

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock Street Denver, CO 80202</p> <hr/> <p>IN THE MATTER OF THE APPLICATION OF COLORADO INDEPENDENT ETHICS COMMISSION</p> <p>AND</p> <p>COLORADO ETHICS WATCH Plaintiff</p> <p>v.</p> <p>COLORADO INDEPENDENT ETHICS COMMISSION</p> <p>Defendant.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>JOHN W. SUTHERS, Attorney General JAMES F. CARR, Senior Assistant Attorney General* 1525 Sherman Street, 7th Floor Denver, CO 80203 303-866-5283 (James Carr) Registration Number: 9343 *Counsel of Record for the Colorado Independent Ethics Commission</p>	<p>Case No.: 2008CV7995 Consolidated with case no. 2008CV8857</p> <p style="text-align: center;">Ctrm.: 19</p>
<p>COLORADO INDEPENDENT ETHICS COMMISSION’S TRIAL BRIEF</p>	

The Colorado Independent Ethics Commission (“IEC”), by and through counsel, hereby submits its Trial Brief.

INTRODUCTION

In November 2006 the Colorado electorate passed Amendment 41 in an effort to ensure that public officials and public employees do not violate the public trust. Amendment 41 added Article XXIX to the Colorado Constitution. Article XXIX provides for creation of the Colorado Independent Ethics Commission (“IEC”). Among the duties of the newly created IEC is to render Advisory Opinions and Letter Rulings. The purpose of an Advisory

Opinion is to provide guidance to persons subject to Article XXIX, so that they can determine whether an action is in conformance with the ethical standards of the State of Colorado. A Letter Ruling provides the same type of information to persons not covered by Article XXIX. It is the duty of the IEC to review all requests for Advisory Opinions (for the sake of efficiency we will use the term Advisory Opinion in the remainder of this brief to include both Advisory Opinions and Letter Rulings) and provide guidance in the response to the person making the inquiry. The IEC also handles complaints alleging violations of Article XXIX or other ethical guidelines found in the laws of Colorado. Complaints differ from Advisory Opinions because the person bringing the complaint is not seeking guidance, but is alleging a violation of Article XXIX or other ethical standards.

The IEC is composed of five members, one appointed by the Colorado Senate; one appointed by the Colorado House of Representatives; one appointed by the Governor of Colorado; one appointed by the Chief Justice of the Colorado Supreme Court; and one member who is either a local government official or employee chosen by the other four members. The IEC can not have more than two members affiliated with the same political party. The IEC was fully constituted in April 2008 when the four appointed members chose the fifth member. Once it was fully constituted the IEC began the process of promulgating rules to guide it in the consideration of complaints and requests for Advisory Opinions. The IEC's rules took effect on September 1, 2008. The IEC then commenced considering requests for Advisory Opinions, as well as reviewing complaints. Since the IEC is dealing with a new constitutional article it has focused its attention on answering a multitude of questions regarding Article XXIX. One of the strategies the IEC adopted was to, as soon as possible, promulgate position statements that would answer multiple questions about Article XXIX and provide guidance to persons affected by Article XXIX. It was hoped that issuing position statements would provide information on the interpretation of Article XXIX more expeditiously than answering individual requests for Advisory Opinions.

The IEC's initial efforts were focused on promulgating rules; issuing position statements and generally getting the IEC up and running. As the IEC commenced these efforts members were conscious about making the process for seeking an Advisory Opinion as simple and trouble free as possible. In August 2008 Colorado Ethics Watch ("Ethics Watch") submitted a request to the IEC seeking all records of requests for Advisory Opinions, pursuant to the Colorado Open Records Act ("CORA"). The IEC is very concerned that the release of requests for Advisory Opinions will have a chilling effect on people who might submit requests for Advisory Opinions or Letter Rulings. The IEC is aware that private or sensitive information may be included in requests for Advisory Opinions. The release of these requests is likely to result in deterring people from requesting Advisory Opinions. The IEC is aware of at least one instance where a requestor asked if the request would be disclosed and after being informed that it might be a request was not submitted.

Based on its serious concern about the chilling effect disclosure of requests will have on the Advisory Opinion process, the IEC decided to submit this Application for Order Disallowing Disclosure seeking a ruling that requests for Advisory Opinions may be held confidential so that the Advisory Opinion process will not be chilled and thwarted by disclosure to the public.

