

**BEFORE THE INDEPENDENT ETHICS COMMISSION  
STATE OF COLORADO**

**CASE NO. 12-07**

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**In the Matter of**

**SCOTT E. GESSLER, Colorado Secretary of State**

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**RESPONSE  
AND  
REQUEST FOR DETERMINATION OF FRIVOLOUSNESS**

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Respondent Colorado Secretary of State Scott E. Gessler respectfully submits this *Response and Request for Determination of Frivolousness* to the complaint and supplemental complaint (collectively the “Complaint”) under IEC Rule 7(K)(2). Concurrent with this *Response and Request for Determination of Frivolousness*, the Secretary submits his *Motion to Dismiss*.

The *Motion to Dismiss* explains why this Commission does not have jurisdiction and should dismiss the Complaint as a matter of law. By contrast, this *Response and Request for Determination of Frivolousness* accomplishes two separate purposes. First, it provides a factual response in this case, to the extent possible. As discussed in the *Motion to Dismiss*, the Complaint is exceedingly vague and uses criminal allegations as a basis for unspecified ethical complaints. This *Response* demonstrates that the Secretary’s actions were legal, proper, and fully within any applicable ethical standards.

Second, this *Request for Determination of Frivolousness* sets forth the facts and arguments demonstrating that, as a factual matter, the Commission should determine that the Complaint is frivolous. On November 5, 2012, the Commission made a decision without adequate facts before it. Indeed, the Secretary did not have an opportunity to

submit an official response, because he had no notice that the Commission would consider the Complaint. In addition, the complainant failed to attest to the factual assertions in the Complaint, as required by the Commission's rules.

As this *Response* explains, had the Commission received an official response and been able to review all the facts in the matter, it would have reached a different conclusion at its meeting on November 5, 2012. Accordingly, the Secretary asks this Commission to reconsider its earlier determination and find the Complaint frivolous as a matter of fact.

## **I. PROCEDURAL HISTORY**

On October 15, 2012, Citizens for Responsibility and Ethics in Washington (“CREW”) filed a complaint with the Denver District Attorney alleging that the Secretary “may” have committed three crimes: (1) misdemeanor first-degree official misconduct;<sup>1</sup> (2) felony embezzlement;<sup>2</sup> and (3) misdemeanor abuse of public records.<sup>3</sup> To date, CREW has not directly accused the Secretary of violating Colorado law, but it has instead framed its complaint as a possible violation.

On October 15, 2012, CREW filed the same criminal complaint with this Commission, in an undated format. One week later, on October 22, 2012, CREW filed a supplemental complaint, alleging that the Secretary may have received personal payments totaling \$117.99. CREW suggested that this “may” have “violate[d] the

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<sup>1</sup> C.R.S. § 18-8-404<sup>1</sup> and 1 Colo. Code Regs. § 101-1:2-1.01.

<sup>2</sup> *Id.* § 18-8-407.

<sup>3</sup> *Id.* § 18-8-114.



political controversy. But prior to the November 5, 2012 meeting, the Secretary did not have the opportunity to request an executive session or file an official response, because the Commission did not provide notice and an opportunity for the Secretary to respond to the Complaint.

During the executive session, at least one Commissioner asked if the Secretary had submitted an official response, and two Commissioners expressed concern about the vague and unspecified nature of the Complaint. Despite these initial misgivings, the Commission nevertheless went forward and deemed the Complaint “non-frivolous.”

Upon adjournment of the executive session, the Commission notified both CREW and local media outlets of its decision, but not the Secretary. In fact, the Secretary had to learn of the Commission’s decision from media accounts. After reading the media accounts of the Commission’s decision on November 5, 2012, the Secretary’s office requested a copy of the Complaint. The Commission provided a partial copy the next day. Two days later, on November 8, 2012, the Commission served the Secretary with the full Complaint, including exhibits.<sup>7</sup>

The Secretary requested an extension through February 1, 2012 to submit his response (originally due on December 10, 2012), in part to have time to review relevant records that the Commission did not produce within statutory timeframes.<sup>8</sup> The Commission granted an 11-day extension to December 21, 2012.

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<sup>7</sup> See Exhibit A to *The Secretary’s Motion for Extension of Time to Respond, or Alternatively, Motion for Stay* (submitted on Dec. 6, 2012).

<sup>8</sup> See *The Secretary’s Amended Motion for Extension of Time to Respond, or Alternatively, Motion for Stay* (submitted on Dec. 6, 2012).

Alternatively, the Secretary moved for a short stay, pending the resolution of the Denver District Attorney's parallel review.<sup>9</sup> During oral argument, one commissioner stated that the Commission's jurisdiction was not limited as a result of the complaint's criminal allegations, but could review the factual allegations under "other standards of conduct." Counsel for the Secretary objected to this standard, arguing that CREW made three criminal allegations only, and the lack of non-criminal allegations made it impossible for the Secretary to defend himself against unspecified "standards of conduct." This matter is addressed in the Secretary's concurrent *Motion to Dismiss*.

## **II. RESPONSE AND REQUEST FOR DETERMINATION OF FRIVOLOUSNESS**

### **A. The Secretary appropriately used department operating funds, as is typical for travel, to fly home in response to graphic, violent death threats against him and his family.**

The Complaint makes allegations concerning discretionary funds and allegations concerning normal state funds. This portion of the response discusses normal state travel funds. Facts involving discretionary funds are discussed in later sections.

