

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO**

CASE NO. OS 2003-005

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY DOUGLAS BRUCE REGARDING
ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES ACT BY COLORADO
SPRINGS CITY OFFICIALS LORNE KRAMER, KATHRYN YOUNG, MICHAEL
ANDERSON and PATRICIA KELLY; COLORADO SPRINGS CITY COUNCIL; CITY OF
COLORADO SPRINGS; and DOES I-X**

On March 21, 2003, Complainant Douglas Bruce filed a complaint with the Colorado Secretary of State against Colorado Springs city officials Lorne Kramer, Kathryn Young, Michael Anderson and Patricia Kelly; the Colorado Springs City Council; the City of Colorado Springs; and Does I-X (Respondents), alleging violations of the Fair Campaign Practices Act, Sections 1-45-101 *et seq.*, C.R.S. (2002) ("FCPA"), specifically Section 1-45-117(1)(a)(I). The Secretary of State transmitted the complaint to the Colorado Division of Administrative Hearings for the purpose of conducting a hearing pursuant to Article 28, Section 9(2)(a) of the Colorado Constitution.

Hearing was held in this matter May 22, 2003. Complainant appeared without counsel. The Respondents were represented by Stephen K, Hook, Assistant City Attorney, City of Colorado Springs. Does I-X were not identified and were not served with notice of this hearing. Following the hearing the record was left open for the filing of supplemental authority. The Administrative Law Judge issues this Agency Decision pursuant to Colo. Const., Art. 28, Section 9(2)(a) and Section 24-4-105(14)(a), C.R.S. (2002).

ISSUE PRESENTED

The issue to be determined in this proceeding is whether the Respondents expended public funds in violation of the FCPA by mailing a document denominated as a "Factual Summary" to the public in connection with an April 2003 local ballot issue election.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Administrative Law Judge enters the following findings of fact:

1. Respondent Lorne Kramer is the Colorado Springs City Manager. Respondent Kathryn Young is the Colorado Springs City Clerk. Respondent Michael

Anderson is the Colorado Springs Budget Director. Respondent Patricia Kelly is the Colorado Springs City Attorney. Members of the Colorado Springs City Council were not individually identified in this proceeding. Does I-X were neither identified nor served in connection with this proceeding.

2. Issue 1A was a proposal on the Colorado Springs April 1, 2003 municipal election ballot, described as a measure to extend the Trails, Open Space and Parks (TOPS) program in Colorado Springs. The measure was referred by the Colorado Springs City Council.

3. The parties stipulate that Issue 1A was a local ballot issue within the meaning of Section 1-45-117(1)(a)(I)(B), C.R.S. (2002).

4. The TOPS program was originally approved by Colorado Springs voters in connection with an initiated measure that appeared on the April 1997 Colorado Springs municipal ballot. As originally approved, the program imposed a 0.10% sales and use tax within the City of Colorado Springs until April 30, 2009, the proceeds of which were to be used for building trails, neighborhood parks, and preserving open space, among other things.

5. The expressed intent of Issue 1A was to extend the existing 0.10% sales and use tax for the TOPS program from its then-existing expiration date through December 31, 2025. The measure was to maintain the existing TOPS program except that specified limits were placed on the amount of funds that could be expended for program administration and for stewardship and maintenance.

6. In January and/or early February 2003, City Clerk Kathryn Young prepared a proposed Issue 1A Factual Summary for presentation to the City Council. In connection with her preparation of this Factual Summary, Young held two or three meetings to obtain further information. The meetings were attended by certain City employees of the City Parks, Recreation and Cultural Service Department and the City Attorney's Office, as well as certain City Council-appointed members of the TOPS Citizens Advisory Board. Young also exchanged some e-mail messages with some of these individuals. The meetings, e-mails and preparation of the proposed Factual Summary all occurred during working hours. Young considered it part of her job duties to prepare the Factual Summary.

7. Section 5.2.203 of the Colorado Springs City Charter provides that FCPA factual summaries "shall be prepared by the City Clerk" and further provides that "City Council shall authorize distribution of the factual summaries by resolution."

8. On February 7, 2003, Young provided her draft Factual Summary regarding Ballot Issue 1A to the City Council for its consideration. Young's cover memorandum indicated that at its upcoming meeting the Council would be asked to consider a resolution authorizing distribution of the factual summary to registered voters.

