

DISTRICT COURT, CITY AND COUNTY OF DENVER COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: December 20, 2018 4:41 PM FILING ID: B96C8DCE5A834 CASE NUMBER: 2018CV34699
<p>Plaintiff: MICHAEL DUNAFON, individually and in his official capacity as Mayor of the City of Glendale, Colorado, v.</p> <p>Defendants: APRIL JONES, JO ANN SORENSEN, WILLIAM J. LEONE, ELIZABETH ESPINOSA KRUPA, and MATT SMITH, in their official capacities as members of the Independent Ethics Commission, and the INDEPENDENT ETHICS COMMISSION, a tribunal of the State of Colorado.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Attorneys for Plaintiff Michael Dunafon:</p> <p>Douglas J. Friednash, #18128 Richard B. Benenson, #32566 Joshua A. Weiss, #49758 Brownstein Hyatt Farber Schreck, LLP 410 Seventeenth Street, Suite 2200 Denver, CO 80202-4432 Phone: 303.223.1100 Fax: 303.223.1111 Email: rbenenson@bhfs.com, dfriednash@bhfs.com, jweiss@bhfs.com</p>	<p>Case Number:</p> <p>Div.:</p>
<p style="text-align: center;">COMPLAINT, APPLICATION FOR ORDER TO SHOW CAUSE, AND REQUEST FOR ORDER OF <i>IN CAMERA</i> REVIEW</p>	

Plaintiff Michael Dunafon, through undersigned counsel Brownstein Hyatt Farber Schreck, LLP, respectfully submits the following Complaint, Application for Order to Show Cause, and Request for Order of *In Camera* Review. As grounds therefore, Plaintiff states as follows:

INTRODUCTION

1. This case seeks access to records and recordings of closed-door executive session meetings of the Colorado Independent Ethics Commission (“IEC”) under the Colorado Open

Meetings Law (“COML”), C.R.S. § 24-6-401, *et seq.*, and the Colorado Open Records Act (“CORA”), C.R.S. § 24-72-201, *et seq.*

2. Specifically, Plaintiff seeks production and disclosure of written records, electronic records, and recordings of two hours and thirty-four minutes of closed-door executive session meetings in which the IEC purportedly discussed two complaints filed against Plaintiff. *See* C.R.S. § 24-6-402(d.5)(I)(C); CIM PARA 36.

3. To the extent any of the executive session meetings identified in Paragraph 2, above, were not recorded, Plaintiff seeks a declaratory judgment finding this failure to record a violation of COML. *Cf.* C.R.S. § 24-6-402(d.5)(I)(A).

4. To the extent any of the records referenced above in Paragraph 2 no longer exist, were not retained, or were destroyed, Plaintiff seeks a declaratory judgment finding spoliation given the existence of long-running disputes regarding the IEC’s jurisdiction over Plaintiff and the corresponding duty to preserve said records, as well as an award of appropriate sanctions.

5. The records sought here are not shielded from disclosure because the IEC deemed the complaints against Plaintiff non-frivolous.

6. Alternatively, to the extent the Court determines that the records requested are not, on their face, subject to disclosure, Plaintiff seeks an order directing *in camera* review of the records to determine whether they involve any non-enumerated exception to disclosure or the adoption of a proposed policy, position, resolution, rule, regulation, or formal action in violation of COML. *See* C.R.S. §§ 24-72-205(5.5)(b); 24-6-402(2)(d.5)(II)(C).

7. Plaintiff also seeks an award of reasonable attorneys’ fees and costs, as mandated under CORA and COML.

PARTIES

8. Plaintiff Mike Dunafon is an individual currently serving as the Mayor of the City of Glendale, Colorado.

9. Defendants April Jones, Jo Ann Sorensen, William J. Leone, Elizabeth Espinosa Krupa, and Matt Smith (collectively “Commissioners”) are individuals serving as Commissioners of the IEC.

