



March 27, 2017

Bill Leone
Chair, Independent Ethics Commission
1300 Broadway, Suite 240
Denver, CO 80203

VIA EMAIL TO IECINFO@STATE.CO.US

**Re: Draft Position Statement Regarding Implementation of
Position Statement 16-01 (Home rule counties & municipalities)**

Dear Chairman Leone and Fellow Commissioners:

Ethics Watch submits this public comment regarding the Draft Position Statement released for comment at the IEC's March 6, 2017 meeting and set for discussion at the Commission's next meeting on April 3, 2017.

These Proposals are Procedural Rules, not Position Statement Guidance

As an important threshold matter, we remind the Commission that "position statements" are guidance documents created in the IEC Rules of Procedure which do not have legally binding effect on covered individuals, the general public, or the Commission itself.¹ Most provisions in the Draft Position Statement are procedural; attempting to detail when and how the Commission will consider certain matters in the complaint process. Using a position statement to provide general, nonbinding guidance on the "implementation of" another position statement is an ill-fitting approach if the Commission believes such procedures must be detailed and explained to future complainants, respondents and Commissioners. The IEC's complaint process is governed by legally binding regulations that were duly adopted after public rulemaking.² A separate "position statement" document cannot modify official Rules of Procedure.

¹ IEC Rules of Procedure Rule 3.A.15, available at <https://www.colorado.gov/pacific/iec/rules-procedure> (effective April 14, 2011).

² See IEC Rules of Procedure Rule 7, available at <https://www.colorado.gov/pacific/iec/rules-procedure> (effective April 14, 2011).

As the Commission is aware, the Colorado Office of the State Auditor’s February 2016 Performance Audit of the IEC focused on many identified problems in the complaint process.³ The IEC adjusted complaint forms and some policies in the last year in an effort to comply with the audit’s recommendations. Such work will be undermined by exponentially complicating the complaint process through implementation of procedural rules in a position statement that would not be apparent to complainants – or respondents – reviewing IEC Procedure Rule 7 governing complaints. The Audit report warned: “there is a risk that if the complaint process is not easy to understand, some potential complainants may decide not to file a complaint due to the time and resources required.”⁴ As described in more detail below, not only does Ethics Watch believe the proposed process of the Draft Position Statement creates an unduly burdensome system for self-prosecuting complainants, but hiding such process in a position statement separate and apart from the IEC’s duly promulgated Rules of Procedure is irresponsible at best.

Therefore, Colorado Ethics Watch strongly urges the Commission to address these issues as proposed rule changes to IEC Procedure Rule 7 governing processing of complaints *instead of a position statement*.

Review of Proposals from a Citizen and Complainant Perspective

Colorado Ethics Watch submits these comments from its perspective of nine years of attending Commission meetings to summarize and report IEC actions, in addition to filing and prosecuting five ethics complaints as an organizational complainant. Therefore, we will focus on how these provisions affect the citizens and complainants seeking Commission investigation and determination of possible ethics violations. Our choice not to comment on a proposal in the Draft Position Statement should not be interpreted as support or agreement, and we believe that public comments from other participants will address those items we do not focus upon here.⁵

³ Colorado State Auditor, “Independent Ethics Commission: Performance Audit” (February 2016) *available at* https://leg.colorado.gov/sites/default/files/documents/audits/1553p_independent_ethics_commission_performance_audit_february_2016.pdf.

⁴ *Id.* at 20.

⁵ For example, we are not commenting upon the proper length of any “grace period” as proposed on page 1 of the Draft Position Statement as we believe government representatives are in a better position to provide information to the Commission on the feasibility of passing amendments to city ordinances and/or charters to change ethics codes and constitute new ethics enforcement bodies in a 6-month timeframe.

