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<tr><td>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
Court Address: 1437 Bannock Street
Denver, Colorado 80202<hr>In the Matter of the Application of COLORADO INDEPENDENT ETHICS COMMISSION

AND

Plaintiff: COLORADO ETHICS WATCH

v.

Defendant: COLORADO INDEPENDENT ETHICS COMMISSION</td><td>EFILED Document
CO Denver County District Court 2nd JD
Filing Date: Apr 28 2009 4:50PM MDT
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Review Clerk: Sean McGowan</td></tr>
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Case No. 2008CV7995
Consolidated with Case No. 2008CV8857

Division 19</td></tr>
<tr><td colspan="2">COLORADO ETHICS WATCH'S TRIAL BRIEF</td></tr>
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Colorado Ethics Watch ("Ethics Watch"), plaintiff in No. 2008CV8857, respectfully submits its trial brief:

I. INTRODUCTION

In these actions, the Colorado Independent Ethics Commission ("IEC") is asking the Court for a ruling that would effectively amend the Colorado Open Records Act ("CORA") and allow the IEC to circumvent existing statutory requirements for public disclosure. State law mandates public disclosure of the documents requested by Ethics Watch in the open records request at issue. The Court should reject the IEC's

Application in No. 2008CV7995, which is appropriate for legislative not judicial action, and enter an order in No. 2008CV8857 requiring the IEC to make public documents available to Ethics Watch for inspection under CORA.

II. BACKGROUND

Ethics Watch is a non-profit watchdog group that, among other things, monitors the activities of the IEC, an independent commission created by Article XXIX, Section 5 of the Colorado Constitution. The IEC was established to decide complaints and issue advisory opinions and letter rulings regarding ethics issues arising from Article XXIX and any other standard of conduct or reporting requirement in Colorado law. These consolidated actions arise from the IEC's wrongful failure to make available for inspection public documents regarding complaints and requests for advisory opinions and letter rulings submitted to the IEC.

The key facts of this case are essentially undisputed. Ethics Watch submitted a Colorado Open Records Act ("CORA") request to the IEC on August 27, 2008. 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.** [Emphasis in original.]

The IEC did not make the requested documents available for inspection. Instead, on September 10, 2008, it filed its application in No. 2008CV7995, asking this Court to enter an order "finding that access to requests submitted to the IEC for an advisory opinion or a letter ruling shall be restricted and disclosure disallowed, as such disclosure would do substantial injury to the public interest." In a letter to Ethics Watch, the IEC's executive director stated that the IEC's position is "that releasing those documents could

have a chilling effect on persons who are considering requesting advisory opinions or letter rulings." The IEC acknowledges in its Application (at ¶ 11) that it is seeking a court order barring disclosure of some categories of requested documents because "in the IEC's opinion, disclosure of the contents of these requests would do substantial injury to the public interest through the chilling effect on requests for such opinions." After making one final attempt to persuade the IEC to permit inspection of the documents in question, Ethics Watch filed its own complaint in No. 2008CV8857 and the two actions were consolidated.

The IEC's Application addresses only documents regarding requests for letter rulings or advisory opinions; it does not seek an order allowing it to withhold documents related to complaints. Ethics Watch expects the evidence to show that at the time of its CORA request, two complaints (08-03 and 08-04) had been filed with the IEC that were later dismissed without a hearing, but were not found to be frivolous. There is no basis for the IEC to continue to withhold documents regarding those two complaints.

The IEC's opinion regarding the proper balance between the public's right to know how its ethics enforcement agency operates and the asserted need to protect the identity of persons seeking ethical guidance cannot trump statutory law that specifically provides for the disclosure of the documents that are the subject of Ethics Watch's CORA request. Colorado law compels the conclusion that under the facts of this case, Ethics Watch is entitled to an order compelling disclosure of public records and an award of its reasonable attorneys' fees and costs.

III. ARGUMENT

A. The Governing Law Under CORA.

CORA establishes a presumption in favor of disclosure of public records. *Gumina v. City of Sterling*, 119 P.3d 527, 532 (Colo. App. 2004). The policy underlying CORA is that "all public records shall be open for inspection," and therefore, exceptions to CORA must be narrowly construed. *City of Westminster v. Dogan Const. Co*., 930 P.2d 585, 589 (Colo. 1997) (quotation omitted).

