

Comments on Proposed Revised Rules for the Colorado Independent Ethics Commission
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General Comments:

The Independent Ethics Commission's ("IEC" or "Commission") general goal in promulgating these rules seems to be to make its activities less transparent and make its processes and procedures more cumbersome and difficult for the average citizen to navigate. This is the opposite of what the Commission should be doing. As described more fully in my specific comments below, the procedures for filing a complaint are very legalistic and formal and would require the assistance of an attorney to comply correctly. Many private citizens have important information and would like to report their knowledge of possible infractions by public employees and officials but lack the education, experience, or ability to comply with these rules, and may lack the resources to hire an attorney. The failure to make the IEC's procedures more accessible will result in fewer cases being filed by ordinary citizens, and more complaints filed for partisan political purposes wherein an attorney is retained.² In contrast, the Denver Board of Ethics' procedures are very user-friendly, and most complaints are filed and defended without needing the assistance of an attorney. In fact, no complaint has been filed by someone represented by an attorney since at least 2008, when I began monitoring the activities of the Denver Board of Ethics.

Even this Notice of Rulemaking is difficult for the average layperson to respond to. Normally, a red-lined version of Rule changes is provided to the public for ease of comparison. This was not done in this case, and therefore required a line-by-line -comparison. The chart provided by the Commission was not very helpful.

When I was the Executive Director of the IEC from 2008-2014, then Commission Chair Dan Grossman asked me to review the procedures of the approximately 45 state ethics commissions then in existence, especially with respect to enforcement. This was in 2010 or 2011. At that time, not a single state commission required the complainant in an ethics case to "prosecute" a complaint. Commissions had different processes and procedures, but universally, a complaint was reviewed and investigated by Commission staff and then "prosecuted" or pursued by

¹ I am the former Executive Director of the IEC, former Director of Ethics and Compliance for the New York State Assembly and am a current member of the Denver Board of Ethics. I am also a former member of the Steering Committee of the Council on Government Ethics Laws and a former Vice President and President of that Organization. I have been retained as an ethics adviser for municipalities and counties in Colorado and across the country and have drafted, reviewed, and revised ethics codes for several governmental entities. These comments are submitted in my personal capacity, and do not reflect the opinion of the Denver Board of Ethics or any other organization.

² I realize that Rule 6(B) states that the Rules may be relaxed for *pro se* parties, but many ordinary citizens will still be deterred by the legal nature of the process.

someone employed by the relevant commission.³ The Colorado Independent Ethics Commission, then chaired by Commissioner Grossman, worked diligently to obtain funding for a prosecutor position. The Joint Budget Committee funded this position in FY2013. This position was never filled as intended due to a change in membership on the Commission. This model, which is still used in every state commission that I know of, removes partisan politics from ethics cases, and encourages members of the public with information to come forward. I encourage the IEC to reconsider its model of investigating and pursuing ethics violations. This would also permit the Commission to consider anonymous complaints, as discussed further below and to initiate proceedings if it hears of a potential violation through the news or other medium.

I realize that the IEC is permitted, pursuant to *Gleason v. Judicial Watch, Inc.*, 292 P.3d 1044 (Colo. App. 2012) to fashion its own open meetings and public records rules. However, these rules provide little transparency to the public and allow the IEC's custodian of records to make a decision with regards to the documents that can be obtained, with no ability for a member of the public to contest that decision, or to have an independent body, such as a judicial officer review those determinations. The rules generally provide that a public record is what the IEC says it is, and that only public records will be disclosed. Similarly, an Open Meeting is one in which the IEC discusses what it wants to discuss in open session. This circular reasoning is problematic. The insistence on secrecy undermines the public's confidence in the operations of the IEC. Moreover, the Colorado Open Records Act and the Colorado Open Meetings laws have decades of interpretation; many members of the public as well as journalists understand what documents they are and are not entitled to. I urge the Commission to simply adopt those laws in their entirety by reference in order to promote public confidence in the IEC. The current policy of secrecy is also reflected in the limited information provided in the Agendas and Minutes posted on the IEC website. Again, I urge the Commission to be more open and transparent in its activities. A recent report by the Campaign Legal Center on the importance of transparency and simplicity of processes is discussed here.

<https://campaignlegal.org/sites/default/files/2021-12/CLC%20Top%20Ten%20Transparency%20Updates.pdf>

Specific Comments:

Rule 2 (A) Definitions:

(3) "Closed Session". This definition implies that the IEC may simply decide that discussion of a particular matter should be held in a closed session. There should be guidelines regarding when the Commission will discuss a matter in a closed session.

³ The Council on Government Ethics laws has also had several sessions on enforcement models for ethics cases over the years.

(7) “Deliberations” This definition suggests that Commissioners may have conversations about Commission matters with each other outside of a meeting. This should not be permitted.