On Friday, August 24, 2012, the Secretary's staff opened and read an e-mail sent the night before at approximately 11:00 p.m. It was sent from a "Nellie Robinson" (robinsonnellie@yahoo.com) and addressed to the Secretary, who the sender referred to as "Shithead Gessler."<sup>10</sup> Laced with numerous profanities, the e-mail stated that the Secretary is "being watched." It also made the following graphic and disturbing threat:

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<sup>9</sup> See The Secretary's *Amended Motion for Extension of Time to Respond, or Alternatively, Motion for Stay* (submitted on Dec. 6, 2012).

<sup>10</sup> See Exhibit A.

Here's what I earnestly and gladly wish upon you: that your daughter/s or wife or other female family member get raped -- either "forcibly & legitimately" or otherwise -- and then that you [sic] get to watch the barbarism of forcing them to incubate an abomination that certainly scars their psyche for life.<sup>11</sup>

After reading the e-mail, an employee at the Secretary's office forwarded it to the Department of State's Chief of Staff, who then immediately forwarded it to the Colorado Bureau of Investigation ("CBI") and followed up with direct communications with CBI's director.<sup>12</sup>

At that time, the Secretary was attending a Continuing Legal Education election-law conference in Florida; his family remained in Colorado. The Secretary's staff alerted the Secretary to the threat and CBI investigation, and the Secretary and his staff awaited direction from CBI, pending the results of its investigation.<sup>13</sup> The CBI informed the Denver Police Department of the threat. The Department, in turn, increased patrols and security around the Secretary's home and around the home of the Secretary's mother, who also resides in Denver. As a precautionary measure, the Secretary's wife and daughter relocated elsewhere in Colorado and police patrols were increased at that location, as well.

Three days later, on Tuesday, August 28, 2012, an employee in the Secretary's office received a telephone threat directed at the Secretary.<sup>14</sup> The caller, later identified as Richard Wiscomb, stated that all "republicans should be shot in the head" and "people

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<sup>11</sup> *See id.*

<sup>12</sup> *See* Exhibit B.

<sup>13</sup> *See* Exhibits C and D.

<sup>14</sup> *See* Exhibit B.

know where the Secretary and his family live.”<sup>15</sup> The employee recorded the phone number, including its Colorado area code.<sup>16</sup> The Secretary’s office again immediately alerted CBI.<sup>17</sup>

Two violent threats in rapid succession – a serious, specific, local telephone threat, possibly linked to an earlier email threat of violence against the Secretary’s family – caused great alarm. Heightening the alarm was the sudden, unusual nature of these threats. Indeed, prior to the two threats, the Secretary had never received a single death threat during 17 months in office.

On Wednesday, August 29, 2012, Colorado law enforcement performed a more rigorous security assessment of the Secretary’s home.<sup>18</sup> During this time, the Department of State’s Chief of Staff coordinated with both the CBI and the Secretary.<sup>19</sup> As a general matter, the Secretary relied on the advice and judgment of staff in Colorado and the CBI.<sup>20</sup>

The next day, the Chief of Staff, in consultation with the CBI and Deputy Secretary of State, advised the Secretary to return early from his trip to Florida.<sup>21</sup> The Secretary followed this advice and returned to Colorado on the first available flight the

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<sup>15</sup> *See id.*

<sup>16</sup> *See* Exhibit E.

<sup>17</sup> *See* Exhibit B.

<sup>18</sup> *See id.*

<sup>19</sup> *See* Exhibit C.

<sup>20</sup> *See id.*

<sup>21</sup> *See id.*

following morning.<sup>22</sup> At the direction of the Department of State’s Chief of Staff and the Deputy Secretary of State, the Department of State paid for the \$422.00 in costs associated with the Secretary’s early return.<sup>23</sup> Before authorizing this expenditure, the Chief of Staff consulted with other Department of State employees and specifically informed the Secretary that based upon this review, the expenditure of \$422.00 was an appropriate and legal use of state travel funds.<sup>24</sup>

And the analysis conducted by the Department of State was correct. A state expenditure to respond to serious, specific, and violent threats – directly tied to official responsibilities – against the Secretary and his family is unquestionably appropriate, under “any standard[] of conduct.”

Although CREW ignored the death threats in its Complaint, CREW has, nonetheless, responded to the issue in public media. When asked about the threats, CREW’s complainant in this matter, Mr. Luis Toro, dismissed these threats as a “distraction.”<sup>25</sup>

Death threats are not a “distraction.” Unfortunately, sometimes partisan anger turns to violence directed at elected officials. By law, the Secretary’s home address, office address, and even travel schedule (through open records requests) are all matters of public record. The Secretary does not have a security detail. Although one can properly

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<sup>22</sup> *See id.*

<sup>23</sup> *See* Exhibits C and D.

<sup>24</sup> *See* Exhibit C.

