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May 29, 2014

Ms. Rosemary Marshall, Chair
Colorado Independent Ethics Commission
1300 Broadway, Suite 240
Denver, CO 80203

Re: Public comment on Commission revision of CORA policy

Dear Chair Marshall:

We jointly submit this public comment regarding the open records policy of the Independent Ethics Commission (IEC). We understand that IEC staff and counsel have been directed to review and suggest revisions to various policies, including the IEC fee policy applicable to records requests made under the Colorado Open Records Act (CORA). We applaud the Commission for taking the step of making sure the IEC policy is updated, especially reflecting the most recent legislation signed by the Governor on May 2 and effective July 1, 2014.

In addition to the specific policy suggestions included in this comment, we urge the IEC to adopt more proactive disclosure through its government website. There are certain categories of documents relating to IEC actions which are probably the most frequently requested by journalists, organizations and citizens. Placing these public records on the website will reduce the number of CORA requests submitted to your office, reducing staff time and expense. As a government agency charged with accountability, transparency should be one of your highest priorities. The soon-to-be-updated IEC website provides the opportunity to increase public transparency and reduce the need for formal CORA requests and responses.

With regard to the specific CORA fee policy to be discussed and adopted by the IEC, we urge you to include the following items to be compliant with CORA, including the new revisions effective July 1, 2014.

1. If the IEC chooses to charge any fees to CORA requestors (the statute is permissive, not mandating that fees must be charged), the fee policy must conform to the specific categories of fees allowable by statute. The current interim policy (adopted at the April 28, 2014, IEC meeting), which states a charge for "additional costs up to \$2.25 a page may apply for reasonable costs of production for any electronic or paper documents (i.e., staff time, research, redacting)," is not supported by the statutory provisions of C.R.S. §24-72-205 as amended effective July 1, 2014.

2. If a paper copy or printout is requested, the IEC may charge a fee of **no more than 25 cents** per standard page. C.R.S. § 24-72-205(5)(a). However, we urge you to set a photocopying price that more accurately reflects your actual per-page cost. In the unlikely event that a printout or copy of a document in some format that is not a standard page is requested, the IEC may charge a fee **not to exceed the actual cost** of providing that non-standard copy. *Id.* It appears the CORA fee policy adopted at the April 28 IEC meeting complies with these statutory provisions, but we recommend the IEC adopt the model practice used by most state agencies of allowing a set number of pages (usually 20 or 25) to be provided without imposing any copying cost.

3. The other main category of fees authorized by CORA is a charge to the requestor for the “research and retrieval of public records.” These types of fees are now subject to specific statutory standards after the enactment of HB 14-1193, which amends C.R.S. § 24-72-205 effective July 1, 2014. This new subsection (6) has three requirements which the IEC must include in a revised CORA policy:
 - a. The IEC may only charge a fee for research and retrieval if it has, **prior to the date of receiving the request**, adopted and posted a specific public fee schedule covering such fees on the IEC’s website. This means that after July 1, 2014, the IEC may not charge any research and retrieval fees to any CORA requestor unless and until it has adopted and published a revised CORA policy in compliance with HB 14-1193.

 - b. If the IEC chooses to charge a fee for research and retrieval time, it **may not charge for the first hour** of time spent responding to a request. We recommend that the IEC adopt the model policy used by most state agencies and not charge for the first two hours of research and retrieval.

 - c. If the IEC chooses to charge a fee for research and retrieval time, it must be an hourly based fee **that may not exceed \$30 per hour**. We recommend that the IEC adopt the model policy used by most state agencies, which charge \$20 per hour.

4. In unusual circumstances, there are other specific fees authorized by CORA which the IEC may consider including in its CORA policy. For example, if a CORA request requires IEC staff to perform any “manipulation of data so as to generate a record in a form not used” by the IEC, then the IEC would be permitted to charge **a reasonable fee not exceeding the actual cost** of manipulating data and generating the record. C.R.S. § 24-72-205(3). Similarly, if a record produced is the result of a specialized computer database or electronic service, the IEC is authorized, but not required, to charge a fee based on the **actual incremental costs** of providing the electronic service and a **reasonable portion of costs** associated with building and maintaining the information database system. C.R.S. § 24-72-205(4). Based on the types of public records generated and maintained by the IEC, it is unlikely that either of these situations will arise often, if at all, in the CORA requests delivered to the IEC.

5. There is no CORA provision authorizing a per-page fee for “costs of production” as described in the policy adopted on April 28. If the IEC determines that it wishes to charge something beyond the per-page paper copying fee, it must adopt an hourly based rate for research and retrieval time that complies with the provisions described above.
6. If the IEC plans to adopt a CORA fee policy that requires payment to be made before providing the requested documents, then it should put procedures into place to track actual time and costs to appropriately calculate the fee under the statutory standards. We suggest the IEC adopt the model approach used by most state agencies, including the Judicial Department, to provide the requestor with advanced notice and an estimate of compliance costs if it is anticipated that more than the minimum amount of research time will be used. This provides the requestor a chance to refine the request, perhaps saving time for IEC staff, and to limit the costs to be incurred. The IEC should adopt the Judicial Department’s policy of always providing a final invoice including a detailed breakdown of the staff time and costs actually incurred.
7. Finally, as noted in the April 28 policy, the IEC policy must state that documents will be transmitted to a requestor in electronic format if so requested and no additional “transmission” charges may be assessed for emailed documents. C.R.S. § 24-72-205(1)(b). The IEC may charge appropriate postage for documents sent by U.S mail. The statute provides that the IEC must send the records either when payment is received for authorized charges (such as postage or research and retrieval fees, but not a per-page copying fee), if any, **or when arrangements are made for later payment.**

For your reference regarding what other state agencies and the Judicial Department include in their CORA fee policies, attached is a Legislative Council Staff Memo prepared last year. Please note that this information was compiled before the passage of and Governor’s signature on HB 14-1193, but it still provides a good summary of model policies in other state agencies that strive to provide the public transparency beyond the statutory minimums.

We look forward to the discussion and review of the IEC policy at the June 9, 2014 public meeting.

Respectfully submitted,



Jeffrey A. Roberts
Executive Director

On behalf of the Colorado Freedom of Information Coalition and the following member organizations:

American Civil Liberties Union of Colorado
BillTrack 50
Colorado Broadcasters Association
Colorado Common Cause
Colorado Ethics Watch
Colorado Press Association
Colorado Press Women
Independence Institute
League of Women Voters of Colorado
The Colorado Independent

Note: Positions taken by the CFOIC do not necessarily represent the positions of each individual member or member organization.