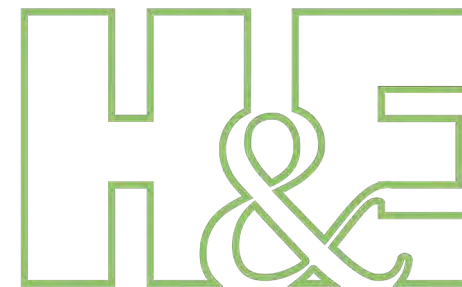


# COLORADO COUNTIES, INC. NEW COMMISSIONER TRAINING

Presented by: Andrew D. Ringel

Hello!



Andrew D. Ringel

# INTRODUCTION

This presentation addresses three issues:



**Open Records**



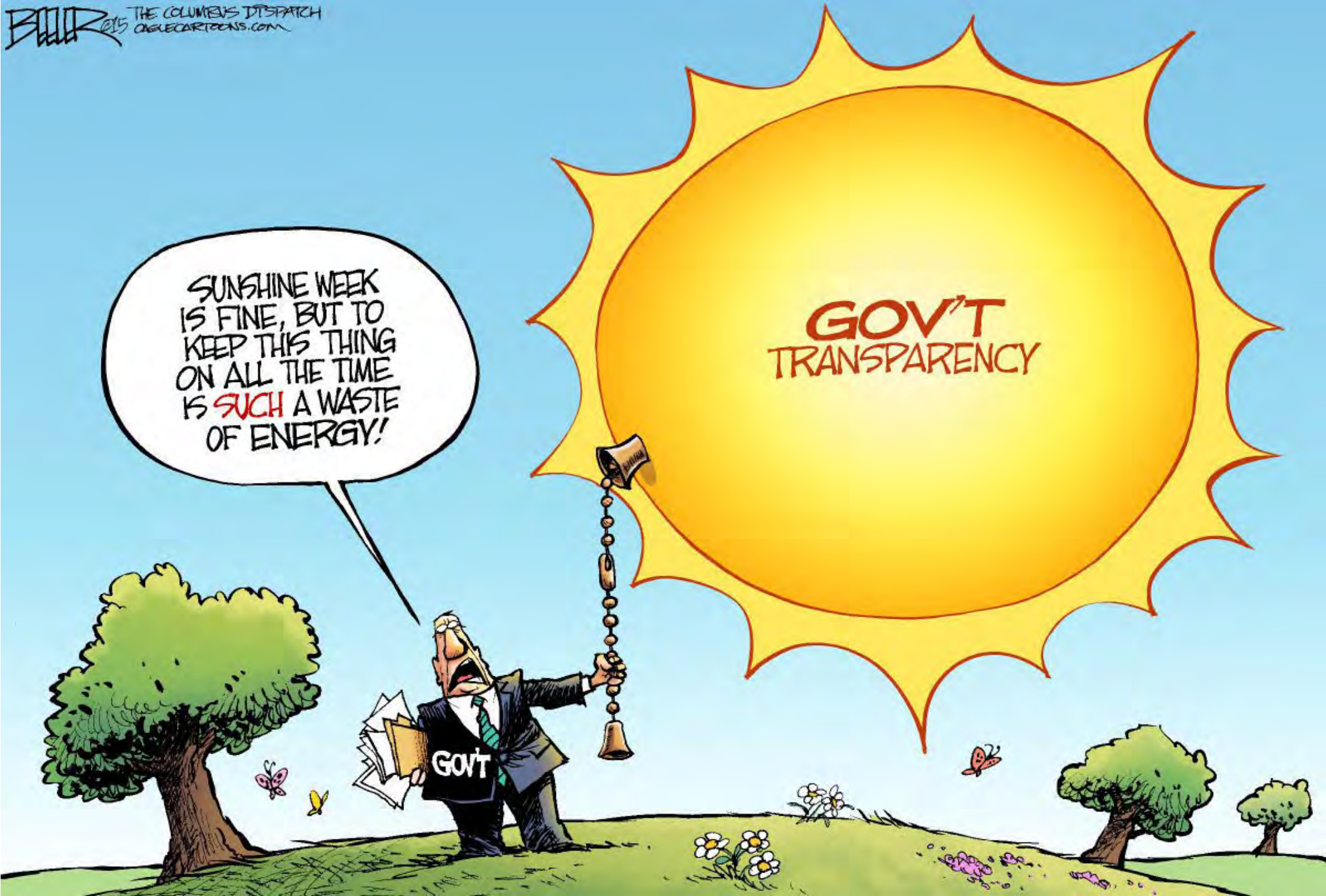
**Open Meetings**

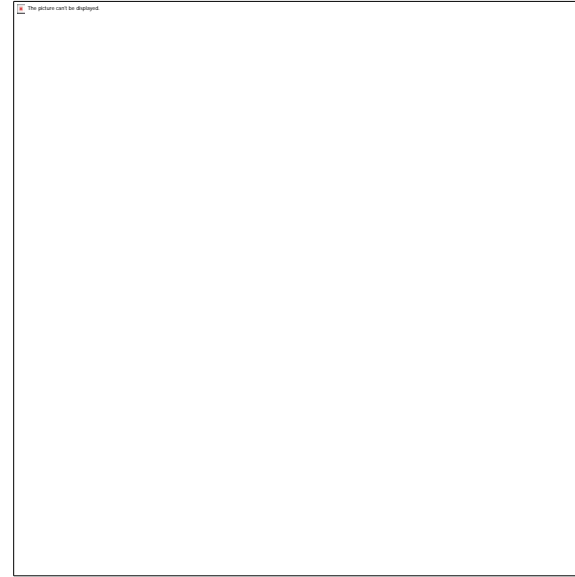


**Government Ethics**

It is not designed to be a comprehensive recitation of all applicable rules, but instead is to highlight the basics. If you are faced with a specific issue, please consult your County Attorney.

