

<p>DISTRICT COURT CITY AND COUNTY OF DENVER, COLORADO City and County Building 1437 Bannock Street, Rm. 256 Denver, CO 80202</p> <hr/> <p>SCOTT E. GESSLER, in his official capacity as Secretary of State for the State of Colorado, and SUZANNE STAIERT, in her official capacity as Deputy Secretary of State for the State of Colorado,</p> <p>Plaintiffs,</p> <p>v.</p> <p>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,</p> <p>Defendants.</p>	<p>DATE FILED: April 3, 2013 1:13 PM FILING ID: D2EB0A97</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>JOHN W. SUTHERS, Attorney General LEEANN MORRILL, First Assistant Attorney General* 1300 Broadway, 6th Floor Denver, CO 80203 Telephone: (720) 508-6159 FAX: (720) 508-6041 E-Mail: leeann.morrill@state.co.us Registration Number: 38742 *Counsel of Record</p>	<p>Case No.:</p> <p>Div.:</p>
<p>C.R.C.P. 106(a)(2) COMPLAINT</p>	

Plaintiffs Scott E. Gessler, in his official capacity as Secretary of State for the State of Colorado (“the Secretary”), and Suzanne Staiert, in her official capacity as Deputy Secretary of State for the State of Colorado (“the Deputy Secretary”), by and through undersigned counsel, hereby submit the following C.R.C.P. (“Rule”) 106(a)(2) Complaint.

INTRODUCTION

1. Under Colorado law, the Colorado Independent Ethics Commission (“the Commission” or “IEC”) must prepare and render advisory opinions “as soon as practicable” after receipt of a request by a public official or government employee. C.R.S. § 24-18.5-101(4)(b)(II).

Collectively, plaintiffs have requested three advisory opinions to date, but the Commission has failed and willfully refused to respond to their requests despite the feasibility of doing so. Accordingly, the Secretary and the Deputy Secretary bring this mandamus action to compel the Commission to fulfill its legal duty to prepare and render advisory opinions.

PARTIES, JURISDICTION, AND VENUE

2. Plaintiff Scott E. Gessler is a resident of the State of Colorado and currently holds the elected office of Secretary of State for the State of Colorado.

3. Plaintiff Suzanne Staiert is a resident of the State of Colorado and currently holds the appointed office of Deputy Secretary of State for the State of Colorado.

4. Defendants Dan Grossman, Sally H. Hopper, Bill Pinkham, Matt Smith, and Rosemary Marshall are residents of the State of Colorado and are members of the Commission. This action is brought against these Defendants in their official capacity as members of the Commission.

5. The Commission is an inferior tribunal and government body of limited jurisdiction arising under Colo. Const. Art. XXIX §5(1) and C.R.S. § 24-18.5-101.

6. This Court has jurisdiction over this action under Colo. Const. Art. VI, §9(1) and Rule 106(a)(2).

7. Venue is proper in this Court under Rule 98(b)(2) and Rule 106(a)(2).

FACTUAL ALLEGATIONS

8. Under Colo. Const. Art. XXIX §5(1), one of the express purposes of the Commission is to “issue advisory opinions...on ethics issues arising under this article and under any other standards of conduct and reporting requirements as provided by law.”

9. With respect to the submission of advisory opinion requests and the rendering of such opinions, Colo. Const. Art. XXIX §5(5) states:

Any public officer...or government employee may submit a written request to the [IEC] for an advisory opinion on whether any conduct by that person would constitute a violation of this article, or any other standards of conduct or reporting requirements as provided by the law. The commission shall render an advisory opinion pursuant to written rules adopted by the commission.

10. Article 18.5 of Title 24 of the Colorado Revised Statutes contains the enabling statute for the Commission. The statutory provision that governs the issuance of advisory

opinions mandates that the Commission “prepare a response to a request for an advisory opinion from a public officer...or government employee as to whether particular action by such officer...or employee satisfies the requirements of article XXIX *as soon as practicable after the request is made to the commission.*” § 24-18.5-101(4)(b)(II), C.R.S. (2012) (emphasis added).

