

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock Street Denver, CO 80202</p> <hr/> <p>COLORADO ETHICS WATCH</p> <p>Plaintiff,</p> <p>v.</p> <p>COLORADO INDEPENDENT ETHICS COMMISSION</p> <p>Defendant.</p>	<p><b>FILED Document</b>  <b>CO Denver County District Court 2nd JD</b>  <b>Filing Date: Aug 6 2009 12:28PM MDT</b>  <b>Filing ID: 26469337</b>  <b>Review Clerk: Orathay Khiem</b></p> <p style="text-align: center;">▲ <b>COURT USE ONLY</b> ▲</p>
<p>JOHN W. SUTHERS, Attorney General  LISA BRENNER FREIMANN, Assistant Attorney General*  JACK WESOKY, Senior Assistant Attorney General*  ERIC MAXFIELD, First Assistant Attorney General*  1525 Sherman Street, 7<sup>th</sup> Floor  Denver, CO 80203  Telephone: 303-866-5519  FAX: 303-866-5395  E-Mail: Lisa.Brenner.Freimann@state.co.us  Registration Numbers: 31175, 6001, 29485  *Counsel of Record</p>	<p>Case No.: 2009CV4989  Division: 5</p>
<p><b>REPLY TO RESPONSE TO MOTION TO DISMISS</b></p>	

The Colorado Independent Ethics Commission (the “Commission”), by and through its counsel, hereby replies to Plaintiff’s response to the motion to dismiss Plaintiff’s first claim for relief (“Plaintiff’s response”).

I. Advisory Opinion 09-04 is not Final Agency Action.

Plaintiff's first claim for relief should be dismissed because Advisory Opinion 09-04 is not a final agency action subject to judicial review. Advisory opinions are not binding legally and do not fix rights or obligations and legal obligations do not flow from advisory opinions. Moreover, neither the Colorado Constitution, the Commission's rules nor any Colorado statute provides for, or even contemplates, the right of judicial review of an advisory opinion.

Plaintiff's response argues that advisory opinions must be final agency actions because the issuance of an advisory opinion is a constitutionally mandated function from which covered persons have the right to rely to guide their conduct and because nothing in the language of Advisory Opinion 09-04 suggests that no legal right or obligation should attach to the opinion. Plaintiff's response, pp. 5-7. Neither argument detracts from the conclusion that an advisory opinion is not a final agency action.

The Commission agrees with Plaintiff that the Colorado Constitution requires the Commission to issue advisory opinions in response to requests from covered persons. *See* Motion to Dismiss, pp. 2-3; Colo. Const. art. XXIX, § 5(5). The Colorado Constitution, however, does not provide that covered persons have a right to rely on advisory opinions as legally binding and the Colorado Constitution

does not provide that advisory opinions fix rights or obligations. Instead, the Colorado Constitution delegates to the Commission the authority to promulgate advisory opinion rules. *See* Colo. Const. art. XXIX, § 5(5).

The Commission rules provide that an advisory opinion is just that - an opinion - and nothing more. *See* Commission Rule 3.A.1. This court should give particular deference to the Commission's interpretation of an advisory opinion as being a non-legally binding opinion not entitled to judicial review, especially where the Commission is authorized to administer and enforce Amendment 41 and promulgate rules regarding advisory opinions. *Cf.*, *Coffman v. Colorado Common Cause*, 102 P.3d 999, 1005 (Colo. 2004); *Colorado Dept. of Revenue v. Woodmen of the World*, 919 P.2d 806, 816 (Colo. 1996) (providing that courts should give particular deference to the interpretation of an administrative agency that is authorized to administer and enforce a particular statute.)

Moreover, contrary to Plaintiff's assertion, nothing in Advisory Opinion 09-04 states that it is a legally binding opinion fixing rights and obligations. Similarly, nothing in Advisory Opinion 09-04 provides that the requestor may seek judicial review or any other type of appellate review.

Plaintiff next contends that the Commission is subject to the Administrative Procedures Act (“APA”) and that the APA governs actions of the Commission unless there is a direct conflict between Article XXIX of the Colorado Constitution, C.R.S. § 24-18.5-101 and the APA. According to Plaintiff, there is no conflict between the silence in C.R.S. § 24-18.5-101 regarding judicial review of advisory opinions and the general rule that all final agency actions are subject to judicial review. Plaintiff’s response, pp. 7-9.

The Commission agrees that its final agency actions are subject to judicial review. For example, the Commission’s final actions concerning complaints are subject to judicial review as contemplated by C.R.S. § 24-18.5-101(9). Advisory opinions, however, are not final agency actions. For this reason, advisory opinions are not subject to judicial review and not for the reason that the Commission’s actions somehow are exempt from the APA.

Plaintiff also contends that had the General Assembly intended to immunize a category of final agency actions, such as advisory opinions, from judicial review, it would have done so expressly. Plaintiff’s response, p. 8-9. Plaintiff’s argument misses the mark because it assumes that an advisory opinion is a final agency action which the General Assembly needed to exempt from judicial review. The General Assembly already exempted advisory opinions from judicial review when

it enacted C.R.S. § 24-4-106(2), which provides that only final agency actions are subject to judicial review.