Colorado  
Open  
Records  
Act  
(CORA)



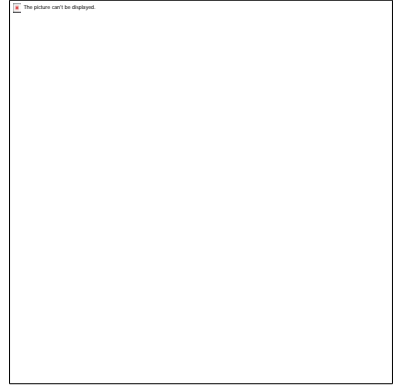


# Open Records

C.R.S. §§ 24-72-201 to 205

## Colorado Open Records Act

- C.R.S. § 24-72-201 Legislative declaration:
  - **“It is declared to be the public policy of this state that all public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise specifically provided by law.”**



## WHAT IS A PUBLIC RECORD?

Applies to “**all writings made, maintained, or kept**” by a local public entity for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.



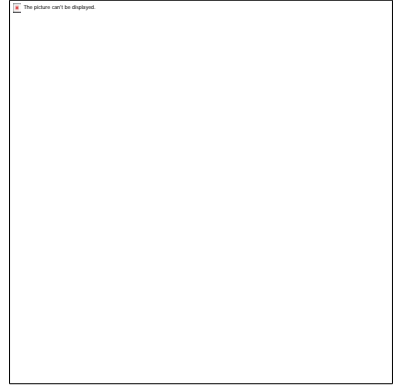
## Colorado Open Records Act

- C.R.S. § 24-72-202(6)(a)(II) **“Public records” includes correspondence of elected officials, except if:**
  - Work product
  - Lacking demonstrable connection to the exercise of legally required functions and not involving receipt or expenditure of public funds
  - Confidential communications with constituent requesting help on private matter
  - Protected from disclosure under C.R.S. § 24-72-204(1)



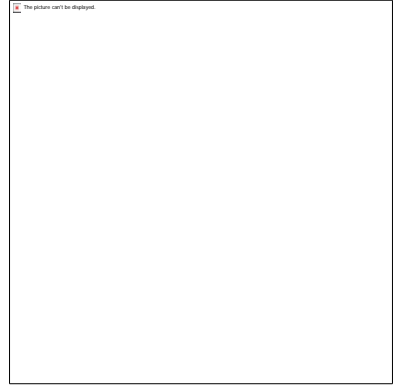
## Colorado Open Records Act

- **C.R.S. § 24-72-204(1) – inspection not allowed if:**
  - Contrary to state statute
  - Contrary to federal statute or regulation
  - Prohibited by rules promulgated by supreme court or by order of any court
  - Contrary to joint rule of senate and house of representatives pertaining to lobbying practices



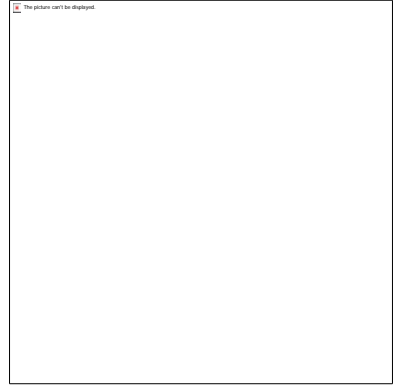
# Colorado Open Records Act

- **“Work product” not subject to disclosure (C.R.S. § 24-72-202(6.5)):**
  - Intra- or inter-agency advisory or deliberative materials assembled for benefit of elected officials, which are deliberative or express opinion or are designed to help official reach a decision, including background memoranda and preliminary drafts of bills
  - Documents relating to drafting of bills
  - Documents relating to assisting elected officials in responding to constituent correspondence



# Colorado Open Records Act

- **“Work product” does not include:**
  - Final version of document expressing final decision by elected official
  - Final version of audit report tracking operations of public entity or public spending
  - Final accounting or financial record or report
  - Materials distributed to public or cited in text of final version of document expressing final decision by official
  - Final version of document prepared for elected official, consisting solely of factual info from public sources



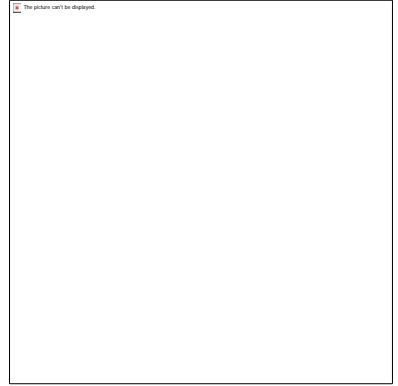
# WHAT IS NOT A PUBLIC RECORD?