Ethics Watch's claim is based on C.R.S. § 24-72-204(5), which provides in pertinent part as follows:

> [A]ny person denied the right to inspect any record covered by this part 2 may apply to the district court of the district wherein the record is found for an order directing the custodian of such record to show cause why the custodian should not permit the inspection of such record . . . . Unless 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 . . . .

There is no dispute that Ethics Watch's request sought documents subject to CORA. *See* Section III.D. below. To support its refusal to turn over the requested documents, the IEC relies on 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."[1]

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[1] C.R.S. § 24-72-204(6)(a) also authorizes an application to the Court when the custodian 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. The IEC does not appear to be proceeding under this provision as its application

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); *accord Daniels v. City of Commerce City*, 988 P.2d 648, 651-52 (Colo. App. 1999) (municipal confidentiality policy, though reasonable, could not override CORA when it was clear that legislature considered such requirements in drafting statute). To prevail on an application under the catch-all exemption, "[t]he custodian of records has the burden to prove an extraordinary situation and that the information revealed would do substantial injury to the public." *Bodelson v. Denver Pub. Co.*, 5 P.3d 373, 377 (Colo. App. 2000). Like other CORA exemptions, that catch-all exemption is to be construed narrowly. *See id.* Moreover, the catch-all exemption must be applied on a case-by-case basis and may not be used to create new categorical exemptions from CORA. *See id*. at 378-79.

Thus, in order to prevail on its own application and in its defense of Ethics Watch's CORA complaint, the IEC must prove **both** that Ethics Watch's CORA request presents an extraordinary situation that the General Assembly could not have foreseen, **and** that the public will suffer substantial injury if Ethics Watch is provided the requested documents. *See Freedom Newspapers*, 961 P.2d at 1156; *Bodelson*, 5 P.3d at 377. Moreover, the IEC must show on a case-by-case basis that requested information will cause significant harm to the public. If it wishes to obtain a categorical exemption from CORA for documents related to requests for advisory opinions and letter rulings, its

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does not allege that it was unable to determine whether CORA prohibits disclosure of the requested documents and there is no evidence that either the IEC was uncertain whether CORA applied or that it exercised reasonable diligence before filing its Application.

policy arguments should be presented to the General Assembly, not this Court. *See Bodelson*, 5 P.3d at 378-79.

Ethics Watch submits that the IEC will fail to meet its burden for two principal reasons. First, as discussed more fully below, the General Assembly could and did foresee confidentiality questions regarding documents regarding complaints, advisory opinions and requests for letter rulings. That being the case, as a matter of law the IEC is not entitled to use C.R.S. § 24-72-204(6)(a) to substitute its own judgment for that of the General Assembly based on its different opinion regarding the public policy issues involved. *See Freedom Newspapers*, 961 P.2d at 1156. Second, the IEC's "proof" of substantial injury rests on a single, hearsay assertion by a person who allegedly "implied" he or she would not submit a request if the IEC could not guarantee confidentiality. Trial Exhibit C. Even if the IEC's hearsay evidence is admitted over objection, the weight of the evidence will support a finding that the prospect of public disclosure has not caused a chilling effect; in fact, the IEC has received far more requests for advisory opinions and letter rulings than it has been able to handle.

B. The IEC's Policy Preference Cannot Override CORA or the IEC's Governing Statute.

1. The General Assembly Considered Questions Of Confidentiality When It Enacted C.R.S. § 24-18.5-101.

The key legal question in this case is whether Ethics Watch's CORA request presents an "extraordinary situation[] which the General Assembly could not have identified in advance." *Freedom Newspapers*, 961 P.2d at 1156. Ethics Watch submits that when the Court reviews the IEC's plain, unambiguous governing act, particularly against the backdrop of the constitutional amendment that created the IEC, it will agree

that the General Assembly and the voters who enacted Amendment 41 were fully aware of confidentiality issues regarding complaints and requests, and determined that only the identity of persons requesting letter rulings should be kept confidential.

The Colorado Constitution provides that the IEC exists "to hear complaints, issue findings, and assess penalties, and also to issue advisory opinions, on ethics issues arising under this article and under any other standards of conduct and reporting requirements as provided by law." Colo. Const., art. XXIX, § 5(1). "Any person" may file a complaint with the IEC alleging a violation of Article XXIX or any other standard of conduct or reporting requirement. *Id*., § 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.

