**BEFORE THE INDEPENDENT ETHICS COMMISSION**
**STATE OF COLORADO**

**CASE NO. 18-29**

---

**In the Matter of**

**JOHN HICKENLOOPER.**

---

## RESPONSE TO COMPLAINT FILED BY FRANK McNULTY

---

COMES NOW John Hickenlooper, by and through counsel, Mark G. Grueskin of Recht Kornfeld, P.C., to respond to the complaint filed with the Independent Ethics Commission ("IEC") by Frank McNulty ("McNulty") of the Public Trust Institute, pursuant to IEC Rule 7.K.3.

## INTRODUCTION

McNulty filed a summary complaint, alleging only that the Respondent flew on a private plane and thus was "likely violating Amendment 41's gift prohibitions." Unlike Complaint 18-22, no reporting violations are alleged here. Thus, this Response will address only the allegations appearing on the face of that complaint.

**Much of the legal argument herein reflects the argument made in connection with the previously filed Response to McNulty's Complaint 18-22. Nonetheless, the Commission is urged to pay particular attention to argument set forth below concerning the required dismissal under C.R.S. § 24-18.5-101(5) (complaint is frivolous if it fails to allege acceptance of a gift or other thing of value for private gain or personal financial gain). These legal issues were raised briefly in oral argument at the January 14, 2019 IEC hearing on the Motion to Dismiss filed as to Complaint 18-22 but are addressed in greater detail here.** ***See p.* 3-4, *infra*.**

## BASIS FOR DISMISSAL OF COMPLAINT

*A. Standards for dismissal of a complaint*

When considering a C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim upon which relief may be granted, "only a complaint that states **a plausible claim for relief** survives a motion to dismiss." *Warne v. Hall*, 2016 CO 50, ¶ 9, 373 P.3d 588 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)) (emphasis added). "Dismissal under C.R.C.P. 12(b)(5) is proper only when the facts alleged in the complaint cannot, **as a matter of law**, support the claim for relief." *N.M. v. Trujillo*, 2017 CO 79, ¶ 18, 397 P.3d 370 (emphasis added).

A C.R.C.P. 12(b)(5) motion to dismiss serves to test "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief.'" *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In addressing a C.R.C.P. 12(b)(5) motion, it is typical for an adjudicative body to accept all factual allegations in the complaint as true and view them in the light most favorable to the complainant. *Id.* (citations omitted). Where legal conclusions are couched as factual allegations, however, they need not be accepted as true. *Warne, supra*, ¶ 9.

*B. Grounds for Dismissal*

1. All claims in the complaint are frivolous for failure to satisfy the specific requirement that they allege and identify an attempt to influence a public official's "official act."

The Commission incorrectly found the McNulty complaint to be non-frivolous. McNulty fails to allege that a gift was given by a person who sought to influence an official act of a public officer. In other words, he fails to meet the only specified standard for what comprises frivolousness in this context.

> (a) ...[T]he **commission shall dismiss as frivolous any complaint** filed under article XXIX **that fails to allege that a public officer**, member of the general assembly, local government official, or government employee **has accepted or received any gift or other thing of value for private gain or personal financial gain.**
>
> (b) For purposes of this subsection (5):
>
> > (I) "Official act" shall have the same meaning as set forth in section 24-18-102 (7).
> > (II) **"Private gain" or "personal financial gain" means** any money, forbearance, forgiveness of indebtedness, **gift, or other thing of value given** or offered **by a person seeking to influence an official act** that is performed in the course and scope of the public duties of a public officer, member of the general assembly, local government official, or government employee.

C.R.S. § 24-18.5-101(5) (emphasis added); *see* Colo. Const., art. XXIX, §§ 1(d), 6 (efforts "to realize personal financial gain through public office" violate the public trust; penalties may be imposed only if covered official "breaches the public trust for private gain"). An "official act" is "any vote, decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." C.R.S. § 24-18-102(7).

Colorado law thus mandates that the IEC dismiss a complaint where, as in the case of McNulty's, it fails to allege that a gift or other thing of value, was "accepted or received" with the result that the affected public officer obtains "private gain or personal financial gain." C.R.S. § 24-18.5-101(5). Assuming it is factually accurate for purpose of this Motion to Dismiss, the McNulty complaint neither alleges: (1) there were any "official acts" of interest to alleged donors to be performed by Governor Hickenlooper; nor (2) any goods or services were provided in order "to influence" the Governor's performance such act. It thus fails to meet this statutory mandate.

The IEC has defined the term "frivolous" in its Rules of Procedure. "'Frivolous' means a complaint filed without a rational argument for the IEC's involvement **based on** the facts or **law**." IEC Rule 3.A.5 (emphasis added). Thus, the IEC's rules incorporate pertinent statutory provisions.

The IEC has successfully advocated for incorporating statutory provisions in its process, as a matter of "law." In *Gessler v. Smith*, 2018 CO 48, a respondent sought to limit the IEC's jurisdiction to the specific offenses arising under Article XXIX. In essence, that respondent sought to avoid IEC jurisdiction as to "any other standards of conduct and reporting requirements as provided **by law**." *Id.* at ¶ 22 (emphasis added), citing Colo. Const., art. XXIX, sec. 5.

The IEC argued, and the Supreme Court agreed, that "provided by law" related to pertinent statutes. There, the other statutes contained standards that refined or added substance to the basic provisions of Article XXIX. "[W]e conclude that the phrase 'as provided by law' refers to **laws already in existence**." *Id.* at ¶ 28 (emphasis added). In so holding, the Court cited Black's Law Dictionary, which defines "provided by law" to mean "prescribed or **provided by some statute**." *Id.* (emphasis added).