- Criminal justice records
- Work product prepared for public officials, although officials may release
  - Information security plan of public agency
  - Information security incident reports or assessments
    - Among others



## Colorado Open Records Act

- C.R.S. § 24-72-203 **Public records open to inspection**
  - “All public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise provided by law, but the official custodian of any public records may make such rules with reference to the inspection of such records as are reasonably necessary for the protection of such records and the prevention of unnecessary interference with the regular discharge of the duties of the custodian or the custodian's office.”

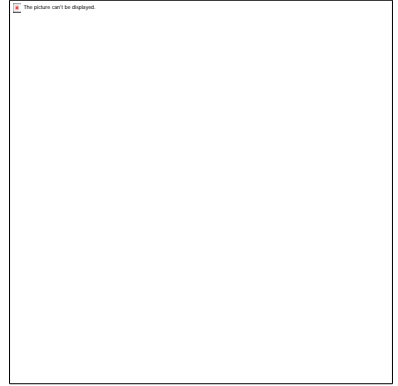


## Colorado Open Records Act

- Public records shall be **open for inspection by any person at reasonable times**
- Custodian of records **may make such rules as are reasonably necessary for protection of records and prevention of unnecessary interference with regular discharge of duties**
- Custodian must **adopt policy relating to retention, archiving, and destruction of digital or miniaturized records (C.R.S. § 24-72-203(1)(b))**

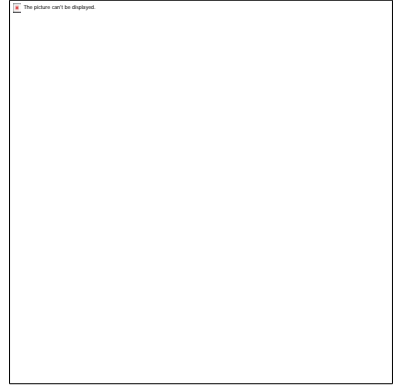
## Colorado Open Records Act

- **If custodian has custody of correspondence sent or received by elected official, she must consult with elected official prior to allowing inspection to determine whether correspondence is public record (C.R.S. § 24-72-203(2)(b))**
- **If records are not in custody or control of person to whom application is made, she must notify applicant, stating the reason the records she does not have the records, the location of the records, and the person or entity with custody or control (C.R.S. § 24-72-203(2))**



## Colorado Open Records Act

- If records are in “active use,” in storage, or otherwise not readily available, custodian must notify applicant and set reasonable time for inspection (C.R.S. § 24-72-203(3))
  - Reasonable time presumed to be **3 working days or less**, can be extended for extenuating circumstances, **not to exceed 7 working days**



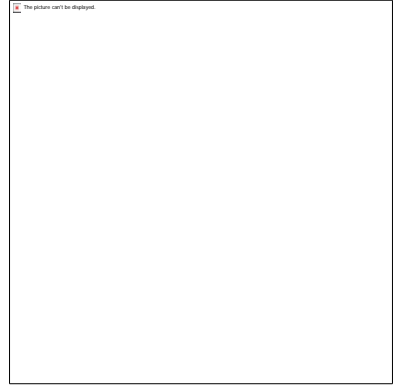


## Colorado Open Records Act

- Denial of inspection (C.R.S. § 24-72-204)
- Custodian shall deny access if contrary to law
- Custodian may deny access to the following on the ground that disclosure would be contrary to the public interest:
  - Law enforcement investigation records
  - Test questions and scoring keys for licensing, employment, or academic examinations
  - Bona fide research projects

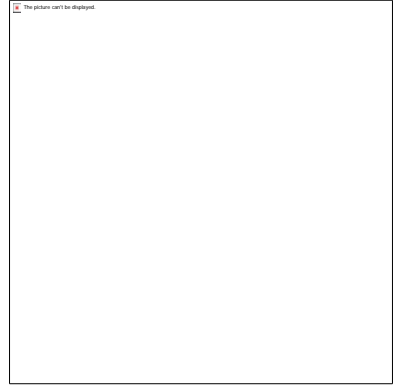
## Colorado Open Records Act

- The custodian may deny access if contrary to public interest:
  - Real estate appraisals relative to acquisition of property for public use
  - Email addresses provided to agency for purpose of future communications
  - Records of civil or administrative investigations conducted by agency



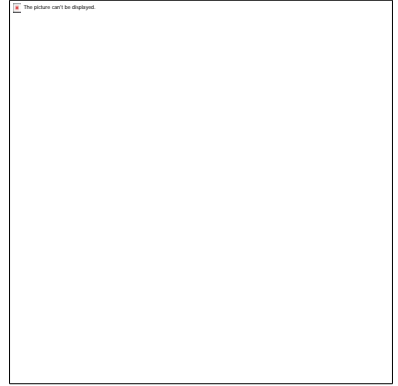
## Colorado Open Records Act

- The custodian shall deny access to:
  - Medical, mental health, sociological, and scholastic achievement data
  - Personnel files
  - Letters of reference
  - Trade secrets, privileged information, and confidential commercial, financial, geological, or geophysical data



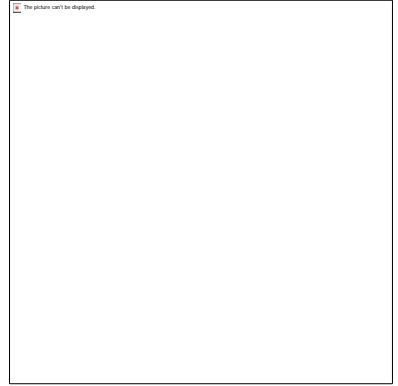
## Colorado Open Records Act

- **The custodian shall deny access to:**
  - Records of sexual harassment complaints and investigations
  - Applications for executive position by person who is not a finalist
  - Records protected under common law “deliberative process” privilege
- **Other than letters of reference concerning employment, licensing, or issuance of permits, these categories shall be available to the person in interest**



