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The Voice for Open Government in Colorado

December 28, 2021

Via email [iecinfo@state.co.us]

Independent Ethics Commission
1300 Broadway, Suite 240
Denver, CO 80203

Re: Public Comments on Proposed IEC Rules

Dear members of the Independent Ethics Commission (“IEC”):

I write on behalf of the Colorado Freedom of Information Coalition (“CFOIC”),¹ a not-for-profit educational corporation, dedicated to helping Coloradans (and those interested in Colorado government) exercise their rights to monitor the conduct of “public business,” through inspection of public records and attending meetings of public bodies at which such business is discussed. The current organizational members of CFOIC are listed at <https://coloradofoic.org/about/>.

Prior to the Court of Appeals’ decision in *Dunafon v. Krupa*, 2020COA149, CFOIC, along with two of its member organizations, the Colorado Broadcasters Association and the Colorado Press Association, wrote the IEC and urged it to abide by the two so-called “Sunshine Laws” – the Colorado Open Records Act (“CORA”) and the Colorado Open Meetings Law (“COML”). For decades, those two statutes have served this State’s residents well, by setting forth clear guidelines for which records and meetings the public, for whose benefit the IEC is empowered to act, has the right to access. These statutes embody legislative weighing of competing aspects of “the public interest” and determine, based on those countervailing values, when the public is entitled to observe, first-hand, the official conduct of their public servants. Those statutes also provide a formal mechanism for independent judicial review of every state and local agency’s decisions applying those statutes. Decades of published judicial decisions provide helpful guidance to records custodians and public bodies in fulfilling their duties under those two Acts. And, when the courts interpret a provision of either Act in a way that misconstrues the legislature’s intent, or the General Assembly otherwise disagrees with “the law” as applied by the courts, amendments are thereafter proposed and adopted to better balance the competing interests in transparency/accountability and other societal values, such as personal privacy or security protocols.

While the IEC is an atypical public body, created by the Colorado Constitution, we maintain that there is no specific functional reason why the IEC should be treated any differently from any other state or local “agency” or “instrumentality” when it comes to public accountability and transparency. If anything, the role played by the IEC – as a truly *independent* watchdog passing judgment on the actions of other governmental bodies and public officials – requires that its records and meeting be subject to even *greater* public access than any other governmental office. If the decisions rendered by the IEC are to be respected and honored by the public, it must be given access to all the underlying documents and other information upon which those decisions are premised, and the actions of its members (and staff) must be

¹ Positions taken by the Colorado Freedom of Information Coalition do not necessarily represent the positions of each individual member or member organization.

as open and accessible as those of any other branch of Colorado’s government. As the United States Supreme Court has noted, “Public confidence cannot long be maintained where important . . . decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the [government’s] decision sealed from public view.”

Contradicting its public charge, the IEC’s proposed Rules governing public access to the records and meetings of the IEC fall far short of the standards applicable to all other state and local governmental bodies in the CORA and COML. One obvious, concrete example: the “Definitions” section of the proposed Rule (2(a)(17)), defines “personnel files” that are “not public records” as “any document maintained because of the employer-employee relationship, including home addresses, telephone numbers, financial information, and other documents specific to an individual’s employment with the IEC.” In contrast, CORA, and the judicial decisions that have interpreted it, make clear that the “personnel files” exemption – those portions of records “maintained because of the employer-employee relationship” – is narrowly limited only to “personal demographic information” like “home address, home phone number, and personal financial information” *unrelated to the conduct of official governmental business*. See, e.g., *Daniels v. City of Commerce City*, 988 P.2d 648, 651 (Colo. App. 1999); *Jefferson Cty. Educ. Ass’n v. Jefferson Cty. Sch. Dist. R-1*, 2016 COA 10, ¶¶ 14-22.

Even more egregious than the substantive shortcomings of the proposed Rule, especially when compared to analogous provisions of CORA and COML, is the complete lack of any procedural mechanism by which any citizen or resident of the State can challenge the IEC’s interpretation and application of its own rule. Unlike CORA, which mandates that a court must set a hearing on any challenge to a public records denial “at the earliest practicable time,” § 24-72-204(6), C.R.S., the IEC’s proposed Rule provides absolutely no mechanism for independent judicial review of the IEC’s decision-making. In other words, the IEC’s decision is “final” but non-appealable.

The public cannot be expected to have faith or trust in an agency (i.e., to respect its decisions) when it tells the People whom it is empowered to serve: “trust us; we know what’s right.”

Accordingly, CFOIC again urges the IEC – if it genuinely wishes to maintain public respect for its activities and rulings – not to carve itself out of the well-established “Sunshine Laws” applicable to all other state and local governmental offices. If an IEC decision to close a meeting to the public or deny a public records request is “correct,” right, and just, then the IEC should not be concerned about having a judge review (and, presumably, affirm) that decision. Doing so will maintain the public’s trust and respect for this *independent* institution. In contrast, declaring itself essentially “above the law,” or “subject only to its own rules,” will only serve to undermine IEC’s stature among the People, and inevitably lead to it being perceived as yet another result-oriented body, without legitimacy.

Sincerely,



Steven D. Zansberg, Esq.
President, CFOIC