The General Assembly exercised its power under Section 9 of Article XXIX to enact laws "to facilitate the operation of this article" in 2007, when it passed the IEC's governing statute. As relevant here, the governing 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) (emphasis added). The General Assembly's intent could not be clearer: 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. In drawing this distinction, the General Assembly may have been informed by the Colorado Supreme Court's holding that "public employees have a narrower right and expectation of privacy than other citizens." *Denver Post Corp. v. University of Colorado*, 739 P.2d 874, 879 (Colo. 1987). What matters is that the General Assembly has already conducted the weighing and balancing of interests that the IEC asks the Court to conduct anew in these cases.

Also germane is the definition of "public records" in CORA, which specifically excludes any "communication from a constituent to an elected official that clearly implies by its nature or content that the constituent expects that it is confidential or a communication from the elected official in response to such a communication from a constituent." C.R.S. § 24-72-202(6)(a)(II)(C). When it enacted CORA, the legislature chose not to expand this exception to include communications from members of the public with administrative agencies. Practically any agency could argue, as the IEC argues here, that members of the public would be more comfortable communicating with the agency if they were assured documents regarding those communications could not

become public knowledge, yet the General Assembly limited this exception to communications between elected officials and constituents. Moreover, the General Assembly could, but did not, exempt documents regarding letter ruling and advisory opinion requests from CORA at the same time it enacted C.R.S. § 24-18.5-101 in 2007. *Cf. Zubeck v. El Paso County Retirement Plan*, 961 P.2d 597, 600 (Colo. App. 1998) (CORA exempts trade secrets furnished to public agencies from disclosure in order to encourage cooperation from persons who are not required to provide such information) (citing C.R.S. § 24-72-204(3)(a)(IV)) (quotation omitted).

The Court's analysis of the IEC's Application should end here. The catch-all exemption from CORA cannot apply, as a matter of law, because this is not a situation that the General Assembly could not foresee. *See Freedom Newspapers*, 961 P.2d at 1156; *see also Bodelson*, 5 P.3d at 378 (General Assembly could not have foreseen mass homicide event at Columbine High School when it determined that autopsy reports are public records, and petitioners proved release of autopsies would cause substantial harm to Columbine community). To the contrary, the legislature made a conscious choice to require the IEC to hold confidential the identity of persons who request letter rulings, but **not** other information related to nonfrivolous complaints and letter ruling or advisory opinion requests. It necessarily follows that the Court must reject the IEC's proposed categorical exemption from CORA for all documents related to nonfrivolous complaints and requests for advisory opinions and letter rulings. Neither the IEC nor the Court is permitted to substitute the IEC's policy preference for that of the General Assembly. *See Freedom Newspapers*, 961 P.2d at 1156.

2. The IEC's Stated Policy Reasons Do Not Withstand Scrutiny.

The IEC's "policy" argument in this case is based on a single, uncorroborated hearsay example of a potential advisory opinion requestor who allegedly implied that he or she would not file a request if the IEC could not guarantee confidentiality. Against this solitary, inadmissible example stands the evidence that despite the law's clear directive that such records are public, 71 requests for advisory opinions or letter rulings were filed in 2008 alone.

By statute, the IEC is required to respond to requests for advisory opinions within twenty days. C.R.S. § 24-18.5-101(4)(b)(II). Apparently in violation of the twenty-day requirement, the IEC failed to issue any advisory opinions or letter rulings at all during 2008. Instead, it used the authority it granted itself under Rule 6 of its Rules of Procedure to issue "position statements" on some of the issues presented in the duplicative requests. The IEC defines "position statement" as "an IEC-initiated written statement addressing ethics issues, which provides guidance for public officers, members of the General Assembly, local government officials, government employees, and members of the public." IEC Rule of Procedure 3.A.14. Doubtless, the position statement procedure is an efficient means for the IEC to address questions that have been asked repeatedly by different requestors, each presenting a slightly different variation of the same issue. For purposes of this action, however, what matters is that the IEC's request that the Court find that the public will be substantially harmed if the Court does not permit it to create a new categorical exception to CORA is fatally undermined by the fact that the IEC has not responded individually to each request submitted, and in fact has created a procedure that permits it to give guidance even in the absence of any request.