<sup>25</sup> [http://blogs.westword.com/latestword/2012/10/scott\\_gessler\\_misuse\\_of\\_funds\\_investigation\\_colorado\\_ethics\\_watch.php?page=2](http://blogs.westword.com/latestword/2012/10/scott_gessler_misuse_of_funds_investigation_colorado_ethics_watch.php?page=2) (last visited Dec. 19, 2012).

question Mr. Toro's callous disregard for human safety, one cannot dispute that it was appropriate to use state funds so the Secretary could alter his travel schedule and come home in response to these graphic threats of violence against him and his family.

**B. Normal state accounting procedures do not govern discretionary funds, because an elected official may make official use of the annual discretionary fund "as the [official] sees fit."**

1. Colorado law explicitly gives elected officials -- not the IEC -- authority to determine how discretionary funds may be spent.

The Governor receives an annual salary of \$90,000; the Attorney General receives \$80,000; and the Lieutenant Governor, Secretary of State, and State Treasurer each receive \$68,500.<sup>26</sup> Additionally, each receives an annual discretionary fund "for expenditure in pursuance of official business *as each elected official sees fit.*"<sup>27</sup> The Governor receives \$20,000 each year, and the others each receive \$5,000.<sup>28</sup> These discretionary funds are all "subject to annual appropriation by the general assembly."<sup>29</sup>

Unlike other state monies, the standards for using discretionary funds are left to the discretion of elected officials. Colorado law is very specific on this matter, stating the funds are to be used "as each elected official sees fit." The Commission should "give effect to the ordinary meaning of words used by the legislature" and "the statute should be construed as written, giving full effect to the words chosen, as it is presumed that the

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<sup>26</sup> C.R.S. § 24-9-101(1). Because he concurrently serves as the Executive Director of the Colorado Department of Higher Education, Lieutenant Governor Garcia's annual salary is \$146,040. <http://blogs.denverpost.com/thespot/2011/01/11/hick-it-aint-about-the-salary/20409/> (last visited Dec. 20, 2012).

<sup>27</sup> C.R.S. § 24-9-105(1) (emphasis added).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

General Assembly meant what it clearly said.”<sup>30</sup> Here, the General Assembly stated that each elected official has discretion to determine what constitutes official use of the discretionary fund. The General Assembly specifically exempted the discretionary funds from the standards that govern other state expenditures.

If the General Assembly had wanted to subject elected officials’ discretionary funds to the same standard as other state expenditures, it could have simply said so. For example, it could have set forth a standard “for expenditure in pursuance of official business *according to the standards established by the Department of Personnel and Administration.*” Or it could have stated “*according to the standards established by the Governmental Accounting Standards Board.*” Or, it could have simply abolished the discretionary funds completely, requiring all non-salary expenditures to fall within standards applicable to other state spending.

But the General Assembly did not set forth any of the standards above. Rather, the General Assembly’s standard is this: each statewide elected constitutional officer has the flexibility to use the relatively limited discretionary funds for activities that fall outside of normal state rules, but within official purposes, as the elected official “*sees fit.*”

2. Elected officials have interpreted official business to include parties and clothing; many elected officials provide no explanation and no receipts whatsoever.

The standard for the Secretary’s spending from the discretionary fund is “for expenditure in pursuance of official business as each elected official sees fit.” Although each elected official has discretion, it is nonetheless instructive to see what *other* elected state officials have used as standards for “official business.” And to gain a sense of these

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<sup>30</sup> *State v. Nieto*, 993 P.2d 493, 500 (Colo. 2000).

standards, not only is it important to see *what* other elected officials have interpreted as “official business,” it is important to see *how* they have accounted for their activities.

To the extent any standard exists, it is that elected officials have discretion, and that there is little distinction between official and personal activities. Other elected officials have interpreted “official business” to include the following activities:

- Office parties;
- Personal clothing;
- Charitable donations;
- Holiday receptions;
- Meetings with lobbyists;
- Direct transfers to other accounts; and
- International travel.<sup>31</sup>

To clarify, the purpose of these examples is not to criticize or opine upon other elected officials’ use of funds. Rather, these examples demonstrate the wide and varied interpretations of “official business.” They also demonstrate that many of these activities could pejoratively be characterized as personal entertainment, reimbursement for personal expenses, or activities that clearly do not fall within normal state accounting standards.

But it would be wrong to automatically assign such activities as merely personal. Elected office is a full-time endeavor, and an elected official’s public duties and personal life are intertwined. Holiday receptions can enable an elected official to discuss official

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<sup>31</sup> See Exhibit H.

business in an informal and relaxed setting. Office parties can increase morale and effectiveness in the workforce. And certain international travel – even personal international travel – has the potential to benefit the State of Colorado.

The Commission itself has recognized the close connection between an elected official’s personal activities with “official business.” Governor Hickenlooper sought permission to receive a gift to travel to New York City, in order to appear on a television show to discuss education reform.<sup>32</sup> In his request, the Governor could not identify a specific state legislative or administrative issue that required the attendance of the Governor and his aide, and the Commission found that the trip would generally help bolster the Governor’s national profile on an important policy issue.

The Commission stated in dicta that the Governor’s trip was “official business.” The Commission reasoned that activities affecting an elected officials’ “national profile” were enough to place those activities within “official business.” Something as indirect as personal publicity from education policy discussions was properly deemed to be “official business.” In other words, this Commission recognized the connection between personal activities and official business.

