

COLORADO INDEPENDENT ETHICS COMMISSION

Complaint No. 13-11

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Compass Colorado and Alexander Hornaday  
Complainants,

vs.

John W. Hickenlooper  
Respondent.

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RESPONDENT GOVERNOR HICKENLOOPER'S MOTION: (1) TO RECONSIDER NON-FRIVOLOUS DETERMINATION, (2) TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, (3) TO DISMISS FOR FAILURE TO STATE A CLAIM, AND (4) FOR SUMMARY JUDGMENT

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## **I. INTRODUCTION**

This matter is not political or partisan. This case is simply about whether the Governor's hosting of the Democratic Governors Association ("DGA") 2013 Summer Policy Conference ("Policy Conference") in Aspen, Colorado, was permissible under the law. The Governor's role as chief executive of the State of Colorado is to take care that its laws are faithfully executed, including Article XXIX of the Constitution. See COLO. CONST. art. IV, § 2. For himself and governors that follow, Governor Hickenlooper is obligated to the citizens of Colorado to assist the Commission in determining whether his hosting of, and participation in, the Policy Conference complied with Colorado's ethical rules.

The Governor respectfully requests that the Commission treat this matter like any other that comes before it. The Commission should, based on the facts and preponderance of the evidence, make an informed, reasoned and unbiased decision that is supported by law. By examining the law and facts, and putting partisan accusations aside, the Commission will find:

- the complaint in this matter ("Complaint") is frivolous because it fails, on its face, to meet the legal threshold required by statute;
- it lacks the jurisdiction to hear and make findings related to the allegations regarding use of State staff time; and
- even if the Commission assumes all of the Complainants' allegations to be true, there was no improper gift, no expenditure of State funds and no impermissible use of State resources in connection with the Governor's hosting of the Policy Conference.

In short, the Governor's hosting of the Policy Conference complied with all of Colorado's constitutional and statutory ethical laws. The Complaint should be dismissed with prejudice.

**II. THE COMMISSION SHOULD RECONSIDER ITS PRIOR DETERMINATION THAT THE COMPLAINT IS NON-FRIVOLOUS: THE COMPLAINT IS FRIVOLOUS PURSUANT TO CRS § 24-18.5-101(5)**

The Commission made its decision that the Complaint passed the frivolous test without the benefit of Governor's counsel apprising the Commission that the Complaint is legally deficient on its face. Neither our October 9, 2014 letter to the Commission, nor the formal December 20, 2014 Response ("Response") highlighted a threshold issue: the Complaint ignores the statutory criteria *required* by Colorado Revised Statutes ("CRS") § 24-18.5-101(5), and is therefore frivolous on its face because it fails to make even a *prima facie* case.<sup>1</sup> The Commission should reconsider its determination and now dismiss the Complaint as frivolous in order to comply with the statutory mandate set forth in CRS § 24-18.5-101.<sup>2</sup>

What makes a complaint frivolous is described in both the IEC Rules of Procedure ("Rules") and statute. CRS Section 24-18.5-101(5)(a) provides that the Commission "shall dismiss as frivolous any complaint . . . that fails to allege that a public officer . . . has accepted or received any gift or other thing of value for private gain or personal financial gain." Private gain or personal financial gain means (1) "any money, forbearance, forgiveness of indebtedness, gift, or other thing of value", (2) "given or offered by a person seeking to influence an official act", (3) "that is performed in the course and scope of the public duties of a public officer . . ." CRS § 24-18.5-101(5)(b)(2).<sup>3</sup> In enacting this section the Colorado General Assembly specifically included these components with the expectation that they should be part of every complaint involving an impermissible gift.<sup>4</sup> *See Wine and Spirits Wholesalers of*

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<sup>1</sup> The Governor hereby incorporates by reference the arguments made in the Response in support of this Motion.

<sup>2</sup> The Commission granted leave for the Governor to ask the Commission to reconsider its non-frivolous determination at the January 17, 2014 prehearing conference.

<sup>3</sup> "Official Act" means "any vote, decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." CRS § 24-18.5-101(5)(b)(I) and CRS § 24-18-102(7).

<sup>4</sup> In the Order Regarding Motion to Dismiss from Case 08-01, the Commission addressed a jurisdictional issue regarding complaints that allege violations involving conduct not for the purpose of "private gain" or "personal financial gain." While the order provides that the Commission *may* review conduct which does not fall under "private gain" or "personal financial gain," this should not be interpreted to mean complainants are no longer required to make an allegation which satisfies the statutorily required criteria for a claim of an improper gift. The

*Colorado, Inc. v. Colorado Dep't of Revenue, Liquor Enforcement Div.*, 919 P.2d 894, 897 (Colo. 1996) quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (when applying an applicable statute, the agency “must give effect to the unambiguously expressed intent of [the legislature].”

While the Complaint alleges an improper gift of meals and accommodations and an improper use of State resources, it is completely silent as to how these alleged improprieties were (1) for the Governor’s private gain or personal financial gain, (2) in order to influence an official act, (3) performed in the course and scope of the Governor’s public duties.<sup>5</sup> These basic, codified criteria were completely absent from the Complaint. Each of these elements must be alleged, or pursuant to CRS § 24-18.5-101(5), the Commission “shall dismiss as frivolous” a complaint.