Proposal 2: Process for determining whether a complaint is frivolous – The first new requirement proposed is that the complainant would now bear the burden of providing in the complaint “facts supporting a determination that the home rule entity has failed to address the matters in Article XXIX.” *Draft Position Statement at 2.*⁶ As a legal matter, shifting the burden of proof to the *complainant* is inconsistent with both Position Statement 16-01 (“PS 16-01”) and the earlier portions of this Draft Position Statement which state a home rule city or municipality bears the burden of proof to show local adopted ethics codes and enforcement procedures address the matters in Article XXIX and comply with PS 16-01. Anyone who files a complaint with the Commission asking whether ethical violations have occurred does not bear the legal burden of disproving a possible defense by the respondent in the threshold filing of a complaint.

Practically speaking, it is not proper to place this burden on complainants who may not even be aware whether the entity (1) is a home rule jurisdiction, (2) has opted-out of Article XXIX through adoption of local ethics codes and enforcement, and (3) has local ethics codes and enforcement that meet the standard of PS 16-01. It is unreasonable to require complainants to provide the allegations supporting this analysis for the Commission and should instead be the burden of a respondent who wants to assert a home rule based jurisdictional defense. Procedure Rule 7F permits the IEC to ask the respondent for a response in order to aid the Commission in making the frivolous determination. Or the Commission could consider jurisdictional motions by the respondent during the public investigation phase after the substantive frivolous determination made in executive session. These would be proper ways to get specific information regarding whether a home rule opt-out is appropriate – not through placing the burden on complainants filing (and prosecuting) complaints at their own time and expense (and often without legal counsel). The 2016 Performance Audit recommended the Commission clarify the complaint process, make it easier to understand for citizens and less likely to deter complainants from filing. This proposal would have the opposite effect.

Proposal 2a: considerations in executive session – The Draft Position Statement proposes to possibly conduct the precedential decisions on home rule entity compliance with PS 16-01 in

⁶ Note this information is *not* required in the complaint per IEC Procedure Rule 7D, another reason why this proposal should be considered as an amendment to those rules, not a separate position statement without authority to change or contradict agency rules.

executive session. This means that there would be no public record of those decisions for complainants – or covered individuals – to rely upon when making decisions about whether to file a complaint or how to comply with Article XXIX. If the Commission imposes a high bar for “non-frivolous” allegations on this point, few complainants will be able to provide the factual and legal briefing necessary to meet that bar on a question that took over a year for expert Commissioners to decide in PS 16-01. Thus, we can expect most complaints filed against any official or employee of a home rule entity to be discussed exclusively in executive session.

For example, if the IEC determined during executive session that allegations against a Denver official were frivolous because the Denver Code and Board of Ethics is so clearly properly constituted under Article XXIX and PS 16-01 that there is “no reasonable argument for the IEC’s involvement,”⁷ such a decision would presumably be followed as precedent in future complaints filed against Denver officials. However, no member of the public would ever know of that decision and complainants (who would be forced to bear the burden of these home rule ethics code compliance allegations) would continue to file complaints with the IEC about Denver officials without knowing that they are in direct conflict with IEC precedent. Similarly, Denver officials would not know the precedent governing their own compliance with Article XXIX versus the Denver code. Such a process does not provide proper guidance, clarity, or transparency to the public or covered individuals. If Denver is so clearly outside Article XXIX and IEC jurisdiction it should not be a secret.

But not every complaint that is ultimately determined to be outside of the jurisdiction of the commission is frivolous. Complaints that do allege “a reasonable argument” to find that a home rule entity’s officials or employees are under the Commission’s jurisdiction must be processed under Procedure Rule 7 and proceed to public session discussions if they otherwise are not frivolous. Any discussion of home rule entity compliance with Article XXIX in executive session at the frivolous stage should be a minimal threshold of inquiry to pass, not a full determination on the merits of that question as will occur later in the investigation and hearing process.

⁷ IEC Rules of Procedure Rule 3.A.5, available at <https://www.colorado.gov/pacific/iec/rules-procedure> (effective April 14, 2011).