The manner in which elected officials document their official business is likewise open to elected official interpretation, and oftentimes an elected official’s accounting of public funds includes no receipts or explanation.<sup>33</sup> For example, legislative leadership in Colorado can accept reimbursement for state expenses through per diem (\$99 per day)

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<sup>32</sup> See IEC AO 11-12.

<sup>33</sup> See Exhibit K.

and mileage reimbursement.<sup>34</sup> Legislative leadership receives these reimbursements when the legislature is not in session if used for “necessary attendance at meetings or functions or to legislative matters . . . .”<sup>35</sup>

Explanations for reimbursement are oftentimes vague and vary from member to member; there is apparently no reporting standard. Examples include the following:

- Some legislators justify expenses with explanations such as “matters pertaining to the general assembly” or “holiday reception.”<sup>36</sup>
- Some legislators seek per diem for days that they are away from the Capitol, including with groups that actively lobby on behalf of political causes.<sup>37</sup>
- Some legislators request per diem for many calendar days, with no explanation whatsoever.<sup>38</sup>
- Other legislators only request per diem for the days that the General Assembly conducts business.<sup>39</sup>
- Some legislators provide vague explanations for expenses far away from the Capitol or from their legislative districts.<sup>40</sup>

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<sup>34</sup> See C.R.S. § 2-2-307.

<sup>35</sup> See *id.*

<sup>36</sup> See Exhibit K.

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> See *id.*

Indeed, a review of elected legislators' justifications for claiming reimbursement for "necessary attendance at meetings or functions or to legislative matters" shows almost a complete lack of any accounting or any receipts whatsoever.

3. Other state entities -- not the IEC -- review the expenditure of state funds.

As the Secretary's *Motion to Dismiss* asserts, the Commission lacks jurisdiction to review the Secretary's use of his discretionary fund. But on a practical level, the Commission's review is unnecessary and duplicative.

The State Controller has the statutory authority to issue fiscal rules. The State Auditor is generally in charge of enforcing those rules. With respect to discretionary funds, the State Controller recognizes the right of an elected official to use the "elected official" exemption in reporting the use of discretionary funds.<sup>41</sup> This generally allows elected officials to opt out of certain fiscal rules. For example, elected officials may generally document certain expenses with memoranda in lieu of receipts. This is also the practice of the General Assembly.

Moreover, the General Assembly also requested that the State Auditor review the Department of State's discretionary fund. The State Auditor's and General Assembly's recent interest in Department of State's discretionary funds shows that the legislature is willing to devote a large amount of attention and extensive state resources to this matter.

**C. The Secretary properly spent discretionary funds for accrued out-of-pocket expenses and educational expenses.**

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<sup>41</sup> See C.R.S. 24-2-102(4); see also Exhibit F.

1. The Secretary appropriately used discretionary funds for accrued out-of-pocket expenses, such as mileage and telephone costs, associated with his duties.

For fiscal year 2011-2012, CREW alleges – again without attesting to a good-faith basis – that the Secretary “may” have embezzled and misreported the use of \$117.99 from his discretionary fund. The only conceivable fact that CREW relies upon is that the Secretary did not produce specific receipts or documentation for \$117.99 in expenditures. As noted before, very few – if any – legislators document their use of official business.

More directly, the Secretary has expenses for well over \$117.99 that can easily and properly be characterized as official business. First, is cellular phone service. The Secretary makes state-related phone calls on his cellular phone on a daily basis. The cost for basic cellular service is over \$100 per month, which easily exceeds \$117.99 in undocumented expenses for an entire year. But the Secretary has never requested reimbursement for this cost.

Additionally, the Secretary often uses his personal vehicle to travel to events that are properly characterized as “official business.” But his practice has been to only seek mileage reimbursement for long trips, usually beyond Colorado’s Front Range. Below is a chart showing unreimbursed mileage expenses for fiscal year 2011-2012:

<b>FY 11/12</b>		<b>\$0.50 per mile per State for FY 11/12</b>		
<b>Date</b>	<b>Destination (some are roundtrips)</b>	<b>Purpose for Travel</b>	<b>Miles</b>	<b>Total</b>
7/7/11	6840 S. University Blvd. Centennial	South Metro Chamber Meeting - Speaking	27	\$13.50
7/18/11	12484 E. Weaver Place, Centennial	Citizenship Ceremony	30	\$15.00
8/17/11	200 W. Oak Street, Ft. Collins	County Clerks Board Meeting	130	\$65.00
8/26/11	Boulder	Steve Tebo Lunch	60	\$30.00
8/26/11	Pueblo	Pueblo Chamber Legislative BBQ	230	\$115.00
8/30/11	Pueblo	Denver Rustler's Trip - Was not able to take the bus	230	\$115.00
9/15/11	6903 Wadsworth Blvd. Arvada	Independence of Mexico Event	26	\$13.00
10/10/11	2255 East Evans Ave.	Meet with Dean Katz	16	\$8.00
10/21/11	5830 County Road 20, Frederick	Business Owners Breakfast	62	\$31.00
11/4/11	Colorado Springs	Colorado Springs Chamber Reception/Dinner	142	\$71.00
11/14/11	29th and Welton	Corky Kyle Radio Interview	1	\$0.50