The facts simply do not support the IEC's asserted policy reasons for application of the catch-all exception to CORA. Almost certainly, some government agencies would prefer to avoid the public scrutiny that CORA promotes and, like the IEC here, could devise a policy argument in favor of confidentiality. The test the Court must apply, however, is not whether the asserted policy is reasonable, but whether it is **necessary** to prevent substantial injury to the public that the General Assembly could not have foreseen. *See Bodelson*, 5 P.3d at 377; *Freedom Newspapers*, 961 P.2d at 1156. Where the policy argument in favor of nondisclosure is strong enough, as in the case of trade secret information furnished to public agencies, the General Assembly has shown that it will act to protect such records from disclosure under CORA. *See Zubeck*, 961 P.2d at 600.

In contrast to the IEC's factually unsupported assertion that there may be a chilling effect if documents regarding advisory opinion and letter ruling requests are not shielded from public scrutiny, a number of strong policy reasons support application of CORA's presumption in favor of public disclosure in this case.

First and foremost, the public has a compelling interest in monitoring the activities of the IEC to determine whether it is adequately and timely handling complaints and requests for advisory opinions and letter rulings. In the absence of disclosure, the public is currently in no position to assess the IEC's compliance with the twenty day deadline to respond to advisory opinion requests contained in C.R.S. § 24-18.5-101(4)(b)(II). Nor is the public able to assess whether the IEC's responses to letter ruling and advisory opinion requests fairly address the substance of those requests, or for that matter, whether the IEC is leaving unaddressed some subjects raised in those requests. In

a similar case, the Colorado Supreme Court held that the public interest in knowing whether the University of Colorado's internal review system was adequate outweighed the university's concern that disclosure of documents regarding the internal review would "have a chilling effect on the process of internal review, investigation, and correction." *Denver Post Corp*. 739 P.2d at 879. The IEC has been described as a "super-agency" set up to be independent of both the executive and legislative branches so as to monitor their ethical conduct. *Developmental Pathways v. Ritter*, 178 P.3d 524, 535 (Colo. 2008). Ethics Watch submits that the IEC's independence makes the case in favor of public scrutiny even stronger than it was when the Denver Post sought documents regarding the University of Colorado's internal review process in *Denver Post Corp*. 739 P.2d at 879.

Second, public disclosure of the requested documents will allow the public to know what requests have been made and what types of complaints have been found outside of IEC jurisdiction. This will enable members of the public to submit better informed requests and complaints, thus contributing to the development of ethics law in Colorado, not inhibiting it as the IEC contends.

A third reason to permit disclosure is to monitor conflicts of interest in the Attorney General's office. The Attorney General and his staff advise the IEC, yet are also subject to its jurisdiction. Because IEC decisions may affect personal interests of the Attorney General or attorneys in the Department of Law, conflicts of interest may arise under Colo. R.P.C. 1.7(a)(2), which provides that a concurrent conflict of interest exists when "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." In the absence of disclosure, and under the IEC's practice of not disclosing that an advisory opinion or letter ruling is

under consideration until the day before a meeting, and even then to disclose only the file number and not the subject matter of the request, there is currently no way for the public to monitor whether such a conflict of interest may exist until the opinion is already written and the Department of Law has given advice to the IEC. Accordingly, the policy arguments overwhelmingly support full disclosure.

C. The IEC Will Be Unable To Meet Its Burden Of Showing That Disclosure Will Substantially Injure The Public Interest.

For the reasons set forth in Section II.B. above, the fact that the General Assembly could and did foresee confidentiality issues when it passed the governing statute, Ethics Watch would prevail even if the IEC had admissible evidence to support its policy argument. Regardless, Ethics Watch expects the evidence to show that the IEC has received numerous requests for advisory opinions and letter rulings, many of them repeating variations of a handful of questions that have gathered significant media attention since the passage of Amendment 41. Even though the IEC cannot statutorily provide assurances of confidentiality, it has received far more requests than it has been able to process. Ethics Watch expects the evidence will fall far short of supporting a claim by the IEC that application of CORA under these circumstances has had or will have a chilling effect on the clarification of ethics law in Colorado.

To the contrary, the undisputed evidence will show that the IEC received 71 requests for advisory opinions or letter rulings in 2008 alone and that the IEC itself considered "many of those requests" to be "duplicative." Exhibit E at p. 2. Rather than responding to each request individually, the IEC elected to respond to categories of questions generally through the use of position statements. The use of the position statement procedure may be an efficient way to handle the high volume of requests for

letter rulings, but it should also be viewed as an admission by the IEC that the prospect of public disclosure has caused no chill in the submission of requests to the IEC and certainly no delay in the IEC's development of ethical guidance.