9. At its February 11, 2003 meeting, the City Council adopted a resolution authorizing distribution to Colorado Springs electors of the Issue 1A Factual Summary prepared by Young. In its resolution, the Council noted that Section 1-45-117()(b)(1) permits a political subdivision to expend public moneys or make contributions to dispense a factual summary that complies with the requirement of that provision. The Council also noted that "it is a legitimate function of City government to provide factual information to the citizens on ballot questions submitted for their consideration" and further noted that the factual summary prepared by Young "provides proper factual information."

10. Following City Council approval, the Factual Summary was sent out to be printed. It was mailed to all active Colorado Springs registered voters on approximately February 27, 2003.

11. The Factual Summary mailing consisted of a cover page indicating the authority under which the summary was being issued, followed by a document entitled "Factual Summary Under the Fair Campaign Practices Act Provided by the City of Colorado Springs." The Factual Summary itself contains the Ballot Title and Ballot Text on page 2 of the mailing, followed by "Arguments For" and "Arguments Against" on pages 3 and 4 of the mailing. A copy of the Factual Summary mailing is appended hereto as Attachment 1 and incorporated in this Agency Decision by reference.

12. On February 14, 2003, prior to the printing and mailing of the Factual Summary, but after the Factual Summary was approved by the City Council, Complainant filed with the City Clerk his statement in opposition to Issue 1A for inclusion in the Taxpayer's Bill of Rights (TABOR) summary required to be mailed to all active registered voters concerning this ballot issue election pursuant to Article X, Section 20 of the Colorado Constitution.

13. The City's Factual Summary concerning Issue IA was mailed to active registered voters in the same mailing as the required TABOR mailing. The evidence did not establish the mailings were combined for the purpose of confusing voters or persuading voters to vote in favor of Issue 1A. The evidence also did not establish that combining these mailings in fact had the effect of confusing or persuading voters.

14. The City did not incorporate Complainant's TABOR opposition statement into its Factual Summary. The City also did not consult with any Issue 1A opponents in drafting the Factual Summary, including the "Arguments Against" section of the Factual Statement.

15. The exact cost incurred by the City in mailing the Factual Summary is not revealed in the record. However, it appears that mailing costs exceeded \$5,000 and further sums were spent on printing. Additionally, city employee time was expended in the preparation of the summary.

16. The cover page of the Factual Summary mailing (page 1) accurately quotes from Section 1-45-117(1)(b)(l) of the FCPA¹ and accurately indicates that the Factual Summary was authorized by Resolution No. 38-03 of the City Council.

17. Page 2 of the Factual Summary mailing accurately reflects the Ballot Title and Ballot Text for Issue 1 A.

18. The "Arguments For" section of the Factual Summary consists of approximately 1 and 1/5 pages of text. It begins with a summary of projects and accomplishments of the TOPS program since its inception. The "Arguments For" section additionally asserts:

a. "The proposed extension from 2009 to 2025 does not increase the tax; the current TOPS tax will sunset April 30, 2009."

b. "The proposed extension, during its additional 16 year life span, will generate an estimated \$80 million to \$100 million" for TOPS projects. "Securing matching funds may further increase this amount."

c. The extension will allow the City to preserve open space candidate areas such as certain areas specifically named in the Factual Summary.

d. The extension will enable the City to implement approved TOPS master plans, reduce the lacklog of underdeveloped parks, playgrounds and ballfields; purchase smaller, neighborhood open space parcels; and protect important wildlife habitat and watersheds.

e. The extension allows for up to 3% of the revenue to be used for administration and up to 6% for stewardship and maintenance.

f. "All TOPS expenditures are subject to approval by a Citizen Advisory Committee, Parks and Recreation Advisory Board, City Council and are independently audited biannually."

g. "The current 0.1% (one-tenth of a cent) tax costs one cent on every ten dollars spent in Colorado Springs—an annual cost of \$16.00 to the average (area median) household. Tourists and other non-residents pay an estimated 40% of the tax—not Colorado Springs residents. The Colorado Springs sales tax rate remains the lowest effective rate among the 10 largest Colorado Front Range cities."

¹ However, the statutory reference on the cover page to the section quoted is in error: the citation inadvertently references "1-45-117(b)(l)" rather than "1-45-117(1)(b)(l)." This error is minor and does not substantially affect the accuracy of the document as a whole.