11/15/11	13300 W. 6th Avenue	W. Chamber Elected Officials Reception	24	\$12.00
2/3/12	Boulder to Greeley	Steve Moreno and Sean Conway Meetings		\$0.00
4/4/12	101 Monroe Street	Daniels Fund Interviews	8	\$4.00
4/20/12	Pueblo	Pueblo Business Owners Building	230	\$115.00
4/30/12	101 Monroe Street	Daniels Fund Video Taping	8	\$4.00
5/11/12	101 Monroe Street	Daniels Fund Non-Profit Lunch	8	\$4.00
			<b>1232</b>	<b>\$616.00</b>

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Although not part of the Complaint, in other forums CREW has made allegations with respect to approximately \$1,400 in undocumented expenditures from the 2010-2011 discretionary fund. Although the one-year statute of limitations bars the Commission from considering these allegations,<sup>42</sup> the Secretary wishes to show that he incurred unreimbursed expenses well in excess of \$1,400 that can properly be characterized as “official business.” This is necessary to rebut the sensationalized and politicized accusations that CREW has advanced to injure the Secretary’s reputation.

First, the Secretary operated in good faith, based upon guidance from his long-serving Deputy Secretary of State and the State Auditor. After his inauguration, the Secretary retained Deputy Secretary of State Bill Hobbs, who had served under *six* previous Secretaries of State. Mr. Hobbs advised the Secretary that discretionary funds could be used at the complete discretion of the Secretary, that former Secretaries had simply treated the discretionary fund as income (and accordingly paid taxes on income), and that receipts were not required.<sup>43</sup>

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<sup>42</sup> See IEC Rule 7(G); see also *Developmental Pathways v. Ritter*, 178 P.3d 524, 534-35, n.8 (Colo. 2008).

<sup>43</sup> See Exhibit H.

Additionally, the State Auditor advised the Department of State staff that receipts for discretionary fund expenditures were preferred, but *not* required.<sup>44</sup> This advice was communicated to staff who advised the Secretary regarding his discretionary fund.<sup>45</sup>

Based upon this advice, at the end of the 2010-2011 fiscal year, the Secretary in good faith withdrew the remaining funds from the discretionary fund, in the reasonable belief that this action was entirely proper and recognizing that he had substantial incurred but unreimbursed expenses.

Following the public attacks on the Secretary’s actions, the Secretary has reviewed old receipts and expenses to identify unreimbursed expenses from the 2010-2011 fiscal year that can properly be characterized as “official business.” Although not nearly an exhaustive accounting of expenses, these unreimbursed expenses well exceed the \$1,400 of which CREW complains. This includes cellular phone service, online newspaper subscriptions, and conference attendance, as detailed below:

<b>Date</b>	<b>Amount</b>	<b>Description</b>
12/24/10-1/23/11 (Pro-rated for 12 days to coincide with inauguration day)	38.71	Cellular Phone Service
	11.61	Cellular Data
	11.61	Cellular Messaging
1/24/11-2/23/11	100	Cellular Phone Service
	30	Cellular Data
	30	Cellular Messaging
2/23/11-3/5/11 (pro-rated for 10 days, to coincide with new plan)	33.33	Cellular Phone Service
	10	Cellular Data
	10	Cellular Messaging

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<sup>44</sup> See Exhibit G.

<sup>45</sup> See Exhibits C and H.

3/6/11-3/9/11	14.29	Cellular Phone Service
	6.43	Smartphone surcharge
	2.86	Cellular "hotspot" fee
3/10/11-4/9/11	100	Cellular Phone Service
	44.99	Smartphone surcharge
	-9	Discount
	20	Cellular "hotspot" fee
4/10/11-5/9/11	100	Cellular Phone Service
	44.99	Smartphone surcharge
	-9	Discount
	20	Cellular "hotspot" fee
5/10/11-6/9/11	100	Cellular Phone Service
	44.99	Smartphone surcharge
	-9	Discount
	20	Cellular "hotspot" fee
6/10/11-7/9/11 (pro-rated for 21 days, to coincide with end of fiscal year)	70	Cellular Phone Service
	31.49	Smartphone surcharge
	-6.3	Discount
	14	Cellular "hotspot" fee
1/31/11	7.95	Dow Jones daily update subscription
2/28/11	7.98	Dow Jones daily update subscription
3/31/11	7.95	Dow Jones daily update subscription
4/11/11	154.39	Mobile cloud computer subscription
4/27/11	155	Wall Street Journal annual subscription
4/30/11	7.95	Dow Jones daily update subscription
5/31/11	7.95	Dow Jones daily update subscription
6/30/11	7.95	Dow Jones daily update subscription
2/23/11	110	Policy Conference Fees
2/26/11	196.48	Policy Conference Lodging in Colorado Springs
2/26/11	14	Policy Conference Parking

**TOTAL:** \$1,553.61

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In addition, the Secretary has been able to document at least \$166.05 in otherwise unreimbursed mileage for fiscal year 2010-2011,<sup>46</sup> as follows:

<b>FY2010 Date</b>	<b>Destination (Some are</b>	<b>Purpose</b>	<b>Miles</b>	<b>Total (\$0.45 per mile for FY2010)</b>
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<sup>46</sup> See Exhibit C.