The Commission is required by statute to dismiss the Complaint as frivolous, and the Governor requests that it be dismissed with prejudice. The Commission’s Rules are designed for it to make a frivolous determination before a complaint is made public. See Rule 7(E). Despite this Complaint being facially frivolous, it was made public, destroying the expectation of privacy that respondents are guaranteed under the Rules and Constitution See COLO. CONST. art. XXIX, § 5, cl. 3(b); Rule 7(F). This matter has already generated a great deal of public attention: because the Governor cannot un-ring this bell, the only equitable solution would be to dismiss the case with prejudice. Not only would this prevent continued public airing of a frivolous issue, but doing so would also further the Commission’s goals of conducting a just, fair, speedy and inexpensive resolution of the case. See Rule 3(B)(2). Finally,

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Commission may review allegations of violations of “other standards of conduct,” but a complaint asserting an improper gift must *still* comply with the statutory requirements and allege the contested gift was for “private gain or personal financial gain,” including each of its required components.

<sup>5</sup> Had it properly pled this necessary component of a gift ban allegation, Complainants would still have had a difficult time meeting these requirements. The accommodations and meals provided by the DGA could not influence an official act of the Governor performed in the course and scope of his public duties because the DGA has never had, does not currently have, and will likely never have business before the State, in which the Governor would use his discretionary authority.

as the Commission will read below, dismissal with prejudice is justified given there was no violation of any ethical laws relating to the Governor's participation in the Policy Conference. The Commission should therefore reconsider its November 18 determination, and now find that the Complaint is, on its face, frivolous, and dismiss the Complaint with prejudice.

### **III. THE COMMISSION LACKS THE CONSTITUTIONAL AUTHORITY TO HEAR FAIR CAMPAIGN PRACTICE ACT CLAIMS**

If the Commission does not reconsider the non-frivolous determination, Complainants' Claim III regarding impermissible use of State resources should be dismissed because the Commission lacks the jurisdiction to hear Fair Campaign Practices Act ("FCPA") claims. *See* COLO. CONST. art. XXVIII § 9, cl. 2(a). The law in Colorado that applies to Complainants' assertion regarding use of "state staff time to plan, travel and attend the conference" is well settled, however it involves a body of law that is constitutionally assigned to the Secretary of State for adjudication. *Id.* The Commission should therefore dismiss this claim because it lacks the subject matter jurisdiction to hear it.

Claim III of the Complaint asserts "The Use of State Funds for Partisan Purposes Violates the Undefined 'Other Standards of Conduct' in Colo. Const. Art. XXIX"; the Governor "used state staff time to plan, travel and attend the conference"; "staff members are paid from the state general funds"; and "the stated goal of the DGA is to support Democratic Governors." At prehearing conferences in this matter, Complainants have regularly asserted that alleged fundraising for the DGA and the Governor's campaign are integral to their claims. *See e.g.*, counsel for Complainants' comments at the February 25, 2014 prehearing conference (requesting information regarding total Policy Conference fundraising amounts, and whether the Governor received any campaign contributions). Although a transcript of the prehearing conference is currently not available, Commissioners will recall that Complainants' counsel's response to a direct question about the relevance of seeking contribution amounts was something akin



to: “We want to show that attendees at the policy conference contributed to the DGA, which supports the Governor’s campaign for reelection.”

To the Governor’s knowledge, virtually all the developed law in Colorado regarding the use of the Governor’s time, and that of his staff, on political or personal activities is governed by the Fair Campaign Practices Act.<sup>6</sup> See Order In the Matter of the Complaint Filed by Dick Sargent Regarding Alleged Violations of the FCPA by Governor Roy Romer, and Jennifer Robles and Linda Wilz, as Employees of the Office of Governor, Case no. OS 97-14 (*hereinafter Sargent*); Agency Decision In the Matter of the Complaint Filed by Douglas Bruce Regarding the Alleged Violations of the FCPA by Governor Bill Owens, et al., Case no. OS 99-05 (*hereinafter Bruce*); see also *Coffman v. Colorado Common Cause*, 102 P.3d 999 (Colo. 2004); *Colorado Ethics Watch v. Broomfield*, 203 P.3d 623 (Colo. Ct. App. 2009). These cases have all found that governmental employee staff time is a thing of value under the FCPA. See *e.g.*, *Sargent* at 9; *Bruce* at 14. When there is a claim that staff resources have been improperly used on a campaign, the complaint must be filed with the Secretary of State. COLO. CONST. XXVIII art. 9, cl. (2); CRS § 1-45-111.5(1.5)(a); § 1-45-117(4). The allegation here, that State staff time was impermissibly used to support political campaign activities, is analogous to the claims in *Sargent* and *Bruce*. The Commission, having no constitutional authority to hear Complainants’ claims that State staff time was improperly used in planning and attending a campaign event, should dismiss Claim III of the Complaint for lack of subject matter jurisdiction.

If the Commission nevertheless determines it can constitutionally consider a FCPA claim as a violation of “Other Standards of Conduct” under Article XXIX, it should dismiss the claim on its merits as explained in Section (IV)(C) below.