The IEC's letter stating its reasons for denying Ethics Watch's CORA request also mentions that the IEC has surveyed other ethics commissions around the country, and "most" of them provide for the confidentiality of advisory opinion requests. Trial Exhibit C. The experience of other states, however, only reinforces Ethics Watch's argument that any exemption from CORA for documents reflecting communications between the IEC and the public should be created by the General Assembly, not a court on an application filed under the catch-all exemption to CORA.

This is because the laws governing confidentiality of advisory opinion requests are established by the legislature, not the court. New York provides by statute for absolute confidentiality of all ethics commission records except for six categories of documents specifically identified by statute. New York Executive Law § 94.17 (CLS 2009). Delaware and Massachusetts specifically provide by statute for confidentiality of documents regarding advisory opinion requests. 29 Del. Code § 5807, Mass. Gen. Laws c. 268B, §§ 3(g), 4(a).[2] Texas requires documents regarding complaints to be maintained as confidential, but requires only that the name of a party requesting an advisory opinion be kept confidential when the advisory opinion is published. Tex. Govt. Code §§

[2] Delaware goes so far as requiring that the advisory opinion itself be maintained as confidential; only a summary may be published. 29 Del. C. § 5807(d). While the IEC may prefer the Delaware approach to confidentiality, by law IEC advisory opinions are public documents that must be posted on the IEC's website. C.R.S. § 24-18.5-101(4)(b)(IV). The larger point is that because the laws governing different states' ethics commissions vary so much, the Court cannot accept at face value the IEC's argument that "most" state ethics commissions keep advisory opinion requests confidential.

571.093 (advisory opinions), 571.040 (complaints). Florida law provides that the identity of a person requesting an advisory opinion shall not be disclosed in the advisory opinion itself; however, this statute has been interpreted **not** to create an exception to Florida's open records act for documents regarding advisory opinion requests, even when the documents would reveal the identity of the requesting party. Fla. Stat. §§ 119.071 (open records exemptions), Fla. Stat. § 112.322(3)(a) (providing for redaction of requesting party names from advisory opinions); Op. Att'y Gen. Fla. 1977-33 (copy attached as an Appendix hereto).

The IEC's reliance on the practice of other state's ethics commissions only emphasizes Ethics Watch's point that it is for the legislature, not the court, to determine whether documents regarding non-frivolous complaints or requests for advisory opinions and letter rulings should be subject to public inspection under CORA. The IEC is asking the Court to install by judicial fiat a rule of confidentiality much more stringent than contemplated by CORA or C.R.S. § 24-18.5-101. The Court should reject the IEC's invitation to create a new blanket exemption to CORA.

D. The Court Should Rule In Favor Of Ethics Watch In Case No. 2008CV8857.

To prevail in a CORA case, a "plaintiff must show 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).

There is no dispute that the second and third prongs of this test are satisfied. It is a stipulated fact that the IEC has withheld all documents responsive to Ethics Watch's CORA request. *See* Trial Management Order, Stipulated Fact No. 9. Nor is there any dispute that the documents requested meet the statutory definition of "public records" –

they are writings maintained by the state, acting through the IEC, for use in the exercise of functions required or authorized by law, specifically, the IEC's handling of complaints and requests for advisory opinions and letter rulings. *See* C.R.S. § 24-72-202(6)(a)(I); *see also Developmental Pathways v. Ritter*, 178 P.3d 524, 535 (Colo. 2008) (IEC is an independent "super-agency" established to supervise the ethical conduct of the executive and legislative branches).

The real dispute in this case is whether the IEC's withholding of all documents responsive to Ethics Watch's CORA request was improper. Based on a plain reading of applicable law, Ethics Watch submits that the IEC's withholding was improper. For the reasons set forth in Sections II.B. and C. above, the Court should reject the IEC's argument that for policy reasons, it should be permitted to withhold all requested documents.