	<b>roundtrips)</b>			
1/25/2011	4695 South Monaco Street	Radio Show Appearance	10	\$4.50
2/17/2011	Greeley	Student Election Judge Ceremony	112	\$50.40
2/20/2011 (Sunday)	3301 Milwaukee Street	Election Speech at African Methodist Church	6	\$2.70
2/25/2011	Colorado Springs	Policy Conference Mileage	142	\$63.90
3/7/2011	431 South Broadway	Constituent Meeting	5	\$2.25
4/4/2011	5334 South Prince Street, Littleton	Clerk and Recorder Meeting	11	\$4.95
4/4/2011	1044 Lincoln Street	Television Interview	6	\$2.70
4/8/2011	101 Monroe Street	Scholarship Fund Interviews	8	\$3.60
4/10/2011 (Sunday)	3801 Quebec Street	Veteran Organization Dinner	10	\$4.50
4/20/2011	9808 Sunningdale Boulevard, Lone Tree	Constituent Speaking engagement and luncheon	21	\$9.45
5/5/2011	500 Interlocken Parkway, Broomfield	North Metro Day of Prayer	20	\$9.00
5/5/2011	11373 East Alameda Avenue	National Day of Prayer Reading of Proc.	9	\$4.05
5/14/2011 (Saturday)	1700 Lincoln Street	Asian Roundtable of Colorado Lunch	4	\$1.80
5/31/2011	1300 South Steele Street	Archbishop Meeting	5	\$2.25
		<b>TOTAL</b>	371	\$166.95

Even though elected officials have discretion to determine “official business” when spending discretionary funds, any reasonable person would agree that the above documented, unreimbursed expenses are related to official business.

2. The Secretary appropriately used discretionary funds for a national election-law seminar that was accredited by the Colorado Supreme Court.

In August, 2012, the Secretary used part of his \$5,000 annual discretionary fund to attend a three-day national election-law continuing legal education seminar in Tampa, Florida hosted by the Republican National Lawyers' Association (RNLA).<sup>47</sup> In light of media reports related to the Secretary's attendance of the Republican National Convention after the RNLA seminar, it is necessary to point out that discretionary funds were not used to attend the Republican National Convention. These expenses were reimbursed from the Secretary's campaign fund on September 10, 2012.<sup>48</sup>

Ultimately, CREW's only criticism of the election-law conference is that the sponsor's name prominently displays the word "Republican." From that, CREW asks the Commission to infer "partisan" activity, which CREW implies cannot be "official business." CREW's Complaint relies upon a shallow focus on the word "Republican" -- in ignorance of the actual *content* of the conference.

The Secretary is an attorney and to keep his law license current, he must earn 45 credit hours in continuing legal education every three years. The Department of State has a long-standing policy of paying for its lawyer employees' continuing legal education.

In reviewing whether the election-law conference could be reasonably characterized by the Secretary as official business, any reasonable person should follow the Colorado Supreme Court's example and examine the content of the election-law conference -- not the name of the sponsor. The Colorado Supreme Court's Board of

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<sup>47</sup> See Exhibit L.

<sup>48</sup> See I.

Continuing Legal and Judicial Education accredited the three-day seminar for continuing legal education (CLE) credit.<sup>49</sup> This means that the Supreme Court board found that the RNLA national election-law seminar was an “educational activity which has as its *primary objective* the increase of professional competence of registered attorneys and judges” and it was “an organized activity dealing with subject matter directly related to the practice of law or the performance of judicial duties.”<sup>50</sup> In other words, the Supreme Court Board properly reviewed the RNLA’s actions and the quality of the conference’s educational activities. In granting credit, it properly ignored potential *ad hominum* criticism of the RNLA.

Furthermore, actual review of the conference agenda shows that the conference focused on election law. And no reasonable person would dispute that this education helped the Secretary better perform his official duties because he is – after all – the State of Colorado’s chief election officer. Put another way, it is perfectly reasonable for the state’s chief election officer to learn more about election law, and this easily fits within an elected official’s view of his duties.

At the conference itself, the Secretary participated on a panel entitled “The Department of Justice, the Role of the States, and Voter ID.” Participants included other governmental and former government officials, including the chair of a state election commission and a former U.S. Department of Justice trial attorney specializing in voting rights. And the Secretary attended other panels, including:

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<sup>49</sup> See Exhibit J.

<sup>50</sup> Regulation 103, Board of Continuing Legal and Judicial Education, <http://www.coloradosupremecourt.com/pdfs/CLE/Rules.pdf> (last visited Dec. 18, 2012) (emphasis added).

- “Voting Before Election Day: Military, Overseas, Absentee, and Early Voting”;
- “Poll Closing and Opening; Provisional Ballots”; and
- “After Election Day: Recounts and Contests.”<sup>51</sup>

These panels and sessions were taught by leading legal practitioners and officials, including:

- a former state governor;
- a sitting state attorney general;
- a sitting secretary of state;
- legal counsel to governors;
- high-ranking former military commanders;
- a state assistant attorney;
- a county commissioner;
- attorneys for a presidential and other national campaigns and political organizations; and
- leading campaign election-law attorneys from across the nation.<sup>52</sup>

Meeting and learning from these national election-law leaders is both relevant and useful to performing the official duties of Colorado Secretary of State.<sup>53</sup> And, as mentioned above, this Commission has previously agreed that activities that raise the public profile of an elected official – even without any direct connection to state duties – is “official business.” Under the Commission’s own standard, attendance at an election-

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<sup>51</sup> See Exhibit L.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

law conference directly relates to the Secretary’s duties as Colorado’s chief election officer and qualifies as “official business” – regardless of the sponsoring organization’s political affiliation.