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<sup>6</sup> One case, *Colorado Taxpayers Union v. Romer*, 750 F.Supp. 1041 (Colo. D. Ct. 1990), was adjudicated by a federal section 1983 claim.

**IV. EVEN ASSUMING ALL THE ALLEGATIONS ARE TRUE, THE COMPLAINT FAILS TO STATE A CLAIM UNDER WHICH RELIEF COULD BE GRANTED**

The assertions in the Complaint fail to state legal claims upon which relief can be granted by the Commission. Even assuming all the allegations in the Complaint are true, the Governor's actions at the Policy Conference were appropriate, ethical and at all times in compliance with Colorado law.<sup>7</sup> The Commission has great discretion to determine the grounds by which a case may be dismissed. See Rule 2. For example, in another case last year the Commission made an initial determination that a complaint was non-frivolous, and then subsequently granted a motion to dismiss, finding no violation of Article XXIX after reviewing the evidence and both parties' arguments in a motions hearing. Commission Complaint No. 13-07 (filed by *Lark's Wing, L.L.C.*). The Governor respectfully asks the Commission to treat this matter as it has others and, after a considered review of the pleadings, dismiss the Complaint with prejudice.

**A. KEY FACTS**

The material facts surrounding the Policy Conference are either undisputed or have been admitted.<sup>8</sup> The Policy Conference was held over the weekend, beginning at 6:00 p.m. on a Friday evening and ending with a Saturday night dinner. Exhibit ("Ex.") 2 to Complaint ("Comp."). The

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<sup>7</sup> The Commission has historically entertained motions to dismiss as motions for summary judgment. The Governor believes that because it fails to meet the statutory threshold in CRS § 24-18.5-101(5)(b)(2), the Complaint fails to state a claim upon which relief may be granted. However, to the extent the Commission determines to consider this a Summary Judgment motion, the Governor respectfully pleads in the alternative. The Governor urges the Commission to reflect on the purpose of summary judgment as a procedural tool which allows the parties to "save the time and expense" of further deliberations when it is clear "one party could not prevail." *Ginter v. Palmer Co.*, 585 P.2d, 583, 584 (Colo. 1978).

<sup>8</sup> In accordance with Rule 8(C), the Governor has provided the Commission with copies of documentary evidence, answers to interrogatories and admitted facts. At the February 25, 2014 Prehearing Conference, the parties agreed to explore further discovery and disclosures. Because the discovery process has been extended, factual citations in this Motion are made whenever possible to documents already in the record (the Stipulated Facts ("Stip. Facts"), the Interrogatories ("Inter."), and the Respondent's Statement of Facts ("Resp. Facts")). Facts disclosed through additional discovery will refer to and be incorporated into the Governor's Disclosures ("Discl.") due March 6, 2014. However, for purposes of this Motion, the Governor assumes, without admitting, that all of the allegations and facts in the Complaint are true. Thus, the Commission can decide this matter on the basis of the pleadings, all viewed in a light most favorable to Complainants.

Governor, along with staff members from his office, attended. Ex. 2 to Comp. Hickenlooper for Colorado campaign staff, representatives from State agencies, Colorado legislators and private citizens were also listed attendees. *Id.*

The focus of the Policy Conference was, as the title implies, policy related. While political and partisan conversations undoubtedly occurred among conference attendees, organized political or partisan sessions are noticeably absent from the agenda. *See id.* The Policy Conference was focused on educational and policy issues important to Colorado like balancing budgets, affordable energy and collaboration between government and business. *Id.* Indeed, DGA policy conferences stand in direct contrast to the other, purely networking and political events the DGA puts on, like its ski weekend, or events at the Kentucky Derby or Preakness Stakes. *See* Democratic Governors Association, Upcoming Events, *available at* <http://democraticgovernors.org/events/> (last visited Feb. 28, 2014).

The Democratic Governors Association invites democratic governors to its policy conferences. Unlike for other attendees, no conference registration fee is charged for the governors to attend policy conferences. *See* Resp. Facts. When a policy conference is held in a governor's state, that governor helps the DGA to plan, organize and host the conference. Inter. No. 2; Resp. Facts. That governor is also expected to participate in each of the conference sessions. *Id.* In exchange, the DGA provides the host governor with accommodations.<sup>9</sup> Resp. Facts. Food and beverages are served to all conference attendees at policy conferences. *Id.*

Governor Hickenlooper, Vice Chair of the DGA in 2013, was the host of the Policy Conference. Inter. No. 2; Resp. Facts. This meant he was responsible for helping the DGA organize and prepare for the event. *Id.* Hickenlooper for Colorado campaign staff worked with the DGA to select a date for the event, research and identify event locations, and identify and secure potential conference speakers and

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<sup>9</sup> The DGA may also provide other governors with accommodations, in certain circumstances. Resp. Facts.

panelists. *See* Discl. Additionally, based on the Governor's long-standing involvement in and pre-existing knowledge of certain topic areas, five Governor's Office staff members spent a total of approximately seven hours and ten minutes helping the Governor schedule the event, creating the substantive agenda, and briefing the Governor prior to the roundtable sessions. *See id.* These educational sessions were focused on areas of the Governor's expertise and responsibilities as Governor of Colorado. *See* Ex. 2 to Comp.; Inter. No. 5.