19. A factual basis exists for the disputed “Arguments For” assertions contained in the Factual Summary.² For example:

a. The extension proposal does not increase the existing TOPS tax in the sense that under the proposal the existing one-tenth of a cent rate does not increase; the same tax at the same rate is instead extended beyond its previously-established sunset date. Thus, a factual basis exists for the statement “[t]he proposed extension . . . does not increase the tax; the current TOPS tax will sunset April 30, 2009.”

b. The revenue that is “estimated” to be generated during the extended life span of the TOPS program, \$80 million to \$100 million, is based upon economic assumptions that are possible. Like almost all economic forecasts, tax revenue projections are inherently subjective and subject to debate among professional economists and lay people alike. Tax revenue projections are based on assumptions concerning such things as population growth rates, economic growth rates and inflation rates. The estimates of \$80-\$100 million in revenue from the TOPS extension reflect a conservative set of assumptions concerning these factors during the life of the extension. For example, the middle of the estimated revenue range of \$80 million to \$100 million would be achieved if the current (depressed) rate of collection were to continue unchanged. No persuasive evidence was presented that established the assumptions utilized in reaching estimated TOPS revenue projections contained in the “Arguments For” section of the Factual Summary are inherently incredible or fail to reflect a legitimate economic opinion.³

c. The proposed extension of TOPS is actually for a period of 16 and 2/3 years, rather than the 16 years listed in the “Arguments For” section. While not exact, the reference to 16 years is not substantially misleading.

d. Colorado Springs has a combined percentage and a bracket tax system. For transactions of under \$5.00, the 0.1% TOPS tax is not charged at all. For transactions of \$5.00 to \$14.99, one cent is collected for TOPS. In light of this tax system, the statement that “[t]he 0.1% (one-tenth of a cent) tax costs one cent on every ten dollars spent in Colorado Springs” is factually accurate and is not affirmatively misleading. The statement provides an easily-understandable example of how large the tax actually is, chosen from

² Not all the assertions in the “Arguments For” section have been disputed. For example, no issues were raised concerning the section that lists projects and accomplishments of the TOPS program since its inception. Additionally, no issue was raised as to the accuracy of the list of potential projects that might be undertaken or the list of areas that might be designated as open space in connection with the extension. Complainant also did not dispute the representation that the extension proposal allows for up to 3% of the revenue to be used for administration and up to 6% for stewardship and maintenance or the representation that TOPS expenditures are subject to citizen and governmental review.

³ Respondent Anderson, Budget Director for the City, testified that consistent with current economic conditions at the state and national level, tax revenues in Colorado Springs are down substantially in the current year. He also testified that this is a period of extreme economic uncertainty in Colorado Springs and elsewhere. Based on these factors and others, Anderson testified that it would be unrealistic to project the City’s recent unprecedented growth (up until the current downturn) will prevail in the future. No testimony from an economic expert was presented that would establish Anderson’s opinions in this regard are inherently incredible.

the middle of bracket that yields a one-cent tax. The statement does not imply that transactions of less than ten dollars will not be taxed.

e. A factual basis exists for the Factual Summary's projection of annual household costs of the tax and the percentage of tax paid by non-residents. As the City conceded at hearing, the Summary's assertion that the tax will amount to "an annual cost of \$16.00 to the average (area median) household" is somewhat confusing because the statement uses the terms "average" and "median" as if they were synonymous when they are not. Nevertheless, assuming the intent was to reference median income, a factual basis for the statement exists, based on an estimate of what the tax will cost a Colorado Springs household of median income on an annual basis. Figures used to arrive at this number include the median household income published by the Pikes Peak Area Council of Governments; a percentage estimated by the U.S. Department of Labor to represent the portion of income spent on sales taxable consumption; and an estimate (inferred from other factors) that 40% of sales taxable consumption is attributable to non-residents of the City. The evidence did not establish that the \$16.00 figure, the 40% figure, or the underlying assumptions utilized to arrive at those amounts are inherently incredible or fail to reflect a legitimate economic opinion.

f. The statement that the "Colorado Springs sales tax rate remains the lowest effective tax rate among the 10 largest Colorado Front Range cities" has a factual basis when public transit taxes are considered. Although Lakewood has a lower base tax rate than Colorado Springs, the cost of transit is included in the base tax rate for Colorado Springs whereas Lakewood's transit costs are covered by a separate RTD tax. When the cost of the RTD tax is added to Lakewood's tax rate, the Colorado Springs tax rate is lower. The evidence did not establish that comparing the sales tax rates of Colorado Springs and Lakewood in this manner, along with use of the term "effective tax rate," is inaccurate, is inherently misleading, or fails to reflect a legitimate way of comparing city tax rates.

