEC consulted with ethics commissions around the country and that "most" of them keep requests for advisory opinions confidential. *Id.*

9. On September 10, 2008, the IEC filed an application with the Court seeking an order allowing it to keep requests for Advisory Opinions and Letter Rulings confidential, so that it is not required to release any documents related to these requests pursuant to the Colorado Open Records Act.

10. There is no evidence that the IEC was uncertain as to whether documents subject to Ethics Watch's CORA request were public records after exercising reasonable diligence to determine whether those documents were subject to CORA before filing its Application. To the contrary, the IEC took the position that (1) although public records, documents regarding complaints were not available for inspection before the IEC determined whether the complaints were frivolous, and (2) documents regarding letter ruling and advisory opinion requests should

be exempted from CORA because of IEC's concern that their release would cause a chilling effect on future requests for Advisory Opinions and Letter Rulings. Trial Exhibit C.

11. The IEC did not name Ethics Watch as a party in No. 2008CV7995. However, pursuant to the Court's Order of October 2, 2008, IEC was required to notify Ethics Watch of any scheduled hearing on IEC's Application as required by statute, to accord it a right to be heard.

12. On or about September 17, 2008, Ethics Watch's counsel transmitted to the IEC a notice, pursuant to C.R.S. § 24-72-204(5) that Ethics Watch was reserving its right to seek an order from this Court compelling the IEC to produce the documents at issue if they were not made available within three days. Trial Exhibit D. The letter also stated that the documents could be made available in redacted format. *Id.* Finally, the letter stated that "the IEC need not produce complaints filed, although correspondence regarding complaints should be produced." *Id.* It was stipulated by the parties at trial that there was no dispute about the adequacy of Ethics Watch's notice.

13. To date, the IEC has not made any documents responsive to Ethics Watch's CORA request available for inspection.

14. As of the date Ethics Watch served its August 27, 2008 CORA request, at least two complaints had been filed with the IEC, which were assigned numbers 08-01 and 08-02. In its trial brief and at trial, Ethics Watch advised the Court that it does not seek documents regarding Complaints 08-01 and 08-02. The evidence presented at trial was unclear as to whether two additional complaints, 08-03 and 08-04, were filed in late August or early September, and therefore before or after Ethics Watch's initial CORA request.

15. The IEC ruled on all four complaints at its meeting on October 6, 2008. Complaint No. 08-01, filed by Ethics Watch, was ruled nonfrivolous and set for a hearing. Complaint No. 08-02 was dismissed as frivolous and on the ground that the alleged misconduct occurred more than 12 months prior to the filing of the complaint. Complaint No. 08-03 was dismissed on the ground of lack of jurisdiction because it alleged misconduct by a member of the judicial branch. Complaint No. 08-04 was dismissed pursuant to IEC Rule of Procedure 7.D.3 (8 CCR 1510-1) because the alleged violation, if true, would not constitute a violation of Colorado Constitution Article XXIX, or any other standard of conduct or reporting requirement under the jurisdiction of the IEC.

16. The IEC did not expressly find that either Complaint 08-03 or 08-04 was frivolous.

17. The IEC did not establish at trial by a preponderance of the evidence that there exists a significant risk of harm to the public if documents related to requests for advisory opinions and letter rulings were made available for inspection under CORA.

18. The evidence offered by IEC at trial is insufficient to establish a significant risk that permitting public inspection of documents regarding advisory opinion or letter ruling

requests will have a chilling effect on future requests for advisory opinions or letter rulings. To the contrary, the IEC's annual report for 2008 established that the IEC received 71 requests for advisory opinions and/or letter rulings during 2008. It did not issue any advisory opinions or letter rulings during that year. Instead, as a way of dealing with the high volume of requests, which witness Jane Feldman, Executive Director of IEC, testified were duplicative, and covered the same or similar issues, the IEC issued several position statements during 2008. Position statements are defined in IEC Rule of Procedure 3.A.14, 8 CCR 1510-1, as "an IEC-initiated written statement addressing ethics issues, which provides guidance" to persons subject to IEC jurisdiction and members of the public.