Proposal 2b(i): announcements in public session – The Draft Position Statement proposes that the vote to dismiss a complaint as frivolous because the home rule entity has properly complied with PS 16-01 and Article XXIX would be held in public session without disclosing the “complainant [sic], the allegations, and the identities of the complainant and the respondent.” We submit that a jurisdictional decision that a home rule entity has complied with Article XXIX opt-out requirements by meeting the PS 16-01 standard could *and should* be disclosed and announced as part of the motion, discussion and public session vote. As discussed above, the Commission has a duty to provide public notice of the precedent set, especially when the issue is so clear that it can be decided at the threshold of “no reasonable argument” to question that the home rule entity has complied with Article XXIX. Information can be given in the public motion and discussion about this determination without noting the individual names or substantive allegations of any complaint that could be construed as violating the confidentiality duty in Article XXIX.

Moreover, under IEC Procedure Rule 7G, dismissal of a complaint because the Commission has no jurisdiction is an *alternative* ground to dismissal based on “frivolous” allegations. Thus, confidentiality protections for “frivolous” complaints arguably do not apply to complaints dismissed merely on jurisdictional grounds and this information should be provided in the public session regardless. Discussion of the IEC decision for such a home rule entity would ensure that the public, potential complainants and respondents, and other home rule entities would have some public guidance and notice of this Commission precedent. This alternative approach would also provide transparency for the IEC consideration of these important issues.

Proposal 2b(iii): public session hearing on home rule entity – The Draft Position Statement appears to propose a two-step hearing process for non-frivolous complaints against home rule entities. Before any of the substantive allegations of ethical conduct can be considered in the hearing, the IEC will first hold a hearing on the question of whether the home rule entity has complied with PS 16-01 and Article XXIX. *Draft Position Statement at 2.* Does the complainant bear the burden of prosecuting the issues at this hearing like the burden placed upon them for substantive ethical violations? As explained above, it is not proper to shift this burden to the complainant when PS 16-01 places the burden on a home rule entity to comply. Instead the

procedure should explicitly state that the home rule compliance hearing is a presentation by the respondent who bears the burden, subject to questioning by the Commissioners, to prove compliance with Article XXIX, Section 7. Perhaps the Commission could establish a procedural step for the respondent to file, if they choose, a motion to dismiss for lack of jurisdiction under Article XXIX, Section 7, which could be decided through briefing and a hearing. The complainant could in some cases provide information to the Commission tending to show non-compliance with Article XXIX in an opposition to such a motion, but it should not be their burden of proof. Then the IEC could hold a motions hearing and argument and make a decision on the motion before proceeding to the substantive allegations in the complaint.⁸

Alternatively, the Commission should consider this question as part of the Commission's Article XXIX, Section 5 investigative burden and require staff or contracted outside counsel to investigate and prosecute the issue of Article XXIX, Section 7 compliance with the respondent defending the matter. Such an approach would move the Commission closer to the intended vision of Colorado voters for government investigation and prosecution of ethics complaints like every other state ethics enforcement entity in the nation.

Proposal 3: Standards for reviewing home rule jurisdiction complaints – The Draft Position Statement appears to set up an appellate review structure in this proposal where complainants may be required to run the following gauntlet to find out whether an ethical violation has occurred:

1. File a complaint with the home rule entity ethics enforcement official (regardless of whether it is an independent board or internal self-policing appointment);
2. Wait an indeterminate amount of time to get some sort of final ruling or decision from the home rule entity official (which may include self-prosecution of the complaint's ethical violation allegations);
3. File a complaint with the IEC, including detailed factual and legal allegations surrounding the home rule entity compliance with PS 16-01;

⁸ These proposals for two-step hearings, presentation of evidence, and burden of proof highlight how the matters in the position statement are proper subjects for rulemaking and proposed amendments to the IEC Rules of Procedure. Indeed, the current Rules removed prior rules regarding motions filing and practice that existed in the Commission's first promulgated Rules of Procedure. Similarly, the IEC should amend those rules if it chooses to incorporate such stages back into the complaint process.

4. Prosecute the home rule entity compliance with PS 16-01 and Article XXIX at the first jurisdictional IEC hearing;
5. Prosecute the substantive ethical violation allegations (possibly for the second time at a second tribunal) at the second IEC hearing;
6. Repeat the home rule entity process again if the IEC decides to “refer the matter to the local ethics board for further proceedings”;
7. Repeat the IEC process again after completion of second home rule entity process.