20. The "Arguments Against" section of the Factual Summary consists of approximately 4/5 of a page of text, including the following assertions:

a. "Much of the land preserved as open space under the current TOPS program could have been developed to provide housing and commercial facilities for the City's growing population."

b. If not extended the TOPS tax will sunset in 2009, thus making an additional \$16.00 available annually to the median Colorado Springs household after 2009.

c. If TOPS is not extended, various named scenic properties can be developed to meet the City's housing and commercial space needs for a growing population.

d. Issue 1A will cost taxpayers between \$80 million to \$100 million.

e. The City's trails and parks development programs, as well as the 3% management allowance and 6% maintenance/stewardship allowance, can be paid for out of the City's general fund.

f. The anticipated revenues will be insufficient to fully fund the current TOPS master plans which extend only to 2010.

g. "Non-city residents will pay approximately 40% of the extended TOPS tax."

h. City open space needs could be met by utilizing the 1.2 million-acre Pike National Forest.

21. The "Arguments Against" section of the Factual Summary provides an adequate statement of arguments in opposition to the Issue 1A.

a. Taken as a whole, the "Arguments Against" section of the factual summary expresses the opinion that the TOPS program should not be extended because it is too costly, is unnecessary, and will interfere with needed development. These constitute legitimate arguments against the program.

b. The "Arguments Against" section fails to contest the figures contained in the "Arguments For" section (and, in fact, incorporates some of those numbers in its arguments in opposition). In addition, the "Arguments Against" section contains at least one argument (40% paid by non-residents) that is more persuasive as an argument for the proposal. It also contains certain overtly pro-development statements that likely would have been recast in less inflammatory terms had the section been written by opponents of the proposal. Nevertheless, taken as a whole, the section constitutes a legitimate attempt to provide balanced arguments against the proposal. It is not so ineffective or incomplete as to constitute a failure to include balanced arguments against the proposal or to constitute an opinion by the City in favor of Issue 1A.

DISCUSSION

I. MOTION TO DISMISS

The FCPA provides that no agency of the state or any political subdivision of the state shall expend any public moneys to urge electors to vote in favor or against certain election measures. Section 1-45-117(1)(a)(I), C.R.S. (2002). The City of Colorado Springs does not contest that it is a political subdivision of the state of Colorado and, as such, is subject to FCPA's provisions.

The complaint in this matter asserts that the City of Colorado Springs, the Colorado Springs City Council, and various named and unnamed Respondents have violated Section 1-45-117(1)(a)(I) of the FCPA by expending public moneys on the Factual Summary. The

City moves to dismiss each of the named respondents (with the exception of the City Council and the City itself) to the extent those Respondents are named in their individual capacities. The City argues the prohibitions in Section 1-45-117(1)(a)(I) relate solely to public entities and thus asserts the named and unnamed individuals are not properly parties in this matter in their individual capacities. The Administrative Law Judge agrees.

The language of Section 1-45-117(1)(a)(I) indicates that prohibitions of that section run against public entities, rather than individuals. Although individual employees of public entities act as agents of those agencies, such individuals are not individually subject to the FCPA. Individual agents acting behalf of an agency may engage in conduct that results in a violation of the Act by the agency. However, any such actions constitute violations of the FCPA by the public agency, rather than its individual agents. See Agency Decision, October 31, 2000, Case No. OS 2000-08.