19. In view of these facts based on the evidence offered at trial, the Court is unable to find that the IEC has proven by a preponderance of the evidence that the public interest will be substantially harmed by any "chilling effect" that might or might not occur if the public is permitted to review documents regarding advisory opinion or letter ruling requests pursuant to a CORA request. The Court finds that the concern of the IEC regarding such a chilling effect, while sincere, is merely speculation that such an effect may occur. This speculation, without supporting and corroborative evidence, is insufficient to establish a significant risk of any public harm which would flow from such disclosure. No such supporting evidence has been provided.

20. The Court also finds that Ethics Watch established credible grounds for public disclosure of such documents and that in view of IEC's dearth of evidence at this time in support of its concern that the requested documents should not be released, the balance between the IEC's asserted reasons for secrecy and Ethics Watch's reasons in favor of transparency is not so clearly in favor of the IEC that the Court should enter an order blocking Ethics Watch from obtaining access to the public records at issue.

II. CONCLUSIONS OF LAW

1. The IEC filed its Application pursuant to C.R.S. § 24-72-204(6)(a), which allows a custodian of records to seek an order barring disclosure of documents when "in the opinion of the official custodian of any public record, disclosure of the contents of said record would do substantial injury to the public interest, notwithstanding the fact that said record might otherwise be available to public inspection."

2. C.R.S. § 24-72-204(6)(a) also permits a custodian to file an application when it is "unable, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if disclosure of the public record is prohibited" under CORA. In this case, there is no evidence that the IEC was unable to determine whether the documents in question were public records. To the contrary, the IEC stated in its letter to Ethics Watch (Trial Exhibit C) that it believed documents regarding complaints were not public records until a determination regarding frivolousness had been made, and clearly implied in its letter that documents regarding letter ruling requests and advisory opinion requests, like the opinions and rulings themselves (which it specifically addressed), "are public records." The Application filed by the IEC herein relies on the IEC's argument that the public records in question should be withheld from the public for policy reasons, not because of any constitutional or statutory prohibitions, and, in the words of the statute, would "otherwise be available to public inspection." Thus, the provision of

Subsection 6(a) addressing situations when the custodian is unable to determine whether disclosure of a public record is “prohibited” does not apply to this case.

3. C.R.S. § 24-72-204(6)(a) is a “catch-all exemption” that is “to be used only in those extraordinary situations which the General Assembly could not have identified in advance.” *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1156 (Colo. App. 1998), citing *Civil Service Comm’n v. Pinder*, 812 P.2d 645, 649 (Colo. 1991). Because the catch-all exemption applies only to extraordinary situations, it cannot properly be used to create new categorical exemptions from CORA. See *Bodelson v. Denver Pub. Co.*, 5 P.3d 373, 378-79 (Colo. App. 2000). Moreover, the catch-all exemption, like all exemptions to CORA, is to be narrowly construed. See *id.*

4. This case involves competing burdens of proof. Typically, the burden is on the party seeking public records, here Ethics Watch, to establish that “the public entity in question: (1) improperly; (2) withheld (3) a public record.” *Wick Comm. Co. v. Montrose County Bd. of County Comm’rs*, 81 P.3d 360, 363 (Colo. 2003). However, in this case the second prong (withholding) is undisputed, and the third prong (public records) is undisputed with respect to documents related to advisory opinions and letter rulings. The key issue is whether the IEC’s withholding of the documents was “improper.” On that issue, the IEC relies on the “catch-all” exemption of C.R.S. § 24-72-204(6)(a). Case law establishes that the burden of proof is assigned to the custodian of records in a case under the catch-all exemption. *Bodelson*, 5 P.3d at 377. Under the circumstances of this case, the burden to establish that the catch-all exemption should apply, and therefore, that the withholding of documents was proper, falls on the IEC.