10. The IEC is a governmental body created by Article XXIX of the Colorado Constitution that exercises judicial or quasi-judicial functions over certain ethics-related matters in Colorado.

JURISDICTION AND VENUE

11. Jurisdiction is proper under C.R.S. §§ 24-72-204(5), 24-72-204(5.5), and 24-6-402(9).

12. Jurisdiction is also proper under C.R.S. § 24-18.5-101(9) because any final action of the IEC “concerning a complaint shall be subject to judicial review by the district court for the city and county of Denver.”

13. Venue is proper under C.R.S. § 24-18.5-101(9), which provides for judicial review of the IEC’s final actions in Denver District Court.

14. Venue is also proper pursuant to C.R.C.P. 98(b)(2) insofar as the claims made against the Commissioners and the IEC arose in this county and pertain to the official duties and actions of the Commissioners and the IEC.

GENERAL ALLEGATIONS AND APPLICABLE LAW

A. Colorado Open Meetings Law

15. The IEC is subject to the provisions of COML as a “state public body.” C.R.S. § 24-6-402(d)(1).

16. COML “is to be construed broadly in favor of its purpose of providing the maximum extent possible of public access to the meetings of governmental bodies.” *Center for Independent Media v. Independent Ethics Commission*, 2009 CV 5109, ¶ 33 (Colo. Dist. Ct. Aug. 31, 2009).

17. The “underlying intent” of COML is ensuring “that the public is not deprived of the discussions, the motivations, the policy arguments and other considerations which led to the discretion exercised by the [public body].” *Center for Independent Media v. Independent Ethics Commission*, 2009 CV 5109, ¶ 34 (Colo. Dist. Ct. Aug. 31, 2009) (quotation marks omitted; alteration original).

18. COML is to be construed in favor of public access to records. *Center for Independent Media v. Independent Ethics Commission*, 2009 CV 5109, ¶ 35 (Colo. Dist. Ct. Aug. 31, 2009).

19. Closed-door executive session meetings of state public bodies are not subject to disclosure unless an exception applies or the executive session meetings include discussion of non-enumerated topics. C.R.S. § 24-6-402(2)(d.5)(I)(D).

20. COML permits closed-door executive session meetings for the narrow purpose of discussing “[m]atters required to be kept confidential by federal law or rules, state statutes, or in

accordance with the requirements of any joint rule of the senate and the house of representatives pertaining to lobbying practices.” C.R.S. § 24-6-402(3)(a)(III).

21. There is no statutory basis for discussing or deliberating “on ethics complaints, advisory opinions, letter rulings, and position statements” behind closed doors. *Center for Independent Media v. Independent Ethics Commission*, 2009 CV 5109, ¶ 47 (Colo. Dist. Ct. Aug. 31, 2009).

22. “COML does not contain an exemption for deliberations behind closed doors, and Colorado law does not authorize closed-door meetings for quasi-judicial bodies to discuss the adjudicative matters before them.” *Center for Independent Media v. Independent Ethics Commission*, 2009 CV 5109, ¶ 47 (Colo. Dist. Ct. Aug. 31, 2009).

B. Colorado Open Records Act

23. The IEC’s recordings and records of closed-door executive session meetings are also “public records” under CORA. C.R.S. §§ 24-6-402(2)(d.5)(1)(A), 24-72-202(6).

24. Pursuant to COML, recordings of closed-door executive session meetings are exempt from disclosure under CORA unless the public body waives confidentiality or a petitioner shows “ground sufficient to support a reasonable belief that the state public body . . . engaged in substantial discussion of any matters not enumerated in” COML. C.R.S. §§ 24-6-402(2)(d.5)(1)(D), 24-72-204(5.5)(a).

25. The application for an order to show cause should be evaluated “at the earliest practical time.” C.R.S. § 24-72-204(6)(a).

26. Once the requisite showing has been made, the Court must conduct an *in camera* review of the records at issue. C.R.S. § 24-72-204(5.5)(b)(I).