This holding was anything but novel. For half a century, the Colorado courts have held that the general reference to "by law" refers to statutory sources. *See, e.g., Cokley v. People*, 450 P.2d 1014, 1015 (Colo. 1969) (Court held "that the phrase 'as defined by law' means 'as defined by statute" rather than by case law or judicial interpretation).

C.R.S. § 24-18.5-101(5) is just such a law that relates to the IEC frivolousness inquiry. According to the Supreme Court, this subsection (5) "addresses frivolousness in the context of gift bans." *In re Colo. Ethics Watch v. Independent Ethics Comm'n*, 2016 CO 21, n. 2.

Having incorporated this frivolousness standard that is "based on the... law," IEC Rule 3.A.5, the IEC may not deviate from the test that was adopted as part of the IEC Rules of Procedure by this Commission's predecessors. "**An agency must scrupulously follow the** regulations and **procedures it promulgates** and, if it does not, the court may strike the agency's action." *Rags Over the Ark. River, Inc. v. Colo. Parks & Wildlife Bd.*, 2015 COA 11M, ¶ 26 (emphasis added). Clearly, the IEC must comply with its own rules as they embody relevant statutory provisions.

The IEC's Rules of Procedure were made effective on April 14, 2011, according to the IEC's website. *See* www.colorado.gov/pacific/iec/rules-procedure (last viewed, Jan. 12, 2019). Thus, from that date forward, the IEC affirmatively adopted provisions of law pertaining to frivolous complaints, which include C.R.S. § 24-18.5-101(5).

The statutory standard at issue here was incorporated by the IEC by means of its rules. As a result, this pleading requirement became a Commission test for sufficiency of complaints rather than the legislature's. *See Zamarripa v. Q & T Food Stores*, 929 P.2d 1332, 1342 (Colo. 1997) (agency rule was effective, having used and incorporated statutory criteria).

Any previous decisions the IEC may have reached without considering its rules in this manner are not binding on it. A state agency is "not bound by its previous decisions regarding jurisdiction," particularly where (like the IEC) it is not operating under the strictures of the

Administrative Procedure Act ("APA"). *Herpin v. Head*, 4 P.3d 485, 493 n.4 (Colo. 2000); *see generally Colo. Ethics Watch, supra*, 2016 CO 21 at ¶ 17 (cases construing APA "are inapposite" to IEC actions under Article XXIX).

Complaint 18-29 does not allege that Respondent received the plane trip in question in order to influence his official acts. Given the IEC rules, then, the Complaint must be dismissed.

2. All claims based on the Complainant's speculation must be dismissed.

In order to meet his pleading requirements, McNulty cannot base his complaint solely on conclusory statements or innuendo. His generalized allegations only give rise to a supposition based on redactions of personal or other details on the Governor's calendar. The failure to plead any essential element of an alleged offense is sufficient to support a motion to dismiss. A complainant's factual allegations necessarily fail if they cannot "raise a right to relief 'above the speculative level.'" *N.M., supra,* 2017 CO 79 *at* ¶ 18 (citing *Twombly, supra*).

Given the central role played by speculation in the Complaint, all of its allegations must be dismissed.

## ANSWER TO SUBSTANTIVE ALLEGATION REGARDING TRAVEL FROM WASHINGTON, D.C. TO DENVER

Hickenlooper traveled to Denver from Washington, D.C. with his chief of staff, Patrick Meyers. Meyers leases his own airplane and was scheduled to leave Washington, D.C. on the same date as Hickenlooper. Both were headed to Denver.

Meyers' provision of an open seat on this airplane was not a gift to Hickenlooper. Meyers is and has been a "personal friend" of Hickenlooper's for years, and he was entitled to provide transport to the Governor in this instance. Their shared need to return from Washington, D.C. met the "special occasion" requirement in law. Colo. Const., art. XXIX, § 3(3)(g).

Just as a covered official may "turn to friends and family" for a useful resource such as a legal defense fund, IEC Advisory Opinion 13-01 at 7, such official may turn to friends and family for a resource that broaches no concern whatsoever of impropriety or appearance of impropriety. *Id.* at 9. This exception applies outside of celebrations and can even apply to opportunities to spend uninterrupted time together. IEC Policy Statement 08-01 at 10 ("occasion" need not be "unusual" and can even occur in the ordinary course of events, such as "a weekly meal with friends or family"). The fact that this occurrence arose in the context of the working relationship between Hickenlooper and Meyers is of no moment. This exception in Article XXIX was intended to be broadly applied. *Id.* ("The term 'special occasion' should not be restricted to birthdays, anniversaries and holidays; nor should it necessarily mean events that are rare or unusual.") Certainly, the working relationship here is exempt under Article XXIX.

Thus, there was no violation of Article XXIX.

## RELIEF SOUGHT

WHEREFORE, for the reasons stated herein, Respondent seeks:

(1) Dismissal of all claims in the Complaint;
(2) To the extent that the IEC may consider one or more of the allegations, any such determination be based on the legal arguments contained herein; and
(3) Such other relief as is warranted by law or equity.

Respectfully submitted this 16th day of January, 2019.

**RECHT KORNFELD P.C.**

Mark Grueskin, Reg. No. 14621
1600 Stout Street, Suite 1000
Denver, CO 80202
303-573-1900
mark@rklawpc.com

## CERTIFICATE OF SERVICE

I, Erin Holweger, hereby certify that on 16th day of January, 2019, I submitted via email and U.S. mail, first class, postage prepaid, the foregoing **RESPONSE TO COMPLAINT FILED BY FRANK McNULTY** to the following:

Frank McNulty
5190 S. University Blvd.
Greenwood Village, CO 80121
trust@publictrustinstitute.org

Erin Holweger