The Governor, on his own time during a weekend, was the emcee and host of each event during the Policy Conference. Inter. Nos. 3-5. His work began at the opening reception on Friday evening (where he opened the conference and welcomed the attendees), and lasted through late Saturday night (when he provided closing remarks and thanks to all of the attendees, the DGA and others). *See* Ex. 2 to Comp; Inter. Nos. 3-5. He attended every event, which was not a requirement of the other attending governors. Inter. No. 2; Resp. Facts. At each event, he was accompanied by Governor's Office staff. Stip. Facts. He made remarks and actively participated at each organized event, and was specifically listed on the Conference agenda for each session. *See* Ex. 2 to Comp.

Governor Hickenlooper also raised funds for the DGA to help it put on these types of policy conferences, "which provide a forum for governors and private citizens to engage in robust dialogue on governance and core issues." Inter. No. 2. The Governor did not raise funds for his own campaign during the Policy Conference, nor did the Hickenlooper for Colorado campaign receive any contributions as a result of his attendance at the conference. Inter. Nos. 8 and 9.

In consideration for the valuable services (hosting, planning, logistics, substantive agenda preparation, participation) provided by Governor Hickenlooper, the DGA supplied the Governor with

two nights of accommodations at the host hotel.<sup>10</sup> Resp. Facts. Like the other conference attendees, Governor Hickenlooper ate and drank at the Policy Conference events. Stip. Facts. In accordance with the DGA's practice, no conference fee was charged to the Governor. Resp. Facts. The value of the lodging, meals and conference fees provided to Governor Hickenlooper by the DGA was less than the value of the hosting services he provided. Inter. No. 2; Resp. Facts.

B. COMMISSION CASE 12-07 IS FACTUALLY DISTINGUISHABLE AND THEREFORE HAS NO PRECEDENTIAL VALUE TO THIS MATTER

The Commission has asked the parties to address Commission Case 12-07 as it might relate to this matter. In both law and fact, the Policy Conference was the mirror opposite of the 2012 Republican National Lawyer's Association ("RNLA") National Election Law Seminar at issue in Case 12-07, where the Commission found ethical violations. Case 12-07 is not on point, and has no precedential value to the current matter before the Commission.

Factually, the cases are distinguishable in virtually every way. In Case 12-07, Secretary of State Gessler used \$1,278.90 of State discretionary funds for airfare and lodging to attend the RNLA conference. Commission Case 12-07 Findings of Fact and Conclusions of Law (*hereinafter* Findings) at I.A.5. The Commission determined that Secretary of State Gessler "breached the public trust for private gain in using public funds for personal and political purposes." 12-07 Findings at IV. Additionally, the Commission found that the mission of the RNLA "include[d] support for Republican Party ideals, platforms and candidates," and that in order to attend the conference, participants had to state affirmatively that they supported the RNLA's mission. *Id.* at I.A.3. Secretary of State Gessler was not a member of the RNLA when he spoke at the conference. 12-07 Investigative Report at 3. Not all the RNLA conference topics related to Colorado law, and some events were concerned with "partisan values

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<sup>10</sup> For reasons unrelated to hosting, the DGA also provided several other governors with lodging at the Policy Conference. Resp. Facts.

and/or politics.” 12-07 Findings at I.A.3. One session was a reception for the Romney for President Campaign. *Id.* at I.A.3.

The DGA’s Policy Conference shares none of the same characteristics. Most importantly, there were ***no State funds spent*** on the Governor’s attendance at the Policy Conference. Inter. No. 13; Resp. Facts. Additionally, although the DGA’s mission includes supporting Democratic governors and candidates, it also explicitly describes that the DGA “provides expert advice in policy areas to Democratic governors and candidates, with several policy conferences a year on topics such as biotechnology and life sciences and the new energy economy.” Stip. Facts. The Policy Conference, in both name and substance, was directly related to the DGA’s ***policy, not political***, mission as it focused on issues like balancing budgets, affordable energy and collaboration between government and business. No sessions were concerned primarily with partisan values and/or politics.<sup>11</sup> See Ex. 2 to Comp. No conference attendee had to swear or pledge to support the DGA’s mission in order to attend the conference. See *id.* There were no candidate campaign receptions for any candidate or campaign on the Policy Conference agenda. See *id.*

The following chart helps to quickly distinguish the factual differences between the two events:

<b>Factual Differences Between 2012 RNLA Conferences and 2013 DGA Policy Conference</b>		
<b><u>Fact</u></b>	<b><u>2012 RNLA Conference</u></b>	<b><u>2013 DGA Policy Conference</u></b>
State funds spent or reimbursed on conference?	Yes. (12-07 Findings at I.A.5)	No State funds spent. (Inter. No. 13)
Topics discussed as speaker?	Sec. of State did not recall. (12-07 Findings at I.A.2.)	Opening and closing remarks, acknowledgements and substantive policy remarks at each session (Inter. No. 3-5)
Explicit mission of Organization?	“includes support for Republican Party ideals platforms and candidates.” (12-07 Findings at I.A.3)	Includes support of Democratic governors and candidates. Also explicitly “provides expert advice in policy areas...with several policy conferences a year on topics such as biotechnology and life sciences and the new