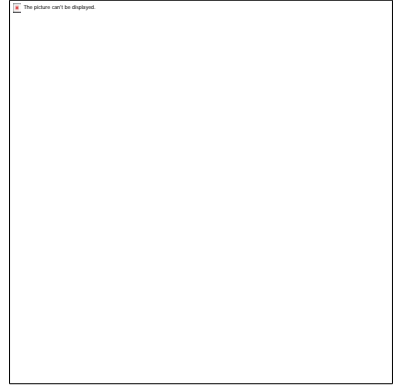
# Colorado Open Records Act

- **Denial of access to records**
  - Applicant can request a written statement of grounds for denial citing specific law or regulation (C.R.S. § 24-72-204(4))
  - Applicant can file complaint in state district court challenging denial after giving 14 days' notice to custodian (C.R.S. § 24-72-204(5))
    - Meet and confer during 14 day period



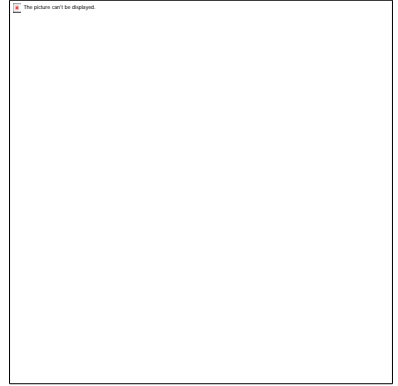
## Colorado Open Records Act

- **Court proceeding challenging denial of access**
  - If court determines denial was improper, applicant can recover attorneys' fees and costs, unless documents subject of pending litigation
  - If court upholds denial, entity can recover attorneys' fees and costs only if court finds action was frivolous, vexatious, or groundless



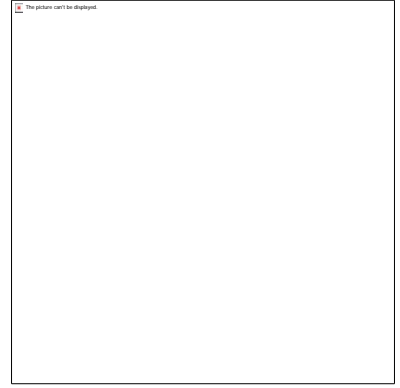
# Colorado Open Records Act

- **Court action by custodian (C.R.S. § 24-72-204(6))**
  - If custodian believes disclosure would to substantial injury to the public interest, even if otherwise available, or if custodian is unable, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if disclosure is required
  - May apply to district court for order permitting custodian to restrict or deny disclosure
  - Burden of proof on custodian
  - Even if disclosure ordered, no attorneys' fees if custodian makes good faith showing



## Colorado Open Records Act

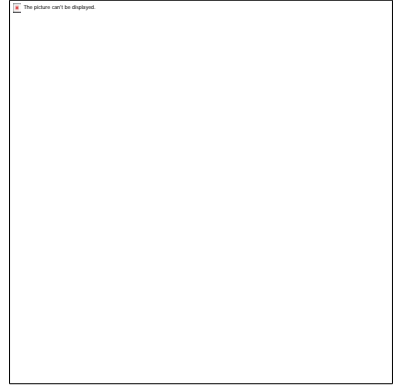
- **Electronic mail policy (C.R.S. § 24-72-204.5)**
  - Counties that maintains electronic mail communications system shall adopt written policy on any monitoring of electronic mail communications
  - Policy shall include statement that e-mail correspondence of the employee may be a public record and may be subject to public inspection





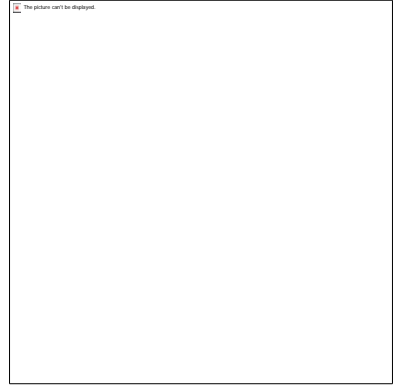
# Colorado Open Records Act

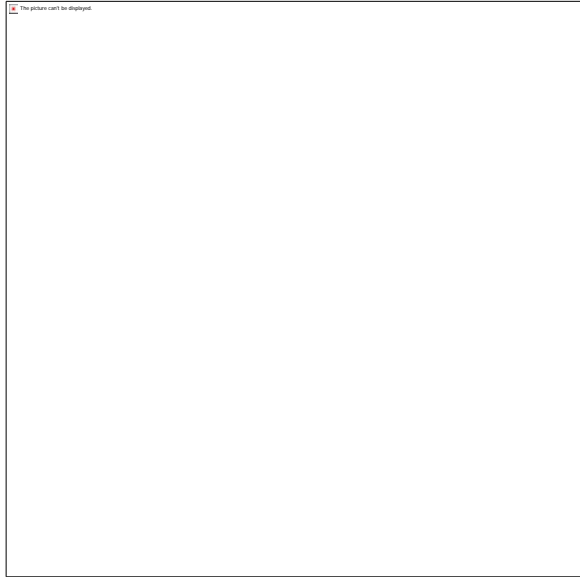
- **Allowable fees (C.R.S. § 24-72-205)**
  - Research and retrieval fee of no more than \$30/hour after first hour, adjusted for inflation 7/2019
  - Fees must be posted on website or published in written policy
  - Copying fees of \$0.25/page or actual cost of copying non-standard page
  - No transmission fees for records sent by e-mail
- **Can require fees be paid in advance**