Complainant cites *Colorado Common Cause v. Coffman*, 01CA1709, 32 Colo. Lawyer, May 2003 at 178 (March 27, 2003) in support of his position that individuals are subject to individual liability under FCPA. The Administrative Law Judge is not convinced that *Coffman* supports the position for which it is cited. In *Coffman*, the Colorado Court of Appeals upheld a determination that State Treasurer Mike Coffman willfully violated Section 1-45-117, C.R.S. (2002) and affirmed the imposition by an ALJ of a civil penalty. Although the Court's decision referenced in passing the fact that the penalty was imposed against Coffman "individually," the Court did not directly address the issue of whether imposition of the fine in that manner was appropriate. The decision instead addressed the question of whether the expenditures at issue in the case were proper under the FCPA. Because the court did not directly confront the question of whether imposition of individual liability is proper under the FCPA, *Coffman* does not provide support for Complainant's assertion that persons may be named and held liable in their individual capacities under the FCPA.⁴

Complainant asserts that any result other than the one he urges would create an absurd result: fines would then be available for a violation of Section 117 only against the public agency that allegedly misspent public funds in the first instance, thus causing a second expenditure of public funds, rather than a reimbursement of such funds. Complainant asserts such a reading of the FCPA would serve neither a deterrent purpose and nor the purpose of conserving public funds.

Without determining whether the imposition of fines is still an available penalty under Section 1-45-117(4) following the passage of Colorado Constitution, Article 28,⁵ the

⁴ The ALJ notes that on page one of the *Coffman* decision the Court took the trouble specifically to identify Coffman as State Treasurer and "the individual who leads the Office of the State Treasurer," some indication the Court was considering Coffman in his representative capacity. In any event, because the issue was not directly addressed in *Coffman*, that decision is not controlling in resolving the question of whether Section 1-45-117 creates individual liability.

⁵ The Administrative Law Judge notes that prior to the passage and effective date of Colo. Constit Art. 28, Section 1-45-117(4) provided that any violation of Section 1-45-117 "shall be subject to sanctions authorized in section 1-45-113 or any appropriate order or relief, including injunctive relief or a restraining order to enjoin the

ALJ nonetheless concludes the FCPA does not permit the imposition of individual liability under the facts of this case.

In construing a statute and determining legislative intent, courts must rely on the language of the statute and give the words used their plain and ordinary meaning. Section 2-4-101, C.R.S. (2002); *Hall v. Walter*, 969 P.2d 224 (Colo. 1998). If the meaning of the statute is clear and unambiguous, then the court may not resort to other aids of statutory construction to ascertain the statutory intent. *Vaughan v. McMinn*, 945 P.2d 404 (Colo. 1997).

The language of Section 1-45-117(1)(a)(I) is clear and unambiguous. Its prohibitions run only to public agencies, not individuals. Under these circumstances, the Administrative Law Judge may not construe the statute or re-write it to make a "better" one, but instead must apply it as it is written. See *Board of County Commissioners v. Moreland*, 764 P.2d 812 (Colo. 1988) (the absence of a legislative provision for a civil damages remedy against governmental entity forecloses the court from recognizing such a remedy); *Silverstein v. Sisters of Charity*, 559 P.2d 716 (Colo. App. 1976) (where a statute creates legal duties and provides a particular means for their enforcement, the designated remedy excludes all others). Furthermore, such an interpretation will not lead to an absurd result, as Complainant claims. Even if relief against individual actors is not available for violations of Section 1-45-117 under the FCPA, a final agency order declaring that a public agency has misspent funds in violation of the FCPA can have important educational value for the agency and may result in subsequent negative electoral consequences for the elected officials responsible for supervising the errant public agency activity.

Consequently, the Administrative Law Judge determines no individual liability is available under Section 1-45-117 and Colo. Const. Art. 28. Because the Administrative Law Judge determines that the prohibitions of the FCPA run against public entities, rather than individuals, the Administrative Law Judge dismisses the individually named Respondents to the extent Complainant intended to name them in their individual capacities.

Complainant has also names as parties "Does I-X." These individuals were never named or served. They did not appear at hearing in person or through counsel. Does I-X are therefore properly dismissed from this proceeding.

continuance of the violation." However, with the passage of Colo. Const. Art. 28, § 12, Section 1-45-113 was repealed. In addition, Colo. Const. Art. 28, § 9(2)(a) provides that violations of Section 1-45-117 shall be as "authorized by this article," while Art. 28, § 10, the only provision in Article. 28 authorizing sanctions, fails to provide any sanctions at all for Section 1-45-117 violations. In light of the fact that Colo. Const. Art. 28, § 9(2)(a) provides for ALJ hearings for violations of Section 1-45-117, and thus explicitly incorporates Section 1-45-117 violations within its purview, the fact that the sanction section of Art. 28 omits any reference to Section 1-45-117 at least raises the question of whether Section 1-45-117(4) has been repealed by implication. In light of the ultimate result reached in the present case, the Administrative Law Judge need not resolve this issue.