**D. CREW’s Complaint “is filed without a rational argument based on the facts or law.” CREW failed to properly attest to its allegations.**

The Secretary concurrently files a *Motion to Dismiss* arguing that the Commission lacks jurisdiction over CREW’s complaint because (1) it is “frivolous” as a matter of statute; and (2) the Commission lacks jurisdiction over criminal complaints. The Secretary moves now, however, for the Commission to reconsider its initial non-frivolous determination and dismiss CREW’s complaint pursuant to the Commission’s rules, after more fully understanding CREW’s unattested allegations and the Secretary’s response.

1. CREW has no rational argument for the IEC’s involvement based on the facts or law.

Amendment 41 (Article XXIX) to the Colorado Constitution generally grants to the Commission jurisdiction to hear non-frivolous ethics complaints.<sup>54</sup> While defined differently by Colorado statute,<sup>55</sup> the Commission’s rules define “frivolous” complaints as those “filed without a rational argument for the IEC’s involvement based on the facts or law.”<sup>56</sup> The Commission’s rules require dismissal of such complaints.<sup>57</sup>

The Commission has now had the opportunity to further understand CREW’s Complaint, along with the Secretary’s substantive response. It is clear that the Secretary

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<sup>54</sup> See Colo. Const. art. XXIX, § 5(3)(c).

<sup>55</sup> See C.R.S. § 24-18.5-101(5).

<sup>56</sup> IEC Rule 3(A)(5).

<sup>57</sup> *Id.* 7(G)(1).

legally, ethically, and appropriately utilized state funds. It is also clear that there is no evidence – because no evidence exists – that the Secretary violated the three criminal statutes that CREW alleges. Moreover, even if the Commission were to consider CREW’s Complaint under some vague and undefined “other standards of conduct,” it is entirely unclear how the Secretary would have committed an ethics violation.

Because CREW’s Complaint is “filed without a rational argument for the IEC’s involvement based on the facts or law,” it is frivolous. Thus, the Secretary moves the Commission to re-examine its frivolous determination, as dismiss CREW’s complaint as frivolous, under IEC Rules 7(G)(1) and 3(A)(5).

2. CREW’s unattested complaint omits a signed statement that, to the best of the complainant’s knowledge, information and belief, the facts and any allegations set out in the complaint are true.”

Commission rules state, “[t]he complaint shall contain . . . [a] [signed] statement that, to the best of the complainant’s knowledge, information and belief, the facts and any allegations set out in the complaint are true.”<sup>58</sup> But neither CREW’s initial complaint nor the supplemental complaint contains the required signed attestation. CREW’s failure is not a mere technicality; it is a jurisdiction requirement, and the complainant’s written attestation of a good-faith factual basis to support allegations helps prevent the costly, vexatious, and partisan misuse of the legal system that is CREW’s hallmark.

Colorado statute recognizes that “courts of record of this state have become increasingly burdened with litigation which is straining the judicial system and interfering with the effective administration of civil justice.”<sup>59</sup> Thus, courts are broadly

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<sup>58</sup> IEC Rule 7(D)(4) (emphasis added).

<sup>59</sup> C.R.S. § 13-17-101.

given power to sanction when a party brings a “substantially frivolous, substantially groundless, or substantially vexatious” claim or defense.<sup>60</sup>

Moreover, both the federal and Colorado courts have a similar requirement in Rule 11 of their respective rules of civil procedure.<sup>61</sup> Federal Rule 11 is “aimed at curbing abuses of the judicial system.”<sup>62</sup> “Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay.”<sup>63</sup>

Colorado version of Rule 11

provides that an attorney’s signature on a pleading constitutes his or her certification (1) that the attorney has read the pleading; (2) that to the best of the attorney’s knowledge, information, and belief formed after reasonable inquiry, the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (3) that the pleading is not interposed for any improper purpose.<sup>64</sup>

As noted earlier, CREW failed to attest to the accuracy of any of its facts, and it further failed to make any direct accusations, instead stating that the Secretary “may” have engaged in improper conduct. This is important, of course, because it shows that CREW failed to meet the basic requirements for filing a complaint with the Commission – it did not vouch for its facts, and it did not even state that its facts constituted

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<sup>60</sup> *Id.*

<sup>61</sup> *See* Fed. R. Civ. P. 11; *see also* Colo. R. Civ. P. 11.

<sup>62</sup> *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 397 (1990).

<sup>63</sup> *Id.*

<sup>64</sup> *Stepanek v. Delta County*, 940 P.2d 364, 370 (Colo. 1997).

misconduct. It evidences that CREW's Complaint is "substantially frivolous, substantially groundless, or substantially vexatious."<sup>65</sup>

CREW is not motivated by a desire to ensure more ethical government; rather, CREW is motivated by a desire to attack and embarrass Republicans. CREW's past and current history shows that it operates almost exclusively as a vehicle to attack Republican officeholders, candidates, and supporters.