## Colorado Open Records Act

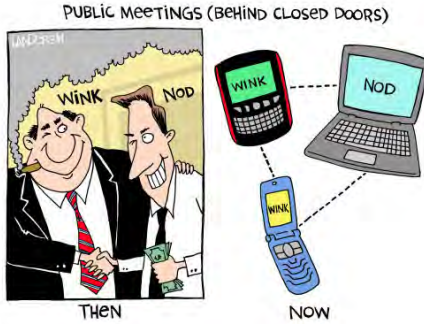
- **No private right of action for violation of CORA requirements**
- **Penalty provision repealed**





# Open Meetings

C.R.S. §§ 24-6-401, -402



## WHAT IS A MEETING?

Any gathering convened by public body to discuss public business, by any medium (in person, phone, email, etc.)

## HOW MANY PEOPLE CONSTITUTE A MEETING?

All meetings of three or more members of the public body



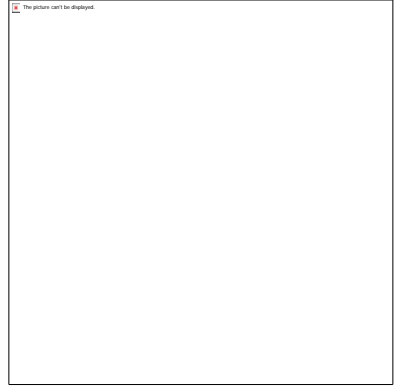
## **If you have a meeting, you must provide NOTICE**

- **Notification posted in public space so everyone knows meeting details**
- **24 hours in advance**
- **Posted in designated physical space**
- **Newspaper → Online**
- **Include agenda if possible**
- **“Sunshine List”**

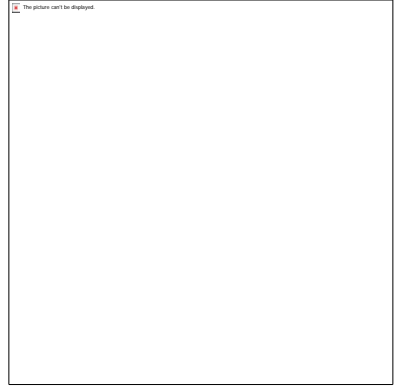


## Notice is important

- Citizen can petition court to enjoin or nullify body's action
- Either enforce OML or establish OML violation
- Costs & fees possible either way
- **BUT** OML violation can be cured by subsequent complying meeting



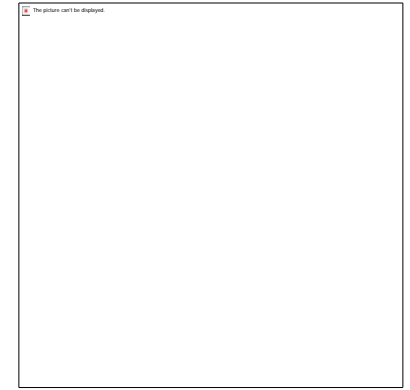
## Exceptions from Meeting Requirements



- **Social gatherings or chance meetings where discussion of public business is not the central purpose**
- **Persons on the administrative staff**
- **Emergency**
- **Executive Session**
- ~~Meetings fewer than three people (unless two is a quorum)~~
- **E-mail is not an exception**

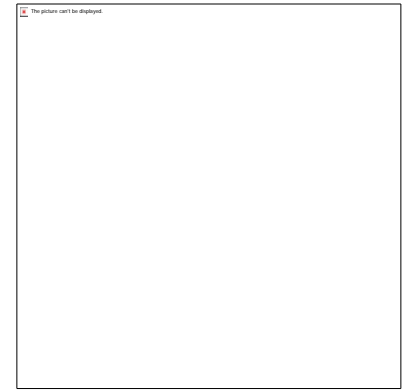
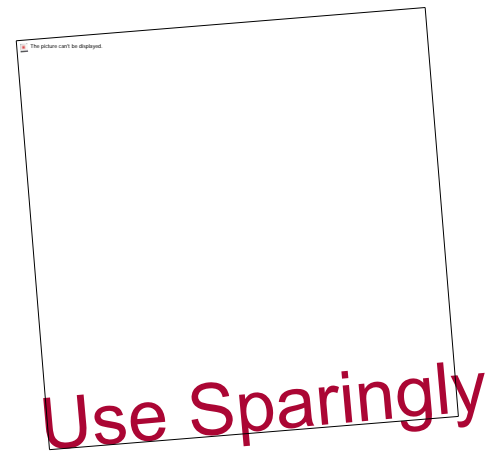
# Meeting Minutes

- “Prompt and Thorough”
- Available to public / open to inspection
- Must include the topic of discussion in executive session