II. DID THE CITY OF COLORADO SPRINGS EXPEND PUBLIC MONEYS TO URGE ELECTORS TO VOTE FOR ISSUE 1A?

A. The FCPA prohibits a political subdivision of the state from expending any public moneys to urge electors to vote for or against certain elections issues. One of the covered issues is a local ballot issue that has been submitted for the purpose of having a title fixed pursuant to Section 31-11-111 or that has had a title fixed pursuant to that section. Section 1-45-117(1)(a)(I)(B), C.R.S. (2002). The parties concede that Issue 1A was a local ballot issue as defined by the FCPA. Thus, the City is bound by the prohibitions of Section 1-45-117(1)(a)(I)(B) with respect to Ballot Issue 1A.

Complainant maintains that the City expended public moneys to urge electors to vote in favor or against local ballot Issue 1A, in violation of Section 1-45-117(1)(a)(I)(B), C.R.S. (2002), in connection with the Factual Summary sent to Colorado Springs electors on or about February 27, 2003. The evidence is clear that public funds were expended for preparing, printing and mailing the Factual Summary. The question presented is whether those public funds were expended in violation of Section 1-45-117(1)(a)(I)(B).

As set forth below, the Administrative Law Judge concludes no violation of Section 1-45-117(1)(a)(I)(B) has been established.

The prohibition in Section 1-45-117(1)(a)(I)(B) against expending public funds to “urge electors to vote in favor or against” an election issue is further clarified by Section 1-45-117(1)(b)(I). This provision permits a public entity to expend public moneys in connection with dispensing “a factual summary, which shall include arguments both for and against” a ballot issue, as long as the summary does not contain “a conclusion or opinion in favor or against” any particular issue. Taken together, Sections 1-45-117(1)(a)(I)(B) and 1-45-117(1)(b)(I) provide that a public entity may provide, at public expense, reasonably neutral and balanced information concerning a ballot issue, as long as the information provided does not contain a conclusion or opinion in favor or against the proposal and does not urge electors to vote for or against the proposal. See Agency Decision, Case No. OS 2000-8, October 31, 2000.

One underlying purpose of the FCPA is to assure that government does not provide an unfair advantage to one side over the other in the electoral process by utilizing public funds to propagandize in support of a particular candidate or issue. *Mountain States Legal Foundation v. Denver School District*, 459 F. Supp. 357 (D. Colo.1978). Further, the specific purpose of Section 1-45-117 is to prohibit governmental entities from spending public funds to influence the outcome of campaigns for political office and ballot issues. *Coffman, supra*. Thus, in order to comply with the prohibitions contained in Section 117 of the FCPA, ballot issue mailings to the electorate produced at government expense must be facially neutral and must not have the effect of urging electors to vote one way or the other on the proposal. Moreover, election material prepared by a public entity at public expense is not protected from the prohibitions of the FCPA merely because it does not contain an explicit directive to voters to vote “yes” or “no” on the measure in question; compliance with

Section 117 requires the material to be balanced and even-handed. See Agency Decision, Case No. OS 2000-8, October 31, 2000; see also Initial Decision, Case No. OS 96-18.

The City's Factual Summary concerning Issue 1A complies with the dual requirements of Sections 1-45-117(1)(a)(I)(B) and 1-45-117(1)(b)(I) of the FCPA. The Summary's cover page indicating the authority under which it was issued and the page containing the Ballot Title and Ballot Text clearly fall within the category of a factual summary permissible under Section 117. In addition, the "Arguments For" and "Arguments Against" sections of the Summary provide information for and against the measure. Taken as a whole, the Summary does not urge electors to vote in favor of or against the ballot issue, does not contain a conclusion or opinion in favor of or against the proposal, and is sufficiently balanced and even-handed to fall within the requirements of that section. In particular, the arguments for and against the proposal presented in the Summary appropriately reflect reasonable arguments for and against the proposal and provide electors with information to assist in evaluating the proposal without implicitly or explicitly urging voters to vote for the proposal.⁶

B. Complainant asserts the arguments for the proposal contained in the Summary are inaccurate and are neither neutral nor even-handed. He therefore asserts the "Arguments For" section amounts to improper advocacy by a public entity at public expense. The Administrative Law Judge disagrees.