Draft Position Statement at 3. Each of these steps would be completed at the complainants’ own expense, perhaps without legal counsel competing against government counsel, with no prospect for recover of fees or costs much less penalties (like *qui tam* actions). The IEC complaint process itself can already take a year or more; the addition of “exhaustion of the complaint process” at a home rule entity first and possible remands back to the home rule entity afterwards will certainly stretch even a small – yet non-frivolous – ethical matter into a multi-year undertaking. What private citizen will take that on? How does this possibly further the Colorado voters’ intent in enacting Article XXIX?

It is not only burdensome, but unrealistic to impose an “exhaustion” requirement on complainants like a civil court standard for agency review. What is a complainant supposed to do in cases where the home rule entity has no civil enforcement authority and only a discretionary decision by a district attorney or city attorney or county attorney to prosecute an ordinance violation as the response to a citizen’s ethics complaint? Or when a complainant files an ethics complaint with a designated civil official who just never responds to the complainant? Even if a board considers the matter at the level of the home rule entity, the complainant would not necessarily have access to the full “record” of those proceedings to present to the IEC when filing at that time. The proposal attempts to cast the Commission as an appellate body that will “review whether the local board’s application” of the law was correct without the infrastructure of an “inferior” courts system with preservation and transfer of record, or even written decisions. The IEC has no authority, for example, to request and review executive session minutes or recordings from a home rule entity that considered a complaint in closed session pursuant to local rules. Nor does a complainant have access to any of these materials to be able to navigate the proposed exhaustion – appeals process.

There are also many legal questions raised by these proposed steps in the process which require firm definitive language for reliance by all interested parties. For example, Proposal 3c states the Commission “will not normally” entertain complaints about home rule entity individuals until local process has been exhausted. *Draft Position Statement* at 3. Complainants – and potential respondents – need to know whether there is an exhaustion of remedies requirement or not. The Commission Rules of Procedure do not contain such a requirement. Similarly, in that same Proposal 3c the Draft states that the Commission “will generally consider the complaint filing date” to be the earlier local entity filing date when considering if a complaint is timely filed the IEC. The one year statute of limitations on complaints filed with the Commission is a constitutional requirement of Article XXIX, Section 5(3)(a) and IEC Rule 7.G.3 states that a complaint shall be dismissed if fails to allege conduct occurred within 12 months of filing the complaint with the Commission. Any IEC rule about tolling the statute of limitations or considering other dates as the date of filing with the Commission must be specific to provide notice to potential respondents and complainants and overrule an IEC Rule of Procedure.

Finally, it is unclear from this proposal if the exhaustion and possible remand back and forth between tribunals like an appellate court applies both ways. The Draft Position Statement appears to assume that complaints would be filed with the IEC by a complainant after an adverse finding at the home rule entity – such as a judgment that ethics rules were not violated. But would the same process apply if the home rule official was found to have violated an ethical rule and wanted to “appeal” the case to the IEC for review of improper compliance with Article XXIX? Would this be a way for officials unhappy with being held accountable under local ethics codes to be able to question the legitimacy of local ethics boards?

Conclusion

The Draft Position Statement proposes several new unwieldy procedures that would increase the already heavy burden of complainants in the ethics complaint process. Any changes to how complaints are processed from filing through hearings should only be made thorough amendments to the IEC Rules of Procedure. In addition, the attempt of the Commission to position itself as a reviewing appellate court over ethics decisions even by a “properly constituted local independent ethics board” goes beyond the Constitutional powers of the IEC as established in Article XXIX, Section 5 and most likely conflicts with the rights of home rule

entities under the Colorado Constitution. We urge the Commission to start a rulemaking process instead and seriously consider revising these proposals before placing proposed rules out for public comment in that process.

Thank you again for this opportunity to comment regarding this inquiry by the Commission. I will be happy to answer any questions regarding our submissions at the April 3, 2017 monthly IEC meeting.

Respectfully Submitted,

A handwritten signature in blue ink that reads "Peg Perl". The signature is written in a cursive, flowing style.

Peg Perl
Senior Counsel