27. If the Court determines, following an *in camera* review of the records, “that violations of the open meetings law occurred,” then those portions of the record of the closed-door executive session meetings “shall be open to public inspection.” C.R.S. § 24-72-204(5.5)(b)(II).

28. At least fourteen days prior to seeking judicial relief, the party seeking access to records “shall file a written notice with the custodian who has denied the right to inspect the record informing the custodian that the person intends to file an application with the district court.” C.R.S. 24-72-204(5)(a).

29. During the fourteen day period described in C.R.S. § 24-72-204(5)(a), the custodian of the records sought and the party seeking access “shall either meet in person or communicate by telephone . . . to determine if the dispute may be resolved without filing an application with district court.” C.R.S. § 24-72-204(5)(a).

C. The IEC and Its Closed-Door Executive Session Meetings

30. The IEC was created in 2006 through a constitutional citizen initiative (Amendment 41), and is now codified as Article XXIX of the Colorado Constitution.

31. The IEC “hear[s] complaints, issue[s] findings, and assess[es] penalties” regarding “ethics issues arising under [Article XXIX] and under any other standards of conduct and reporting requirements provided by law.” Colo. Const. art. XXIX, § 5(1).

32. The IEC received a complaint filed by M.A.K. Investment Group, LLC against Plaintiff on or about February 3, 2016 (“Complaint 16-02”).

33. The IEC received a second complaint filed by M.A.K. Investment Group, LLC against Plaintiff on or about March 24, 2017 (“Complaint 17-14”).

34. Prior to determining that Complaint 16-02 is non-frivolous, the IEC held nine closed-door executive session meetings regarding Complaint 16-02, which meetings collectively lasted two hours and thirty-three minutes. True and correct copies of the minutes for each of the below-referenced meetings are attached here as Exhibits 1 through 8.

Date	Start Time	End Time	Duration
March 3, 2016	2:50pm	3:06pm	16 minutes
May 2, 2016	12:30pm	12:39pm	9 minutes
June 30, 2016	4:07pm	4:43pm	36 minutes
September 13, 2016	1:07pm	1:09pm	2 minutes
December 19, 2016	12:57pm	1:30pm	33 minutes
January 23, 2017	10:13am	10:40am	27 minutes
January 23, 2017	11:50am	12:01pm	11 minutes
March 6, 2017	11:57am	12:02pm	5 minutes
October 30, 2017	12:30pm	12:44pm	14 minutes

35. On October 30, 2017 at approximately 1:35pm, the IEC deemed Complaint 16-02 not frivolous. *See Exhibit 8 at 6.*

36. The IEC met in a closed-door executive session meeting regarding Complaint 17-14 for one minute on October 30, 2017, from 12:49pm to 12:50pm. *See Exhibit 8 at 3.*

37. On October 30, 2017 at approximately 1:35pm, the IEC deemed Complaint 17-14 not frivolous. *See Exhibit 8 at 6.*

38. The IEC is subject to the requirements of CORA and COML.¹

D. The IEC Denies Plaintiff's Records Requests and the Parties Confer

39. On May 11, 2018, counsel for Plaintiff issued a written CORA request to the IEC requesting “[a]udio recordings, video recordings, minutes, transcripts, staff notes, commissioner notes, and any other writings or documents” regarding the closed-door executive session meetings described in Paragraphs 34 and 36, above. A true and correct copy of the May 11, 2018 letter is attached here as Exhibit 9.

40. On May 15, 2018, the IEC denied Plaintiff's request. A true and correct copy of the May 15, 2018 denial is attached here as Exhibit 10.

41. On July 19, 2018, Plaintiff's successor counsel issued a preservation notice to the IEC in connection with, *inter alia*, the records requested on May 11, 2018. A true and correct copy of the July 19, 2018 preservation notice is attached here as Exhibit 11.