Complainant directs his complaints about the Summary's "Arguments For" section largely to the portions of those arguments relating to economic forecasts. Complainant essentially takes the position that the underlying assumptions are so unreliable as to be non-factual and to amount to the City urging voters to vote for the proposal.

Complainant has failed to establish that the underlying economic assumptions which form the basis of the Factual Summary arguments in favor of Issue 1A are inherently incredible, do not reflect a legitimate economic opinion, or are otherwise so unreliable, baseless, or patently false as to, in effect, constitute an opinion of the public entity rather than a legitimate argument for Issue 1A. To the contrary, despite Complainant's disagreement with the economic assumptions that form the basis for the arguments in favor of the proposal, the evidence established a rational basis exists for those economic projections. The evidence also established underlying data exist to support various

⁶ Complainant acknowledges that it is his burden to establish a violation of Section 1-14-117(1)(a)(I)(B) but asserts the City has the burden to establish it has complied with Section 1-45-117(1)(b)(I), which permits the City to dispense a factual summary. The Administrative Law Judge disagrees. Section 1-45-117(1)(b)(I) provides that nothing in subsection (1) of Section 117 "shall be construed" as prohibiting a public entity from expending public to dispense a factual summary, thereby further explaining the requirements and prohibitions of Section 1-14-117(1)(a)(I)(B). The provision is therefore best characterized as a part of the affirmative provisions of the FCPA, rather than as an exemption or exception in the nature of avoidance. See *Moore's Federal Practice* § 8.07[1]–[2] (3rd ed. 1997) (an affirmative defense, if accepted by the court, will defeat an otherwise legitimate claim for relief). In any event, regardless of which party bears the burden of proof with respect to compliance or lack of compliance with Section 1-45-117(1)(b)(I), the Administrative Law Judge finds the evidence affirmatively established the City has complied with the requirements of that section.

assumptions contained in the summary. Under these circumstances, Complainant's arguments and evidence reflect a difference of opinion as to appropriate economic assumptions but do not establish that the "Arguments For" section of the Summary amounts to improper advocacy.

Complainant specifically contests the following statement contained in the "Arguments For" section of the Factual Summary: "[t]he proposed extension . . . does not increase the tax; the current TOPS tax will sunset April 30, 2009." Complainant maintains that S.B. 98-171 constitutes a determination by the General Assembly that all extensions of existing taxes are tax increases, thereby rendering false the above assertion in the Factual Summary. Complainant's argument in this regard is without merit. S.B. 98-171 relates solely to a modification of the Metropolitan Football Stadium District Act. In connection therewith, the General Assembly approved language for a ballot question with respect that the Metropolitan Football Stadium District only. The General Assembly made no determinations of general applicability as to how tax extensions in other contexts must be characterized. Therefore, S.B. 98-171 does not "prove" that the quoted language in the Factual Summary is false.

C. Complainant also maintains that the "Arguments Against" section of the Summary fails to comply with the requirements of Section 117. He asserts that there are better arguments against Issue 1A that were not included. He also suggests that opponents of the proposal should have been consulted when the summary was drafted and that his own TABOR statement in opposition to the proposal should have been included (in whole or in part) in the summary. Complainant further asserts that the arguments against the proposal in the summary are misleading in that they appear to concede the economic assumptions of the proponents (repeating the \$80 to \$100 million revenue projection and the \$16.00 annual cost per median household). He also contends that some of the arguments are worded in an inflammatory manner, some are repetitious, and some are really arguments in favor of the proposal.

Despite these arguments of Complainant, the Administrative Law Judge has found that taken as a whole, the "Arguments Against" section of the factual summary expresses the opinion that the TOPS program should not be extended because it is too costly, is unnecessary, and will interfere with needed development. These viewpoints constitute reasonably framed, legitimate positions against the program. Therefore, when the "Arguments Against" section is considered as a whole, Complainant's assertions that the "Argument Against" section of the Summary fails to comply with Section 117 is unpersuasive.

