

COLORADO INDEPENDENT ETHICS COMMISSION

Complaint 22-22

RESPONSE TO COMPLAINT 22-22

IN THE MATTER OF: TINA PETERS

This *Response* requests dismissal of the *Complaint*.¹ Alternatively, it seeks a better explanation of the source and details of any obligations imposed upon Ms. Petters with respect to a legal defense fund. Specifically, there are four points that merit dismissal.

First, there is no actual legal requirement that donors to a legal defense fund must be disclosed. To be sure, Advisory Opinion 13-01 states that with respect to donations to the fund, “the names and donation amounts *should* be publicly available”² and that “[e]ach donor relying on the special occasion exception *should* specify in an affidavit the nature of his or her family or friendship relationship with the Secretary of State, and that he or she has no pending or foreseen business with the [public official’s office]”³ By use of the word “should,” Advisory Opinion 13-01 recommends – but not require – reporting of donors to a legal defense fund. In other words, the plain language of Advisory Opinion 13-01 advises, but does not mandate, disclosure of donors to a legal defense fund.

¹ This response is nearly identical to Respondent’s *Response to Complaint 22-07*.

² Advisory Opinion 13-01, p. 9 (emphasis supplied).

³ *Id.* at 10 (emphasis supplied).

The *Complaint* cites the summary to Advisory Opinion 13-01 as imposing a mandatory obligation. But that summary is not binding – it is the opinion that is binding. And the summary incorrectly reflects the actual opinion and is in error.

Beyond Advisory Opinion 13-01, there is no constitutional provision, statute, or rule that imposes a reporting requirement. Indeed, the discussion of a reporting requirement in Advisory Opinion 13-01 itself is void of any citation to authority or other legal analysis. No such authority requiring disclosure exists.

To the extent that Advisory Opinion 13-01 contains or imposes a disclosure requirement, an advisory opinion does not – and cannot – have the force of a legal mandate. By its terms and structure, advisory opinions (including Advisory Opinion 13-01) are *advisory*, intended to provide guidance to the public as to the Commission’s interpretation of its enforcement authority. An advisory opinion is not a mandate.

Even if the Commission in 2013 intended to impose a mandate through Advisory Opinion 13-01, the Commission does not have authority to make rules imposing new obligations on members of the public, including rules imposing new disclosure obligations. And even if the Commission were to assert such authority, in 2013 the Commission never adopted any disclosure rule or requirement in accordance with the Colorado Administrative Procedure Act. That Act requires that agencies follow a number of legal procedures, and an

agency must, among other things, publish notice and consider public comment before promulgating a rule.⁴

Second, the legal defense fund cannot not comply with the Advisory Opinion 13-01's reporting section, even if it wants to. Bluntly put, there exists no practical way to report donations, and no guidance with respect to the type of information subject to disclosure. There is no web site or reporting authority that accepts reports. And there is no guidance regarding the contents of disclosure reports, such as reporting thresholds, reporting deadlines, or type of information that a person must report (e.g., person's address or place of employment). So even if a reporting requirement exists, it is impossible for the legal defense fund to comply. There is no specific guidance as to the type of information required, and there is no practical way for the legal defense fund to comply. This lack of practical implementation further supports the conclusion that Advisory Opinion 13-01 did not establish mandator reporting requirements.

Third, any potential reporting requirement applies to the legal defense fund itself, not Ms. Peters. The legal defense fund has followed the recommendation in Advisory Opinion 13-01, that "The IEC believes that all donations should flow through an independent administrator who is not an employee or otherwise affiliated with the [public official]." Under this guideline, that administrator is in fact independent, meaning that Ms. Peters has no control over the defense fund. Further, any potential disclosure obligations in Advisory

⁴ C.R.S. § 24-4-103.

Opinion 13-01 are directed at the legal defense fund, not the public official. For that reason, any complaint should be directed towards the legal defense fund itself, and this complaint against Ms. Peters should be dismissed.

Fourth, disclosure of contributions to the legal defense fund is fraught with potential First Amendment issues, for two reasons. First, Advisory Opinion 13-01 does not, for the reasons discussed above – provide any warning to potential contributors that their contributions must be reported. Second, this lack of warning is particularly important in this case, because Ms. Peters’ legal defense seems to draw unlimited hostility. As detailed in the response to Complaint 21-18, both Ms. Peters and her associates have faced harassment and threats, and any contributor to the legal defense fund faces an equally strongly likelihood of similar dangers. For these reasons, any legal obligation to disclose must be specific, concrete, and published well in advance of any complaint. A reliance on an advisory opinion that recommends (rather than mandates) disclosure does not provide adequate warning to potential donors, particularly donors to a cause that draws such hostility.

FOR THESE REASONS, *Complaint 22-22* should be dismissed.

Respectfully submitted this 17th day of June 2022,

GESSLER BLUE LLC

s/ Scott E. Gessler

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Certificate of Service

I certify that on this 17th day of June 2022, the foregoing was electronically served via e-mail on the IEC all counsel and/or parties of record.

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