OPEN RECORDS ACT

The Colorado Open Records Act, C.R.S. 24-72-201, et seq. declares that as policy of the State of Colorado that all government records be open for inspection by any person at reasonable times, except as otherwise provided by law. The plain language of this legislative declaration is clear in expressing the policy of this state that records shall be open to the public absent an exception to the disclosure requirement. The obvious purpose of this law is to further the public interest by providing access to certain information in the possession of governmental entities. Because the law is intended to benefit the public the statute provides certain specific exceptions for records where disclosure would not benefit the public interest. CORA also provides a more general exception to the rule of disclosure for situations where it is determined that such disclosure would do substantial injury to the public interest. C.R.S. § 24-72-204(6)(a). The Colorado Supreme Court in *Civil Service Commission v. Pinder*, 812 P.2d 682 (1991) discusses C.R.S. § 24-72-204(6)(a) and states that “plain reading of language indicates an intent to protect public records against disclosure where harm to the public interest would result, although the records might be accessible under other provisions of the Act”.

The IEC understands, acknowledges and agrees with Colorado’s strong open records policy. However, the voters of Colorado made a clear statement in 2006 when they passed Amendment 41 mandating that Colorado have strong and effective ethics laws. An effective process for providing Advisory Opinions is at the heart of the purpose of the scheme established by Amendment 41. The ethics laws become effective, in part, through the guidance provided in Advisory Opinions. If no guidance is provided because requests for Advisory Opinions on sensitive or personal matters are not submitted to the IEC, then this part of the ethics scheme breaks down. The end result will be that the requests submitted will not involve the more difficult and sensitive issues. Covered persons will not have guidance on these important issues resulting in increased conduct that would be unintended violations of the ethics laws. The essence of this ethics system is to provide covered persons with necessary advice so they can tailor their actions to comply with the ethics laws, not leaving them gambling as to whether their activities are ethics violations. For this reason the IEC, which is responsible for effectively implementing Article XXIX and enforcing Colorado ethics laws, asserts that disclosure of requests for Advisory Opinions would seriously impede the application of Article XXIX. Due to the chilling effect disclosure would have on persons who would otherwise request Advisory Opinions substantial injury to the public interest may occur.

This case involves competing public interests. On the one hand there is the public interest in access to documents in the government's possession or control. On the other hand is the public interest in strong effective ethics laws administered by the IEC. The Colorado Supreme Court dealt with a CORA case involving balancing interests in *Office of the State Court Administrator v. Background Information Services, Inc.*, 994 P.2d 420 (1999). In that case the Court addressed the fragile balance between the interests of the public and the protection of individuals who are parties to court cases. Here the Court is dealing with the balance between competing public interests. Since Article XXIX is new and the IEC has been operational for less than a year we can not provide the Court with historical information regarding the impact of disclosing requests for Advisory Opinions. We do have one known instance of a person contacting the IEC about an advisory opinion and not requesting the opinion after being informed that the request might not be confidential. It is the strong position of the IEC that disclosure of the requests will seriously impede the Advisory Opinion process by chilling the willingness of people to make requests. This chilling will thereby hamper the IEC's goal of providing Advisory Opinions to guide appropriate ethical conduct. For this reason it is our position that disclosure of requests for Advisory Opinions would do substantial injury to the public interest. We further contend that this substantial injury to the public interest would outweigh the public interest considerations for disclosure of the information.

Providing an opportunity for those seeking guidance from the IEC to provide a confidential, candid synopsis of potentially unethical behavior will encourage the use of this very important process. The public interest gains little in knowing who requested certain advice or the manner in which the request was framed. The public interest is better served in knowing that those seeking advice can be straightforward in the request and that the ultimate advice given through the Advisory Opinion is open and shared with the public as well as other public employees and public officials. Further, when those requesting Advisory Opinions are free of the fear that their request may be disclosed, they are likely to provide more frank and honest descriptions of the conduct about which they seek guidance. This also promotes the public interest that is the basis for Article XXIX, to ensure that the citizens of Colorado have trust and confidence in their officials and employees.

The IEC requests the Court to determine that disclosure of requests for Advisory Opinions would do substantial injury to the public interest and that the IEC is not required disclose such requests when asked pursuant to an open records request.