42. On October 31, 2018, undersigned counsel renewed Plaintiff's requests pursuant to CORA and COML and provided written notice of Plaintiff's intent to file this complaint. A true and correct copy of the October 31, 2018 letter is attached here as Exhibit 12.

43. On November 6, 2018, the IEC again denied Plaintiff's requests. A true and correct copy of the November 6, 2018 denial is attached here as Exhibit 13.

44. On November 30, 2018, undersigned counsel and counsel for the IEC conferred telephonically regarding Plaintiff's record requests and engaged in a good faith discussion to determine whether Plaintiff's record requests could be resolved without judicial intervention. *Cf.* C.R.S. § 24-72-204(5)(a). The parties were unable to resolve the disputes at issue here.

E. The IEC's Closed-Door Executive Session Meetings are Subject to Disclosure

45. The IEC denied Plaintiff's request pursuant to C.R.S. § 24-6-402(3)(a)(III), which applies to “[m]atters required to be kept confidential by federal law or rules, state statutes, or in accordance with the requirements of any joint rule of the senate and the house of representatives pertaining to lobbying practices[.]” C.R.S. § 24-6-402(3)(a)(III).

46. The IEC contends that its closed-door executive session meetings regarding Complaint 16-02 and 17-14 should remain confidential under C.R.S. § 24-6-402(3)(a)(III) because Article XXIX, Section 5(3)(b) of the Colorado Constitution “requires the IEC to keep confidential all complaints not yet deemed non-frivolous.” Exhibit 13 at 1.

¹ The IEC has declared itself exempt from CORA. Plaintiff disputes the IEC's legal conclusion in this regard. Upon information and belief, notwithstanding the IEC's own determination that it is not subject to CORA, no Court has evaluated the validity of this legal claim.

47. The Colorado Constitution is not a state statute. *Cf.* C.R.S. § 24-6-402(3)(a)(III).
48. Article XXIX, Section 5(3)(b) does not state that the IEC must keep confidential “all complaints not yet deemed non-frivolous.” Exhibit 13 at 1.
49. Article XXIX, Section 5(3)(b) only states that the IEC “may dismiss frivolous complaints without conducting a public hearing,” and that “[c]omplaints dismissed as frivolous shall be maintained confidential by the commission.” Colo. Const., art. XXIX, § 5(3)(b).
50. The IEC’s rules of procedure provide as follows: “Any complaint provided to the Commission shall be kept confidential **until a determination is made** as to whether or not the complaint is frivolous. Any complaint dismissed as frivolous shall be maintained confidential by the commission.” 8 CCR 1510-1(7)(E) (emphasis supplied).
51. The Colorado Constitution and the IEC’s rules of procedure protect the confidentiality of frivolous complaints in order to protect the reputation of defendants named in frivolous complaints.
52. The confidentiality afforded to not-yet-frivolous complaints is conditional given that non-frivolous complaints are subsequently disclosed by the IEC.
53. By extension, no basis exists for maintaining confidentiality of closed-door executive session meetings regarding complaints deemed to be non-frivolous. *Cf. Center for Independent Media v. Independent Ethics Commission*, 2009 CV 5109, ¶ 47 (Colo. Dist. Ct. Aug. 31, 2009) (“with respect to the Commission’s deliberations on ethics complaints, advisory opinions, letter rulings, and position statements, there is no statutory basis for conducting such discussions behind closed doors.”).
54. The confidentiality afforded to frivolous complaints in Article XXIX, Section 5(3)(b) is conditional and ceases to apply once the IEC deems a complaint non-frivolous.
55. No provision of Article XXIX or the IEC’s rules of procedure “require[] to be kept confidential” closed-door deliberations regarding non-frivolous complaints. C.R.S. § 24-6-402(3)(a)(III).
56. Non-frivolous complaints and the records associated therewith are not “[m]atters required to be kept confidential.” C.R.S. § 24-6-402(3)(a)(III).
57. The IEC has deemed Complaints 16-02 and 17-14 against Plaintiff non-frivolous.
58. The requested records are no longer confidential because Complaints 16-02 and 17-14 against Plaintiff were deemed non-frivolous.

