

# AGENDA

## Senate Committee on Ethics

Senate Committee Room 352

State Capitol Building

Tuesday, June 11, 2024

9:30 a.m. – 11:30 a.m.

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### *Call to Order*

1. Introduction and Opening Remarks

*Senator Julie Gonzales, Chair*

*Office of Legislative Legal Services*

2. Review of Procedures, Standards, and Criteria Pursuant to Senate Rule 43 including Committee process, application of open meetings and open records to Committee's work, and probable cause standard.

*Office of Legislative Legal Services*

3. Review of Proposed Committee Timeline

*Office of Legislative Legal Services*

4. Discussion of Next Steps

a. Discussion of Requests for Documentation Pursuant to Senate Rule 43 (c)

b. Scheduling Next Meeting

5. Other

## PROPOSED TIMELINE FOR SENATE COMMITTEE ON ETHICS

### Ethics Complaint against Sen. Winter, 2024

Monday, June 3, 2024	Senate Ethics <b>Committee appointed</b> by President Fenberg and Minority Leader Lundeen
Tuesday, June 11, 2024	<p><b>Organizational meeting</b></p> <p>Consider adopting committee procedures and time line</p> <p>Committee decides whether to request and compile additional evidence</p>
<p>Within 10 days after appointment of committee pursuant to SR 43 (c):</p> <p>On or before Thursday, June 13, 2024</p>	<p><b>Sen. Winter's answer</b>, if any, is due</p>
[Date]	<p><b>Receipt of additional evidence requested by the Committee</b></p> <p>Per SR 43(c), the preliminary investigation consists of an examination of the complaint, the answer, if any, and any other evidence "compiled pursuant to the request of the committee", but does not consist of "testimony or other evidence from other sources".</p>
[Date]	Second meeting of the Committee [ <i>tentative date of Thursday, June 20</i> ]
[Date]	Possible third meeting of the Committee
<p>Within 30 days after appointment of committee pursuant to SR 43(c)</p> <p>On or before Wednesday, July 3, 2024</p>	<p><b>Preliminary investigation deadline</b> for consideration whether there is probable cause to believe an ethics violation may have occurred.</p> <p>Committee takes action to determine whether the complaint should be dismissed on the basis that probable cause does not exist. If the committee determines there is probable cause to proceed with the matter, the committee may provide further direction to staff and must notify Senator Winter.</p>

<p>Within 7 days after notice that probable cause exists, Sen. Winter may request an evidentiary hearing pursuant SR 43 (d)</p> <p>On or before Wednesday, July 10, 2024</p>	<p><b>Request for evidentiary hearing</b></p>
<p>Within 14 days after receipt of the request for an evidentiary hearing pursuant to SR 43(d):</p> <p>On or before Wednesday, July 24, 2024</p>	<p><b>Requested evidentiary hearing must commence.</b></p> <p>Witnesses may testify, subpoenas may be issued, cross-examination may occur, and Sen. Winter may be represented by an attorney</p>
<p>To be determined</p>	<p><b>Recommendation to the Senate</b></p> <p>If the Committee has proceeded to a hearing, it makes its final recommendations to the Senate based on the evidence presented at the hearing(s).</p>
<p>To be determined</p>	<p><b>Action by the Senate</b></p> <p>Final action by the Senate on the Committee's recommendations.</p>

# OFFICE OF LEGISLATIVE LEGAL SERVICES

COLORADO GENERAL ASSEMBLY

## DIRECTOR

Ed DeCecco

## DEPUTY DIRECTORS

Jeremiah B. Barry      Christine B. Chase

## REVISOR OF STATUTES

Jennifer G. Gilroy

## ASSISTANT DIRECTORS

Jennifer A. Berman      Michael J. Dohr  
Jason A. Gelender

## MANAGING SENIOR ATTORNEYS

Kristen J. Forrestal      Nicole H. Myers  
Jane M. Ritter

## SENIOR ATTORNEY FOR ANNOTATIONS

Michele D. Brown



200 E. COLFAX AVE., ROOM 091  
DENVER, COLORADO 80203-1716

TEL: 303-866-2045

EMAIL: OLLS.GA@COLEG.GOV

## SENIOR ATTORNEYS

Jacob Baus  
Brita Darling  
Conrad Imel  
H. Pierce Lively

Yelana Love  
Jery Payne  
Shelby L. Ross  
Richard Sweetman

## STAFF ATTORNEYS

Rebecca Bayetti  
Anastasia DelCarpio  
Jed Franklin  
Clare Haffner  
Jessica L. Herrera  
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## PUBLICATIONS COORDINATOR

