

<p>STATE OF COLORADO SECRETARY OF STATE ADMINISTRATIVE HEARING OFFICER 1700 Broadway #550 Denver, CO 80290</p> <hr/> <p>BEFORE THE SECRETARY OF STATE, COLORADO DEPARTMENT OF STATE, <i>in re</i> ED 2023-03, 2023-11</p> <p>ELECTIONS DIVISION OF THE SECRETARY OF STATE,</p> <p>Complainant,</p> <p>vs.</p> <p>HUSCH BLACKWELL LLP, and JOHN DOE(S)</p> <p>Respondents.</p>	<p><input type="checkbox"/> COURT USE ONLY <input type="checkbox"/></p> <p>CASE NUMBER</p> <p>2023 AHO 0019</p>
<p>RESPONSE TO MOTION TO DISMISS</p>	

This matter arises out of a special district election in the Granby Ranch Metropolitan District (“GRMD”) in May 2023. During the lead-up to that election, Husch Blackwell, LLP made a series of requests under the Colorado Open Records Act (“CORA”) for various election-related documents and information. Because it is plausible that these requests—which included repeated requests for information about the candidates for the election and a list of eligible electors—were used for the purposes of express advocacy, Husch’s Motion to Dismiss should be denied.

BACKGROUND

A. Factual Background

In 2023, Husch provided legal services for a variety of individuals and entities involved in the GRMD. Compl. ¶ 22. This included two candidates for the May 2023 special district board of directors election, two developers with interests in the special district, and a neighboring special district in Granby. *Id.* ¶¶ 17–22. Several of these entities have recently been involved in litigation against GRMD. *Id.* ¶ 23.

In 2022 and 2023, Husch submitted over two dozen CORA requests to GRMD. *Id.* ¶ 26–27. In 2023 alone, Husch submitted 26 CORA requests, including multiple requests for the self-nomination forms submitted by candidates for the May 2023 election, and a request for the GRMD’s Mail Ballot Election Plan, the lottery results for ordering the candidate names on the ballot, and a copy of the certified ballot. *Id.* ¶ 27. In 2022, Husch also requested a list of all eligible electors for a May 2022 board of directors election.

B. Procedural History

In 2023, the Elections Division received two campaign finance complaints naming Husch as a Respondent. The first, filed by GRMD’s District Manager and designated election official for the May 2023 special district election, Charles Wolfersberger, alleged that Husch’s CORA requests were election-related, and that Husch was operating as an unregistered political committee. *Id.* ¶ 12. The second, filed by Natascha O’Flaherty, a candidate in the May 2023 special district election, levied similar allegations involving Husch’s political activity. *Id.* ¶ 16.

The Division originally moved to dismiss the Wolfersberger Complaint. *Id.* ¶ 13. The Deputy Secretary denied that motion, holding that the Wolfersberger Complaint had

sufficiently alleged that Husch may have made contributions to one or more candidates in the GRMD May 2023 election. *Id.* ¶ 13. After consolidating the Wolfersberger and O’Flaherty complaints, the Division again moved to dismiss. *Id.* ¶ 31. Again, the Deputy Secretary denied that motion, concluding that it was “plausible that the materials obtained through the CORA requests [submitted by Husch] were likely used for the purpose of expressly advocating for or against a candidate for the GRMD board by [an] undisclosed client.” *Id.* ¶¶ 34–35. A copy of that Order is attached as Exhibit A.¹

LEGAL STANDARD

“Motions to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) are viewed with disfavor.” *Begley v. Ireson*, 2017 COA 3, ¶ 7. “In reviewing a motion to dismiss, [the Court] accept[s] all matters of material fact in the petition as true and view[s] the allegations in the light most favorable to the plaintiff.” *Abu-Nantambu-El v. State*, 2018 COA 30, ¶ 8. “Under this standard . . . a party must plead sufficient facts that, if taken as true, suggest plausible grounds to support a claim for relief.” *Id.* (citing *Warne v. Hall*, 2016 CO 50, ¶ 24). “For a party’s claim to be deemed plausible, ‘the factual allegations of the complaint must be enough to raise a right to relief above the speculative level.’” *Alderman v. Bd. of Governors of Colo. State Univ.*, 2023 COA 61, ¶ 12 (quoting *Warne*, 2016 CO 50, ¶ 9). To survive a motion to dismiss, a plaintiff cannot rely on “bald assertions without further factual enhancement.” *Alderman*, 2023 COA 61, ¶ 12. However, “[a] claim has facial

¹ In ruling on a Motion to Dismiss, the Court may consider documents that are “referenced in and central to the complaint.” *Prospect Dev. Co., Inc. v. Holland & Knight, LLP*, 2018 COA 107, ¶ 11. The Complaint refers to the Order, Compl. ¶¶ 32–35, which is central to the Complaint because it served as the impetus for the Division’s filing. *Id.* ¶ 34 (noting that Order “directed the Division to file a Formal Complaint before the Secretary’s administrative hearing officer[.]”).

plausibility when the plaintiff pleads factual content that allows a court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

ARGUMENT

In its Motion, Husch admits that at least some of the CORA requests it served in 2022 and 2023 “sought materials related to either the 2022 or 2023 GRMD board elections.” Mot. to Dismiss (Feb. 1, 2024) (“Mot.”) at 4. Yet it argues that it is not plausible that these requests were used for the purposes of express advocacy. Because it is a “reasonable inference” that such materials were used for the purposes of express advocacy, *Alderman*, 2023 COA 61, ¶ 12, the Motion should be denied.

