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MEMORANDUM

March 28, 2011

TO: Jeffrey Worthington and Greg Vincent

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #23, concerning a civilian review board to review complaints against law enforcement personnel

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purpose

The major purpose of the proposed initiative appears to be:

1. To create an independent, statewide civilian review board for the purpose of investigating and hearing testimony concerning complaints submitted by members of the public, which complaints allege various acts of misconduct committed by law enforcement officers.

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so

request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

The Proposed Initiative Is an Idea Rather Than Text

1. Under section 1 (5) of article V of the Colorado constitution, the proponent of an initiative is directed to submit the text of a proposed constitutional amendment for review and comment. The proponents have submitted an idea rather than the actual language that would be added to the Colorado constitution or Colorado Revised Statutes. The proponents should amend their proposal to include the actual text of their proposed constitutional or statutory change. The remainder of the technical comments included in this memo are intended to assist the proponents in the drafting of their proposal.

Enacting Clause

1. Article V, section 1 (8) of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by the initiative: "Be it Enacted by the People of the State of Colorado". To comply with this constitutional requirement, this phrase should be added to the beginning of the proposed initiative.

Format/Organization of Initiative

1. It is standard drafting practice to insert a left tab at the beginning of the first line of each new section, subsection, paragraph, or subparagraph, including amending clauses and section headings. It is also standard practice to bold the section number.

2. It is standard drafting practice for the first subsection to immediately follow the headnote on the same line instead of the first subsection appearing on a separate line from the headnote.

3. The provisions of the proposed initiative should appear in the following order: The enacting clause, followed by the amending clause indicating what change is being made to the Colorado constitution or Colorado Revised Statutes, followed by the text of the initiative.

Numbering of Statutes and Constitution

1. Constitutional and statutory provisions are usually divided into component parts using the following structure: Subsection, for example, "(1)"; followed by paragraphs, for example, "(a)"; followed by subparagraphs, for example, "(I)"; ending with sub-subparagraphs, for example, "(A)".

2. Constitutional and statutory provisions are often divided into subsections, paragraphs, subparagraphs, and sub-subparagraphs for ease of reading. The proponents may want to consider breaking up the text of the proposed initiative into separate subsections, etc.

Amending Clauses

1. It is standard drafting practice to include an amending clause telling the reader what is being

added to or amended in the Colorado Revised Statutes. For example, if your intention is to add a new article to title 39 of the Colorado Revised Statutes, include an amending clause that reads as follows: "Title 39, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW ARTICLE to read:".

2. Each constitutional and statutory section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. For example, "Article X of the constitution of the state of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:".

Strikes/Small Caps/Capitalization

1. When you're amending a section of the Colorado constitution or Colorado Revised Statutes, use strike type to delete language and small caps to show new language. Current law cannot be deleted without showing it as such in strike type. Also, the current language should be in mixed-case letters, while the language being added should be the only language shown in small caps. Stricken text should precede new text where such changes appear together.

2. It is standard drafting practice to use small capital letters (rather than ALL CAPS) to show the language being added to the Colorado constitution or Colorado Revised Statutes.

Note that although the text of the proposed initiative should be in small capital letters, a large capital letter should be used to indicate capitalization where appropriate. The following should be large capitalized:

- a. The first letter of the first word of each sentence;
- b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and
- c. The first letter of proper names.

3. It is unnecessary to capitalize "general assembly" in the proposed initiative.

Headnotes

1. Each section in the Colorado Revised Statutes and Colorado constitution has a headnote. Headnotes should briefly describe the contents of the section, should follow the section number, should be in bold-faced type, and should be in mixed-case letters. A headnote should precede each new section in the proposed initiative.

Commas

1. The preferred method for separating a series in a list is to include a comma after the second to last item in the series.

2. It is standard drafting practice to set off certain phrases (i.e., introductory, parenthetical, or prepositional phrases) with commas.

3. It is standard drafting practice to use commas to connect two independent clauses.
4. It is standard drafting practice to separate coordinate adjectives with a comma.