## Executive Session – Limited Circumstances



**Property transactions**

**Attorney conferences**

**Confidential matters under law**

**Security arrangements or investigations**

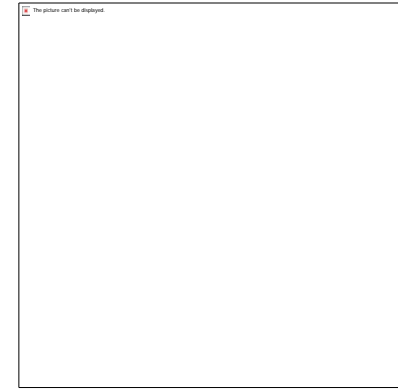
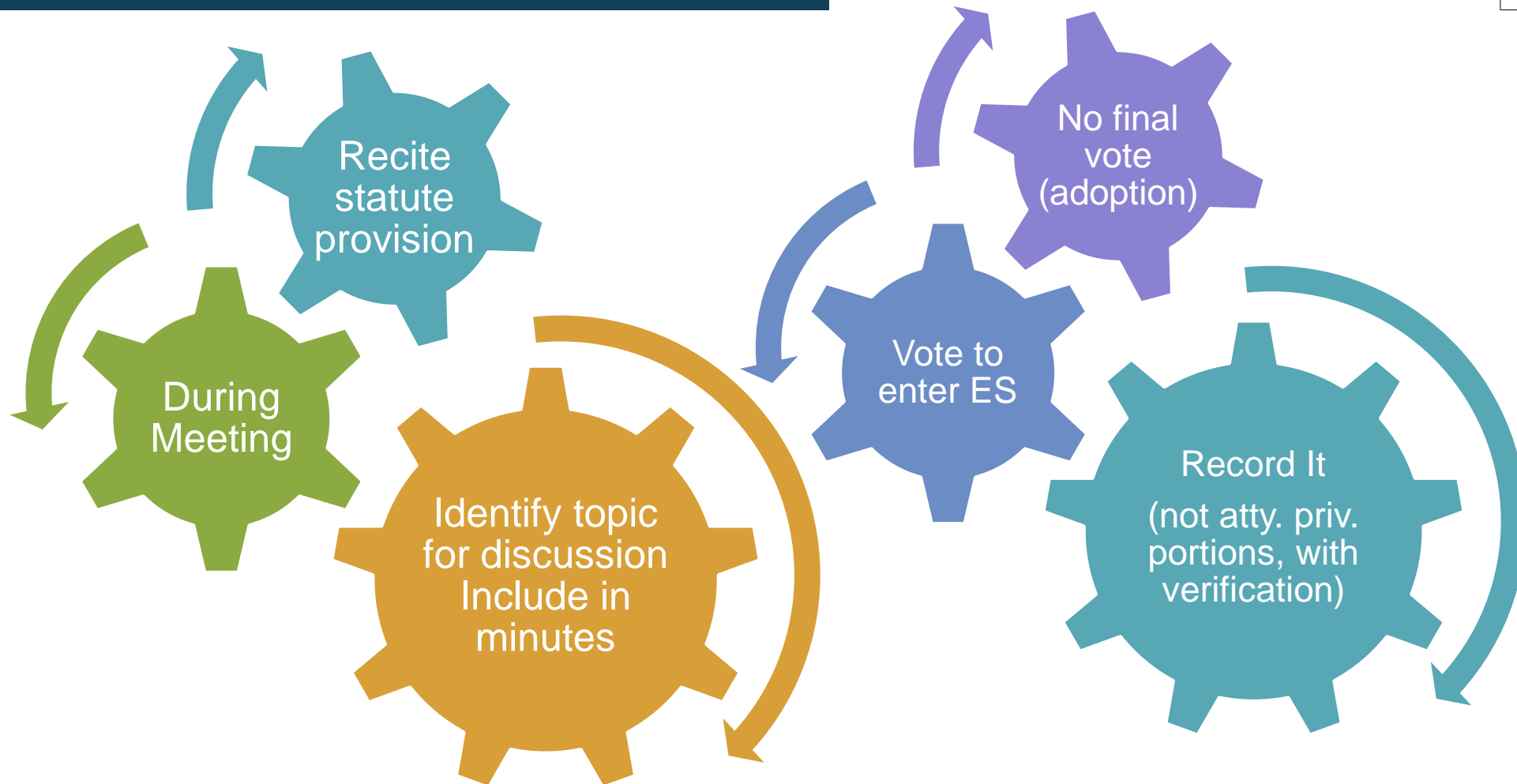
**Negotiations**

**Personnel matters\***

**CORA exempt docs**

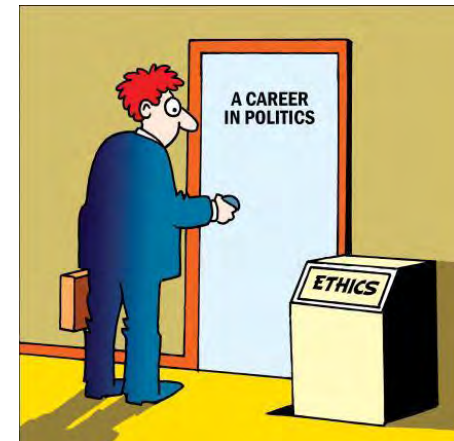
**Student identification**

# Executive Session: The Devil's in the Details ...





# Government Ethics



## Standards of Conduct



- **Article 29 to the Colorado Constitution**
- **Colorado Code of Ethics (COE)**

