

DISTRICT COURT, CITY & COUNTY OF DENVER,  
STATE OF COLORADO

Court Address: 1437 Bannock St.  
Denver, Colorado 80202

**Plaintiffs:**

**Center for Independent Media**, a District of  
Columbia nonprofit corporation doing business as *The  
Colorado Independent*; and,

**Wendy Norris**, a citizen of Colorado,

v.

**Defendants:**

**Independent Ethics Commission of the State of  
Colorado**, a constitutionally enacted state commission  
and body politic; and,

**Jane T. Feldman**, in her official capacity as executive  
director of the Independent Ethics Commission of the  
State of Colorado.

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Case No.: \_\_\_\_\_

Courtroom: \_\_\_\_\_

**COMPLAINT  
and APPLICATIONS FOR ORDER TO SHOW CAUSE  
and ORDER OF *IN CAMERA* REVIEW**

Plaintiffs Center for Independent Media, doing business as *The Colorado Independent*, and Wendy Norris (collectively here, “Plaintiffs”), through their undersigned attorneys at Levine Sullivan Koch & Schulz, L.L.P., for their Complaint against Defendants Independent Ethics Commission of the State of Colorado and Jane T. Feldman (collectively here, “the Commission”), allege as follows:

### **Introduction**

This action seeks injunctive relief to remedy an ongoing pattern of illegal closed-door meetings by the Commission in violation of the Colorado Open Meetings Law (“COML”), §§ 24-6-401, *et seq.*, C.R.S., and in so doing, to provide transparency and accountability to the very body created by the voters of Colorado as the guarantor of transparency and accountability in government.

This action arises under the procedures and doctrines dictated by the COML and the Colorado Open Records Act (“CORA”), §§ 24-72-201, *et seq.*, C.R.S. In particular, based on long-standing precedents establishing that a failure to strictly comply with the requirements of the COML will strip any privilege of confidentiality from the records of an illegally closed meeting of a public body, Plaintiffs seek an order here declaring that the records of past closed-door meetings must be made available to the Plaintiffs and the public as public records. In this regard, the Commission’s failures to strictly comply with the COML’s procedures mean that the closed-door meetings at issue in this action do not qualify, by definition, as “executive sessions,” and they therefore are not entitled to any of the confidentiality protections available for “executive sessions.”

Separately, and alternatively, to the extent the Court determines that the at-issue records are not on their face stripped of all confidentiality protections by virtue of the Commission’s procedural violations of the COML, the Plaintiffs also seek an order requiring the Commission to produce to the Court for *in camera* review any as-yet unproduced electronic recordings and/or written minutes of the purported “executive sessions” conducted by the Commission in 2009. Pursuant to the CORA, the Court should then review those recordings and/or minutes and determine whether they reveal improper adoption by Commission members of a proposed position or otherwise include substantial discussion of non-exempt topics. Plaintiffs submit that there is more than sufficient grounds to reasonably believe that during these closed-door meetings the Commission “adopted” any number of “proposed positions” in secret and merely “rubber-stamped” those already-adopted positions when the Commission subsequently met in public, voting unanimously and without discussion on the matters before it. In addition, there is also sufficient grounds to reasonably believe that during these closed-door meetings, the Commission conducted substantial discussions of non-exempt topics

by deliberating behind closed-doors – deliberations not being one of the enumerated topics for which an executive session is permitted.

With respect to the certain closed-door meetings for which there is no electronic recording of any kind, Plaintiffs seek a declaratory judgment finding that this failure to record the closed-door meeting itself was a violation of the COML because the unrecorded discussions were not an attorney-client communication, but rather constituted the Commission’s actual deliberations. As a result, for such improper failures to record the closed-door meetings, the Commission should be required to produce any notes, memoranda, email, or any other materials that would reveal or relate to the content of the improperly recorded closed-door discussions.

Plaintiffs also seek prospective injunctive relief barring the Commission from continuing its pattern of illegal closed-door meetings. Such injunctive relief should ensure that in the future the public is given the statutorily required full and complete notice of the particular matters the Commission intends to discuss behind closed doors.

Finally, Plaintiffs seek their reasonable attorney’s fees and costs, as are mandated by both the COML and the CORA.

### **Parties**

1. Plaintiff Center for Independent Media is a District of Columbia corporation registered as a charitable, tax-exempt entity under 26 U.S.C. § 501(c)(3), doing business as *The Colorado Independent* news website, with its principal place of business at 1825 Connecticut Avenue, N.W., Suite 625, Washington, D.C., 20009.

2. *The Colorado Independent* publishes news and information of interest to the people of Colorado at its website <[www.coloradoindependent.com](http://www.coloradoindependent.com)>. It has covered the meetings and business of the Commission since the Commission’s founding. If the Commission’s purported “executive sessions” had not been improperly closed, *The Colorado Independent* would have attended and reported on those proceedings.

3. Plaintiff Wendy Norris is a citizen of the state of Colorado, and she is employed by the Center for Independent Media as the state editor of *The Colorado Independent*. Ms. Norris supervises and directs the website’s coverage of the Commission. Ms. Norris supervised and approved the CORA access requests that are at issue in this action.

4. Defendant Independent Ethics Commission is a body politic created by Article XXIX of the Colorado Constitution, and the facilitating legislation, § 24-18.5-101(2)(a), C.R.S., enacted by the General Assembly following voter approval of Article XXIX.

5. The Commission is a “state public body” under the COML, as that term is defined in § 24-6-402(d), C.R.S., and it is therefore subject to the COML.

6. Defendant Jane T. Feldman is, and has been throughout the relevant time-period, the executive director of the Commission. She is sued here solely in her official capacity, including her capacity as the “official custodian,” as that term is defined in § 24-72-202(2), C.R.S., of the records at issue in this action. Ms. Feldman is the author of the Commission’s denials of the CORA requests at issue here.

### **Jurisdiction and Venue**

7. This Court has jurisdiction over the claims asserted herein under Article VI, section 9(1) of the Colorado Constitution, and under §§ 24-72-204(5) and -204(5.5), C.R.S. of the CORA, and under § 24-6-402(9), C.R.S., of the COML.

8. With respect to the jurisdictional requirement for providing notice of an intent to sue under Section 204(5) of the CORA, Plaintiffs provided a prior draft copy of this Complaint to Ms. Feldman and counsel for the Commission, by email delivery, on May 17, 2009. A true and correct copy of that notice letter is attached hereto as **Exhibit A**.

9. Venue for this civil action is proper in this District under Rules 98(b)(2) and (c)(1) of the Colorado Rules of Civil Procedure and under §§ 24-72-204(5) and -204(5.5), C.R.S. of the CORA.

### **Applicable Statutory Provisions**

10. This case is controlled by provisions of the COML and the CORA.

#### **A. Colorado Open Meetings Law:**

11. Under the COML, as a “state public body,” the Commission’s meetings are subject to requirements of advance notice and public access. *See* §§ 24-6-402(1)(d), (2)(a), and (2)(c), C.R.S.

12. The “underlying intent” of the COML is to ensure that the public is not “deprived of the discussions, the motivations, the policy arguments and other considerations which led to the discretion exercised by the [public body].” *Van Alstyne v. Housing Auth.*, 985 P.2d 97, 101 (Colo. App. 1998).

13. Indeed, the Colorado Court of Appeals has made clear that the purpose of the COML is to allow the public to see their government officials’ decision-making

processes at work, on full display, regardless of whatever hesitations, foibles, or idiosyncrasies such public deliberations may reveal:

The purpose of the OML, as declared in § 24-6-401, C.R.S. 2006, is to afford the public access to a broad range of meetings at which public business is considered; to give citizens an expanded opportunity to become fully informed on issues of public importance, and to allow citizens to participate in the legislative decision-making process that affects their personal interests.

