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| FORMAL |) | |
| OPINION |) | |
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| |) | January 8, 2015 |
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This opinion, requested by the Independent Ethics Commission (“the IEC”), concerns whether the IEC may release to the Colorado Office of the State Auditor (“OSA”) complaints the IEC has deemed “frivolous,” which the IEC must maintain as confidential under the Colorado Constitution.

QUESTION PRESENTED AND SHORT ANSWER

Question: May the IEC release to the OSA, in connection with the OSA’s performance-audit duties, complaints the IEC has deemed frivolous while maintaining the “confidentiality” of those complaints under Article XXIX, section 3(b) of the Colorado Constitution?

Answer: Yes, in connection with the OSA’s performance-audit duties, the IEC may release frivolous complaints to the OSA without violating the confidentiality requirement of Article XXIX, section 5(3)(b).

The OSA is evaluating whether to initiate a performance audit of the IEC. As part of its evaluation, the OSA has asked whether the IEC may disclose complaints that the IEC has found frivolous. Under the Colorado Constitution, these complaints must be maintained as confidential by the IEC. The IEC has requested this formal opinion to clarify its ability to disclose frivolous complaints in connection with the OSA’s performance-audit duties.

BACKGROUND

I. The Independent Ethics Commission's Duties Regarding "Frivolous" Complaints

Section 5 of Article XXIX of the Colorado Constitution sets forth the IEC's jurisdiction over written complaints questioning whether a public officer, a member of the general assembly, a local government official, or a government employee has failed to comply with ethical requirements. Colo. Const. Art. XXIX, §§ 3(a) and 5(1). If the IEC determines that a written complaint is "frivolous," it may dismiss the complaint without conducting a public hearing. Colo. Const. Art. XXIX, § 5(3)(b). "Complaints dismissed as frivolous shall be maintained as confidential" by the IEC. *Id.*

II. The Office of the State Auditor's Constitutional and Statutory Mandates

The OSA is a constitutionally created office with the duty to "conduct post audits of all financial transactions and accounts kept by or for all departments, offices, agencies, and institutions of the state government." Colo. Const. Art. V, § 49(2). The OSA's duties are further defined by statute. In addition to its post audit responsibilities, the state auditor must conduct performance audits of state entities. *See* sections 2-3-103(1)(a) and 2-7-204(5), C.R.S.

Specifically, under section 2-7-204(5), C.R.S., the OSA must conduct performance audits of one or more programs or services in at least two departments every year. In selecting which programs will be subject to performance audits, the OSA must consider risk, audit coverage, resources to conduct the audit, and the impact of the audited programs or services on a department's performance-based goals. § 2-7-204(5)(b), C.R.S. Performance audits may include the integrity of performance measures audited, the accuracy and validity of reported results, and the overall cost and effectiveness of the audited programs or services in achieving legislative intent, and the department's performance goals. § 2-7-204(5)(c), C.R.S. Performance audits are used to enhance legislative oversight of executive agencies: the state auditor presents performance audit reports to the legislative audit committee and to appropriate joint legislative committees. § 2-7-204(5)(d), C.R.S.

Aside from limited exceptions relating to confidential tax information, the OSA is given broad access to "accounts, reports, vouchers, or other records or

information in any department, institution, or agency.” § 2-3-107(2)(a), C.R.S. This includes “records or information required to be kept confidential or exempt from public disclosure upon subpoena, search warrant, discovery proceedings, or otherwise.” *Id.* Because of the OSA’s broad access to government records and information, the OSA is prohibited from releasing, “in connection with an audit,” any “information required to be kept confidential pursuant to any other law.” Section 2-3-107(2)(b), C.R.S.

III. Article XXIX Does Not Require the IEC to Withhold Frivolous Complaints from the OSA.

Article XXIX does not explicitly define the scope of the confidentiality for frivolous ethics complaints. Further, Article XXIX neither specifically grants, nor specifically restricts, the OSA’s access to frivolous ethics complaints. This is not unusual, given the OSA’s broad legal right of access to confidential government records and information. Section 2-3-107(2)(a), C.R.S. Most statutes that impose duties of confidentiality on government agencies do not mention the OSA or its ability to access confidential information. *See, e.g.*, § 24-37.5-603, C.R.S. (setting forth various duties of the state’s Chief Information Officer and creating a duty of confidentiality for all employees in the Office of Information Technology).