In fact, CREW is a Delaware corporation, with its principal office in Washington, D.C., and its self-purported mission is to use "high-impact legal actions to target government officials who sacrifice the common good to special interests."<sup>66</sup> Despite its lofty mission statement, CREW is well known for employing its "common good" standard in a partisan manner, to specifically target and attack Republican officeholders and supporters. National media organizations, such as The Washington Post and Time Magazine, have labeled CREW as partisan.<sup>67</sup> In 2006, the DC-based newspaper ROLL CALL reported that CREW "refuses to release information about its donors" and "all but a handful of its complaints against Members of Congress have targeted Republicans."<sup>68</sup>

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<sup>65</sup> C.R.S. § 13-17-101.

<sup>66</sup> CREW's Mission, <http://www.citizensforethics.org/pages/mission> (last visited Dec. 18, 2011).

<sup>67</sup> [http://www.washingtonpost.com/wp-dyn/content/article/2008/06/17/AR2008061702579\\_2.html?sid=ST2008061703210](http://www.washingtonpost.com/wp-dyn/content/article/2008/06/17/AR2008061702579_2.html?sid=ST2008061703210) (last visited Dec. 18, 2012) (labeling CREW as "liberal"); *see also* <http://www.time.com/time/magazine/article/0,9171,1549301,00.html> (last visited Dec. 18, 2012) (same).

<sup>68</sup> [http://www.rollcall.com/issues/53\\_85/-21796-1.html?pg=1](http://www.rollcall.com/issues/53_85/-21796-1.html?pg=1) (last visited Dec. 18, 2012).

In 2006, under the trade name of “Colorado Ethics Watch,” CREW registered as a foreign entity doing business or conducting activities in Colorado. And CREW, under the banner of Colorado Ethics Watch, imported to Colorado its partisan legal tactics. For example, in 2010, as the legal weekly Law Week Colorado reported, a Colorado administrative law judge “chastised” and “upbraided” CREW for filing a “substantially groundless and frivolous” complaint against a conservative group.<sup>69</sup>

On two separate occasions, Colorado tribunals ordered CREW to pay the other side’s attorney fees following CREW’s filing groundless complaints.<sup>70</sup> Before the 2008 elections, CREW demanded the criminal prosecution of Republican candidate Bob Beauprez for airing a campaign ad with which CREW disagreed.<sup>71</sup> Very similar to this case, CREW filed an ethics complaint against a Republican Secretary of State just before an election. Indeed, prior to the presidential election in 2008, CREW filed an ethics complaint against then-Secretary of State Mike Coffman, and the Commission ultimately and completely cleared Secretary Coffman of all wrongdoing.<sup>72</sup>

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<sup>69</sup> <http://www.lawweekonline.com/2010/07/denver-administrative-judge-upbraids-colorado-ethics-watch/> (last visited Dec. 18, 2012); *see also generally* <http://thecoloradoobserver.com/2012/05/critics-question-impartiality-of-colorado-ethics-watch/> (last visited Dec. 18, 2012).

<sup>70</sup> *See Colo. Citizens for Ethics in Gov’t v. Comm. for Am. Dream*, 187 P.3d 1207, 1219 (Colo. App. 2008) (“groundless”); *see also* <http://www.lawweekonline.com/2010/12/ethics-watch-must-pay-attorney-fees-in-clear-the-bench-case/> (last visited Dec. 20, 2012).

<sup>71</sup> <http://www.citizensforethics.org/co-legal/entry/2355/> (last visited Dec. 20, 2012).

<sup>72</sup> <http://www.colorado.gov/cs/Satellite/DPA-IEC/IEC/1225190784719> (last visited Nov. 24, 2012).

CREW's partisan pattern continues, in the form of this present Complaint. "Rule 11 was designed to prohibit the proverbial 'shoot first, ask questions later' method of pleading."<sup>73</sup> This is exactly what CREW did, in violation of IEC Rule 7(D)(4) (the Commission's version of Rule 11). This failure to attest to facts and this failure to appropriately allege misconduct exemplifies CREW's partisan and bad-faith behavior. Accordingly, this Commission should dismiss the Complaint because CREW seeks to manipulate the Commission's proceedings as part of a partisan, political campaign against the Secretary.

### **III. REQUESTED RELIEF**

The Secretary denies CREW's alleged wrongdoing; the Secretary legally, ethically, and appropriately utilized state funds. Fortunately, the Commission can end this frivolous, partisan, and costly complaint, by re-visiting its frivolous decision. Because the Commission has now had a more full opportunity to review CREW's allegations and the Secretary's response, the Secretary moves for the Commission to find that (1) CREW's complaint is frivolous, under IEC Rules 7(G)(1) and 3(A)(5); and (2) CREW failed to properly attest to its allegations, under IEC Rule 7(D)(4).

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<sup>73</sup> 4 Colo. Prac., Civil Rules Ann. R. 11 (4th ed.).

Dated: December 20, 2012

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 20, 2012, I submitted via email the foregoing

**RESPONSE AND REQUEST FOR DETERMINATION OF FRIVOLOUSNESS**

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