59. Other deliberations, such as those regarding the IEC's jurisdiction over Plaintiff in connection with Complaints 16-02 and 17-14, have no basis for confidentiality or non-disclosure under either COML or CORA.

60. With respect to Complaint 17-14, it does not appear that the IEC engaged in *any* meaningful deliberation before deeming the complaint non-frivolous.

61. The IEC entered executive session to discuss Complaint 17-14 for one minute. *See* Exhibit 8 at 3-4.

62. The IEC then continued in executive sessions, considering other matters, before returning to open session, at which point the IEC promptly voted to deem Complaint 17-14 non-frivolous. *See* Exhibit 8 at 4-6.

63. The lack of deliberation, whether in closed-door executive session meetings or in open, public meetings, undercuts the legitimacy of the IEC's determination.

First Claim for Relief
Violation of CORA/COML – March 3, 2016

64. Plaintiff incorporates by reference each and every allegation contained in this complaint.

65. The IEC met in a closed-door executive session meeting regarding Complaint 16-02 on March 3, 2016 from 2:50pm to 3:06pm.

66. The IEC subsequently deemed Complaint 16-02 non-frivolous.

67. The records associated with this meeting are subject to disclosure.

68. The IEC has denied Plaintiff's request for disclosure of these records.

Second Claim for Relief
Violation of CORA/COML – May 2, 2016

69. Plaintiff incorporates by reference each and every allegation contained in this complaint.

70. The IEC met in a closed-door executive session meeting regarding Complaint 16-02 on May 2, 2016 from 12:30pm to 12:39pm.

71. The IEC subsequently deemed Complaint 16-02 non-frivolous.

72. The records associated with this meeting are subject to disclosure.

73. The IEC has denied Plaintiff's request for disclosure of these records.

Third Claim for Relief
Violation of CORA/COML – June 30, 2016

74. Plaintiff incorporates by reference each and every allegation contained in this complaint.

75. The IEC met in a closed-door executive session meeting regarding Complaint 16-02 on June 30, 2016 from 4:07pm to 4:43pm.

76. The IEC subsequently deemed Complaint 16-02 non-frivolous.

77. The records associated with this meeting are subject to disclosure.

78. The IEC has denied Plaintiff's request for disclosure of these records.

Fourth Claim for Relief
Violation of CORA/COML – September 13, 2016

79. Plaintiff incorporates by reference each and every allegation contained in this complaint.

80. The IEC met in a closed-door executive session meeting regarding Complaint 16-02 on September 13, 2016 from 1:07pm to 1:09pm.

81. The IEC subsequently deemed Complaint 16-02 non-frivolous.

82. The records associated with this meeting are subject to disclosure.

83. The IEC has denied Plaintiff's request for disclosure of these records.

Fifth Claim for Relief
Violation of CORA/COML – December 19, 2016

84. Plaintiff incorporates by reference each and every allegation contained in this complaint.

85. The IEC met in a closed-door executive session meeting regarding Complaint 16-02 on December 19, 2016 from 12:57pm to 1:30pm.

86. The IEC subsequently deemed Complaint 16-02 non-frivolous.

87. The records associated with this meeting are subject to disclosure.

88. The IEC has denied Plaintiff's request for disclosure of these records.

Sixth Claim for Relief

Violation of CORA/COML – January 23, 2017, First Executive Session

- 89. Plaintiff incorporates by reference each and every allegation contained in this complaint.
- 90. The IEC met in a closed-door executive session meeting regarding Complaint 16-02 on January 23, 2017 from 10:13am to 10:40am.
- 91. The IEC subsequently deemed Complaint 16-02 non-frivolous.
- 92. The records associated with this meeting are subject to disclosure.
- 93. The IEC has denied Plaintiff's request for disclosure of these records.