5. Specifically, to prevail on its application under the catch-all exemption, the IEC must prove two things: “an extraordinary situation and that the information revealed would do substantial injury to the public.” *Id.*

6. The Court finds and concludes that the IEC has failed to meet its burden. First, as a matter of law, it is apparent both that the voters who passed Amendment 41, which created the IEC, and the legislature which passed the IEC’s facilitating statute, C.R.S. § 24-18.5-101, considered issues regarding confidentiality and yet did not provide for the categorical exemption from disclosure the IEC seeks in this case. The constitutional provision which established the IEC provides that “[a]ny person” may file a complaint with the IEC alleging a violation of Article XXIX or any other standard of conduct or reporting requirement. Colo. Const. art. XXIX, § 5(3). If the IEC determines the complaint not to be frivolous, it must investigate and hold a hearing. Frivolous complaints, on the other hand, “shall be maintained confidential by the commission.” *Id.* Persons subject to IEC jurisdiction may request advisory opinions on ethics issues. *Id.* § 5(5). In contrast to the requirement that the IEC hold frivolous complaints in confidence, the Constitution provides only that the IEC “shall render an advisory opinion pursuant to written rules adopted by the commission.” *Id.* In other words, the constitutional scheme contemplates that only frivolous complaints will be kept confidential.

7. The legislature has the power under the Colorado Constitution to enact appropriate legislation to facilitate Article XXIX. Colo. Const. art. XXIX, § 9. Exercising this authority, the legislature enacted the IEC’s facilitating statute, C.R.S. § 24-18.5-101. As relevant

here, the statute adds a new vehicle through which the IEC may interpret ethical standards – the “letter ruling,” which may be requested by any person who is not entitled to request an advisory opinion to determine “whether potential conduct of the person making the request satisfies the requirements of article XXIX.” C.R.S. § 24-18.5-101(3)(b)(III). The statute also provides as follows:

Each advisory opinion or letter ruling, as applicable, issued by the commission shall be a public document and shall be promptly posted on a web site that shall be maintained by the commission; except that, in the case of a letter ruling, the commission shall redact the name of the person requesting the ruling or other identifying information before it is posted on the web site.

C.R.S. § 24-18.5-101(3)(b)(IV). The legislature’s intent is clear: the identity of persons who request letter rulings shall be protected, but not the identity of persons who request advisory opinions. Moreover, the method to protect the identity of a person requesting a letter ruling is redaction in the final, public letter ruling, not wholesale withholding of documents regarding letter ruling requests.

8. CORA itself contains an exclusion for communications between legislators and their constituents that imply that the constituent expects the communication to be confidential, and to the legislator’s response to such communications. C.R.S. § 24-72-202(6)(a)(II)(C). CORA also excludes certain trade secret information provided to public agencies, in order to encourage trade secret holders to cooperate with government agencies. C.R.S. § 24-72-204(3)(a)(IV); *Zubeck v. El Paso County Retirement Plan*, 961 P.2d 597, 600 (Colo. App. 1998). If the legislature believed that communications between the IEC and persons covered by Article XXIX or members of the public should be excluded from CORA, it could have amended CORA to include such an exemption at the time it enacted C.R.S. § 24-18.5-101 et seq. It apparently chose not to amend CORA at the time it was directing the IEC to redact identifying information of persons who request letter rulings. The Court is unable to conclude that a request for documents regarding advisory opinion and letter ruling requests is so extraordinary that the legislature could not foresee that such a request would be made. That being the case, the Court cannot find in favor of the IEC on its application under C.R.S. § 24-72-204(6)(a). *See Freedom Newspapers*, 961 P.2d at 1156.

9. The IEC argues that its policy determination should be given deference by this Court, citing *Colorado Association of Public Employees v. Lamm*, 67P.2d 1350 (1984). This case, however, centers on an exemption to CORA rather than involving the interpretation of Article XXIX or any other statute that the IEC is entrusted to administer and use its specialized knowledge to interpret. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (courts defer to agency interpretations regarding the “meaning and reach” of ambiguous statutes they are entrusted to administer); *see also Developmental Pathways v. Ritter*, 178 P.3d 524, 535 (Colo. 2008) (principle of deference to administrative agencies applies to Article XXIX and statutes enforced by the IEC). The IEC is not entrusted to administer CORA, rather, the IEC is subject to CORA, and this is not a case in which specialized knowledge of the IEC is needed to resolve any ambiguity regarding the meaning or reach of CORA. Moreover, the IEC does not purport to interpret CORA, it merely has expressed a policy preference for a

general exemption from CORA for documents relating to requests for advisory opinions and letter rulings.