In making a determination that the "Arguments Against" section is in compliance with the FCPA, the Administrative Law Judge recognizes that there are reasonable arguments against Issue 1A that were not included in the statement (including, for example, arguments that the proponents' underlying economic assumptions are invalid). In addition, it is evident that some arguments against the proposal contained in the summary are not articulated in the most artful manner possible, that the "Arguments Against" section is not

as long as the section listing arguments in favor of the proposal, and that at least one of the arguments (40% is paid by non-residents) appears to be largely, if not exclusively, an argument in favor of the proposal, at least in the manner it is worded. In addition, the Administrative Law Judge recognizes that, although not required by the FCPA, a better practice when preparing a factual summary concerning a ballot issue favored by the City would be for the City to invite opponents of the measure to participate in drafting the arguments in opposition to the proposal. Such a practice would provide helpful input as to arguments that are important to at least some opponents, thereby providing assistance in achieving a balanced summary. It might additionally avoid FCPA litigation.

Despite the fact, as explained above, that the "Arguments Against" section of the Factual Summary is not ideal, it is nevertheless sufficient and adequate, taken as a whole, to meet the requirements of Section 117. The section contains legitimate arguments against the proposal, set forth in a reasonable manner. It therefore does not amount to an implicit urging by the City to vote in favor of the proposal or a conclusion or opinion on the part of the City to vote in favor of the proposal.

Accordingly, the Factual Summary, including its arguments for and against, does not amount to improper propagandizing on the part of the City or an improper use of public funds to influence the outcome of the ballot election and complies with the requirements of the FCPA.

D. Complainant asserts the Factual Summary is inaccurate and therefore fails to comply with the requirements of Section 117 because ballot title is misleading and ballot contents are legally insufficient to effectuate the intended purpose of the proposal. The Administrative Law Judge determines that neither of these arguments is cognizable under the FCPA.

Whether or not a ballot title is misleading is not an issue to be determined in this proceeding. The only issue to be determined in an action brought under Section 117(1)(a)(I) of the FCPA is whether a public entity has expended public funds to urge electors to vote in favor or against certain election matters. In contrast, Section 31-11-111(4), C.R.S. (2002) provides an avenue unrelated to the FCPA to contest ballot titles. Thus, the issue of whether the ballot title is misleading is not an issue that may be determined in this FCPA proceeding.

Complainant asserts that the ballot issue itself is not legally sufficient to extend both the TOPS tax and the underlying ordinance passed by the voters in 1997. The City disputes this assertion. Whatever the merits of this dispute may be, it is apparent that it may not be resolved in an action under the FCPA. Section 117 is intended to ensure that public moneys are not expended to advocate in favor of or in opposition to an election matter; it does not provide any authorization to determine the legal effectiveness of a ballot issue. Other avenues are available to Complainant if he wishes to contest the legal sufficiency of Issue 1A; that issue may not be determined in a FCPA proceeding.

E. Complainant has failed to meet his burden of establishing any violation of Section 1-45-117(1)(a)(I)(B), C.R.S. (2002) of the FCPA occurred in connection with the City's use of public funds to produce and distribute the Factual Summary concerning Issue 1A. Because no violation has been established, the Administrative Law Judge need not address the issue of what sanctions are available for violations of Section 1-45-117 following the passage of Colo. Constit. Art. 28

CONCLUSIONS OF LAW

1. The Secretary of State and the Administrative Law Judge have jurisdiction over this complaint.

2. The individually named Respondents are dismissed from this proceeding to the extent Complainant intended to name them in their individual capacities.

3. Does I-X are dismissed from this proceeding.

4. Complainant failed to establish the City of Colorado Springs or the Colorado Springs City Council committed any violation of Section 1-45-117(1)(a)(I)(B), C.R.S. (2002) of the FCPA in connection with the City's use of public funds to produce and distribute the Issue 1A Factual Summary.

AGENCY DECISION

Because no violation of Section 1-45-117(1)(a)(I)(B), C.R.S. (2002) of the FCPA has been established by Complainant with respect the Issue 1A Factual Summary prepared and distributed by the City of Colorado Springs, the complaint in this matter is dismissed.

DONE AND SIGNED

September ____, 2003

JUDITH F. SCHULMAN
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above **AGENCY DECISION** was served by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado addressed to: Stephen K. Hook, Assistant City Attorney, P.O. Box 1575, Mail Code 510, Colorado Springs, CO 80901; and to: Douglas Bruce, Box 26018, Colorado Springs, CO 80936 on this ___ day of July, 2003, and was served via inter-office mail on William A. Hobbs, Deputy Secretary of State, Department of State, 1560 Broadway, Suite 200, Denver, CO 80202.

Secretary to Administrative Law Judge

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