Courtney Dunaway

## LEGAL MEMORANDUM

TO:            Senate Committee on Ethics

FROM:        Office of Legislative Legal Services

DATE:        June 7, 2024

SUBJECT:     Probable Cause<sup>1</sup>

### Legal Question

Following receipt of a complaint about Senator Winter pursuant to Senate Rule 43, the President of the Senate and the Senate Minority Leader appointed five members to a Senate Committee on Ethics (Committee) pursuant to Senate Rule 43. The Committee is tasked with making a preliminary investigation of the complaint and, as part of the preliminary investigation, determining if probable cause exists to find that a violation may have occurred. What is the standard for finding probable cause?

### Short Answer

Senate Rule 43 does not define "probable cause". "Probable cause" is a standard that is often used in criminal proceedings during a preliminary hearing to determine whether the charges should be dismissed for lack of evidentiary support to proceed to a full

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<sup>1</sup> This legal memorandum was prepared by the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly. OLLS legal memoranda do not represent an official legal position of the General Assembly or the State of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

trial. In that context, the probable cause standard "requires evidence sufficient to induce a person of ordinary prudence and caution to a reasonable belief that the defendant committed the crimes charged."<sup>2</sup> Applying that standard to the context of a legislative ethics complaint, the Committee should review the evidence to determine if the evidence is sufficient to induce a person of ordinary prudence and caution to a reasonable belief that the person complained about engaged in the ethics violation alleged.

## Discussion

The Senate President received a complaint under Senate Rule 43 alleging that, during an appearance at a community meeting held in Northglenn on April 3, 2024, Senator Winter engaged in behavior that constituted a dereliction of her legislative duties under Senate Rule 41 (a.5) by:

- Failing to uphold her office with integrity in the public interest;
- Being disrespectful to her constituents and the people of the State of Colorado, as well as to herself;
- Losing confidence from the public, most damagingly from her own constituents that elected her to office; and
- Failing to watchfully guard the responsibilities of the public office and the responsibilities and duties placed on her as a member of the Senate.

Senate Rule 43 (d) provides in part:

If, after the preliminary investigation, the committee determines probable cause exists to find that a violation may have occurred, it shall so notify the person complained against.

The Committee's preliminary investigation "shall consist of an examination of the complaint, the answer, if any, and any other evidence compiled pursuant to the request of the committee".<sup>3</sup> The Committee, however, shall not receive testimony or evidence from other sources.<sup>4</sup> If the Committee finds that no violation has occurred, the Committee shall dismiss the complaint.<sup>5</sup> If, through its preliminary investigation, the

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<sup>2</sup> *People v. Johnson*, 618 P.2d 262, 265 (Colo. 1989).

<sup>3</sup> Senate Rule 43 (c).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

Committee determines that probable cause exists to find that a violation may have occurred, the Committee shall notify Senator Winter of its finding, and, within 7 days of such notification, Senator Winter may request an evidentiary hearing on the matter.<sup>6</sup>

**1. In a criminal preliminary hearing, the probable cause standard is used as a screening device.**

"Probable cause" is a standard in criminal cases, often used in a preliminary hearing to determine if charges should be dismissed or the case should proceed to trial. In that context, the probable cause standard "requires evidence sufficient to induce a person of ordinary prudence and caution to a reasonable belief that the defendant committed the crimes charged."<sup>7</sup> "Probable cause must be established as to each element of the crime charged."<sup>8</sup>

The probable cause standard "is incapable of precise definition or quantification into percentages".<sup>9</sup> That said, it is clear that "probable cause is something less than a preponderance" of the evidence.<sup>10</sup> A fact is established by a preponderance of the evidence when, upon considering all of the evidence, the existence of the fact is more probable than its nonexistence.<sup>11</sup>

In a criminal case, "the preliminary hearing is not intended to be a mini-trial ... the 'restricted purpose' of the preliminary hearing 'is to screen out cases in which prosecution is unwarranted by allowing an impartial judge to determine whether there is probable cause to believe that the crime charged may have been committed by the defendant.'"<sup>12</sup>

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<sup>6</sup> Senate Rule 43 (d).