*Walsenburg Sand & Gravel Co. v. City Council*, 160 P.3d 297, 299 (Colo. App. 2007) (citation omitted).

14. The fact that a public body is “quasi-judicial” and thus engages in collective deliberations on adjudicatory matters does **not** exempt the body from any of the otherwise applicable provisions of the COML, nor does it allow the public body to shroud its deliberations in secrecy. *See Lanes v. State Auditor’s Office*, 797 P.2d 764, 766 (Colo. App. 1990) (“[T]he fact that the Board was acting in a quasi-judicial capacity did not negate its obligation to comply with the Open Meetings Law.”); *see also Colonial Bank v. Colo. Fin. Servs. Bd.*, 961 P.2d 579, 587-88 (Colo. App. 1998) (“[A]s required by the COML, Board members deliberated in public prior to voting.”); *Gilpin Cty. Bd. of Equalization v. Russell*, 941 P.2d 257, 264 n.13 (Colo. 1997) (noting that the COML applies to public bodies acting in quasi-judicial capacity).

15. Under the COML, all exemptions from the default rule that a public body’s meetings must be open to the public must be narrowly construed, ensuring as much public access as possible. *See Gumina v. City of Sterling*, 119 P.3d 527, 530 (Colo. App. 2004) (“In our view, this rule [of a presumption in favor of public access] applies with equal force to the executive session exception carved out in the Open Meetings Law.”); *Zubeck v. El Paso County Ret. Plan*, 961 P.2d 597, 600 (Colo. App. 1998) (construing both the COML and the CORA in harmony and requiring narrow construction of any exemption limiting public access); *see also Cole v. State*, 673 P.2d 345, 349 (Colo. 1983) (“As a rule, [the Open Meetings Law] should be interpreted most favorably to protect the ultimate beneficiary, the public.”).

16. Under the COML, a public body may conduct an “executive session,” *i.e.*, a closed-door meeting, **only** if the body “strictly complies” with the procedural requirements for announcing and conducting such closed meetings, which include limiting its discussion during such meetings to the narrow topics permitted by the statute and taking no action or adoption of any position during the closed meeting. *See* § 24-6-402(3), C.R.S.; *see also Gumina v. City of Sterling*, 119 P.3d 527, 532 (Colo. App. 2004); *WorldWest LLC v. Steamboat Springs Sch. Dist. RE-2 Bd. of Educ.*, Case No. 07-CA-1104, 37 Media L. Rep. 1663, 1668-69 (Colo. App. Mar. 26, 2009) (copy attached hereto in Appendix of Additional Case Authority).

17. Under the COML, the procedural requirements for conducting a closed meeting include the following:

- An executive session may only be convened during the midst of a public meeting, where such public meeting has received the otherwise required 24-hour advance written notice, including notice of the possibility that the public meeting may include an executive session discussion;
- The state public body must announce in public, at the public meeting, the topic of any executive session discussion in advance of closing the meeting;
- The state public body’s announcement of the topic of the executive session discussion must include a specific citation to the particular provision of the COML that permits that particular topic to be discussed behind closed doors;
- The state public body’s announcement of the planned closed-door discussion must also identify, in addition to the topic, “the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized”;
- The state public body must approve a motion to go into executive session to discuss the announced topics by a vote of two-thirds of the quorum present; and,
- The state public body must make an electronic recording of the executive session unless the attorney representing the state public body attests that the unrecorded portion of the executive session constitutes a privileged attorney-client communication.

*See* §§ 24-6-402(3)(a), -402(2)(d.5)(I)(A) and -402(d.5)(I)(B), C.R.S.

18. In addition to these procedural requirements, a state public body may not adopt “any proposed policy, position, resolution, rule, regulation or formal action” during a closed meeting, other than the approval of minutes of a prior closed meeting. *See* § 24-6-402(3)(a), C.R.S.

19. The Colorado Supreme Court has held that the prohibition against the closed-door adoption of a proposed position includes a ban on informal decision-making, even when the informal closed-door decision is subsequently approved in a public vote.

See *Hanover Sch. Dist. No. 28 v. Barbour*, 171 P.3d 223, 228 (Colo. 2007); see also *Van Alstyne*, 985 P.2d at 101 (“[A] public body’s meeting is not in compliance with the Open Meetings Law if it is held merely to ‘rubber stamp’ previously decided issues.”); cf. *Bagby v. School Dist. No. 1*, 186 Colo. 428, 434, 528 P.2d 1299, 1302 (Colo. 1974) (same, under prior version of statute).

20. Under the COML, the burden is on the public body that conducted an executive session to demonstrate that the closed meeting was proper. Cf. *Zubeck v. El Paso County Retirement Plan*, 961 P.2d 597, 600 (Colo. App. 1998).

21. The COML provides a narrow exemption authorizing executive session discussions for “matters required to be kept confidential by federal law or rules, state statutes, or in accordance with the requirements of any joint rule of the senate and the house of representatives pertaining to lobbying practices.” § 24-6-402(3)(a)(III), C.R.S.

22. With respect to the Commission’s purported “executive session” meetings at issue in this action, the Commission regularly cited the exemption for “matters required to be kept confidential,” and then cited the following “state statutes” as the grounds for requiring the matter to be kept confidential: (a) the testimonial privilege for attorney-client communications in § 13-90-107(10)(b), C.R.S., (b) Article XXIX of the Colorado Constitution, and (c) its facilitating legislation in § 24-18.5-101, C.R.S. These provisions pertain to the following:

a The Colorado testimonial privilege for attorney-client communications codified in § 13-90-107(1)(b), C.R.S., provides as follows: “An attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment.” On its face, this provision is irrelevant to the COML exemption in § 24-6-402(3)(a)(III), C.R.S., because it does not create an independent duty for a public body to maintain a matter as confidential.

b. As for Article XXIX of the Colorado Constitution, only a portion of Section 5 of the Article relates in any way to a confidentiality obligation. This provision requires the Commission to maintain as confidential any complaint that it dismisses as frivolous: “The commission may dismiss frivolous complaints without conduct a public hearing. Complaints dismissed as frivolous shall be maintained confidential by the commission.” Colo. Const., Art. XXIX, § 5, cl. (3)(b). This constitutional provision does not require confidentiality for non-frivolous complaints, or any of the other activities of the Commission. This District Court has already concluded in a separate case that records related to non-frivolous complaints, as well as records related to requests for advisory opinions and letter rulings, are all public records subject to disclosure. See *Colo. Ethics Watch v. Colorado Independent Ethics Comm’n*, No. 2008-cv-7995, slip op. at 5, ¶ 6 (“Findings of Fact, Conclusions of Law, Order and Judgment”) (Colo. Dist.

Ct. – Denver May 14, 2009) (“In other words, the constitutional scheme contemplates that only frivolous complaints will be kept confidential.”) (copy attached hereto in the Appendix of Additional Case Authority).

c. Finally, the facilitating legislation in § 24-18.5-101, C.R.S., provides that with respect to the specific category of “letter rulings,” the Commission must redact the name or identifying information of the person requesting a letter ruling from its public decision on the request. *See* § 24-18.5-101(4)(b)(III), C.R.S. This provision, however, does not require the Commission to maintain the entirety of the request for a letter ruling as confidential.

23. The COML provides a separate exemption for “attorney conferences,” but this exemption was not cited by the Commission as the basis for any of the closed-door meetings at issue in this action.