II. Assuming this Court Finds Advisory Opinion 09-04 is a Final Agency Action, Plaintiff has no Right to Challenge the Opinion Because Plaintiff is not Adversely Affected or Aggrieved by the Opinion and There is no Actual Controversy.

Plaintiff next contends that Plaintiff has standing to challenge Advisory Opinion 09-04 because Plaintiff has established a legally protected right and the Commission's action caused an injury in fact. Plaintiff's response, pp. 11-13. Plaintiff misreads the Commission's motion to dismiss.

The Commission's contention relates to the narrower standing requirement specifically set forth in the APA. C.R.S. § 24-4-106(4) only provides for a right of judicial review of final agency action to persons "adversely affected or aggrieved."

For the reasons set forth in the Commission's motion to dismiss, Plaintiff is not adversely affected or aggrieved by Advisory Opinion 09-04. None of the cases cited by Plaintiff in its response address judicial review of final agency actions or whether a party is "affected or aggrieved" as those terms are used under the APA at C.R.S. § 24-4-106(4) and thus, are inapplicable.

With respect to Plaintiff's claim for declaratory relief, Plaintiff's response contends that there is a justiciable controversy because declaratory relief is an alternative remedy to the remedies provided in the APA and declaratory judgment is a proper method to raise constitutional questions regarding final agency action. Further, Plaintiff asserts that as an "ethics watchdog organization," Plaintiff should not have to go through the "futile gesture of filing a complaint and having it dismissed based on the authority of Advisory Opinion 09-04 before seeking declaratory relief." Plaintiff's response, pp. 13-15.

Plaintiff's contentions fail in part because they rest on the assumption that Advisory Opinion 09-04 is a final agency action. For the same reasons Advisory Opinion 09-04 is not a final agency action, there is no justiciable controversy. Advisory Opinion 09-04 is just an opinion of the Commission – it is not legally binding on the requestor of the advisory opinion or anyone else for that matter. Advisory Opinion 09-04 does not fix any right or obligation and no legal obligation flows from the opinion.

Moreover, Plaintiff's assertion that it would be a futile gesture for it to file a complaint lacks factual support. Plaintiff's position requires that this Court assume Plaintiff will file a complaint with the Commission at some point in the future, based on the actual actions of the legislator who requested Advisory Opinion 09-04

rather than hypothetical future activity that Advisory Opinion 09-04 contemplates. *See* Commission Rule 3(A)(4) (defining “complaint” as a written document setting forth facts asking whether a covered employee “has violated” Article XXIX or other ethics laws) and Commission Rule 7(A) (providing that any person may file a complaint asking whether a covered employee “has failed” to comply with Article XXIX or other ethics laws).

Plaintiff’s position also requires this court to assume that the legislator’s actual actions will be exactly as those contemplated by Advisory Opinion 09-04. Plaintiff’s position also requires this Court to assume that the Commission will thereafter dismiss Plaintiff’s complaint based on Advisory Opinion 09-4. For these reasons, Plaintiff’s contention is based on mere speculation.

None of Plaintiff’s arguments detract from the conclusion that Plaintiff’s first claim for relief is in itself a request for an advisory opinion based on the possibility of a future controversy. Therefore, it should be dismissed. *See CFI Steel Corp. v. the Colo. Air Pollution Control Comm.*, 610 P.2d 85, 92 (Colo. 1980); *Farmers Elevator Co. of Sterling v. First National Bank of Fleming*, 489 P.2d 318, 319 (Colo. 1971); *Burkett v. Amoco Production Company*, 85 P.3d 576, 578 (Colo.App. 2003).

WHEREFORE, for the reasons and authorities set forth herein and in the Commission's motion to dismiss, the Commission requests that Plaintiff's first claim for relief be dismissed.

Respectfully Submitted this 6<sup>th</sup> day of August, 2009.

JOHN W. SUTHERS  
Attorney General

*Original signature of Lisa Brenner Freimann on file  
at the Office of the Attorney General*

/s/Lisa Brenner Freimann

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LISA BRENNER FREIMANN, 31175\*  
Assistant Attorney General  
Business & Licensing Section  
Attorneys for INDEPENDENT ETHICS  
COMMISSION and JANE T. FELDMAN,  
in her official capacity as Executive Director  
of the Independent Ethics Commission  
\*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **REPLY TO RESPONSE TO MOTION TO DISMISS** upon all parties herein via the LEXIS E-filing service this 6<sup>th</sup> day of August, 2009 addressed as follows:

Chantell Taylor  
Luis Toro  
Colorado Ethics Watch  
1630 Welton Street, Suite 415  
Denver, Colorado 80202

*Original signature of Dorothy Mashburn on file at the  
Office of the Attorney General*

/s/Dorothy Mashburn  
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