<sup>7</sup> *Johnson* at 265.

<sup>8</sup> *People v. Fisher*, 759 P.2d 33, 36 (Colo. 1988).

<sup>9</sup> *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

<sup>10</sup> *United States v. Limares*, 269 F.3d 794, 798 (7th Cir. 2001).

<sup>11</sup> *People v. Garner*, 806 P.2d 366, 370 (Colo. 1991).

<sup>12</sup> *People v. Brothers*, 2013 CO 31 ¶16.

**2. Applying the probable cause standard to the context of a legislative ethics committee, the Committee should determine if the evidence supports a reasonable belief that an ethics violation occurred.**

Translating the criminal probable cause standard and the preliminary hearing principles into the context of the Committee's preliminary investigation of the ethics complaint, a common-sense approach for making its determination would be for the Committee to examine the evidence before it—the complaint, the answer, and any evidence compiled pursuant to the Committee's request, but not including testimony or other evidence from other sources—to evaluate whether the evidence would "induce a person of ordinary prudence and caution to a reasonable belief" that the person complained about engaged in the ethics violation alleged.<sup>13</sup> In conducting the preliminary investigation, the Committee should view whether probable cause can be established for every element of the ethics violation alleged.

Even if the evidence before the Committee might be inadmissible in court, the Committee could review it as part of the preliminary investigation to determine whether it supports a finding of probable cause of an ethics violation.

## **Conclusion**

Applying the "probable cause" standard to the context of a legislative ethics complaint, the Committee should review the evidence to determine if the evidence would induce a person of ordinary prudence and caution to a reasonable belief that the person complained about engaged in the ethics violation alleged.

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<sup>13</sup> Quoting *Johnson* at 265.

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COLORADO STATE CAPITOL  
200 EAST COLFAX AVENUE SUITE 091  
DENVER, COLORADO 80203-1716

TEL: 303-866-2045 FAX: 303-866-4157

EMAIL: OLLS.GA@STATE.CO.US

### SENIOR ATTORNEYS

Jacob Baus      Yelana Love  
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Sarah Lozano      Josh Schultz

### PUBLICATIONS COORDINATOR

Courtney Dunaway

## LEGAL MEMORANDUM

TO: Senate Committee on Ethics

FROM: Office of Legislative Legal Services

DATE: June 7, 2024

SUBJECT: Open Meetings and Open Records in Ethics Investigations<sup>1</sup>

### Legal Question

Following receipt of a complaint about Senator Winter pursuant to Senate Rule 43, the President of the Senate and the Senate Minority Leader appointed five members to a Senate Committee on Ethics (Committee) pursuant to Senate Rule 43. The Committee is tasked with making a preliminary investigation of the complaint, and if, after the preliminary investigation, the Committee determines that probable cause exists to find that a violation may have occurred and if Senator Winter then requests a hearing, holding an evidentiary hearing on the matter. Do the Open Meetings Law (OML), part 4 of article 6 of title 24, C.R.S., and the "Colorado Open Records Act" (CORA), part 2 of article 72 of title 24, C.R.S., apply to the Committee's actions?

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## Short Answer

Yes. Pursuant to Senate Rule 43 (e), all proceedings of the Committee are "governed by" both the OML and CORA. Under the OML, the Committee's meetings are likely public meetings open to the public, and the Committee may meet in executive session only under certain circumstances, including receiving legal advice from attorneys representing the Committee on specific legal questions. Generally, a document relating to the Committee is a public record unless the document meets one of the exceptions set forth in CORA, which, for purposes of the Committee's work, would most likely be the work product exception.

## Discussion

The Senate President received a complaint under Senate Rule 43 alleging that, during an appearance at a community meeting in Northglenn on April 3, 2024, Senator Winter engaged in behavior that constituted a dereliction of her legislative duties under Senate Rule 41 (a.5) by:

- Failing to uphold her office with integrity in the public interest;
- Being disrespectful to her constituents and the people of the State of Colorado, as well as to herself;
- Losing confidence from the public, most damagingly from her own constituents that elected her to office; and
- Failing to watchfully guard the responsibilities of the public office and the responsibilities and duties placed on her as a member of the Senate.

The Committee was formed under Senate Rule 43 in response to the complaint.

Senate Rule 43 (e) provides:

(e) All proceedings of the committee shall be governed by the provisions of part 4 of article 6 and part 2 of article 72 of title 24, Colorado Revised Statutes.