Definitions

1. The following is the standard drafting language used for creating a definition: "As used in this [section][subsection][paragraph], unless the context otherwise requires, '[term]' means (the definition for the term)...".
2. Definitions should be in alphabetical order.
3. It is standard drafting practice to use the terms that have been defined for a particular article, without having to refer to full names repeatedly. Accordingly, the proponents may simply state "the commission" rather than "the Colorado public utilities commission," because "commission" is a defined term for this particular article (see section 40-1-102, Colorado Revised Statutes).

References

1. When referencing a subsection, paragraph, subparagraph, or sub-subparagraph, it is standard drafting practice to repeat the letter or number of the subsection, paragraph, subparagraph, or sub-subparagraph.
2. If the proposed initiative is adding language to the Colorado constitution and refers to entities outside the constitution, the proponents should consider adding the phrase "or a successor statute/officer/agent/committee" to every instance that a statute, entity, etc., is referenced.

Miscellaneous

1. Use the singular form whenever possible.
2. Numbers should be spelled out.
3. It is standard drafting practice to use the word "that" instead of "which" when indicating a restrictive clause, meaning the word, clause, or phrase following the word "that" is necessary to the meaning of the sentence and is not simply additional or descriptive information.
4. It is standard drafting practice to avoid the use of archaic terms. For example, instead of using "herein", use "in this section".
5. It is standard drafting practice to use "shall" for requirements and "may" for privileges or rights.
6. It is standard drafting practice to use gender-neutral language. Therefore, "his attorneys fees and costs" should be written as "his or her attorney fees and costs" or "the property owner's attorney fees and costs".

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Subsection (5.5) of section 1 of article V of the state constitution requires each proposed initiative to have a single subject. What is the single subject of the proponents' initiative proposal?
2. The civilian review board described in the proposal appears to be a statewide entity with "seven to nine" members each serving terms of two years. How many members, exactly, will be on the board? How are the members of the board to be elected or appointed to the board? Who elects or appoints them? Do the proponents intend for the board members to be allowed to serve an unlimited number of terms?
3. The civilian review board described in the proposal has certain legal powers, such as the power to issue subpoenas and impose sanctions against law enforcement officers. Upon what legal authority are such powers to be based? For example, do the proponents intend to establish the civilian review board within the judicial branch, within the department of law, within some division of the department of public safety, or elsewhere within state government?
4. The proposed initiative states that the executive director of the civilian review board "is selected by the chief judge of the 11th judicial circuit". By this, do the proponents mean the chief judge of the 11th judicial *district* in Colorado, which consists of the counties of Chaffee, Custer, Fremont, and Park? If so, what is the proponents' reasoning for allowing the chief judge of this (relatively small) district to appoint the executive director of a statewide civilian review board?
5. The proposed initiative states that members of the civilian review board "should undergo a training regimen". What, exactly, do the proponents intend to require as training for the board members? Who will establish the curriculum for the training, who will provide the training, and how will the training be paid for?
6. The proposed initiative suggests that the functions of the civilian review board will require the hiring of investigators, who may not be present or former law enforcement officers. These investigators will apparently be charged with investigating complaints received in every county and municipality of the state. How many investigators do the proponents believe will be necessary for this task? How will these investigators be compensated? How much money do the proponents believe will be required (annually) to compensate such investigators?
7. The proposed initiative states that the civilian review board "has the authority to broaden its reach to decide other types of complaints as well." Can the proponents elaborate on this statement? Specifically, what are the proponents' intentions regarding the limits of the civilian review board's quasi-judicial authority?
8. The proposed initiative states that one of the functions of the civilian review board is to "make concrete recommendations about police policies and procedures and to suggest improvements in training." However, there is no indication in the proposed initiative that any members of the civilian

review board will have any law enforcement experience or any other expertise that would qualify them to make such recommendations. Have the proponents considered requiring a minimum number of the members of the civilian review board to possess some minimum professional experience in law enforcement or criminal justice?

9. The proposed initiative states that one of the functions of the civilian review board is to "hold regular monthly meetings that are open to the public". Where do the proponents intend for these meetings to be held? If such meetings are indeed to be held "monthly", it would seem that the members of the board would need to live in fairly close geographical proximity to each other (as opposed to being spread all over the state). Where do the proponents intend to locate the board, and do the proponents intend to include within their proposal provisions to address the geographical diversity (or lack thereof) of the members of the board?