11. The Commission promulgated rules to govern its duty to respond to requests for advisory opinions, one of which requires the Commission to respond “as soon as practicable after receipt of a completed request for advisory opinion[.]” 8 C.C.R. 1510-1, §5(J).

12. The Commission’s rules also provide that “[a]ll requests for [an] advisory opinion ...should be filed with the IEC at least 10 days prior to the next scheduled meeting of the IEC.” 8 C.C.R. 1510-1, §5(C)(2).

13. The Commission’s rules further provide that “[a] request for an advisory opinion...is complete when the IEC has determined that no additional information is necessary to issue the advisory opinion[.]” 8 C.C.R. 1510-1, §5(E).

14. Upon information and belief, during the past five years the Commission has consistently prepared and rendered an advisory opinion no more than thirty to forty-five days after receiving a request.

15. As explained on the Commission’s own website, an advisory opinion “may provide the requestor a ‘safe haven’ should the conduct be questioned at a later time[.]” *See* Exhibit 1.

16. On January 2, 2013, acting through the Deputy Secretary, the Secretary submitted a request for an advisory opinion to the Commission regarding the propriety of establishing a legal defense fund for public officials (“the Defense Fund Request”). *See* Exhibit 2.

17. Under C.R.S. 24-21-105, the Secretary “may appoint a deputy to act for him if he deems it necessary, who shall have full authority to act in all things relating to the office. The secretary shall be responsible for all acts of such deputy.”

18. Since the Defense Fund Request was submitted, the Commission has met five times on the following dates: January 7, 2013, January 23, 2013, February 4, 2013, February 15, 2013, and March 4, 2013.

19. The Commission listed the Defense Fund Request on its agenda for the last five meetings. *See* Exhibit 3.

20. Despite the feasibility of acting on the Defense Fund Request at least five times since its submission, and at least four times since the requirement of 8 C.C.R. 1510-1, §5(C)(2)

was satisfied, the Commission has failed to prepare and render a response to the Defense Fund Request.

21. The Commission has not informed the Secretary or the Deputy Secretary that any additional information is necessary to prepare and render an advisory opinion in response to the Defense Fund Request.

22. In accordance with 8 C.C.R. 1510-1, §5(E), the Defense Fund Request is “complete.”

23. As of the date of this Complaint, the Secretary’s Defense Fund Request has been pending for ninety-one days without a response from the Commission.

24. By failing to prepare and render an advisory opinion “as soon as practicable,” the Commission has violated the Secretary’s constitutional and statutory rights, as a public officer, to obtain an advisory opinion in response to the Defense Fund Request.

25. By failing to prepare and render an advisory opinion “as soon as practicable” in response to the Defense Fund Request, the Commission has created and perpetuated uncertainty for the Secretary. If he proceeds to establish a legal defense fund without first obtaining the Commission’s guidance, then he will subject himself to the likelihood of an ethics complaint for which he may be held personally liable. Therefore, the uncertainty has caused the Secretary to forego establishing a legal defense fund and to personally incur costs for the same type of legal services contemplated by the Defense Fund Request.

26. The Commission’s failure to act has deprived the Secretary of the “safe haven” afforded by Colo. Const. Art. XXIX and C.R.S. § 24-18.5-101, and subjected him to the dilemma of having to either wait indefinitely for an advisory opinion, or proceed with establishing a legal defense fund without the benefit of the Commission’s guidance – an action for which he may later be held personally liable if an ethics complaint is filed.

27. The Secretary has been further damaged by the Commission’s failure to prepare and render an advisory opinion “as soon as practicable” in response to the Defense Fund Request as a result of having to incur costs and attorney fees to bring this action under Rule 106(a)(2).

28. On January 22, 2013, the Deputy Secretary submitted a request to the Commission for an advisory opinion regarding reimbursement for travel and educational seminars anticipated by covered members of the Colorado Department of State (“the Travel Request”). *See* Exhibit 4.