The only other possible defense suggested in the IEC's Answer to the Complaint in No. 2008CV8857 is that Ethics Watch somehow did not comply with the three-day notice requirement of C.R.S. § 24-72-204(5) because its three-day notice said that Ethics Watch "reserves the right" to file an application if documents were not produced, rather than saying it "intends" to file. This purported defense is nothing more than a red-herring and Ethics Watch clearly gave adequate notice. Nothing in CORA requires the use of the word "intends" or provides grounds for the Court to avoid the merits of this case for failure to do so. Even in the context of the Colorado Governmental Immunity Act ("CGIA"), where (unlike CORA) a notice of claim is expressly made a "jurisdictional prerequisite," the Colorado Supreme Court has held that only "substantial compliance" is required. *Woodsmall v. Regional Transp. Dist.*, 800 P.2d 63, 69 (Colo. 1990); *see also*

C.R.S. § 24-10-109 (CGIA notice provision). Ethics Watch's reservation of the right to file an application if documents were not produced in three days, and its specific citation of C.R.S. § 24-72-204(5), sufficiently advised the IEC that Ethics Watch intended to sue if the documents were not made available within three days. This is, at a minimum, substantial compliance with the notice requirement.

The timing of Ethics Watch's notice is also significant because it was given after the IEC had already filed an application seeking an order permitting it to withhold documents regarding advisory opinions and letter rulings. It is axiomatic that the law does not require a futile act. *See, e.g., Hirsch v. Jones Intercable, Inc*., 984 P.2d 629, 635 (Colo. 1999); *People v. Green*, 884 P.2d 339, 342 (Colo. App. 1994). There is no reason to require heightened compliance with the three-day notice requirement, which is apparently intended to give a governmental entity a last chance to avoid CORA litigation, when the entity has already filed suit over the CORA request. For the same reason, the Court should alternatively find that the IEC suffered no prejudice from any purported defect in the three-day notice, and therefore cannot rely on the three-day notice requirement as a defense. *See Woodsmall*, 800 P.2d at 69 (in determining whether a plaintiff substantially complied with the CGIA notice requirement, court "may consider whether and to what extent the public entity has been adversely affected in its ability to defend the claim by reason of any omission or error in the notice").[3]

[3] The IEC's answer also suggests that Ethics Watch's statement that the IEC could redact the names of requesting parties and still comply with the request somehow nullifies the three day notice. The sentence in question was not part of the three day notice; obviously the IEC could have complied by producing unredacted documents. The only legal impact of Ethics Watch's suggestion would be that if the IEC had provided redacted documents, the letter would have supported an argument that Ethics Watch had waived any CORA

All that remains for the Court to determine is exactly what categories of documents Ethics Watch is entitled to receive pursuant to its requests, and after trial, to determine the amount of prevailing party attorneys' fees to be awarded to Ethics Watch pursuant to C.R.S. § 24-72-204(5). C.R.C.P. 121, § 1-22. In determining what documents should be made available for inspection, the Court should note the disconnect between Ethics Watch's CORA request, which requested non-privileged documents regarding pending complaints, requests for advisory opinions and letter rulings, including related responses and correspondence**,** and the IEC's application in No. 2008CV7995, which requested only an order allowing it to keep requests for advisory opinions and letter rulings confidential. The documents sought by Ethics Watch fall into several categories, only two of which – requests for advisory opinions and requests for letter rulings – are subject to the IEC's application. Ethics Watch will discuss each category in turn.

1. Complaints and Related Correspondence.

The evidence will show that in 2008, four complaints were filed with the IEC. Exhibit E. While the date each complaint was filed is unknown, Ethics Watch expects the evidence to show that all four were ruled upon in October 2008, less than six weeks after Ethics Watch's CORA request. Thus, all four complaints likely had been filed as of the date of the CORA.

Of the four, only one (No. 08-02) was dismissed as frivolous by the IEC. *See id*. That complaint is subject to the constitutional requirement that complaints dismissed as frivolous be kept confidential. Colo. Const., art. XXIX, § 5. Another (No. 08-01) was

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claim based on the failure to provide unredacted copies. Because it is undisputed that no documents were ever made available, this point is academic.

filed by Ethics Watch. Ethics Watch is not asking the Court to order production of Complaints 08-01 or 08-02 or documents related to those complaints.

The Court should order production of Complaints 08-03 and 08-04 and all correspondence related to those complaints. Complaint No. 08-03 was dismissed for lack of jurisdiction, and Complaint No. 08-04 was dismissed for failure to allege a violation of Article XXIX or any other standard of conduct. When, as here, the IEC rejects non-frivolous arguments to invoke its jurisdiction or state claims, there is no basis in law or policy for the IEC to shield the complaint from public view. To the contrary, public knowledge of the substance of the arguments rejected by the IEC will help members of the public make educated decisions regarding whether and how to file complaints with the IEC, improve the overall quality of complaints and reduce the percentage of complaints filed with the IEC that deserve to be dismissed for lack of jurisdiction or failure to state a claim.