<sup>11</sup> Position Statement 12-02 reminds covered individuals that Article XXIX applies regardless of the type of event, including political events and political conventions. PS 12-02 does not, however, forbid covered individuals from attending such events, so long as such attendance otherwise complies with Article XXIX.

		energy economy" (Stip. Facts)
Covered Individual a member of organization at time of conference?	No. (12-07 Investigative Report at 3.)	Yes. (Stip. Fact)
Requirement to affirmatively support organizational mission in order to attend conference?	Yes. (12-07 Findings at I.A.3)	No. (Ex. 2 to Comp.)
Conference sessions pertained to Colorado law or issues?	No. (12-07 Findings at I.A.3)	Yes. (Ex. 2 to Comp.)
Conference sessions concerned primarily with partisan values and/or politics?	Yes. (12-07 Findings at I.A.3)	No. (Ex. 2 to Comp.)
Reception for a candidate campaign as part of conference agenda?	Yes. (12-07 Findings at I.A.3)	No. (Ex. 2 to Comp.)

Just as the facts between Case 12-07 and this matter cannot be compared, the law applied in Case 12-07 is entirely unrelated to the law at issue here. In Case 12-07 Secretary of State Gessler "breached the public trust for private gain in using public funds for personal and political purposes." 12-07 Findings at IV. In reaching this decision under Article XXIX's "other standards of conduct" provision, the Commission reviewed and applied CRS § 24-18-103(1) *Public Trust--Breach of Fiduciary Duty* (public officers "shall carry out [their] duties for benefit of the people of the state"); CRS § 24-9-105(1)(d) *Elected State Officials--Discretionary Funds* (Secretary of State has \$5,000 in discretionary funds "for expenditure in pursuance of official business"); and State Fiscal Rule 3.2.2 regarding travel charged to the State and political expenses. 12-07 Findings at II.A-D; 12-07 Findings at III.2-3.

Here, the Complaint alleges "The Use of State Funds for Partisan Purposes Violates the Undefined 'Other Standards of Conduct' in Colo. Const. Art. XXIX" because the Governor "used state staff time to plan, travel and attend the conference" and that "[t]hese staff members are paid from the state general funds." However, the Complaint fails to identify the applicable law at issue. Complainants have not described what "public trust" the Governor allegedly violated. Similarly, the Complainants have also not alleged that the Governor *spent State monies* for travel; rather it alleges *State staff time was used* to plan the conference. The applicable law here is Article XXIX's gift ban and, as described above in

Section III and below in Section IV(C), the FCPA. The law at issue in Case 12-07 is inapposite to the applicable law in the current matter. Quite simply, the law and facts at play in Case 12-07 have no relevance to the matter currently before the Commission.

C. THE GOVERNOR'S USE OF STATE RESOURCES WAS CONSISTENT WITH COLORADO LAW

The law regarding a Governor's time devoted to political activities is clear: "Colorado law directly supports the proposition that one of the activities in which the Governor may engage outside of his governmental duties is an involvement in political pursuits."<sup>12</sup> *Sargent* at 8. "By statute, the Governor serves as a member of his political party's central committee." *Id.*; see also CRS § 1-3-103(2)(a). "In fact, the [FCPA] itself recognizes that the Governor will engage in activities which may involve partisan campaigning." *Sargent* at 8. "The governor is entitled to, and expected to, spend time on personal and political matters...." *Bruce* at 14. Moreover, State fiscal regulations "acknowledge that the office of the governor involves considerations not applicable to other state officials or employees."<sup>13</sup> *Sargent* at 8. Under Colorado law, there is no conflict of interest, no appearance of impropriety, nothing illegal or inappropriate with Governor Hickenlooper being involved in Democratic Party activities.

Similarly, Colorado courts have ruled that the Governor's staff time dedicated to assisting the governor in political activities is permissible.<sup>14</sup> In *Sargent*, Governor Romer's staff devoted time during working hours to supporting the Democratic National Committee ("DNC") activities of Governor Romer, who was general chair of the DNC. *Id.* at 3-4, 9. Governor Romer's activities included fundraising and

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<sup>12</sup> In *Sargent*, the Court concluded that it was not only acceptable, but expected, that Governor Romer would devote time to his duties as general chair of the Democratic National Committee. *Sargent* at 9.

<sup>13</sup> State Fiscal Rule 5(11.6) makes clear that in the case of travel by the Governor, security, protocol, ceremonial functions and time demands may require considerations not accorded any other state official or employee. See State of Colorado Fiscal Rules, Department of Personnel and Administration, Office of the State Controller at 5-1-9 (Jan. 1, 2009).