Part 4 of article 6 of title 24, C.R.S., is the OML and part 2 of article 72 of title 24, C.R.S., is CORA.

### **1. The Committee's proceedings are governed by the OML.**

Section 24-6-402 (2)(a), C.R.S., provides that "[a]ll meetings of two or more members of any state public body at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times." Section 24-6-402 (1)(d), C.R.S., defines a "state public body" to include the

General Assembly and any committee of the General Assembly. For purposes of the application of the OML to the General Assembly, section 24-6-402 (2.5)(c), enacted in SB24-157, now defines "public business", in pertinent part, as follows:

**24-6-402. Meetings - open to public - legislative declaration - definitions.** (2.5) (c)  
For purposes of the application of this part 4 to the general assembly, "public business":

(I) Means:

(C) Other matters before a statutory committee, any type of interim committee, or a committee of reference; and

(II) Does not include matters that are by nature interpersonal, administrative, or logistical or that concern personnel, planning, process, training, or operations, if the merits or substance of matters set forth in subsection (2.5)(c)(I) of this section are not discussed. As used in this subsection (2.5)(c)(II), "merits or substance" has the same meaning as set forth in subsection (2)(d)(III) of this section.

While the Committee may not clearly fit within the terms "statutory committee" or "committee of reference," the Committee appears to be "any type of interim committee" under section 24-6-402 (2.5)(c)(I)(C), C.R.S. The Committee may not be what is typically referred to as an "interim committee" because it is not formed to meet, only during the interim between legislative sessions, to study and possibly propose legislation related to a particular subject. But "interim committee" is not defined for purposes of the OML,<sup>2</sup> and the modifier "any type of" seemingly broadens the term to include any committee that conducts its business during the interim between legislative sessions. The Committee will be meeting in the 2024 interim, and therefore, any matters discussed by the Committee may be considered "public business," and thus subject to the "open to the public" requirement of the OML.

Interpreting the language of Senate Bill 24-157 to continue to apply to the Committee would also maintain the status quo. Historically, ethics committees formed by the Senate have conducted their meetings open to the public. Nothing in the legislative history of Senate Bill 24-157 indicates that the General Assembly intended to exclude meetings of an ethics committee from the requirement of the OML that meetings of state public bodies at which public business will be discussed be open to the public.

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<sup>2</sup> In contrast, Joint Rule 24A (a) establishes a definition of the term.

Note, however, that pursuant to section 24-6-402 (2.5)(c)(II), C.R.S., "public business" does not include the discussion of matters that are "administrative" or that concern "planning" or "process," so long as the substance of the discussion does not involve the discussion, debate, or exchange of ideas regarding the essence of the matter before the Committee. Accordingly, discussions that involve setting the Committee's schedule of meetings would not need to be open to the public as those would likely be considered "administrative" matters. That said, if the Committee will also be discussing other matters related to the essence of the ethics complaint, such as the allegations and any response from Senator Winter, those discussions would need to be open to the public. Assuming most, if not all, of the Committee meetings may involve administrative or process discussions, as well as substantive discussions about the complaint, any answer, the legal standard to apply, and other substantive matters, our Office recommends that the Committee make all of its meetings open to the public,<sup>3</sup> except to the extent an executive session is convened, as discussed below.

In addition to the requirement that the Committee meetings be open to the public, under section 24-6-402 (2)(c), C.R.S., if the Committee takes any formal action, such as adopting a proposed policy, or if a majority or quorum of the Committee is in attendance or expected to be in attendance at a Committee meeting, full and timely notice of the meeting must be provided to the public. Furthermore, section 24-6-402 (2)(d), C.R.S., requires that minutes of any meeting of the Committee be taken, be promptly recorded, and be open for public inspection.

Section 24-6-402 (3), C.R.S.,<sup>4</sup> establishes when a state public body may convene in an executive session, including when the state public body conferences with an attorney

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<sup>3</sup> Even if the Committee is not required under the OML to discuss a particular matter at a meeting that is open to the public, there is nothing that prohibits the Committee from exceeding the requirements of the OML and conducting the discussion in public.