A. The Deputy’s prior holding regarding Husch’s expenditures is not controlling here.

Husch’s first argument is that the Deputy Secretary already foreclosed the possibility that Husch made expenditures relevant to this action. Mot. at 6–7. This argument fails for two reasons.

As a threshold matter, the Deputy’s initial Order on the Wolfersberger Complaint was briefly referenced in the Division’s Complaint but was not “central to” that complaint. *See Prospect Dev. Co., Inc.*, 2018 COA 107, ¶ 11. Thus, it is outside the scope of the Court’s consideration in ruling on Husch’s Motion to Dismiss.

More importantly, even if that Order were relevant at this stage, it occurred at a very different procedural posture than where the consolidated complaints are today. As the Complaint makes clear, that Order arose in proceedings under section 1-45-111.7(3)(a)(II), C.R.S. Subsection 3 of section 1-45-111.7 involves the Division’s “initial review” of third-

party campaign finance complaints. Under that subsection, the Division may move to dismiss a complaint on the grounds that it was “not timely filed, has not specifically identified one or more violations of article XXVIII, this article 45, or the rules, or does not assert facts sufficient to support a factual or legal basis for an alleged violation.” § 1-45-111.7(3)(b)(I). This determination must be made prior to the Division conducting an investigation.

Where, as here, a motion to dismiss under section 111.7(3) is denied, the Division either offers the Respondent an opportunity to cure the alleged violation, or conducts a further investigation. § 1-45-111.7(3)(b)(I). Where, as here, this further investigation results in a complaint filed before a hearing officer, the scope of that complaint is determined not by the Deputy Secretary’s initial decision on the motion to dismiss, but rather on the results of the division’s investigation. *See* § 1-45-111.7(5)(a)(V). (“[T]he division . . . is responsible for . . . supplementing or amending the [third-party] complaint with such additional or alternative claims or allegations as may be supported by the division’s investigation[.]”). Put differently, the relevant complaint in a motion to dismiss proceeding under subsection 111.7(3) is the initial third-party complaint, but the relevant complaint at this stage of the proceeding—before the hearing officer—is the Division’s administrative complaint. Whether the third-party complaint was facially sufficient to state a claim (and the Deputy’s assessment of that) is irrelevant to this Court’s assessment of the allegations in the *Division’s* complaint.

Consider a hypothetical scenario in which an original complaint brings two claims: 1) a failure to register, and 2) a failure to include compliant disclaimer statements. Imagine further that the Deputy Secretary denies a motion to dismiss under subsection 111.7(3) as to

Claim 1, but grants it as to Claim 2 because the original complainant offered no facts to support the disclaimer violations. If, during its investigation of Claim 1 the Division finds evidence of disclaimer violations, it is not only permitted to, but must, amend the complaint to add that disclaimer violation notwithstanding the Deputy's ruling on initial review.

The Initial Review stage of the 111.7 process is intended to be a facial assessment of the third-party campaign finance complaint. Where, as here, that complaint proceeds to an investigation and a hearing, the Deputy Secretary's assessment of the facial validity of the third-party complaint is no longer at issue.

B. The Division's Complaint plausibly alleges that Husch's CORA requests were used for the purposes of express advocacy.

Next, Husch argues that the Division's Complaint does not plausibly allege that the information obtained by the CORA requests was used for express advocacy. Mot. at 8–9. In so doing, Husch references a litany of things the Division's Complaint does not allege, Mot. at 8, but does not reference the core of the Division's Complaint: that Husch Blackwell submitted over two-dozen CORA requests in 2023 alone, and that many of those requests were election-related. Compl. ¶¶ 26–27. Husch requested self-nomination forms submitted by candidates for the election, lottery results for the ordering of candidate names on the ballot, and even a copy of the certified ballot. *Id.* ¶ 27. It did so while representing two candidates for the election, and two developers who were adverse to the GRMD Board in litigation, and would therefore plausibly benefit from a change in the Board's membership. *Id.* ¶¶ 16–19.

From there, it is a reasonable inference to conclude that the information obtained by those requests was used for express advocacy. Especially because Husch admits to having

worked for several entities involved in litigation against the GRMD Board, which makes it even more likely that one or more of those entities—or an entity aligned with them—would have sought to influence the GRMD board election through express advocacy. And especially viewing such facts, as the Court must, in the light most favorable to the Division. *See Abu-Nantambu-El*, 2018 COA 30, ¶ 8.

Because that information was worth over \$1,000 to whomever obtained it, any such express advocacy would constitute a reportable independent expenditure. § 1-45-107.5(3), (4)(a). The Deputy Secretary already concluded as much on the record that existed after the Division’s investigation. Ex. A at 10 (finding it “plausible that the materials obtained through the CORA requests were likely used ‘for the purpose of’ expressly advocating for or against a candidate for the GRMD board by the undisclosed client”).

CONCLUSION

The Court should deny the Motion to Dismiss.

Respectfully submitted this 16th day of February, 2024

PHILIP J. WEISER
Attorney General

/s/ Peter G. Baumann

PETER G. BAUMANN*
Senior Assistant Attorney General,
No. 51620
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, Colorado 80203
Telephone: 720-508-6152
Fax: 720-508-6041
peter.baumann@coag.gov
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I will cause the within filing to be served by email this 16th day of February 2023, addressed as follows:

Timothy Posnanski Timothy.Posnanski@huschblackwell.com
Jamie Steiner Jamie.Steiner@HuschBlackwell.com

Counsel for Respondents

/s/ Peter G. Baumann