29. Since the Travel Request was submitted, the Commission has met four times on the following dates: January 23, 2013, February 4, 2013, February 15, 2013, and March 4, 2013.

30. The Commission listed the Travel Request on its agenda for the following meeting dates: February 4, 2013 and March 4, 2013. *See* Exhibit 3.

31. Despite the feasibility of acting on the Travel Request at least four times since its submission, and at least three times since the requirement of 8 C.C.R. 1510-1, §5(C)(2) was satisfied, the Commission has failed to prepare and render a response to the Travel Request.

32. The Commission has not informed the Deputy Secretary that any additional information is necessary to prepare and render an advisory opinion in response to the Travel Request.

33. In accordance with 8 C.C.R. 1510-1, §5(E), the Travel Request is “complete.”

34. As of the date of this Complaint, the Deputy Secretary’s Travel Request has been pending for seventy-one days without a response from the Commission.

35. On February 15, 2013, the Deputy Secretary submitted a request to the Commission for an advisory opinion regarding reimbursement for travel and related expenses incurred by her in the performance of her official duties (“the Mileage Request”). *See* Exhibit 5.

36. Since the Mileage Request was submitted, the Commission has met two times on the following dates: February 15, 2013 and March 4, 2013.

37. The Commission listed the Mileage Request on its agenda for the March 4, 2013 meeting. *See* Exhibit 3.

38. Despite the feasibility of acting on the Mileage Request at least once after its submission and the requirement of 8 C.C.R. 1510-1, §5(C)(2) was satisfied, the Commission has failed to prepare and render a response to the Mileage Request.

39. The Commission has not informed the Deputy Secretary that any additional information is necessary to prepare and render an advisory opinion in response to the Mileage Request.

40. In accordance with 8 C.C.R. 1510-1, §5(E), the Mileage Request is “complete.”

41. As of the date of this Complaint, the Deputy Secretary’s Mileage Request has been pending for forty-seven days without a response from the Commission.

42. By failing to prepare and render advisory opinions “as soon as practicable,” the Commission has violated the Deputy Secretary’s constitutional and statutory rights, as a government employee, to obtain advisory opinions in response to the Travel and Mileage Requests.

43. By failing to prepare and render an advisory opinion “as soon as practicable” in response to the Travel Request, the Commission has created and perpetuated uncertainty for the Deputy Secretary. If she proceeds to authorize Colorado Department of State employees to travel to and attend certain educational seminars without first obtaining the Commission’s guidance, then she will subject herself and the Department’s employees to the likelihood of ethics complaints for which they may be held personally liable. Therefore, the uncertainty has caused the Deputy Secretary to forego authorizing employee travel to and attendance at certain educational seminars.

44. By failing to prepare and render an advisory opinion “as soon as practicable” in response to the Mileage Request, the Commission has created and perpetuated uncertainty for the Deputy Secretary. If she proceeds to authorize the Colorado Department of State to reimburse her for travel and related expenses without first obtaining the Commission’s guidance, then she will subject herself to the likelihood of an ethics complaint for which she may be held personally liable. Therefore, the uncertainty has caused the Deputy Secretary to forego authorizing reimbursement and to personally bear the costs for travel and related expenses incurred by her in the performance of her official duties.

45. By failing to prepare and render an advisory opinion “as soon as practicable” in response to the Mileage Request, the Commission has foreclosed the Deputy Secretary’s ability to obtain reimbursement for certain travel costs and related expenses incurred by her in the performance of her official duties.

46. The Commission’s failure to act has deprived the Secretary of the “safe haven” afforded by Colo. Const. Art. XXIX and C.R.S. § 24-18.5-101, and subjected her to the dilemma of having to either wait indefinitely for advisory opinions, or proceed with authorizing employee travel to and attendance at educational seminars and reimbursement for travel and mileage expenses without the benefit of the Commission’s guidance – actions for which she may later be held personally liable if ethics complaints are filed.

47. The Deputy Secretary has been further damaged by the Commission’s failure to prepare and render advisory opinions “as soon as practicable” in response to the Travel and Mileage Requests as a result of having to incur costs and attorney fees to bring this action under Rule 106(a)(2).