<sup>4</sup> Section 24-6-402 (3), C.R.S., provides, in pertinent part:

**24-6-402. Meetings - open to public - legislative declaration - definitions.** (3) (a) The members of a state public body subject to this part 4, upon the announcement by the state public body to the public of the topic for discussion in the executive session, including specific citation to the provision of this subsection (3) authorizing the body to meet in an executive session and identification of the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized, and the affirmative vote of two-thirds of the entire membership of the body after such announcement, may hold an executive session only at a regular or special meeting and for the sole purpose of considering any of the matters enumerated in subsection (3)(b) of this section or the following matters ...:

representing the state public body "for purposes of receiving legal advice on specific legal questions" or when federal or state law require the matter to be kept confidential. Although section 24-6-402 (3)(b)(I), C.R.S., states that an investigation of charges or complaints against a public official or employee is open to the public unless the public official or employee requests the committee go into an executive session, section 24-6-402 (3)(b)(II), C.R.S., expressly exempts discussions concerning an elected official from subsection (3)(b)(I). It does not appear, therefore, that the Committee's meetings could be closed to the public upon the Senator's request.

While the Committee may go into executive session if it meets an exception under section 24-6-402 (3), C.R.S., we encourage the Committee to consider carefully whether the circumstances warrant going into executive session when considering an ethics complaint.

## **2. Generally, documents related to the Committee are subject to CORA.**

CORA requires public records to be "open for inspection by any person...".<sup>5</sup> Pursuant to section 24-72-202 (6)(a), C.R.S., a "public record" includes "all writings made, maintained, or kept by the state..." and includes the correspondence of elected officials. "Correspondence" is defined in section 24-72-202 (1), C.R.S. as "a communication that is sent to or received by one or more specifically identified individuals and that is or can be produced in written form...".

While writings made, maintained, or kept by the state and correspondence of elected officials are generally considered public records, "public records" do not include correspondence that is work product<sup>6</sup> or work product that is prepared for elected

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(II) Conferences with an attorney representing the state public body concerning disputes involving the public body that are the subject of pending or imminent court action, concerning specific claims or grievances, or for purposes of receiving legal advice on specific legal questions. Mere presence or participation of an attorney at an executive session of a state public body is not sufficient to satisfy the requirements of this subsection (3).

(III) Matters required to be kept confidential by federal law or rules, state statutes, or in accordance with the requirements of any joint rule of the senate and house of representatives pertaining to lobbying practices or workplace harassment or workplace expectations policies;

<sup>5</sup> Section 24-72-203 (1)(a), C.R.S.

<sup>6</sup> §24-72-202 (6)(a)(II)(A), C.R.S.

officials.<sup>7</sup> As relevant to documents related to the Committee, "work product" is defined in section 24-72-202 (6.5) as follows:

**24-72-202. Definitions.** As used in this part 2, unless the context otherwise requires:

(6.5) (a) "Work product" means and includes all intra- or inter-agency advisory or deliberative materials assembled for the benefit of elected officials, which materials express an opinion or are deliberative in nature and are communicated for the purpose of assisting such elected officials in reaching a decision within the scope of their authority. Such materials include, but are not limited to:

(I) Notes and memoranda that relate to or serve as background information for such decisions;

(II) Preliminary drafts and discussion copies of documents that express a decision by an elected official.

...

(c) "Work product" does not include:

(I) Any final version of a document that expresses a final decision by an elected official;

...

(IV) Any materials that would otherwise constitute work product if such materials are produced and distributed to the members of a public body for their use or consideration in a public meeting or cited and identified in the text of the final version of a document that expresses a decision by an elected official.

(d) (I) In addition, "work product" does not include any final version of a document prepared or assembled for an elected official that consists solely of factual information compiled from public sources. The final version of such a document shall be a public record. *[the remainder of the introductory portion to subsection (6.5)(d)(I) has been omitted]*

...

Under section 24-72-202 (6.5)(a), C.R.S., documents that staff prepare for the Committee to assist the Committee in reaching its decision would be considered work product and would not be public records; however, if such documents prepared by

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<sup>7</sup> §24-72-202 (6)(b)(II), C.R.S.

staff are discussed at an open meeting of the Committee, the documents may become public records under section 24-72-202 (6.5)(c)(IV), C.R.S. Additionally, if any document prepared by staff "consists solely of factual information compiled from public sources," the final version of such document is a public record under section 24-72-202 (6.5)(d), C.R.S.

## **Conclusion**

The Committee's proceedings are likely governed by the open meeting, notice, and minutes requirements of the OML, and documents related to the Committee are generally subject to CORA.