## Article 29: Ethics in Government



Enacted by  
Colorado  
voters in  
2006

Applies to  
government  
employees  
and elected  
officials

Pre-empts  
conflicting or  
inconsistent  
provisions of  
state law

## Article 29



- **Gift ban** – forbids the acceptance of money, forbearance, or forgiveness of indebtedness unless the regulated person provides equal consideration in return
- **Applies to the spouse or dependent child of the regulated person**
- **Exception for gift with fair market value or aggregate actual cost of less than \$53 in any calendar year**

## Article 29



- **Examples of forbidden activities and behaviors**
  - Gifts
  - Loans
  - Rewards
  - Promises or negotiations of future employment
  - Favors or services
  - Honoraria
  - Travel
  - Entertainment
  - Special discounts

## Article 29: **Exceptions to Gift Ban**



- **Campaign contributions**
- **Unsolicited item, token, award, or certification of “trivial” value less than \$53, such as pen, calendar, plant, book, note pad, or similar item**
- **Unsolicited token or award of appreciation such as plaque, trophy, desk item, or wall memento**
- **Unsolicited informational material, publications, or subscriptions relating to official duties**
- **Ticket or meal relating to speaking engagement**



## Article 29: **Exceptions to Gift Ban**



- Reasonable expenses paid by non-profit or other state or local government for attending convention, fact-finding mission or trip, or other meeting if official scheduled to deliver speech, make presentation, participate on panel, or represent state or local government, provided organization receives less than five percent funding from for-profit organizations
- Gift by relative or friend on special occasion
- Compensation or incentives related to employment

## Article 29: Professional Lobbyists



- **No gift or thing of value of any kind regardless of amount**
- **Includes meals, beverages, or any other item to be consumed by regulated person**
- **Applies to anyone registered with the state as a lobbyist - does not apply to volunteer lobbyists, elected official acting in their official capacities, or attorneys or advisors in adjudicatory proceeding**

## Article 29



- **Creates Independent Ethics Commission to enforce provisions of Article 29**
- **Consists of five unpaid Commissioners appointed by:**
  - Governor
  - Each house of General Assembly
  - Chief Justice of the Colorado Supreme Court
  - These four select a local government official or employee
- **No more than two members affiliated with the same party**

## Article 29



- **Commission hears complaints, issues findings, and assess penalties**
- **In 2008, adopted Rules of Procedure to govern its actions relating to advisory opinions, letter rulings, complaints, hearings, and sanctions**
  - <http://www.Colorado.gov/iec>

## Article 29: Handling of Complaints



Complaint can be submitted to Commission **within 12 months of behavior**

Frivolous complaints **may be dismissed without public hearing, and are kept confidential**

Legitimate complaint will **prompt investigation, public hearing, & findings**

Commission **can subpoena people and documents to facilitate inquiry**

## Article 29: Handling of Complaints



- **Standard of proof** – preponderance of the evidence unless Commission decides higher standard warranted
- If dismissed for reasons other than frivolous, **may be subject to disclosure under Colorado Open Records Act**

## Article 29: Handling of Complaints



- **Commission can assess penalties for violations**
- **Penalty for violation of gift ban – double the financial equivalent of any benefits obtained by the challenged action**
- **IEC findings can be appealed to district court and to appellate courts**

## Article 29



- ***Gessler v. Smith*, 419 P.3d 964 (Colo. 2018)**
  - IEC’s jurisdiction is not limited to matters involving gifts, influence peddling, and standards of conduct and reporting requirements that expressly delegate enforcement to IEC
  - Reference to “**any other standards of conduct ... as provided by law**” means ethical standards of conduct relating to activities that could allow covered individuals to improperly benefit financially from their employment



## Article 29



- **IEC can also issue letter rulings, advisory opinions, and position statements**
- Available at: <https://www.Colorado.gov/pacific/iec/opinions>

## Article 29: Letter Rulings



- **Written opinion addressing ethics issues in response to written request from someone who is not a public officer, legislator, local government official, or government employee on a specific factual question**
- **Generally requested by organizations or individuals who lobby legislature, conduct business with government agency, or invite public officials to participate in conference, tour, or meeting**

## Article 29: Letter Rulings



Issued in  
advance of  
event and offers  
guidance about  
specific  
situation

Can be relied on  
as a defense if  
complaint is  
filed against  
individual

## Article 29: **Position Statements**



- **Written statement initiated by Commission, before or after event, addresses broad ethics issues and provides general guidance for public officers, legislators, local government officials, government employees, public**

## Article 29: **Advisory Opinion**



- **Written opinion addressing more specific ethics issues in response to written request by public officer, legislator, local government official, or government employee on a specific factual question**
- **Provides general guidance in advance of event and does not usually set precedent**
- **Can be relied on as a defense if complaint is filed against individual**

## Article 29



- **Counties can adopt ordinances or charter provisions that are more stringent**
- **Does not apply to home rule counties with existing charters, ordinances, or resolutions that address the same issues**

## Colorado Code of Ethics (COE)



- C.R.S. § 24-18-101 *et seq.*
- **Applies to elected or appointed officials, but not to government employees**