24. The COML’s exemption for “attorney conferences” for state public bodies such as the Commission is dramatically narrow, applying only to conferences “concerning disputes involving the public body that are the subject of pending or imminent court action.” § 24-6-402(3)(a)(II), C.R.S. Thus, this provision is inapplicable to matters that are not the subject of “pending or imminent court action,” and is also inapplicable to deliberations between the members of a state public body, as opposed to consultations with the body’s attorney. *See id.* In this regard, a state public body may not use the “mere presence or participation” of the body’s attorney at a closed-door meeting as the basis for excluding the public from observing the discussion. *See id.*

25. Under the COML, a public body may not deny public access to an audio or electronic recording, or minutes, of a closed-door discussion where the public body failed to comply with the announcement and other procedural requirements of the statute; such records are necessarily public records under the CORA and are subject to public access. *See Gumina*, 119 P.3d at 532; *WorldWest*, 37 Media L. Rep. at 1668-69 (attached in accompanying Appendix).

26. Regardless of the sufficiency of a public body’s topic announcement and compliance with other procedural requirements for conducting an executive session, a public body is also prohibited by the COML from adopting “any proposed policy, position, resolution, rule regulation, or formal action” in the course of an executive session. § 24-6-402(3)(a), C.R.S.; *see also WorldWest*, 37 Media L. Rep. at 1671 (concluding that a school board violated the COML by “adopting a position in a closed session”) (Carparelli, J., specially concurring) (copy attached in accompanying Appendix). Nor may a public body conduct a public vote in an open meeting that merely “rubber stamps” a decision or adoption of a position that was made in an earlier executive session. *See Van Alstyne*, 985 P.2d at 101.

27. Under the COML, actions that are taken improperly in an executive session are void and of no legal effect. *See* § 24-6-402(8), C.R.S.; *see also Van Alstyne*, 985 P.2d at 101 (“[A]ny such actions taken at any meeting that is held in contravention of the Open Meetings Law cease to exist or to have any effect.”).

28. Finally, in any suit in which the Court finds a violation of the COML, the Court must – without discretion – award the reasonable attorney’s fees of the citizen who sought the finding of a violation of the statute. *See* § 24-6-402(9), C.R.S.; *see also Van Alstyne*, 985 P.2d at 99-100 (finding reversible error in the failure to award attorney’s fees to a citizen who prevailed in establishing a violation of the COML because “the trial court overlooked the General Assembly’s establishment of *mandatory* consequences for a violation of the statute”) (emphasis added).

B. The Colorado Open Records Act:

29. Under the COML, the audio or electronic recording of a properly convened executive session meeting generally is exempt from disclosure under the CORA and is not otherwise subject to compelled disclosure (although the public body may waive such confidentiality at its discretion). *See* § 24-6-402(2)(d.5)(I)(D), C.R.S. As noted above, however, this confidentiality does not apply if the public body fails to “strictly comply” with the procedural requirements of the COML. *See Gumina*, 119 P.3d at 532.

30. Any person who, in response to a request to inspect a public record under the CORA, is denied such access may file an application in the District Court for an Order to Show Cause why inspection should not be allowed, directed to the custodian of the requested record, with consideration of the application for a show cause order to be set “at the earliest practical time.” § 24-72-204(5), C.R.S.

31. The burden for establishing that a requested record is a “public record” under the CORA falls upon the requester. *See Denver Publ’g Co. v. Bd. of County Comm’rs*, 121 P.3d 190, 199 (Colo. 2005).

32. Under the CORA, a “public record” is any writing that is “made, maintained, or kept by the state, any agency . . . or political subdivision of the state . . . for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.” § 24-72-202(6)(a)(I).

33. As noted above, the Commission is required by state law, *i.e.*, the COML, to electronically record its executive sessions. *See* § 24-6-402(2)(d.5)(I)(A). As a result, the Commission’s recordings and minutes of its executive sessions otherwise meet the statutory definition of “public records” under the CORA.

34. In a CORA show cause proceeding, once the requester establishes a *prima facie* basis for concluding that the requested record is a “public record” under CORA, the burden shifts to the custodian of the record to demonstrate why the refusal to provide access to the requested record is not “improper.” *See Denver Publ’g*, 121 P.3d at 199.

35. Under the CORA, a custodian is required to provide access to a public access to a public record unless “[s]uch inspection would be contrary to any state statute” or is otherwise exempted from disclosure by one of the narrow exemptions in Section 204(3)(a) of the CORA. *See* § 24-72-204(1)(a), C.R.S.

36. In its denial of the Plaintiffs’ records requests, the Commission cited only one basis for withholding access to the requested records of the Commission’s closed-door meetings during 2009, that is: § 24-6-402(2)(d.5)(I)(D), C.R.S. This citation refers to the COML’s provision establishing a general principle of confidentiality for recordings of executive session. No other basis has ever been given by the Commission.

C. The CORA’s Provisions for *In Camera* Review of Executive Session Recordings:

37. The COML’s provision for confidentiality of executive session recordings contains an exclusion from that confidentiality arising from the cross-referenced provisions in the CORA for *in camera* review by a District Court. *See* § 24-6-402(2)(d.5)(I)(D), C.R.S.

38. In these cross-referenced statutory provisions, the CORA establishes a procedure and basis by which a Court may revoke the confidentiality for an executive session recording following an *in camera* review. *See* § 24-72-204(5.5), C.R.S.; *see also* § 24-6-402(2)(d.5)(I)(D), C.R.S. In particular, the CORA establishes that the electronic recording of a state public body’s closed meeting will not be protected from disclosure if the District Court reviews the recording and concludes that *either* (a) the state public body “engaged in a substantial discussion of any matter not enumerated in [the list of specific COML exemptions],” *or* (b) the state public body “adopted a proposed policy, position, resolution, rule, regulation, or formal action in contravention” of the requirements of the COML. *See* § 24-72-204(5.5)(b), C.R.S.; *see also* § 24-6-402(2)(d.5)(II)(C), C.R.S.

39. This statutory right to *in camera* review is triggered under the CORA when “any person who seeks access” to the record establishes “grounds sufficient to support a reasonable belief” that during the putative executive session the state public body *either* engaged in a “substantial discussion of any matters not enumerated in section 24-6-402(3)(a) or (4),” *i.e.*, the provisions listing the limited topics for which an executive session may be called, *or* that during the executive session the public body “adopted a proposed policy, position, resolution, rule, regulation, or formal action.” *See* § 24-72-204(5.5)(a), C.R.S.

40. Cases here in Colorado and elsewhere around the country support the proposition that when a controversial matter is voted upon with no debate in public and no explanation at the meeting among the board members as to their reasoning, it is appropriate for a court to infer that the board members actually reached their decision behind closed doors, and that the public vote is a mere “rubber stamp” on the secretly determined course of action. *See Walsenburg Sand & Gravel*, 160 P.3d at 300; *Bagby v. Sch. Dist. No. 1, Denver*, 186 Colo. 428, 434, 528 P.2d 1299, 1302 (1974) (holding that when all discussion of an issue occurs at a pre-meeting session and the vote is therefore merely a perfunctory ratification of a previously made decision, the public is “deprived of the discussions, the motivations, the policy arguments and other considerations which led to the discretion exercised by the Board and influenced the vote announced without discussion at the later public meeting. One has not participated in a public meeting if one witnesses only the final recorded vote.”); *see also, e.g., Grein v. Bd. of Educ.*, 343 N.W.2d 718, 724 (Neb. 1984) (holding that evidence showing that a board voted unanimously, without discussion, on a controversial issue immediately following an executive session on the topic was sufficient to support an inference that the decision was actually reached during the executive session, and not during the public meeting: “The necessary inference is that the vote during the reconvened open session was the extension, culmination, and product of the closed session. To deny that deduction would not be a tax but a surtax on credibility, and naivete to the nth degree.”).