<sup>14</sup> Cases involving staff time of other state or local offices are distinguishable, as the law views the Governor and his staff in a unique manner. See *e.g.*, *Sargent* at 8 ("... the office of the governor involves considerations not applicable to other state officials or employees.").



travel to DNC events, however, no State funds were used to pay for any DNC related expenditures. *Id.* at

3. The Governor's staff scheduled him for DNC events, reviewed DNC related expenses, and performed related bookkeeping and accounting during working hours. *Id.* at 3-4. The staff also performed these activities for the Governor before he became active in the DNC. *Id.*

The court ruled these activities did not violate FCPA. The court's reasoning is particularly helpful in full:

" . . . it is difficult to separate political and governmental activities of the Governor's office. The melding of these personages is recognized by the [FCPA] and by other provisions of law. [Staff] makes arrangements for the Governor's travel and schedule related to all of his activities. Doing so permits the Governor to efficiently carry out his gubernatorial responsibilities . . . Thus, in planning the Governor's travel and scheduling [staff] assists the Governor in carrying out his duties as governor. [Staff] performed this function before Governor Romer was elected general chair of the DNC, as part of her duties as a state employee who assists the Governor in carrying out his role as chief executive. She would have performed these same duties if the Governor had not been elected to the DNC chairmanship. [Staff's] scheduling and travel related activities in support of the Governor's position with the DNC were in essence part of, and inseparable from, her duties in support of the Governor as governor. [Staff's] time spent on these function as they related to the DNC were merely incidental to her regular governmental duties. The time spent in these activities was part of [staff's] normal role as an employee of the Governor's office, and was not time contributed to the DNC or Democratic Party candidates." *Id.* at 9-10 (internal citations omitted).

The court additionally reasoned that the staff time spent during working hours on DNC activities was *de minimis*, and concluded staff's "duties are substantially intertwined with the general operation of the Governor's office, and are only incidentally related to the Governor's role at the DNC." *Id.* at 10.

Unsurprisingly, Colorado courts apply the same analysis to Republican administrations. In *Bruce*, the complainant alleged that staff time used helping Governor Owens in a political pursuit (advocating for a referendum) did not violate the FCPA. *Bruce* at 14. In *Bruce*, Governor Owens' scheduler, policy advisors, legislative liaisons and cabinet officials helped him make travel and speaking arrangements to support Referendum A, briefed him on related issues and accompanied him to the political events. *Id.* at 2-10. The *Bruce* court echoed the *Sargent* court:

"Incidental or *de minimus* [sic] expenditures of staff time in assisting the governor to express his personal opinion in support of Referendum A do not violate the FCPA. Those staff employees making travel and speaking arrangements are performing their normal job functions. They earn the same salary whether making arrangements for Governor Owens to speak on highway funding or school violence. Similarly, higher level employees commonly meet with and advise the governor on a whole range of issues. It would be folly to hold that the governor may speak, but he may not ask for any information from his own legislative liaison or cabinet officials about Referendum A or may not have any staff person present in the event that he needs additional information about Referendum A. . . .The FCPA does not prohibit [staff] in performing their own job duties from assisting the governor in so speaking." *Id.* at 14 (internal citations omitted).

The court ruled that the staff's time spent assisting, briefing and attending the political events with Governor Owens was not a violation of Colorado law. *Id.* at 14-15.

The Commission should follow established precedent and find that time devoted by staff to helping Governor Hickenlooper plan, brief, and attend the Policy Conference does not violate Colorado law. Established case law and the State's Fiscal Rules support the concept that the Governor is expected to devote time to political and personal matters, and staff time devoted to those matters is permissible. There can be no "breach of the public trust" when the Governor acts in accordance with legal expectations.

In planning the Policy Conference, the Governor's office staff time spent during working hours was limited to scheduling the Governor's trip, preparing the substantive policy agenda and preparing briefing materials for the Governor.<sup>15</sup> See Discl. This time was *de minimis*. These activities were undertaken for only a few hours over the course of a few days, for a one-time conference. As a percentage, the approximately seven hours spent by the five employees represents less than one tenth of one percent (0.07627%) of their total annual working hours (even assuming the employees used all of their annually allotted vacation time). If the activities in *Sargent* and *Bruce* were *de minimis* (assisting a governor over the course of a months-long referendum campaign, or during the full term of a chairmanship with the DNC), then the handful of hours taken by Governor Hickenlooper's staff to prepare for the one-time Policy Conference was infinitesimal.

Additionally, the topics addressed by the Governor at the Policy Conference were topics about which he regularly speaks (balanced budgets, affordable energy and collaboration between government and business): any time used by policy staff preparing substantive materials or briefing the Governor was time "performing their normal job functions." See *Bruce* at 14. The briefings and materials were generally pre-prepared and revised for the Policy Conference, or would have been prepared for other policy purposes anyway as duties "substantially intertwined with the general operation of the

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<sup>15</sup> Any staff time at the event was during the weekend, and not during staff working hours.

Governor's office." *See Sargent* at 10. Because the topics of the Policy Conference were topics about which the Governor regularly speaks, any time devoted by staff to preparing or briefing the Governor on those topics was "part of their normal role as an employee of the Governor's office." *See Sargent* at 10.