## Colorado Code of Ethics



- **Rules of conduct for local government officials (C.R.S. § 24-18-104)**
  - May not disclose or use confidential information acquired in the course of official duties for financial gain
  - Must refuse gift of substantial value where acceptance would tend to influence reasonable person to depart from faithful and impartial discharge of public duties



## Colorado Code of Ethics



- **Ethical principles for public officials (C.R.S. § 24-18-105)**
  - Should not acquire or hold interest in business activity that may be affected in direct or substantial fashion by official actions of official's agency
  - For six months after leaving office, should refrain from taking employment that offers direct advantage not available to others related to government activity involving official
  - Should not perform official act that will negatively affect an entity in competition with entity the official holds substantial financial interest in
  - "Discouraged" from assisting family members in obtaining employment, gifts, or economic benefit from person official is in position to reward

## Colorado Code of Ethics



- **Rules of conduct for local government officials (C.R.S. § 24-18-109) – “shall not”**
  - Engage in substantial financial transaction with anyone who is inspected or supervised in course of official’s business
  - Perform official act to economic benefit of business he has substantial financial interest in or is engaged as counsel, consultant, representative, or agent
  - Accept goods or services from person providing goods or services to local government unless totality of circumstances indicate transaction is legitimate

## Colorado Code of Ethics



- **If member of governing board holds private interest in matter before board, interest shall be disclosed and member may not participate in vote (unless required for quorum) (C.R.S. § 24-18-109(3))**

## Colorado Code of Ethics



- **Interest in contracts (C.R.S. § 24-18-201)**
  - **May not have interest in contract made in their official capacity or by any person, agency, or board they serve**
  - **See exceptions under C.R.S. § 24-18-201**
    - Contract awarded to lowest responsible bidder based on competitive bidding procedures
    - Merchandise sold to highest bidder at public auction
    - Contract with interested party if, because of geographic restrictions, government could not reasonably afford
    - Official discloses and recuses

## Colorado Code of Ethics



- **Remedies for violation**
  - Public official who “departs from his fiduciary duty is liable to the people of the state as a trustee of property and shall suffer such other liabilities as a private fiduciary would suffer for abuse of his trust.” C.R.S. § 24-18-103(2)
  - Requires proof beyond a reasonable doubt
  - Money collected paid to general fund of state or local government

## Colorado Code of Ethics



- **Remedies for violation**
  - District attorney may bring civil action on behalf of the people – in addition to criminal action
  - Part 2 – class 1 misdemeanor – fine of no more than twice the benefit obtained

## Fair Campaign Practices Act



- **The Fair Campaign Practices Act**
  - The Fair Campaign Practices Act, C.R.S. § 1-45-117 and its predecessor and companion, Colo. Const. Art. XVIII impose limitations on the political activities of public officials.

## Fair Campaign Practices Act



- In general, the **FCPA** serves to ban any use of public funds in relation to political campaigns involving the nomination, retention or election of any person to any public office or any statewide or local “issue” elections.



## Fair Campaign Practices Act



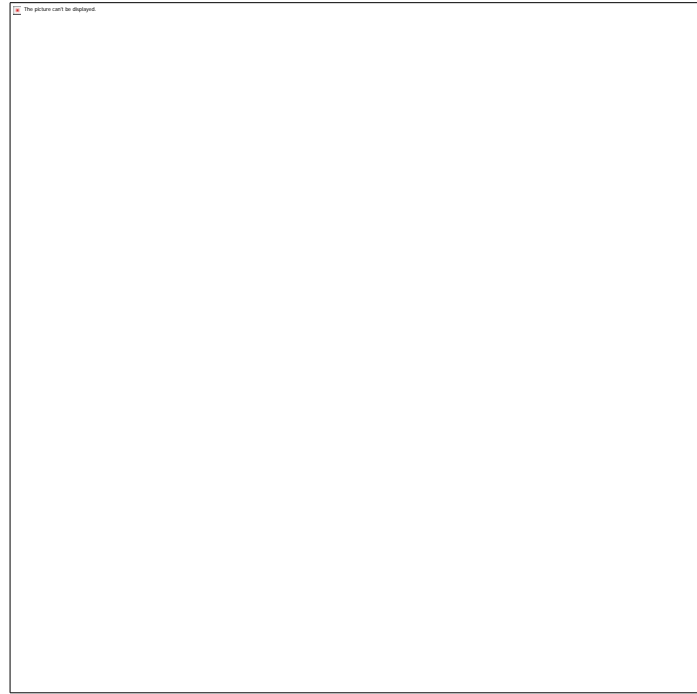
- Public officials and employees may express a personal opinion about any ballot issue.
- Public officials and employees may answer questions about any ballot issue provided no action is taken by the public official or employee to prompt the question being asked.

## Fair Campaign Practices Act



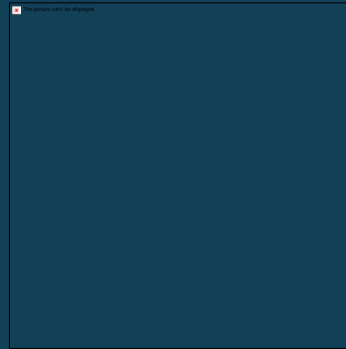
- **An elected official or an employee with “policy-making responsibility” may also spend up to \$50 of public money in the form of letters, telephone calls or other activities incidental to expressing an opinion on a ballot question pursuant to the FCPA.**

Q



**QUESTIONS**

# THANK YOU!



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