DEFERENCE TO EXPERTISE OF ADMINISTRATIVE AGENCY

The IEC was created by Article XXIX and is charged with implementation, interpretation, and enforcement of this new ethics law. The IEC is the administrative agency charged with administering not only the specific ethics provisions in Article XXIX, but also “any other standards of conduct or reporting requirements as provided by law.” Therefore, the IEC determinations and positions as to matters within its area of expertise are accorded deference by the Courts. Courts do not have to adopt the opinion of an administrative agency, but the position of the IEC should be considered and given deference by the Court. The case law on this issue goes back many years and deals primarily with enforcement or interpretation of statutes by administrative agencies or officials. It is well established that agencies or officials charged with enforcement or interpretation of statutes should be given great deference by the courts. *Travelers Indemnity Co. v. Barnes*, 191 Colo. 278, 552 P.2d 300 (1976); *Colorado Association of Public Employees v. Lamm*, 677P.2d 1350 (1984); *Sears v. Romer*, 928 P.2d 745, 749 (Colo. App. 1996). The United States Supreme Court has also articulated this position in the noteworthy case of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., et al.*, 104 S.Ct. 2778, 467 U.S. 837, 81 L.Ed.2d 694 (1984). The Court stated:

”We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.”

Although we are not dealing with a circumstance where the IEC is construing a statutory scheme in the same manner as found in the cited cases, this matter does involve the IEC’s position regarding the most effective way to accomplish the public goal and public interest in applying Article XXIX. The IEC’s determination, that disclosure of requests for Advisory Opinions would have a significant negative effect on its ability to fully implement Article XXIX and thereby do substantial injury to the public interest, should be accorded deference by the Court.

RESPONSE TO OPEN RECORDS REQUEST

The IEC is clear that the requested records will be timely provided to Ethics Watch if the Court should deny the IEC’s Application. It has always been our position that we are requesting an exemption from the Court under C.R.S. § 24-702-204(6)(a) because, in the opinion of the IEC, the custodian, disclosure would do substantial injury to the public

interest. We are not seeking to impede Ethics Watch obtaining public records; rather, we seek to promote the implementation and effectiveness of the Advisory Opinion process and thereby further Colorado ethics laws. We oppose disclosure of the requests for advisory Opinions to the extent that we feel such disclosure would do substantial injury to the public interest. For this reason, we filed the application with the Court and included Ethics Watch in all proceedings and discussions with the Court. Ethics Watch, as the person seeking permission to examine the record, is entitled to appear and be heard at the hearing on the IEC Application, and was fully involved with the IEC Application proceeding from the time of filing. We made it clear to Ethics Watch that we sought to avoid an adversary proceeding because the IEC considers this issue to involve much more than the CORA request from Ethics Watch. It involves the ability of the IEC to effectively implement and administer the ethics laws in Colorado; as such, it involves the public interest in strong and effective ethics laws, which was the basis for passage of Amendment 41.

C.R.S. 24-72-204(6)(a) provides that:

“The 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.”

The IEC submitted this application to the court in good faith for a determination as to whether production of the requested documents would do substantial injury to the public interest. Ethics Watch had full opportunity to advance its request and its position in this proceeding. They chose to file a separate action for enforcement of their CORA request and seek attorneys fees in that action. The second action has been consolidated with this action on the motion of Ethics Watch. The filing of the second action has had no effect other than to cause the expenditure of additional time and resources by both parties and the Court. It has also resulted in delay of the proceedings in this matter. We oppose the attorney fees request by Ethics Watch because they would not be entitled to such fees if the Court finds that the IEC submitted its application in good faith, and because to award such fees would amount to rewarding a party for unnecessary litigation that resulted in delaying the resolution of the question at issue.

WHEREFORE, the IEC respectfully requests that the Court enter an order finding that disclosure of the requests for Advisory Opinions is disallowed because such disclosure would do substantial injury to the public interest. Further, the IEC requests that the Court dismiss the complaint in case number 2008CV8857, deny the request for attorney fees by Plaintiff in that case, and such other and further relief as the Court deems just and proper.

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*In accordance with C.R.C.P. 121, § 1-26(7), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **COLORADO INDEPENDENT ETHICS COMMISSION'S TRIAL BRIEF** upon all parties herein by e-filing and depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 28th day of April, 2009, addressed as follows:

Luis Toro, Esq.
Colorado Ethics Watch
1630 Welton Street, Suite 415
Denver, Colorado 80202

/s/ Jan Aguilar*

Jan Aguilar
For the Office of the Attorney General

*In accordance with C.R.C.P. 121, § 1-26(7), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.