The law regarding the Governor's use of State resources is well settled: when staff time during working hours is *de minimis*, and when staff's duties "are substantially intertwined with the general operation of the Governor's office," then they are only incidentally related to the Governor's political activities, and are therefore permissible under Colorado law. The law expects the Governor and his staff to engage in political activities: therefore there was no breach of the public trust when the Governor's staff helped him prepare for the Policy Conference.

D. THERE WAS NO IMPROPER GIFT UNDER ARTICLE XXIX

1. THE GOVERNOR PROVIDED CONSIDERATION OF EQUAL OR GREATER VALUE TO THE DGA IN RETURN FOR THE FOOD AND BEVERAGES HE CONSUMED AND ACCOMMODATIONS HE RECEIVED

Under Article XXIX of the Constitution there is no impermissible gift if there has been adequate lawful consideration provided in return. Article XXIX provides that no public officer may accept or receive any gift or thing of value greater than \$53 from a person "without such person receiving lawful consideration of equal or greater value in return from the public officer . . . ." COLO. CONST. Art. XXIX, § 3, cl. 1; *see also* IEC Letter Ruling ("LR") 09-02 at 4 ("The Sec. 3 gift ban does not apply when the person or entity seeking to give the gift receives lawful consideration of equal or greater value in return.") (internal quotes omitted); *see also* Commission 2013-2015 Ethics Handbook at 7 ("Something is not a gift if the covered individual paid for it or made an exchange of one thing of value for another thing of value."). Specifically regarding travel expenses, the Commission has stated: "[w]hen reimbursement of travel expenses to covered individuals is supported by lawful consideration of equal or greater value,

such reimbursement does not constitute a gift under Section 3 of Article XXIX.” IEC Position Statement (“PS”) 12-01 at 8.

As Policy Conference host and DGA Vice Chair, Governor Hickenlooper provided consideration to the DGA that was far greater in value than the value of the lodging and meals he received. Inter. No. 2; Resp. Facts. He did much more than simply prepare for a speech or panel.<sup>16</sup> Indeed, beyond preparing to actively participate in every panel, he also was expected to act as emcee at each event, and make opening remarks, closing remarks and acknowledgments at each event. Inter Nos. 2-4; Resp. Facts. Moreover, the Governor helped the DGA, a Washington DC based organization, to plan, organize and host a conference being held over 1,800 miles away from its DC offices in Aspen, Colorado. Inter. No. 2; Resp. Facts. The Governor helped raise funds for the DGA. *Id.* The Governor and his team selected appropriate dates for the Policy Conference. *See* Discl. Hickenlooper for Colorado campaign staff vetted event locations and coordinated potential conference speakers and panelists. Governor’s office policy staff created the substantive agenda, and developed the topics for the roundtable discussion sessions. *See id.* “The DGA believes that the value of [these] services provided by host governors exceeds the value of lodging provided.” *See id.* Because the Governor provided the DGA with consideration that exceeded the value of the lodging and meals he received, there was no gift as that term is defined in Article XXIX.

## 2. THE LODGING AND MEALS PROVIDED BY THE DGA WERE NOT GIFTS TO A COVERED INDIVIDUAL UNDER POSITION STATEMENT 12-01

The Governor’s acceptance of lodging and meals from the DGA was also permissible when analyzed pursuant to Position Statement 12-01. PS 12-01 sets out several factors to consider in

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<sup>16</sup> The Commission has been clear that preparation for a speech or panel, by itself, is not lawful consideration of equal or greater value.” PS 12-01 at 9. However, as described in the Response, the Commission has recognized that a public officer, who also serves as a board member of a nonprofit, may accept meals provided during meetings because the volunteer time and expertise he provides in return is adequate and lawful consideration under Article XXIX. *See* LR 09-03 and Response at 2.

analyzing whether a gift of travel is a gift to a covered individual. See Advisory Opinion (“AO”) 14-02 at 3. In analyzing gifts of travel under PS 12-01, a number of factors are considered, including whether the invitation is sent to a particular person, whether the invitation is *ex officio*, whether the travel relates to public duties, and whether there is an appearance of impropriety or conflict of interest in accepting the gift. See AO 14-02 at 3; AO 13-12 at 3.

#### The Offer to Host the Policy Conference was *ex officio*

Travel offers to individuals by virtue of their specific position, area of responsibility or expertise weigh in favor of a finding that there is no gift. See PS 12-01 at 7; AO 13-12 at 3; AO 13-11 at 3. Governor Hickenlooper was asked to host and participate in the Policy Conference because he is the Democratic Governor of Colorado. Indeed, being the governor of a state is a prerequisite to being able to host a DGA policy conference: only governors, not other DGA members, host DGA policy conferences. Because of Mr. Hickenlooper’s elected position, and his related long-standing involvement and expertise in the Policy Conference topic areas, he was asked by DGA to host the Policy Conference.