10. The Court also finds that the IEC has not established by a preponderance of the evidence that disclosure of the documents at issue will cause significant harm to the public. In *Bodelson*, the custodian who sought an order blocking the release of reports of autopsies of the victims of the mass homicide at Columbine High School in 1999 presented specific and uncontradicted evidence that under the unique circumstances of that tragedy, release of the autopsy reports would reopen old wounds and substantially set back the Columbine community's efforts to move past the tragedy. *Bodelson*, 5 P.3d at 378. In contrast, in *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d at 1157, the Court, *asre*, rejected similar concerns about the alleged chilling effect of record disclosure, which it concluded were based on speculation and insufficient factual support.

11. The evidence presented in this case, which IEC acknowledges is all that is available, simply does not support the concerns about risk of significant harm to the public which the IEC proffers. To the contrary, it shows that in spite of the fact that the IEC has been unable to assure requesting parties that documents they submit to the IEC would be kept confidential, the IEC received more requests for advisory opinions and letter rulings than it has been able to process. The "chilling effect" feared by the IEC is wholly speculative and insufficient to support a finding that the public will suffer substantial harm if the documents in question are released. In the absence of a finding of substantial injury to the public, the Court is unable to rule in favor of the IEC under C.R.S. § 24-72-204(6)(a). *Bodelson*, 5 P.3d at 377.

12. In addition, it would be improper for the Court to create a new categorical exclusion from CORA in the context of an application under C.R.S. § 24-72-204(6)(a). *Id.*

13. Because the IEC's sole ground for withholding documents regarding letter ruling and advisory opinion requests was C.R.S. § 24-72-204(6)(a), and the IEC has failed to meet its burden of proof to establish grounds to bar the release of documents under that section, the Court concludes that the IEC improperly withheld documents within the meaning of CORA regarding advisory opinion requests and letter ruling requests contained in Ethics Watch's CORA request.

14. The remaining question is whether the IEC's failure to make documents regarding Complaints 08-03 and 08-04 available for inspection also violates CORA. First, the Court concludes that documents regarding those two complaints are "public records" as defined by CORA. "Public records" under CORA include writings maintained by the state and its agencies for use in the exercise of functions required or authorized by law. *See* C.R.S. § 24-72-202(6)(a)(I). The processing of complaints is a function required of the IEC by law. Colo. Const. art. XXIX, § 5(3). The Court concludes, however, that the IEC initially asserted good grounds for not releasing such complaints pursuant to Ethics Watch's August 27 request in its September 8 letter response, since such complaints were required to be treated as confidential, at least temporarily, under Section 3(b) of Colo. Const. art. XXIX. Moreover, despite the fact that Ethics Watch has pursued its right to such documents in its complaint and at trial, the Court concludes that by virtue of its September 17 letter to IEC (trial exhibit D), Ethics Watch withdrew its request for the complaints in question. Thus the Court cannot conclude that the

IEC's failure to release complaint Nos. 08-03 and 08-04, which are the only ones still at issue, was improper under CORA.

15. The Court's determination in this regard does not preclude Ethics Watch from issuing a new CORA request for these two complaints. However, given the evidence offered at trial at least concerning complaint 08-03, there is indication that the complaint was one involving a state judicial officer, over which the IEC determined it lacked jurisdiction and therefore referred on to the appropriate body for addressing complaints involving the judiciary. The Court notes that under C.R.S. § 24-72-204(1), the custodian of a public record should not release such record in response to a CORA request if inspection of the document would be contrary to a state statute ((1)(a)) or is prohibited by rules promulgated by the supreme court ((1)(c)). Colo. Const. art. VI, § 23(3) establishes a commission on judicial discipline to address conduct involving judicial officers, and provides that in certain circumstances papers filed and or evidence relating to alleged judicial misconduct shall be confidential. See Sect. 3(g). See also Colorado Rules of Judicial Discipline, Rule 6. Any further requests and responses concerning complaint 08-03 should address this issue. The Court expresses no opinion at this time with respect to a renewed CORA request for release of complaint 08-04.