41. Under the CORA, once a requester provides the Court with a showing sufficient to establish a reasonable basis to believe that the executive session provisions of the COML were violated, the Court *must* conduct an *in camera* review of the recording. The Court has no discretion to deny the requested *in camera* review. *See* § 24-72-204(5.5)(b)(I), C.R.S.

42. Upon such an *in camera* review, if the Court concludes that the recording of a public body’s closed meeting shows a violation of the COML, then the Court must allow public inspection of those portions of the record. *See* § 24-72-204(5.5)(b)(II), C.R.S.

43. Also under CORA, to the extent the Court orders the Commission to provide public access to the recordings at issue here, the Court is mandatorily required to award the Plaintiff’s their reasonable attorney’s fees. *See* § 24-72-204(5), C.R.S.

### **General Factual Allegations**

44. The Commission was created by a voter-initiated constitutional amendment in November 2006.

45. The Commission is charged with implementing Article XXIX of the Colorado Constitution, which was known as “Amendment 41” during the November 2006 election.

46. The Commission’s purpose is to give advice and guidance on ethics issues arising under Article XXIX of the Colorado Constitution and under any other standards of conduct or reporting requirements as provided by law, and to hear complaints, issue findings and assess penalties and sanctions where appropriate.

47. The Commission’s members are appointed by the Governor, the Chief Justice of the Colorado Supreme Court, the Senate, the House of Representatives, and the Commission itself.

48. The Commission held its first meeting on December 11, 2007.

49. During 2009, the Commission has thus far met on the following dates:

- January 14, 2009,
- January 23, 2009,
- February 2, 2009,
- February 20, 2009,
- March 6, 2009
- March 18, 2009,
- March 19, 2009,
- March 31, 2009,
- April 6, 2009,
- April 13, 2009,
- April 16, 2009,
- April 21, 2009,
- May 6, 2009, and
- May 19, 2009.

(True and correct copies of the Commission's notices for these meetings are attached hereto as **Exhibit B**. True and correct copies of the all of the public minutes, at least to the extent they have been made available by the Commission, for certain of these meetings are attached hereto as **Exhibit C**.)

50. All but one of the Commission's meetings during 2009 have included a purported "executive session" discussion behind closed doors. The one exception is the Commission's evidentiary hearing on March 6, 2009 on Complaint No. 08-01. (*See Ex. B.*)

51. Each purported "executive session" conducted during 2009 was preceded either by no notice at all or by a notice identifying the topic of the closed-door discussion with some or all of the following language: "Discussion pertaining to requests for advisory opinions and complaints filed with the Commission. C.R.S. §§24-6-402(3)(a)(III); 13-90-107(1)(b); 24-18.5-101; Article XXIX of the Colorado Constitution." (*See Ex. B.*)

52. All but one of the Commission's topic announcements for these purported "executive sessions" failed to identify the case number of the particular advisory opinion letter ruling, or complaint that was the subject of the Commission's discussions at each meeting. The one exception is a notice for a telephonic "executive session" on April 13, 2009, which explicitly identified the ethics complaint against Congressman Mike Coffman – citing it as "Complaint 08-01" – as the topic of the planned meeting (*See Ex. B, at 11.*) This notice demonstrates that the Commission can, and at least once has, provided the case number of a matter it intends to discuss during a purported "executive session."

53. None of the Commission's topic announcements for these purported "executive sessions" identified the underlying content or subject matter of the particular advisory opinion or letter ruling requests or the particular complaints that were the subject of the Commission's discussions at each meeting

54. None of the Commission's topic announcements identified the subject of the non-frivolous complaints that the Commission was discussing.

55. None of the Commission's topic announcements identified the requester of an advisory opinion that the Commission was discussing.

56. None of the Commission's topic announcements provided any amount of information that would allow a member of the public to come forward with relevant information concerning the matter under discussion prior to a decision by the Commission because no member of the public could discern what the Commission was considering and discussing behind closed doors.

57. Despite the fact that the Commission was engaged in substantial litigation during the first half of 2009, none of the Commission's meeting notices indicate the Commission ever intended to receive, or actually did receive, legal advice or otherwise discussed any of the outside litigation in which the Commission was involved.

58. The Commission's minutes for its meetings fail to reflect any votes by the Commission, let alone a vote by two-thirds majority of the quorum present, to discuss the particular topic behind closed doors. On information and belief, Plaintiffs allege that the Commission routinely failed to vote on any proposed executive session topics before going behind closed-doors.

59. At no point during any of the public meetings referenced in this Complaint has there ever been any public discussion by Commission members concerning any of their reasoning or their positions on any of the requests for advisory opinions or letter rulings or the complaints before them.

60. Every public vote on every request for advisory opinion or letter rulings and every public vote on every "complaint" during 2009 was unanimous, without a single dissenting voice.

61. At no point during any public meeting in 2009 has any member of the Commission ever revealed the member's thought-processes or decision-making with respect to any request for "advisory opinion" or "letter ruling" or "complaint."

62. In addition, with respect to the highly contentious proceedings involving Congressman Michael Coffman, under Complaint No. 08-01, the Commission never voted in public on the decision it reached. Presumably, therefore, the Commission thus adopted its ultimate decision in that case behind closed doors.

63. The Commission considered the complaint against Congressman Coffman during a series of closed-door sessions prior to the issuance of its written decision on April 14, 2009. The last of those closed-door deliberations occurred on April 13, 2009.

64. The public minutes for the Commission's meetings in 2009 contain no mention of any vote, in public or otherwise, on the Commission's decision to dismiss Complaint No. 08-01. (*See Ex. C.*) Thus, the Commission necessarily not only adopted a proposed position, but it also adopted a formal action behind closed-doors when it decided to dismiss Complaint No. 08-01.

65. On information and belief, Plaintiffs allege that the Commission failed to record any of its closed-door deliberations on Complaint No. 08-01, ostensibly on the grounds that such deliberations allegedly constituted "attorney-client communications." On information and belief, Plaintiffs allege that not all of the closed-door meetings concerning Complaint No. 08-01 were "attorney-client communications." In addition, Plaintiffs allege that any such "attorney-client communications" could not properly be

shielded behind closed doors because the only exemption available to the Commission for such closed meetings is limited to “pending or imminent litigation” of disputes involving the Commission. Because Complaint No. 08-01 did not involve a dispute against or by the Commission, no attorney-client communication concerning that matter could properly be conducted behind closed doors.

66. On information and belief, the Plaintiffs allege that the Commission’s members have come to their collective decisions and adopted proposed positions on all of the substantive matters before the Commission – *i.e.*, “advisory opinions,” “letter rulings,” “position statements,” and “complaints” – during their closed-door meetings.

67. On information and belief, the Plaintiffs allege that the Commission’s public votes on the advisory opinions, letter rulings, position statements, and complaints before the Commission were mere “rubber-stamp” approvals, without discussion, of the decisions that the Commission members had already reached during their preceding putative “executive sessions.”

68. The Commission’s practice of concealing its members’ deliberations on the requests for advisory opinions, letter rulings, position statements, and complaints has deprived the Plaintiffs and the public of access to the discussions, the motivations, the policy arguments and other considerations which led to the discretion exercised by the Commission’s members.

69. In response to the Commission’s practice, on May 5, 2009, Plaintiffs submitted their first request for access to the recordings or notes of the Commission’s purported “executive sessions,” covering the sessions on January 14, 2009, January 23, 2009, February 2, 2009, February 20, 2009, March 18, 2009, March 19, 2009, March 31, 2009, April 6, 2009, and April 21, 2009. A true and correct copy of the Plaintiffs’ request, dated May 5, 2008, is attached hereto as **Exhibit D**.