10. The proposed initiative states that one of the functions of the civilian review board is to "create and utilize an 'early warning' or 'at risk' system to identify officers who are the subject of repeated complaints". Can the proponents elaborate regarding this "system"? Specifically, does it involve the creation of a database or a web site? If so, what are the estimated programming costs associated with the creation and ongoing maintenance of the database or web site? Do the proponents intend the "system" and its data to be available to the public? What is the purpose of the "system", other than to "identify" certain officers?

11. The proposed initiative states that one of the functions of the civilian review board is to "publish a semi-annual report" containing certain data. According to the proposal, the report must include considerable aggregation of data into various statistics. Who will prepare this report "semi-annually", how will the report be paid for, and to whom will the report be submitted?

12. The proposed initiative states that one of the functions of the civilian review board is to "make available to the public a summary report on each complaint and its disposition". This requirement, as stated, does not appear to contemplate the possibility that a person filing a complaint may prefer to remain anonymous, or the possibility that a particular complaint may be utterly frivolous or false. The proponents may consider including exceptions to this broadly stated reporting requirement. For example, the proponents may wish to include provisions to protect the identity of a person who files a complaint for a reasonable amount of time, as well as provisions to protect the identity of a law enforcement officer whose alleged conduct is the basis for a complaint until the complaint is determined to have merit and require some action by the board.

13. The proposed initiative states that the civilian review board "should be provided with unfettered access to *all* police files" [emphasis added]. This language appears to suggest that the board should be able to review *any* file or data that is possessed or maintained by *any* law enforcement agency -- even files and data that are completely unrelated to any alleged misconduct by a law enforcement officer. This could feasibly include access to information that all employers, including law enforcement agencies, are prohibited from disclosing under federal law (e.g., health or medical history information). It could also include evidence and information that is intended to be used in a pending criminal investigation or prosecution. The proponents should consider including language (e.g., ". . . except where such disclosure would be prohibited by state or federal law or present a likelihood of compromising the integrity of an ongoing criminal investigation or prosecution") to

narrow the scope of the information to which the board has access.

14. The proposed initiative states that it is "imperative that the police are required to accept the findings of the [civilian review board] as well as implement the sanctions imposed by the [civilian review board]". Do the proponents intend to preclude the right of a sanctioned law enforcement officer to seek administrative or judicial review of his or her sanction in accordance with the principle of procedural due process, as such principal is set forth in the Fourteenth Amendment to the United States Constitution and interpreted by the historical jurisprudence of the United States Supreme Court? If not, at what point do the proponents intend a sanction or other disciplinary action by the board to constitute a final administrative decision that may be subjected to judicial review?

15. The proposed initiative states that the civilian review board "requires the power to provide whistleblower protection to police officers who report the misconduct of fellow officers." Can the proponents elaborate on the meaning of "whistleblower protection" in this statement? For example, do the proponents merely intend to include certain legal protections for "whistleblowers", or do the proponents envision more elaborate measures, such as witness relocation or witness identity protection?

16. The proposed initiative concludes by stating that the civilian review board "requires an adequate budget that is shielded from politics". Can the proponents indicate what they intend to be the source of moneys for the board's budget? Also, what do the proponents intend to be the size of the board's annual budget? (According to the language of the proposal, the budget must apparently be large enough to accommodate the salary of a full-time executive director; the cost of an unspecified number of "professional investigators" who are charged with investigating every complaint filed in every county and municipality in the state; the cost of purchasing or renting a physical location at which board meetings shall be held; the cost of "mediation" proceedings in cases of "discourtesy complaints"; the cost of "promoting community awareness", presumably through the purchase of print or broadcast media and/or maintenance of a dynamic web site; the cost of preparing and administering a "training regimen" to board members; the cost of preparing and publishing a semi-annual report that includes considerable aggregation of statistical data; the cost of authoring and publishing a public report of "each complaint and its disposition", as well as (presumably) the costs of hiring professional legal assistance in the administration of subpoenas and other quasi-judicial activities of the board. Finally, can the proponents elaborate concerning what practical measures, if any, they intend to include in the proposal for the purpose of "shielding" the board's budget from politics?