Seventh Claim for Relief

Violation of CORA/COML – January 23, 2017, Second Executive Session

- 94. Plaintiff incorporates by reference each and every allegation contained in this complaint.
- 95. The IEC met again in a closed-door executive session meeting regarding Complaint 16-02 on January 23, 2017 from 11:50am to 12:01pm.
- 96. The IEC subsequently deemed Complaint 16-02 non-frivolous.
- 97. The records associated with this meeting are subject to disclosure.
- 98. The IEC has denied Plaintiff's request for disclosure of these records.

Eighth Claim for Relief

Violation of CORA/COML – March 6, 2017

- 99. Plaintiff incorporates by reference each and every allegation contained in this complaint.
- 100. The IEC met again in a closed-door executive session meeting regarding Complaint 16-02 on March 6, 2017 from 11:57am to 12:02pm.
- 101. The IEC subsequently deemed Complaint 16-02 non-frivolous.
- 102. The records associated with this meeting are subject to disclosure.
- 103. The IEC has denied Plaintiff's request for disclosure of these records.

Ninth Claim for Relief

Violation of CORA/COML – October 30, 2017, First Executive Session

104. Plaintiff incorporates by reference each and every allegation contained in this complaint.

105. The IEC met again in a closed-door executive session meeting regarding Complaint 16-02 on October 30, 2017 from 12:30pm to 12:44pm.

106. The IEC subsequently deemed Complaint 16-02 non-frivolous.

107. The records associated with this meeting are subject to disclosure.

108. The IEC has denied Plaintiff's request for disclosure of these records.

Tenth Claim for Relief

Violation of CORA/COML – October 30, 2017, Second Executive Session

109. Plaintiff incorporates by reference each and every allegation contained in this complaint.

110. The IEC met again in a closed-door executive session meeting regarding Complaint 17-14 on October 30, 2017 from 12:49pm to 12:50pm.

111. The IEC subsequently deemed Complaint 16-02 non-frivolous.

112. The records associated with this meeting are subject to disclosure.

113. The IEC has denied Plaintiff's request for disclosure of these records.

WHEREFORE, Mayor Dunafon prays that the Court order the following relief:

- a. An immediate order to show cause, as attached here, directing the IEC to explain and demonstrate the basis for withholding the records requested here. Plaintiff has established a prima facie basis to believe that the requested records are public records, that the IEC's determination that the underlying complaints are non-frivolous remove those records from the confidentiality cited by the IEC, and that discussion of other matters such as the IEC's jurisdiction are not protected from disclosure. Any corresponding hearing should be set "at the earliest practical time." C.R.S. § 24-72-204(5). A proposed order to show cause is attached hereto.
- b. Following a show cause hearing, an order directing the IEC to disclose the records requested by Plaintiff.

- c. If the Court declines to require disclosure of the records requested here upon a show cause order, the Court should conduct an *in camera* review of the records requested and should direct the IEC to submit the records described herein to the Court for said review. Plaintiff has established sufficient grounds to support a reasonable belief that the IEC's discussions pertained to non-exempt matters given that the complaints against Plaintiff were deemed non-frivolous and given that other matters, such as the IEC's deliberations regarding its own jurisdiction are not protected from disclosure.
- d. Upon conducting an *in camera* review, an order directing the IEC to disclose the records requested by Plaintiff.
- e. Following any *in camera* review, the Court should issue and order declaring that the records are subject to public disclosure.
- f. A final order declaring that the IEC has violated COML and/or CORA by failing to disclose to Plaintiff the records requested.
- g. A permanent injunction prohibiting the IEC from withholding records pertaining to complaints that the IEC subsequently deems non-frivolous.
- h. A declaratory judgment that the IEC is subject to CORA and COML, without modification.
- i. An award of reasonable attorneys' fees and costs.
- j. Such other and further relief as the Court deems just and proper.

DATED this 20th day of December 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

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