70. The Commission denied the Plaintiffs’ CORA request on May 8, 2009, citing as the sole basis for this denial the provisions of § 24-6-402(2)(d.5)(I)(D), C.R.S., the provision of the COML declaring executive session recordings to be exempt from access under the CORA. A true and correct copy of the Commission’s denial is attached hereto as **Exhibit E**.

71. Upon learning that the Commission had conducted an executive session during its April 16, 2009 meeting despite the fact that no executive session was listed in the notice for this meeting, the Plaintiffs submitted a supplemental CORA request for the recording of that executive session as well. A true and correct copy of the Plaintiffs’ request, dated May 13, 2009, is attached hereto as **Exhibit F**.

72. The Commission denied the Plaintiff’s CORA request on May 15, 2009, again citing on § 24-6-402(2)(d.5)(I)(D), C.R.S., as the basis for the denial. A true and correct copy of the Commission’s denial is attached hereto as **Exhibit G**.

73. On May 17, 2009, Plaintiffs provided to the Commission and its counsel the statutorily required notice of intent to sue in this action, enclosing a prior draft copy of this Complaint. (*See*. Ex. A.)

74. Following its receipt of this notice of intent to sue, the Commission met on May 19, 2009. At that meeting, the Commission reversed its practice of deliberating behind closed doors and for the first time ever, it conducted a public discussion among the Commission members as to a proposed advisory opinion to be issued by the Commission.

75. At its meeting on May 19, 2009, the Commission also met in executive session to discuss “pending or imminent litigation.” The Commission did not identify in public the particular litigation it intended to discuss.

76. Following its meeting on May 19, 2009, the Commission determined that it would release portions of its recordings of its deliberations on the meetings in 2009 that are the subject of this action and which were included within the scope of relief sought in the Plaintiff’s May 17, 2009 notice of intent to sue.

77. On information and belief, Plaintiffs allege that their delivery of their notice of intent to sue precipitated the Commission’s decision to release portions of the recordings of the at-issue closed meetings in 2009.

78. On information and belief, Plaintiffs allege that but for their delivery of a notice of intent to sue, the Commission would not have voluntarily released any of the at-issue recordings.

79. Despite having decided to release certain portions of the at-issue recordings, the Commission has not yet actually released those recordings.

80. In addition, on information and belief, Plaintiffs allege that even when the recordings are released by the Commission, they will be redacted to exclude some portions of the Commission’s discussions. Plaintiffs allege that any such redactions are in violation of the requirements under *Zubeck*, *Gumina*, and *WorldWest*, as discussed above.

**First Claim for Relief**  
**Violations of Colorado Open Meetings Law – January 14, 2009**

81. Plaintiffs incorporate by reference each and every allegation contained in the previous paragraphs of this Complaint.

82. The Commission held a closed-door meeting on January 14, 2009, for four hours and 25 minutes. (Ex. C, at 2.)

83. The notice for this meeting identified the purpose for the closed-door meeting as “Discussion pertaining to requests for advisory opinions and complaints filed with the Commission. C.R.S. §§24-6-402(3)(a)(III); 13-90-107(1)(b); 24-18.5-101; Article XXIX of the Colorado Constitution.” (Ex. B, at 2.)

84. The public minutes for the open meeting on January 14, 2009 do not record any vote by the Commission on this closed-door session or any further identification of the matters to be discussed. (Ex. C, at 3.)

85. The public minutes for the January 14, 2009 meeting reveal that following the Commission’s extended closed-door discussion, the Commission voted unanimously, without any discourse in public at the meeting, to dismiss Complaint No. 09-01. (Ex. C, at 3.)

86. The Commission’s closed-door session on January 14, 2009, violated the COML in at least the following ways:

- a. The Commission failed to identify the particular matters to be discussed behind closed doors in as much detail as possible.
- b. The Commission failed to vote by two-thirds majority to go into an executive session.
- c. The Commission adopted one or more proposed positions during the closed-door discussion.
- d. The Commission engaged in a substantive discussion of a non-exempt topic behind closed doors.

### **Second Claim for Relief**

#### **Violations of Colorado Open Meetings Law – January 23, 2009**

87. Plaintiffs incorporate by reference each and every allegation contained in prior paragraphs 1 through 80 of this Complaint.

88. The Commission held two closed-door discussions on January 23, 2009, the first for one hour and 35 minutes, and the second for three hours and 25 minutes. (Ex. C, at 4, 5.)

89. The notice for this meeting identified the purpose for both closed-door sessions with exactly the same verbiage: “Discussion pertaining to requests for advisory

opinions and complaints filed with the Commission. C.R.S. §§24-6-402(3)(a)(III); 13-90-107(1)(b); 24-18.5-101; Article XXIX of the Colorado Constitution.” (Ex. B, at 3.)

90. The public minutes for the open meeting on January 23, 2009 do not record any vote by the Commission on either of these closed-door sessions or any further identification of the matters to be discussed. (Ex. C, at 4, 5.)

91. The public minutes for the January 23, 2009 meeting reveal that following the first closed-door discussion, the Commission voted unanimously, without any discourse in public at the meeting, to deny a motion to recuse a Commission member from consideration of Complaint No. 08-01. (Ex. C, at 4.) The Commission also voted unanimously, without any public discussion by Commission members to approve Position Statement No. 09-01. (Ex. C, at 5.)

92. The Commission’s closed-door sessions on January 23, 2009, violated the COML in at least the following ways:

- a. The Commission failed to identify the particular matters to be discussed behind closed doors in as much detail as possible.
- b. The Commission failed to vote by two-thirds majority to go into an executive session.
- c. The Commission adopted one or more proposed positions during the closed-door discussions.
- d. The Commission engaged in a substantive discussion of a non-exempt topic behind closed doors.

**Third Claim for Relief**  
**Violations of Colorado Open Meetings Law – February 2, 2009**

93. Plaintiffs incorporate by reference each and every allegation contained in prior paragraphs 1 through 80 of this Complaint.

94. The Commission held two closed-door discussions on February 2, 2009, the first for two hours and 20 minutes, and the second for two hours and 38 minutes. (Ex. C, at 6, 8.)

95. The notice for this meeting identified the purpose for both closed-door sessions with exactly the same verbiage: “Discussion pertaining to requests for advisory opinions and complaints filed with the Commission. C.R.S. §§24-6-402(3)(a)(III); 13-90-107(1)(b); 24-18.5-101; Article XXIX of the Colorado Constitution.” (Ex. B, at 4.)

96. The public minutes for the open meeting on February 2, 2009 do not record any vote by the Commission on either of these closed-door sessions or any further identification of the matters to be discussed. (Ex. C, at 6, 8.)

97. The public minutes for the February 2, 2009 meeting reveal that following the Commission's first closed-door discussion, the Commission voted unanimously to set a higher burden of proof for certain of the allegations in Complaint No. 08-01 and to deny the motion of the subject of the complaint to dismiss Complaint No. 08-01. The Commission also voted unanimously, without any discourse in public at the meeting, to approve Letter Ruling Nos. 09-01 and 09-02. (Ex. C, at 6, 7.)

98. The February 2, 2009 minutes also reveal that following the Commission's second closed-door discussion, the Commission voted unanimously, without any discourse in public at the meeting, to dismiss Complaint Nos. 09-02. (Ex. C, at 8.)

99. The Commission's closed-door sessions on February 2, 2009, violated the COML in at least the following ways:

- a. The Commission failed to identify the particular matters to be discussed behind closed doors in as much detail as possible.
- b. The Commission failed to vote by two-thirds majority to go into an executive session.
- c. The Commission adopted one or more proposed positions during the closed-door discussions.
- d. The Commission engaged in a substantive discussion of a non-exempt topic behind closed doors.

#### **Fourth Claim for Relief**

#### **Violations of Colorado Open Meetings Law – February 20, 2009**

100. Plaintiffs incorporate by reference each and every allegation contained in prior paragraphs 1 through 80 of this Complaint.