Here, however, the confidentiality of frivolous ethics complaints is granted not by statute, but by the Colorado Constitution. Thus, the question is whether a statute—specifically, the statute governing the OSA’s access to confidential records and information—can authorize disclosure of materials the Colorado Constitution deems confidential. This appears to be an issue of first impression in Colorado, but it is a question that requires only an analysis of the plain meaning of the relevant statutes and constitutional provisions, all of which impose a duty of confidentiality.

ANALYSIS

The meaning of a constitutional provision is a question of law. *Rocky Mountain Animal Def. v. Colo. Div. of Wildlife*, 100 P.3d 508, 513 (Colo. App. 2004). When interpreting a constitutional amendment adopted by citizens’ initiative, like Article XXIX, the objective is to give effect to the electorate’s intent in enacting the amendment. *See Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012). Voter intent, in turn, is determined by giving the amendment’s words their ordinary and popular

meaning. *Id.* at 1253–54. Dictionaries may be used to determine a word’s ordinary meaning. *Wash. Cnty. Bd. of Equalization v. Petron Dev. Co.*, 109 P.3d 146, 152 (Colo. 2005). If the language of an amendment is clear and unambiguous, it must be enforced as written. *Colo. Ethics Watch*, 269 P.3d at 1254; *Colo. Cmty. Health Network v. Colo. Gen. Assembly*, 166 P.3d 280, 283 (Colo. App. 2007).

The ordinary and popular meaning of § 5(3)(b) of Article XXIX is clear. The IEC may disclose frivolous complaints to the OSA without violating § 5(3)(b)’s command that the IEC “maintain[]” frivolous complaints as “confidential.”

The American Heritage Dictionary defines “maintain” as “[t]o keep up or carry on,” to “continue,” to “keep in an existing state,” and to “preserve or retain.” AM. HERITAGE DICTIONARY 1055 (4th ed. 2000). It defines “confidential” as “[d]one or communicated in confidence,” “secret,” and “[e]ntrusted with the confidence of another.” *Id.* at 386. Other dictionaries define these terms in similar ways. See WEBSTER’S THIRD NEW INT’L DICTIONARY 476 (2002) (defining “confidential”); *id.* at 1362 (defining “maintain”); RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY 285 (1991) (defining “confidential”); *id.* at 819 (defining “maintain”).

In light of these definitions, the IEC would not breach the confidentiality provision of Article XXIX by disclosing frivolous complaints to the OSA. Under section 2-3-107(2)(b), C.R.S., the OSA is bound to comply with “any” law requiring confidentiality of government records, including Article XXIX, § 5(3)(b). By “entrusting” the OSA with frivolous ethics complaints, the IEC would be “preserving” their confidentiality. In other words, the IEC would be complying with its duty to maintain frivolous complaints as confidential.¹


¹ Nothing in the enactment history of Article XXIX, as set forth in the Amendment 41 “Bluebook” (Colo. Legislative Council, Research Pub. No. 554-1, Analysis of the 2006 Ballot Proposals (2006)) contradicts this conclusion. Indeed, the Bluebook is silent on this precise question. Although the Colorado Legislative Council’s interpretation of a proposed amendment is not binding, the Bluebook may provide “important insight into the electorate’s understanding of the amendment when it was passed.” *Tivolino Teller House v. Fagan*, 926 P.2d 1208, 1214 (Colo. 1996). Here, the Bluebook’s silence on the scope of confidentiality to be granted to frivolous ethics complaints further emphasizes that a plain-language analysis is dispositive of the question answered in this Formal Opinion.

Additionally, the language of Article XXIX contemplates legislative involvement in the IEC's operation, suggesting that the OSA's statutory responsibilities do not impinge on the IEC's constitutional duties. Section 9 of Article XXIX states that "[l]egislation may be enacted to facilitate the operation of this article, but in no way shall such legislation limit or restrict the provisions of this article or the powers herein granted." Disclosure of frivolous complaints to the OSA for purposes of a performance audit, under circumstances in which the OSA is required to keep those complaints confidential, does not "limit or restrict the provisions of" Article XXIX or any power granted to the IEC by that Article.

CONCLUSION

For these reasons, the IEC may lawfully release complaints deemed frivolous to the OSA as part of the OSA's performance-audit duties.

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