2. Requests for Advisory Opinions and Related Correspondence.

As discussed above, the IEC's governing statute requires both advisory opinions and letter rulings to be published on the IEC's website, and requires the IEC to redact personal identifying information of the requestor only in the latter case. C.R.S. § 24-18.5-101(4)(b)(IV). The conspicuous omission of any requirement that the IEC redact identifying information from published advisory opinions shows that the General Assembly considered and rejected any expectation of confidentiality for persons submitting advisory opinion requests. That being the case, there is no basis in law for the IEC to withhold advisory opinion requests or related correspondence, and the Court should rule that the IEC's withholding of those documents was wrongful.

3. Requests for Letter Rulings.

Requests for letter rulings present the closest question in this case because, as noted above, the IEC's governing statute does provide that published letter rulings must redact identifying information of the requestor. It does not follow, however, that the IEC is entitled to simply refuse to produce any documents regarding letter ruling requests. Rather, the requirement of C.R.S. § 24-18.5-101(4)(b)(IV) that letter rulings be redacted must be read together with CORA's command that all documents not falling into statutory exemptions are public records. Faced with a similar issue, the Florida Attorney General issued a formal opinion holding that documents regarding advisory opinion requests are open for public inspection under Florida's open records law, notwithstanding the fact that under Florida law advisory opinions are required not to identify requesting parties. *See* Op. Att'y Gen. Fla. 1977-33 (Appendix). Ethics Watch submits that the same result should obtain under Colorado law because CORA mandates that all records that are part of a public entity's official business are available for inspection unless those documents fall into one of the narrowly construed exceptions to disclosure. *See City of Westminster*, 930 P.2d at 589.

At a minimum, the Court should order the IEC to produce letter ruling requests subject to the same restriction contained in C.R.S. § 24-18.5-101(3)(b)(IV), that is, that the documents should be redacted to protect the identity of the requesting party. Colorado courts have approved of the practice of redaction in other CORA cases. *E.g., Ritter v. Jones,* __ P.3d. __, 2009 Colo. App. LEXIS 503 (Colo. App. Apr. 2, 2009); *Denver Post Corp. v. Stapleton Dev. Corp*., 19 P.3d 36, 38 (Colo. App. 2000). Ethics Watch submits that under these circumstances, redaction will sufficiently protect any

minimal expectations of confidentiality persons who request letter rulings may have. *See Denver Post Corp. v. University of Colorado*, 739 P.2d at 879 (in public records cases, court may balance "legitimate expectation of nondisclosure" with public interest in access to information by considering "how disclosure may occur in a manner least intrusive with respect to the individual's right of privacy") (*citing Martinelli v. District Court*, 612 P.2d 1083) (1980)).

4. Responses and Correspondence Regarding Requests for Letter Rulings.

Ethics Watch submits that even if the Court determines that letter ruling requests should be exempted from disclosure, correspondence regarding those requests should be made available for inspection. Even if the IEC is correct that the governing statute's mandate that published letter rulings not disclose the identity of requesting parties creates some kind of implied exemption to CORA for letter ruling requests, the Court should read that exemption as narrowly as possible and not extend it to related correspondence. *See Lafferty v. Martha's Vineyard Comm'n,* 17 Mass. L. Rep. 501, 2004 Mass. Super. LEXIS 107 (Mass. Super. 2004) (refusing to extend statutory requirement that documents regarding advisory opinions be kept confidential to correspondence between local commission and Massachusetts Ethics Commission); *see also Bodelson*, 5 P.3d at 377 (catch-all exemption must be narrowly construed).

As with the letter rulings themselves, redaction would be appropriate as a way to balance any expectation of privacy letter ruling requestors may have with the public's right to know. *See Denver Post Corp. v. University of Colorado*, 739 P.2d at 879.

IV. CONCLUSION

The IEC has come to the wrong forum. If the IEC believes that public policy supports exempting documents related to advisory opinion and letter ruling requests from CORA its remedy is to ask the General Assembly to amend the law. Applying the law as it exists, the Court should deny the IEC's Application in No. 2008CV7995 and rule in favor of Ethics Watch in No. 2008CV8857, including awarding Ethics Watch its reasonable attorneys' fees.

DATED: April 28, 2009.

[Original Signature On File]
Luis Toro, #22093

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that on April 28, 2009, I served a true copy of the above and foregoing via LexisNexis File and Serve as follows:

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