101. The Commission held two closed-door discussions on February 20, 2009, the first for two hours and 50 minutes, and the second for four hours and 20 minutes. (Ex. C, at 9, 10.)

102. The notice for this meeting identified the purpose for both closed-door sessions with exactly the same verbiage: "Discussion pertaining to requests for advisory

opinions and complaints filed with the Commission. C.R.S. §§24-6-402(3)(a)(III); 13-90-107(1)(b); 24-18.5-101; Article XXIX of the Colorado Constitution.” (Ex. B, at 5.)

103. The public minutes for the open meeting on February 20, 2009 do not record any vote by the Commission on either of these closed-door sessions or any further identification of the matters to be discussed. (Ex. C, at 9, 10.)

104. The public minutes for the February 20, 2009 meeting reveal that following the Commission’s first closed-door discussion, the Commission voted unanimously to issue subpoenas for testimony in Complaint No. 08-01 and to grant the chairman of the Commission authority to issue additional subpoenas as the need might arise. (Ex. C, at 9.)

105. The February 20, 2009 minutes also reveal that following the Commission’s second closed-door discussion, the Commission voted unanimously, without any discourse in public at the meeting, to approve Advisory Opinion No. 09-01. (Ex. C, at 10.)

106. The Commission’s closed-door sessions on February 20, 2009, violated the COML in at least the following ways:

- a. The Commission failed to identify the particular matters to be discussed behind closed doors in as much detail as possible.
- b. The Commission failed to vote by two-thirds majority to go into an executive session.
- c. The Commission adopted one or more proposed positions during the closed-door discussions.
- d. The Commission engaged in a substantive discussion of a non-exempt topic behind closed doors.
- e. To the extent the Commission’s closed-door discussion of Complaint 08-01 was not recorded, such failure also violated the COML.

#### **Fifth Claim for Relief**

#### **Violations of Colorado Open Meetings Law – March 18, 2009**

107. Plaintiffs incorporate by reference each and every allegation contained in prior paragraphs 1 through 80 of this Complaint.

108. The Commission held a closed-door telephonic meeting on March 18, 2009. (Ex. B, at 7.)

109. This closed-door session was noticed exclusively as a putative “executive session,” with no public proceedings whatsoever, by telephone conference among the Commission members. No dial-in information or other mechanism was provided for the public to access the meeting. (Ex. B, at 7.)

110. The notice for this session identified the sole purpose for the closed-door meeting as “a discussion pertaining to complaints filed with the Commission. C.R.S. §§24-6-402(3)(a)(III); 13-90-107(1)(b); Article XXIX of the Colorado Constitution.” (Ex. B, at 7.)

111. No public minutes for this session were compiled.

112. On information and belief, Plaintiffs allege that the Commission’s discussion during this closed-door session pertained at least to Complaint No. 08-01.

113. On information and belief, Plaintiffs allege that the Commission failed to electronically record the entirety of this closed-door discussion.

114. The Commission’s closed-door session on March 18, 2009, violated the COML in at least the following ways:

- a. The Commission failed to meet in public prior to going into closed-session.
- b. The Commission failed to maintain public minutes of a public session for its meeting.
- c. The Commission failed to provide the public with means to access the telephonic proceedings of the meeting.
- d. The Commission failed to identify the particular matters to be discussed behind closed doors in as much detail as possible.
- e. The Commission failed to vote by two-thirds majority to go into an executive session.
- f. The Commission engaged in a substantive discussion of a non-exempt topic behind closed doors.
- g. The Commission failed to record its closed-door discussion, improperly asserting an “attorney-client communication” basis for the non-recording.

**Sixth Claim for Relief**  
**Violations of Colorado Open Meetings Law – March 19, 2009**

115. Plaintiffs incorporate by reference each and every allegation contained in prior paragraphs 1 through 80 of this Complaint.

116. The Commission held two closed-door discussions on March 19, 2009, the first for ten minutes, and the second for four hours and 10 minutes. (Ex. C, at 11, 12.)

117. The first of the closed-door discussions on March 19, 2009 was conducted with no advance notice whatsoever, solely upon the request, in the midst of the meeting, of the Commission's attorney. The minutes of the meeting fail to reveal the topic of the attorney conference or the "pending or imminent court action" that was the subject of the discussion. (Ex. C, at 11.)

118. The notice for the meeting identified the purpose of the second closed-door session as being: "Discussion pertaining to requests for advisory opinions and complaints filed with the Commission. C.R.S. §§24-6-402(3)(a)(III); 13-90-107(1)(b); Article XXIX of the Colorado Constitution." (Ex. B, at 8.)

119. The public minutes for the open meeting on March 19, 2009 do not record any vote by the Commission on either of these closed-door sessions or any further identification of the matters to be discussed. (Ex. C, at 11, 12.)

120. The public minutes for the March 19, 2009 meeting reveal that following the Commission's first closed-door discussion, the Commission voted unanimously to approve "two PDQs as amended during the discussion." (Ex. C, at 11.) The reference to the amendment of the "PDQs" during the preceding closed-door discussion with the Commission's attorney necessarily indicated that the Commission adopted a proposed position during the first closed-door session.

121. The March 19, 2009 minutes also reveal that following the Commission's second closed-door discussion, the Commission voted unanimously, without any discourse in public at the meeting, to approve Letter Ruling No. 09-03 and to deny a motion to reconsider the Commission's prior dismissal of Complaint No. 09-02. (Ex. C, at 12.)

122. The Commission's closed-door sessions on March 19, 2009, violated the COML in at least the following ways:

- a. The Commission failed to identify the particular matters to be discussed behind closed doors in as much detail as possible.
- b. The Commission failed to vote by two-thirds majority to go into an executive session.

- c. The Commission adopted one or more proposed positions during the closed-door discussions.
- d. The Commission engaged in a substantive discussion of a non-exempt topic behind closed doors.

**Seventh Claim for Relief**

**Violations of Colorado Open Meetings Law – March 31, 2009**

123. Plaintiffs incorporate by reference each and every allegation contained in prior paragraphs 1 through 80 of this Complaint.

124. The Commission held a closed-door telephonic meeting on March 31, 2009. (Ex. B, at 9.)

125. This closed-door session was noticed exclusively as a putative “executive session,” with no public proceedings whatsoever, by telephone conference among the Commission members. No dial-in information or other mechanism was provided for the public to access the meeting. (Ex. B, at 9.)

126. The notice for this session identified the sole purpose for the closed-door meeting as “primarily a discussion pertaining to complaints filed with the Commission. C.R.S. §§24-6-402(3)(a)(III); 13-90-107(1)(b); Article XXIX of the Colorado Constitution.” (Ex. B, at 9.)

127. The Commission failed to provide any further public notice as to any other topics for this closed-door meeting other than the complaints that were “primarily” the purpose of the session.

128. No public minutes for this session were compiled.

129. On information and belief, Plaintiffs allege that the Commission’s discussion during this closed-door session pertained, at least, to Complaint No. 08-01.

130. On information and belief, Plaintiffs allege that the Commission failed to record any portion of the closed-door meeting on March 31, 2009.

131. The Commission’s closed-door session on March 31, 2009, violated the COML in at least the following ways:

- a. The Commission failed to meet in public prior to going into closed-session.
- b. The Commission failed to maintain public minutes of a public session for its meeting.

- c. The Commission failed to provide the public with means to access the telephonic proceedings of the meeting.
- d. The Commission failed to identify the particular matters to be discussed behind closed doors in as much detail as possible.
- e. The Commission failed to vote by two-thirds majority to go into an executive session.
- f. The Commission engaged in a substantive discussion of a non-exempt topic behind closed doors.
- g. The Commission failed to record its closed-door discussion, improperly asserting an “attorney-client communication” basis for the non-recording.

