

DISTRICT COURT, DENVER, COLORADO
1437 Bannock St.
Denver, CO 80202

DATE FILED: September 26, 2013

Plaintiff:

SCOTT E. GESSLER, individually and in his capacity
as the Secretary of State of the State of Colorado

v.

Defendants:

DAN GROSSMAN, SALLY H. HOPPER, BILL
PINKHAM, MATT SMITH and ROSEMARY
MARSHALL in their official capacities as members of
the Independent Ethics Commission and the
INDEPENDENT ETHICS COMMISSION, an inferior
tribunal of the State of Colorado

COURT USE ONLY

Case Number(s): 13CV30421

Courtroom: 376

**COURT'S ORDER RE: DEFENDANTS' MOTION TO DISMISS ALL CLAIMS OTHER
THAN THOSE FOR JUDICIAL REVIEW**

This matter is before the Court pursuant to Defendants' Motion to Dismiss All Claims other than those for Judicial Review in Plaintiff's Second Amended Complaint and Brief in Support Thereof, filed August 2, 2013. The Court having reviewed the Motion, the pleadings, the file and being fully advised Finds and Orders as follows:

I. Background

Plaintiff alleges the Defendant Independent Ethics Commission ("the Commission") exceeded its jurisdiction as granted by Amendment 41 to the Colorado Constitution and C.R.S. § 24-18.5-101 by its handling of an ethics complaint against him. Plaintiff's First and Second Claims for Relief seek judicial review pursuant to both C.R.C.P. 106 and C.R.S. § 24-4-106. Plaintiff's Third and Fourth Claims for Relief seek declaratory judgment for alleged violations of due process and a declaration that Article XXIX of the Colorado Constitution is unconstitutional. The Third and Fourth claims do not state whether relief is sought pursuant to C.R.S. § 24-4-106 or C.R.C.P. 57. Plaintiff's Fifth Claim for Relief appeals the Commission's actions pursuant to C.R.S. § 24-18.5-101. Plaintiff's Sixth Claim for Relief alleges Defendants violated Colorado's Open Meetings Law under C.R.S. § 24-6-401.

Pursuant to C.R.C.P. 12(b), Defendants seek to dismiss all of Plaintiff's claims except for those made under C.R.S. § 24-4-106. In support thereof, Defendants allege Plaintiff's First,

Second, Third, Fourth and Fifth claims made pursuant to C.R.C.P. 106, C.R.C.P. 57 and C.R.S. § 24-18.5-101 should be dismissed because Plaintiff already has a “plain, speedy and adequate remedy” through judicial review pursuant to C.R.S. § 24-4-106. Defendants seek to dismiss Plaintiff’s Sixth Claim for Relief because Plaintiff does not plead an injury and thus does not have standing.

II. Standard of Review

In assessing a C.R.C.P. 12(b) motion, a court must accept all matters of material fact in the complaint as true and view the allegations in the light most favorable to the plaintiff and may grant the motion only if the plaintiff’s factual allegations cannot support a claim as a matter of law. *Asphalt Specialties, Co. v. City of Commerce City*, 218 P.3d 741 (Colo. App. 2009). If the plaintiff fails to establish that the trial court has subject matter jurisdiction, the court must dismiss the matter. *Adams County Dept. of Soc. Serv. v. Huynh*, 883 P.2d 573 (Colo. App. 1994); *City of Boulder v. Pub. Serv. Co. of Colo.*, 996 P.2d 198 (Colo. App. 1999).

Any person adversely affected or aggrieved by any agency action may commence an action for judicial review in the district court. C.R.S. § 24-4-106(4).

The Administrative Procedures Act or “APA” (C.R.S. § 24-4-106) applies to agency actions unless they conflict with a specific provision of the agency’s statute or another statutory provision preempts the provisions of the APA. *Well Augmentation Subdistrict of Central Colorado Water Conservatory Dist. V. City of Aurora*, 221 P.2d 399, 417 (Colo. 2009).

The remedies provided by C.R.C.P. 106(a)(4) are available only in the absence of any other “plain, speedy and adequate remedy.” *State of Colo. v. Dist. Court of Denver*, 802 P.2d 473, 477 (Colo. 1990).

When the provisions of the Administrative Procedure Act (C.R.S. § 24-4-106) provide a claimant with relief, the extraordinary provisions of C.R.C.P. 57 and C.R.C.P. 106 are not available. Exceptions to this rule exist, however, if the remedies within the administrative agency’s jurisdiction are inadequate, or if matters in controversy consist of questions of law rather than issues committed to administrative discretion and expertise. *Purcell v. Colorado Div. of Gaming*, 919 P.2d 905, 907 (Colo. App. 1996).

Any final action of the commission concerning a complaint shall be subject to judicial review by the district court for the city and county of Denver. C.R.S. § 24-18.5-101(9).

The intent of the Open Meetings Law (C.R.S. § 24-6-401) is to afford public access to a broad range of meetings at which public business is considered. *Benson v. McCormick*, 578 P.2d 651 (Colo. 1978). For a party to have standing to sue under the Open Meetings Law, he or she must have suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions. *Pueblo School Dist. No. 60 v. Colorado High School Activities Ass'n*, 30 P.3d 752, 753 (Colo. App. 2000).

III. Conclusions of Law

The Court finds the provisions of C.R.S. § 24-4-106 provide Plaintiff with a plain, speedy and adequate remedy. Accordingly, review pursuant to C.R.C.P. 106 and claims under C.R.C.P. 57 are unavailable. The Court finds Plaintiff's First, Second, Third and Fourth claims are plead sufficiently to withstand C.R.C.P. 12(b) analysis.

Plaintiff's Fifth Claim for Relief is a recognized statutory matter for judicial review and withstands dismissal pursuant to C.R.C.P. 12(b). Obviously, the nature and scope of such review is unclear given the statutory language of C.R.S. § 24-18.5-101(9). Without more, the Court is inclined to undertake such review in accordance with C.R.S. § 24-4-106.

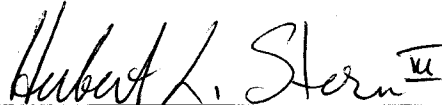
In his Sixth Claim for Relief, Plaintiff alleges the Commission violated the Open Meetings Law by preventing a portion of one of his hearings to be open to the public for a brief time because the building closed at 5:00 PM. The Court finds Plaintiff did not plead sufficient facts to withstand C.R.C.P. 12(b) analysis because he does not allege any injury in fact or any constitutional infringement so as to establish standing pursuant to the Colorado Court of Appeals decision in *Pueblo*.

Accordingly, Defendants' Motion to Dismiss is GRANTED and DENIED as set forth:

1. Plaintiff's First and Second Claims for Relief are DISMISSED WITH PREJUDICE with respect to claims for judicial review pursuant to C.R.C.P. 106. Plaintiff's First and Second Claims for Relief pursuant to C.R.S. § 24-4-106 remain.
2. Plaintiff's Third and Fourth Claims for Relief, to the extent they are made under C.R.C.P. 57, are DISMISSED WITH PREJUDICE. Plaintiff's Third and Fourth Claims for Relief pursuant to C.R.S. § 24-4-106 remain.
3. Plaintiff's Fifth Claim for Relief remains.
4. Plaintiff's Sixth Claim for Relief is DISMISSED WITH PREJUDICE.
5. Each party to pay own fees and costs.

DATED this 26th day of September 2013

BY THE COURT:



Herbert L. Stern, III
District Court Judge

CC: Counsel of Record by e-filing