48. On January 30, 2013, the Secretary filed a complaint under Rule 106(a)(4) against the Commission alleging that it has exceeded the jurisdiction granted to it under Colo. Const. Art. XXIX and C.R.S. § 24-18.5-101. *See Gessler v. Grossman, et al.*, Denver District Court Case No. 13CV030421, (Stern, J., presiding) (“*Gessler I*”).

49. At the Commission’s most recent meeting on March 4, 2013, the Commission considered the Defense Fund, Travel, and Mileage Requests. *See Exhibit 3.*

50. During the March 4, 2103 meeting, the Commission also entered executive session to receive legal advice on matters related to *Gessler I*. See Exhibit 3.

51. After the executive session concluded, the Commission discussed the outstanding advisory opinion requests and Commission Chair Grossman stated: “So Ms. Staiert, you have convinced me now, but this is so inextricably linked with any litigation, I don’t see a way to answer all of your questions without impacting the pending litigation. And so I would be reluctant to support any effort by the commission to address all of the issues.”

52. Consistent with the Commission Chair’s statements, the Commission has failed to prepare and render advisory opinions in response to the Defense Fund, Travel, and Mileage Requests.

53. The Commission has willfully refused, and will continue to refuse, to prepare and render advisory opinions in response to the three requests until the pending litigation in *Gessler I* has concluded.

54. The Commission’s willful refusal to act has deprived the Secretary and the Deputy Secretary of the “safe haven” afforded by Colo. Const. Art. XXIX and C.R.S. § 24-18.5-101, and subjected them to the dilemma of having to either wait indefinitely for advisory opinions, or proceed with establishing a legal defense fund, authorizing employee travel to and attendance at educational seminars, and authorizing reimbursement for travel and mileage expenses without the benefit of the Commission’s guidance – actions for which they may later be held personally liable if ethics complaints are filed.

55. There is no other remedy available to the Secretary and the Deputy Secretary to compel the Commission’s performance of the acts required of it by law.

CLAIM FOR RELIEF
[Mandamus under C.R.C.P. 106(a)(2)]

56. The Secretary and the Deputy Secretary hereby incorporate the allegations contained in paragraphs 1 through 55 above as if recited herein.

57. Rule 106(a)(2) authorizes this Court to grant mandamus relief when a governmental body charged with performing an official duty fails or refuses to act.

58. The Secretary has constitutional and statutory rights, as a public officer, to obtain an advisory opinion on whether his conduct would constitute a violation of Colo. Const. Art. XXIX, any other standards of conduct, or reporting requirements as provided by the law.

59. The Deputy Secretary has constitutional and statutory rights, as a government employee, to obtain an advisory opinion on whether her conduct would constitute a violation of

Colo. Const. Art. XXIX, any other standards of conduct, or reporting requirements as provided by the law.

60. Colorado law imposes a clear duty on the Commission and its members to prepare and render an advisory opinion “as soon as practicable” after a request is submitted.

61. The Secretary requested an advisory opinion from the Commission on January 2, 2013, and the Deputy Secretary requested advisory opinions from the Commission on January 22, 2013 and February 15, 2013.

62. The Commission and its members have failed and willfully refused to act on all three advisory opinion requests despite the feasibility of acting.

63. There is no other remedy available to the Secretary and the Deputy Secretary.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Scott E. Gessler and Suzanne Staiert respectfully request that this Court grant the following relief:

- A. Enter an Order, in accordance with C.R.C.P. 106(a)(2), compelling the Commission and its members to prepare and render advisory opinions in response to the Defense Fund Request, the Travel Request, and the Mileage Request without further delay; and
- B. Grant such other and further relief as this Court deems just and proper.

DATED: April 3, 2013.

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Pursuant to C.R.C.P. 121, § 1-26(9), the original of this document with original signatures is maintained in the offices of the Colorado Attorney General, 1300 Broadway, Denver, CO 80203, and will be made available for inspection by other parties or the Court upon request.