#### **Eighth Claim for Relief**

#### **Violations of Colorado Open Meetings Law – April 6, 2009**

132. Plaintiffs incorporate by reference each and every allegation contained in prior paragraphs 1 through 80 of this Complaint.

133. The Commission held a closed-door session on April 6, 2009, for four hours and 20 minutes. (Ex. C, at 13.)

134. The notice for this meeting identified the purpose for the closed-door session as “Discussion pertaining to requests for advisory opinions and complaints filed with the Commission. C.R.S. §§24-6-402(3)(a)(III); 13-90-107(1)(b); Article XXIX of the Colorado Constitution.” (Ex. B, at 10.)

135. The public minutes for the open meeting on April 6, 2009 do not record any vote by the Commission on this closed-door session or any further identification of the matters to be discussed. (Ex. C, at 13.)

136. The public minutes for the April 6, 2009 meeting reveal that following the Commission’s closed-door discussion, the Commission voted unanimously, without any discourse in public at the meeting, to approve Advisory Opinions Nos. 09-02 and 09-03, and to dismiss Complaints Nos. 09-03 and 09-04 on grounds other than a finding that the complaints were frivolous. (Ex. C, at 13-14.)

137. The Commission’s closed-door session on April 6, 2009, violated the COML in at least the following ways:

- a. The Commission failed to identify the particular matters to be discussed behind closed doors in as much detail as possible.
- b. The Commission failed to vote by two-thirds majority to go into an executive session.
- c. The Commission adopted one or more proposed positions during the closed-door discussion.
- d. The Commission engaged in a substantive discussion of a non-exempt topic behind closed doors.

**Ninth Claim for Relief**  
**Violations of Colorado Open Meetings Law – April 13, 2009**

138. Plaintiffs incorporate by reference each and every allegation contained in prior paragraphs 1 through 80 of this Complaint.

139. The Commission held a closed-door telephonic meeting on April 13, 2009. (Ex. B, at 111.)

140. This closed-door session was noticed exclusively as a putative “executive session,” with no public proceedings whatsoever, by telephone conference among the Commission members. No dial-in information or other mechanism was provided for the public to access the meeting. (Ex. B, at 111.)

141. The notice for this session identified the sole purpose for the closed-door meeting as “a discussion pertaining to Complaint 08-01 filed with the Commission. C.R.S. §§24-6-402(3)(a)(III); 13-90-107(1)(b); Article XXIX of the Colorado Constitution.” (Ex. B, at 11.)

142. No public minutes for this session were compiled.

143. On information and belief, Plaintiffs allege that as this discussion of Complaint 08-01 was the last before the Commission issued its ruling on April 14, 2009, the Commission necessarily must have adopted the formal action of issuing that opinion dismissing Complaint No. 08-01 during this closed-door session. There is no record of a public vote by the Commission ever approving the Commission’s ultimate decision to dismiss the ethics complaint against Congressman Coffman.

144. On information and belief, Plaintiffs also allege that the Commission did not make an electronic recording of any portion of this closed-door session.

145. The Commission's closed-door session on April 13, 2009, violated the COML in at least the following ways:

- a. The Commission failed to meet in public prior to going into closed-session.
- b. The Commission failed to maintain public minutes of a public session for its meeting.
- c. The Commission failed to provide the public with means to access the telephonic proceedings of the meeting.
- d. The Commission failed to vote by two-thirds majority to go into an executive session.
- e. The Commission engaged in a substantive discussion of a non-exempt topic behind closed doors.
- f. The Commission adopted a proposed position or formal action behind closed doors.
- g. The Commission failed to record its closed-door discussion, improperly asserting an "attorney-client communication" basis for the non-recording.

#### **Tenth Claim for Relief**

#### **Violations of Colorado Open Meetings Law – April 16, 2009**

146. Plaintiffs incorporate by reference each and every allegation contained in prior paragraphs 1 through 80 of this Complaint.

147. The Commission held a telephonic meeting on April 16, 2009, during which a closed-door discussion was conducted for twenty-five minutes. (Ex. C, at 16.)

148. No dial-in information or other mechanism was provided for the public to access the meeting. (Ex. B, at 12.)

149. The notice for this meeting failed to provide any advance warning that the Commission would intended to conduct an executive session. (Ex. B, at 12.) The notice merely reflects that the Commission intended to have a general business discussion of Advisory Opinion No. 09-04. (*Id.*)

150. The public minutes for the open meeting on April 16, 2009 reflect that a putative "executive session" was conducted, but the minutes fail to provide any

identification of the topic, purpose or matter to be discussed. (Ex. C, at 16.) The minutes also do not record any vote by the Commission to conduct a closed-door discussion. (*Id.*)

151. The public minutes for the April 16, 2009 meeting reveal that following the Commission's closed-door discussion, the Commission voted unanimously, without any discourse in public at the meeting, to approve Advisory Opinion No. 09-04. (Ex. C, at 16.)

152. The Commission's closed-door session on April 16, 2009, violated the COML in at least the following ways:

- a. The Commission failed to provide twenty-four hours advance written notice of its intention to conduct an executive session.
- b. The Commission failed to provide the public with means to access the telephonic proceedings of the meeting
- c. The Commission failed to identify the topic or statutory basis for its closed-door discussion.
- d. The Commission failed to identify the particular matters to be discussed behind closed doors in as much detail as possible.
- e. The Commission failed to vote by two-thirds majority to go into an executive session.
- f. The Commission adopted one or more proposed positions during the closed-door discussion.
- g. The Commission engaged in a substantive discussion of a non-exempt topic behind closed doors.

#### **Eleventh Claim for Relief**

#### **Violations of Colorado Open Meetings Law – April 21, 2009**

153. Plaintiffs incorporate by reference each and every allegation contained in prior paragraphs 1 through 80 of this Complaint.

154. The Commission held a closed-door session on April 21, 2009, for three hours and 40 minutes. (Ex. C, at 18.)

155. The notice for this meeting identified the purpose for the closed-door session as "Discussion pertaining to requests for advisory opinions and complaints filed

with the Commission. C.R.S. §§24-6-402(3)(a)(III); 13-90-107(1)(b); Article XXIX of the Colorado Constitution.” (Ex. B, at 13.)

156. The public minutes for the open meeting on April 21, 2009 do not record any vote by the Commission on this closed-door session or any further identification of the matters to be discussed. (Ex. C, at 18.)

157. The public minutes for the April 21, 2009 meeting reveal that following the Commission’s closed-door discussion, the Commission voted unanimously, without any discourse in public at the meeting, to authorize the Commission’s executive director to respond to a letter from the complainant in Complaint No. 09-02. (Ex. C, at 18.)

158. The Commission’s closed-door session on April 21, 2009, violated the COML in at least the following ways:

- a. The Commission failed to identify the particular matters to be discussed behind closed doors in as much detail as possible.
- b. The Commission failed to vote by two-thirds majority to go into an executive session.
- c. The Commission adopted one or more proposed positions during the closed-door discussion.
- d. The Commission engaged in a substantive discussion of a non-exempt topic behind closed doors.

**Twelfth Claim for Relief**  
**Violations of Colorado Open Meetings Law – May 6, 2009**

159. Plaintiffs incorporate by reference each and every allegation contained in prior paragraphs 1 through 80 of this Complaint.

160. The Commission held a closed-door session on May 6, 2009. (Ex. B, at 14.)

161. The notice for this meeting identified the purpose for the closed-door session as “Discussion pertaining to requests for advisory opinions and complaints filed with the Commission. C.R.S. §§24-6-402(3)(a)(III); 13-90-107(1)(b); Article XXIX of the Colorado Constitution.” (Ex. B, at 14.)