16. C.R.S. § 24-72-204(5) provides that “[u]nless the court finds that the denial of the right of inspection was proper, it shall order the custodian to permit such inspection and shall award court costs and reasonable attorney fees to the prevailing applicant in an amount to be determined by the court . . .” (emphasis supplied). The Court has found that the IEC's denial of Ethics Watch's right of inspection as to complaints 08-03 and 08-04 was proper, but as to other documents requested under CORA, specifically documents constituting requests for Advisory Opinions and requests for Letter Rulings, and related correspondence, was not proper. Therefore, the Court shall order the IEC to permit Ethics Watch to inspect the documents requested, except complaints 08-03 and 08-04, and the IEC shall redact pertinent documents so as to protect the identity of persons requesting letter rulings. See *Denver Post Corp. v. University of Colorado*, 739 P.2d 874, 879 (Colo. 1987).

17. The IEC argues that the Court should deny an award of attorneys' fees to Ethics Watch for two reasons. First, the IEC argues that the Court should deny fees under C.R.S. § 24-72-204(6)(a). However, the provision of the statute relied upon by the IEC provides that “[t]he attorney fees provision of subsection (5) of this section shall not apply in cases brought pursuant to this paragraph (a) by an official custodian who is unable to determine if disclosure of a public record is prohibited under this part 2 if the official custodian proves and the court finds that the custodian, in good faith, after exercising reasonable diligence, and after making reasonable inquiry, was unable to determine if disclosure of the public record was prohibited without a ruling by the court.” This is not a case filed by a custodian who was “unable to determine if disclosure of a public record is prohibited,” but was instead filed by the IEC in efforts to obtain a court order permitting restricted disclosure on grounds that disclosure would cause substantial injury to the public interest. Therefore, pursuant to statutory mandate, the attorneys' fees provision does apply to this case.

16. Second, the IEC raises concerns about the necessity or reasonableness of Ethics Watch's action in filing a separate complaint under CORA, resulting in case no. 2008CV8857,

which was then consolidated with this case. This is not a legal basis for denying attorneys' fees to Ethics Watch, but simply goes to the Court's determination of the reasonableness of any fees which Ethics Watch may claim. As a party who was denied documents subject to CORA, Ethics Watch was legally entitled to file a complaint under CORA and the IEC's Application proceedings in this case no. 08 CV 7995 did not take away this right nor create an exception to the mandatory language regarding attorneys' fees in C.R.S. § 24-72-204(5). While Ethics Watch could have chosen to intervene in the IEC's Application proceedings rather than filing its own complaint, the Court can fairly determine whether Ethics Watch's chosen procedure unnecessarily or unreasonably multiplied its fees and costs in fee determination proceedings.

The Court therefore ORDERS and enters JUDGMENT AS FOLLOWS:

1. Within fifteen days of the date of this order, as provided in C.R.C.P. 62(a), the Colorado Independent Ethics Commission is ordered to make the following documents available for inspection by Colorado Ethics Watch, redacted to protect the identity of persons filing requests for letter rulings:

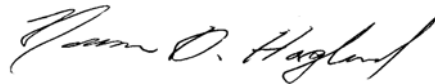
a. Any and all requests for advisory opinions and requests for letter rulings received by the IEC as of August 27, 2008;

b. Any and all responses and correspondence with third parties (not to include counsel for the IEC) regarding requests for advisory opinions or requests for letter rulings received by the IEC as of August 27, 2008.

2. Colorado Ethics Watch is entitled to an award of attorneys' fees in its favor and against the Colorado Independent Ethics Commission with respect to its CORA request related to inspection of requests for Advisory Opinions and requests for Letter Rulings in the custody of the Commission. Colorado Ethics Watch is directed to file a request for attorneys' fees pursuant to C.R.C.P. 121, § 1-22 within fifteen days of date of this Order and Judgment, sufficiently particularizing services related to this particular aspect of its CORA request and its claims in this consolidated action.

DATED on this 14th day of May, 2009

BY THE COURT:



Norman D. Haglund
District Court Judge