#### The Policy Conference was Related to Governor Hickenlooper’s Public Duties

A nexus between the legitimate functions and expertise of a covered individual and the subject of the events to which he has been invited weighs in favor of a finding that there is no gift. See PS 12-01 at 7; AO 13-12 at 3; AO 13-11 at 3. The Policy Conference topics were directly relevant to the Governor’s responsibilities and expertise as Colorado’s chief executive. See COLO. CONST. Art. IV, § 2. See also AO 13-12 at 3, AO 13-11 at 3 (topic of seminar was relevant to covered individual’s responsibilities and expertise); AO 12-12 at 3 (finding that an invitation to speak at a topic specific workshop was evidence that the covered individual was a recognized expert). There is a direct nexus between governing the State of Colorado and balancing budgets, affordable energy and collaboration between government and business. See AO 14-02 at 3. Moreover, the opportunity for Governor Hickenlooper to engage with

other governors about best practices directly relates to Governor Hickenlooper's gubernatorial public duties. *See* AO 13-03 at 3 (finding a permissible gift of travel where the Secretary of State would be participating on a panel with other secretaries of state).

There is No Existing or Potential Conflict of Interest or Appearance of Impropriety

Travel offers from an entity that does not have financial or regulatory interests that can be affected by a covered individual weigh in favor of a finding that there is no gift. *See* PS 12-01 at 7; AO 13-12 at 3; AO 13-11 at 3; AO 13-03 at 3. The DGA did not invite Governor Hickenlooper to the Policy Conference to curry favor with him or the State: the DGA does not have business before the State of Colorado. *See* AO 13-11 at 3 (the event sponsor had no business before the regulatory agency and there was no evidence the invitation was made to curry favor with the regulatory agency). In fact, as a 527 nonprofit entity it is likely the DGA would never stand to gain or profit from official State action because it is not the type of organization that will have business before the State of Colorado. *See* AO 13-12 (event sponsor did not have or expect to have matters before the regulatory agency); *see also* AO 14-02 at 3. Moreover, the Governor was not singled out for special treatment: rather, the DGA invites all democratic Governors to each of its policy conferences.<sup>17</sup> *See* AO 12-12 at 3 (recognizing that because the conference sponsor paid the way of others, the covered individual was not being singled out for special benefits and there was no conflict of interest relating to his selection).

The Purpose of the Policy Conference was Educational

If the purpose of a conference is educational, that weighs in favor of a finding that there is no gift. *See* PS 12-01 at 7; AO 14-02 at 3; AO 13-12 at 4; AO 13-11 at 4. The topics of the conference were educational matters of statewide concern. *See* Ex. 2 to Comp; AO-12-12 at 3 (finding no gift where the

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<sup>17</sup> The fact that the DGA paid for the accommodations of other governor attendees supports the conclusion that the Governor was not being singled out for special benefits.

subject matter of the workshop was a matter of statewide, regional and national concern). The Policy Conference events were not purely social networking opportunities.<sup>18</sup> As the agenda shows, the roundtable policy discussions were purely substantive, and the lunch and receptions each contained a substantive speaking program. Ex. 2 to Comp; *See* AO 12-12 at 3; *but contrast with* AO 13-03 at 3 (where a gala banquet was separate and distinct from the educational portions of the conference and was charged separately from the other events).

The Policy Conference, and the Governor's role in it, was similar to other types of conferences where the Commission has found no gift of travel. The Commission should find the acceptance of lodging and meals by the Governor was permissible when analyzed in accordance with PS 12-01.

### 3. ACCEPTANCE OF MEALS AND CONFERENCE FEE WAS PERMITTED UNDER ARTICLE XXIX, SECTION 3(3)(e)

Article XXIX, Section 3(3)(e) provides an exception to the gift ban when a covered individual is speaking as part of the program: Article XXIX's prohibitions do not apply if the gift or thing of value is "[a]dmission to, and cost of food or beverages consumed at, a reception, meal or meeting by an organization before whom the recipient appears to speak or to answer questions as part of a scheduled program." COLO. CONST. art. XXIX, § 3, cl. 3(e). Subsection (e) makes no distinctions regarding the type of organization, it only requires that a covered individual speak or participate as part of a scheduled program in order to permissibly receive admission to the event and consume food and beverages. *See id.* Additionally, the Commission has recognized "[m]any conferences include a dinner with a guest speaker which is considered part of the conference program. It is permissible for covered employees and officials to attend and participate in those meals, so long as they are part of the program, and are not primarily for entertainment purposes. If a meal is included in a conference, then attendance is

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<sup>18</sup> Unlike other DGA events such as the ski weekend, holiday party or Kentucky Derby and Preakness Stakes events.



permissible." PS 12-01 at 10. Many Commission cases stand as illustrations of this exemption. See PS 13-03 at 3; AO 13-12 at 4; AO 13-11 at 4; AO 12-04 at 3.

As the Policy Conference agenda shows, Governor Hickenlooper was listed as a speaker or active participant for *every single event* at the Policy Conference. Ex. 2 to Comp. Although nothing more is required to take advantage of the exemption, the Governor also admits that he spoke at every Policy Conference event. Inter. No. 4. Therefore, regardless of any other determinations made in this case, the Commission must find that the Conference fee waiver and the food and beverages consumed do not constitute gifts under the very specific terms of Article XXIX.

## V. CONCLUSION

This matter involves legal, not political, issues. Based on a review of the facts and applicable law, the Commission should treat this case like any other and dismiss Complaint 13-11 with prejudice.


Respectfully submitted this 28<sup>th</sup> day of February, 2014,

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