162. No minutes for the open meeting on May 6, 2009 have yet been released by the Commission.

163. On information and belief, the Plaintiffs allege that the Commission's closed-door session on May 6, 2009, violated the COML in at least the following ways:

- a. The Commission failed to identify the particular matters to be discussed behind closed doors in as much detail as possible.
- b. The Commission failed to vote by two-thirds majority to go into an executive session.
- c. The Commission adopted one or more proposed positions during the closed-door discussion.
- d. The Commission engaged in a substantive discussion of a non-exempt topic behind closed doors.

### **Prayer for Relief**

WHEREFORE, the Plaintiffs pray for judgment in their favor and against the Board as follows:

**A.** The Court should immediately issue an Order to Show Cause, as attached hereto and as described in the Application for Order to Show Cause below, directing the Commission to explain and demonstrate why it is continuing to withhold any recordings of the closed meetings of the Commission during 2009 and why any such as-yet-unreleased recordings should not be provided to Plaintiffs and the public. The hearing on the Order to Show Cause should be set "at the earliest practical time." § 24-72-204(5), C.R.S.

**B.** To the extent the Court declines to require disclosure of any recording of any of the Commission's closed-door meetings in 2009 upon a show cause order, the Court should thereafter separately enter an Order of *In Camera* Review as described in the following Application for Order of *In Camera* Review, directing the Commission to submit its full and complete electronic recordings of such executive sessions for *in camera* review, and upon the Court's review of such recordings, the Court enter an Order finding and declaring that:

i. Certain contents of the recordings are deemed to be open to public inspection because the closed meetings of the Commission involved substantial discussions of matters not permitted to be discussed in executive session, and because the Commission adopted proposed positions behind closed doors; and,

ii. Plaintiffs are entitled to an Order directing that certain contents of the recordings be provided to them for inspection and copying.

**C.** Following a full trial on the merits, to the extent such is necessary following the proceedings on the show cause order and any order of *in camera* review, the Court should enter a final judgment declaring that the Commission has violated the COML, including in the following ways:

- i. Failing to provide adequate announcement of the topics and matters to be discussed behind closed doors;
- ii. Failing to vote on an announced topic before discussing that topic behind closed doors;
- iii. Discussing non-exempt topics behind closed doors, including deliberating by and among Commission members on matters before the Commission.
- iv. Adopting proposed positions or formal actions behind closed doors; and,
- v. Halting the Commission's electronic recording of closed-door sessions even though the session did not constitute an "attorney-client" communication.

**D.** The Court should also enter a permanent injunction barring the Commission from continuing to violate the COML with respect to the Commission's executive sessions as follows:

- i. The Commission's public notices of its executive sessions must:
  - a. Identify the case number of the particular matter to be discussed;
  - b. Identify the underlying subject matter of the particular matter to be discussed in as much detail as possible; and
  - c. Identify the requester of any advisory opinion or position statement, and the target and complainant of any non-frivolous complaint that is to be discussed.
- ii. The Commission must conduct a formal vote that is recorded in its minutes for every occasion that it wishes to engage in an executive session, and no executive session may be commenced without first convening the Commission's meeting in public session.

iii. The Commission is barred from deliberating behind closed doors on a request for advisory opinion or letter ruling or on a non-frivolous complaint.

iv. The Commission is barred from adopting a proposed position or formal action on a request for advisory opinion or letter ruling or on a non-frivolous complaint behind closed doors.

v. The Commission must make an electronic recording of all closed-door meetings.

vi. The Commission must make available to Plaintiffs any notes, memoranda or other documents that reflect the Commission's discussions during any improperly closed meeting for which the Commission did not make or retain an electronic recording.

**E.** The Court should award the Plaintiffs their reasonable attorney's fees and costs in obtaining access to the records at issue herein and in vindicating the public's right to access under the COML, pursuant to §§ 24-6-402(9) and 24-72-204(5), C.R.S.

**F.** The Court should award such other and further relief as it deems proper and just.

### **Application For Order To Show Cause**

**AA.** Plaintiffs incorporate by reference all of the allegations for the foregoing Complaint.

**BB.** Plaintiffs have established a *prima facie* basis to believe that the requested documents – the electronic recordings or notes of the Commission's executive sessions in 2009 – are "public records" pursuant to the CORA, and that Plaintiffs have been denied access to these public records of the Commission.

**CC.** Pursuant to § 24-72-204(5), C.R.S., the Plaintiffs are entitled to – and do hereby apply for – an Order to Show Cause, directing that the Commission show cause why the recordings of the Commission's closed-door meetings should not be disclosed to the public. As required by the CORA, the Court should set the date of the show cause hearing in its Order at "the earliest time practical."

**DD.** At the show cause hearing, the Commission should be required to respond to the clearly established proposition, under *Zubeck*, *Gumina*, and *WorldWest*, all *supra*, that the recording of a meeting that has been closed to the public without strict compliance to the requirements of the COML, *i.e.*, an illegally closed meeting, is necessarily subject to disclosure under the CORA. In *Zubeck*, the Colorado Court of

Appeals ordered the release of minutes of illegally closed meetings of a retirement board because the board had failed to comply with the procedural requirements of the COML for conducting an executive session. 961 P.2d at 600. In *Gumina*, the Colorado Court of Appeals ordered the release of a city council's recordings of its closed meetings relating to the discussion of a city employee because the council had failed to strictly comply with the COML's executive session requirements. 119 P.3d at 532. And again, in *WorldWest*, the Colorado Court of Appeals ordered a school board to release the entire recording of a closed meeting that had not been properly announced to the public – including the portion of the recording reflecting an attorney-client communication – because of the school board's failure to strictly comply with the COML. 37 Media L. Rep. at 1668-69 (attached in accompanying Appendix).

**EE.** Thus, under *Zubeck*, *Gumina*, and *WorldWest*, at the show cause hearing, the Commission should be required to demonstrate that its closed meetings during 2009 did in fact strictly comply with the COML's requirements for a legal "executive session." To the extent the Commission fails to demonstrate that it failed to strictly comply with the COML with respect to any meeting the recording of which has not yet been released, those recordings should be made available to the Plaintiffs and the public.

**FF.** The proposed form of an order calling for a show cause hearing is attached hereto.

### **Application for Order of *In Camera* Review**

**AAA.** Plaintiffs incorporate by reference all of the allegations for the foregoing Complaint.

**BBB.** In addition, and as an alternative to any other relief otherwise available to them, Plaintiffs also do hereby apply for an Order of *In Camera* Review pursuant to § 24-72-204(5.5)(a), C.R.S.

**CCC.** Plaintiffs have established sufficient grounds to support a reasonable belief that the Commission adopted proposed positions and engaged in substantial discussions of non-exempt matters during its closed meetings in 2009.

**DDD.** Pursuant to § 24-72-204(5.5)(a), C.R.S., the Court should enter an order directing the Commission to submit forthwith to the Court any as-yet unreleased electronic recordings of any of the Commission's executive session meetings during 2009.

**EEE.** Upon such a submission, pursuant to § 24-72-204(5.5)(b)(I), C.R.S., the Court should determine whether any portion of the recordings reflects a substantial discussion of a non-exempt topic and whether any portion reflects the adoption of any

proposed position by the Commission. To the extent that the Court finds such violations of the COML, the Court should order under § 24-72-204(5.5)(b)(II), C.R.S., that those portions of the recordings be made available for public inspection.

**FFF.** A proposed order to this effect is also attached.

Respectfully submitted this 20th day of May, 2009,

By /s Christopher P. Beall

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THE ORIGINAL SIGNED COPY OF THIS COMPLAINT IS ON FILE  
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