(9) “Frivolous”. The Commission has decided that any complaint over which it has no jurisdiction is frivolous. This definition robs the public of the necessary information to assess whether a complaint was appropriately dismissed and deprives the Commission of the opportunity to educate members of the public on reasons why complaints may be dismissed—no jurisdiction over the person (not a public employee, e.g.), activities, not within 12 months, no ethics violations alleged, etc. I recently had a discussion with a member of the Denver School Board who believed that as a member he would be subject to the IEC’s jurisdiction if he were paid. I told him that was incorrect, given the definition of a local official, and pointed him to the IEC web page in which dismissal of a case against a school board member in 2008 was discussed. Again, the more information is provided to the public, as well as to covered individuals, the more confidence there will be in the Commission, and there will be better understanding of the roles, duties and authority of the IEC.

Definition of “Letter Ruling” was deleted—this should be added back in so that members of the public will understand the difference between a letter ruling and an advisory opinion. The term is referenced in several sections of these rules. Similarly, there are no definitions for “local government official”, “public officer”, “public employee”, etc. Although these terms are defined in Article XXIX and in statute, the definitions should be repeated in the Rules since they are referenced here. Those definitions are not always well understood by the public given the exclusion, for example of school district employees and elected officials, members of special district boards and employees of home rule cities and counties with their own ethics programs.

(12), (13) “Non-public Record”, and “Open Meeting”. These Rules permit the IEC to create their own rules with no guarantee of consistency or appropriateness. The definitions are circular and basically mean whatever the IEC decides in a particular setting. These terms should be defined in reference to CORA and the Open Meetings laws.

Rule 3 Requests for Advisory Opinions, Letter Rulings and Position Statements:

(J) The IEC should clarify that it will attempt to limit identifying information to the extent possible unless the requestor waives confidentiality.

Chapter 3-Filing and Responding to Complaints

Rule 5 Complaints

(A) Requirements for Separate Complaints:- This section seems unduly burdensome for a layperson who may not be technologically savvy or have easy access to printers. If two respondents acted together and the evidence is substantially the same, it seems like it would be easier and more efficient not only for the complainant, but also for the Commission to consider these complaints together. Many potential complainants may not have access to either reliable

internet access or a nearby copy store, and this could severely hinder their ability to file a complaint. I urge the IEC to revise or eliminate this rule. Moreover, lay people may not be familiar with what a legal caption looks like, and an example should be provided.⁴

(B) Anonymous Complaints: I urge the IEC to change its enforcement model to allow for anonymous complaints. A 2020 audit of the Denver Board of Ethics by the Denver City Auditor made this recommendation to the Board, based on its review of several ethics commissions around the country; this change was approved by the Denver City Council and has now been in operation for a year. See, pages 12-15, https://www.denvergov.org/files/assets/public/auditor/documents/audit-services/audit-reports/2020/ethics_february2020.pdf

As a member of the Denver Board of Ethics, I think this change has been a good one. We have seen an increase in complaints filed, but it is easy to distinguish frivolous or inconsequential complaints from more serious ones, and the Board has received several anonymous complaints which allege significant and serious misconduct. Although the Board of Ethics has not yet held a hearing on an anonymous complaint, its more informal hearing process would easily accommodate such a hearing.

I also note that in the nearly six years I was the Executive Director of the IEC, I received many inquiries regarding the filing of anonymous complaints, some situations seemed very egregious. For example, one person told me he had been asked to donate a flat screen television to a Holiday raffle for county employees. He felt uncomfortable with the donation, but was afraid to say no, because a high percentage of his business was with the county. He declined to give me his name or the county involved. Had he been able to file a complaint anonymously, an independent investigation could have been conducted and may have benefitted the residents of the county involved as well as people of Colorado.

(F) Dismissal as Frivolous. If a determination is made that a complaint is frivolous, it should not be referred to as a “frivolity” determination, but a frivolousness determination. The implication of the word “frivolity” is silliness whereas “frivolousness” has a legal connotation of being without merit. Please change the use of Frivolity in this section and in Rule 11.

Rule 7 Hearings

(B) (3) This rule states that documents will only be provided electronically. Many people in Colorado, especially in rural areas, so not have access to reliable broadband internet. The rule should be amended to allow for the provision of physical document when necessary.

(C) (2) Consolidation. This section shows the inefficiency of the requirement to file separate complaints. This puts the burden on the complainant of filing a motion to consolidate when the

⁴ I recently had a conversation with a potential complainant who told me she did not understand what a legal caption was, and had been told to resubmit her documents.

case should have been allowed to be filed together. The IEC is assuming that complainants have attorneys, which may not always be the case, and discourages citizens with knowledge of violations from coming forward.

Rules ((C)(3)-(7). These rules may be intelligible to attorneys, but not to an average layperson. These rules make the Complaint process inaccessible to people without an attorney.

(G) Settlements. The IEC has an interest in ensuring that any proposed settlement is fair to both parties and is made public. Public comment should be available on a proposed settlement. The rule should specify that all settlements are public and will be published on the IEC's web site as soon as practicable.

(K) The Rule should state "audio record", rather than "record audio." It also might be beneficial to video record hearings so that members of the public may observe hearings and assess witnesses' credibility. This seems like it would not be difficult when all appearances are currently by web ex.