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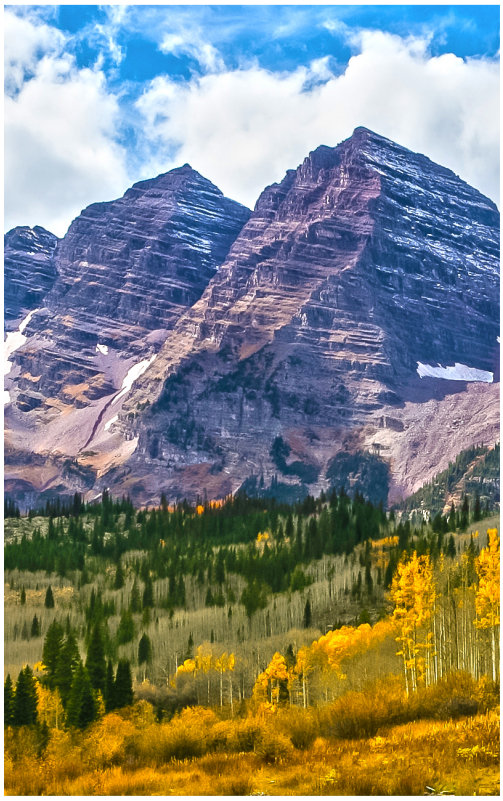
COLORADO CIVIL RIGHTS DIVISION

MANAGEMENT OF CIVIL RIGHTS DISCRIMINATION COMPLAINTS



AUGUST 2019 PERFORMANCE AUDIT

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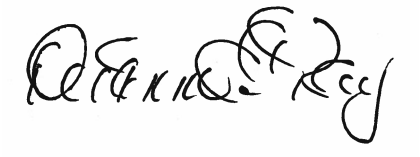
DIANNE E. RAY, CPA
STATE AUDITOR

August 30, 2019

Members of the Legislative Audit Committee:

This report contains the results of a performance audit of the Colorado Civil Rights Commission and the Colorado Civil Rights Division. The audit was conducted pursuant to Section 2-3-125, C.R.S., which requires a performance audit of the Colorado Civil Rights Commission and the Colorado Civil Rights Division by December 15, 2019, and Section 2-7-204(5), C.R.S., which requires the State Auditor to annually conduct performance audits of one or more specific programs or services in at least two departments for purposes of the SMART Government Act. The report presents our findings, conclusions, and recommendations, and the responses of the Colorado Civil Rights Commission and the Colorado Civil Rights Division.



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REPORT HIGHLIGHTS

MANAGEMENT OF CIVIL RIGHTS DISCRIMINATION COMPLAINTS
PERFORMANCE AUDIT, AUGUST 2019

COLORADO CIVIL RIGHTS COMMISSION
COLORADO CIVIL RIGHTS DIVISION

CONCERN

The Colorado Civil Rights Division (Division) does not investigate complaints in a timely manner and uses time extensions that statute provides to the parties to allow itself more time. The Colorado Civil Rights Commission (Commission) could not provide evidence of how it makes decisions related to discrimination complaints, resulting in processes that are opaque and prevent the public from gaining assurance that it operates in a fair and consistent manner.

KEY FINDINGS

- The Division did not complete its investigative work for 367 of the 933 complaints we reviewed (39 percent) within 270 days, as required by statute. On average, the Division took almost a year to complete its work on each of these delayed cases.
- The Division could not provide evidence that staff were actively investigating complaints for time spans ranging from 3 to 10 months for nine of a sample of 25 complaints.
- The Division's records show the Division initiated time extension requests to complete its own work in 58 of a sample of 66 such requests we reviewed, when statute only provides for the complainant and respondent parties to request time extensions. The Commission approved all of the requests, which extended the 270-day statutory deadline, but could not provide evidence that it considered whether there was "good cause" to grant the extension, as statute requires.
- The Division did not maintain complaint information that was accessible in any aggregated form to support its decision-making, achievement of objectives, or external reporting, from November 2016, when it implemented its online complaint management system, through the end of our audit period (June 2019).
- The Commission does not operate in a manner that allows for transparency or accountability. It could not provide evidence in meeting minutes or audio recordings that it discussed the cases, applied rules and policies to the reviews, and how it decided the disposition of any of the 218 cases it reviewed in Fiscal Years 2017 and 2018. Further, the Commission votes in executive session, in violation of the Colorado Sunshine Law.

BACKGROUND

- Individuals in protected classes (e.g. age, race, color, mental or physical disability, marital status, national origin/ancestry, creed, sex, and sexual orientation) may file complaints of discrimination in employment, housing, and public accommodations [Sections 24-34-301 through 805, C.R.S.].
- The Division investigates complaints to determine whether there is "probable cause" the alleged discrimination occurred and mediates settlement terms between complainant and respondent parties when there is probable cause.
- If the parties cannot settle, the Commission reviews the complaint to decide if an Administrative Law Hearing should be set to resolve the complaint.
- The Division and Commission have 270 days to investigate a complaint and determine whether a hearing should be set [Section 24-34-306(11), C.R.S.].
- In Fiscal Year 2019, a total of 1,929 complaints were filed with the Division.

KEY RECOMMENDATIONS

- The Division should improve the timeliness of its complaint investigations by establishing, monitoring, and adjusting expectations for staff on completing each milestone in the process. The Division should not use the parties' statutory time extensions for completing its work.
- The Commission should discuss complaints to determine their disposition; document its consideration of complaints; base decision-making on its discussions and on the factors that must be applied to each complaint; and vote on complaints during open meetings, in accordance with statute.
- The Division and Commission agreed with three of the recommendations and partially agreed with three of the recommendations.

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CHAPTER 1

OVERVIEW

Colorado law [Sections 24-34-301 through 805, C.R.S.] establishes a process for individuals in specific protected classes to file complaints of discrimination in employment, housing, and public accommodations (i.e., access to goods or services a business offers to the public) and have their complaints undergo an expeditious, impartial review of applicable laws and relevant facts with the goal of resolving the situation without the need for legal representation or formal court proceedings.

The Civil Rights Division (Division) and Civil Rights Commission (Commission), within the Department of Regulatory Agencies (Department), both have statutory responsibility and jurisdiction to deal with discrimination complaints that:

- Are filed by a member of a class that is protected under statute, which includes age, race, color, mental or physical disability, marital status, national origin/ancestry, religion or creed, sex, and sexual orientation [Sections 24-34-301 through 805, C.R.S.].
- Allege the respondent (the individual or entity the complainant states was discriminatory) carried out an adverse action prohibited by Colorado law, which includes harassment, refusal to hire, refusal to accommodate, discriminatory financing, refusal to rent, and restricted access to goods or services in a public business or venue [Sections 24-34-301 through 805, C.R.S.].
- Allege discrimination in one of the three areas outlined in statute, which are employment, housing, or public accommodation [Sections 24-34-401 through 805, C.R.S.].

Examples of civil rights complaints that have been filed with the Division include allegations that an employer did not hire a complainant based on age (potential employment discrimination), a rental company did not lease an apartment to a complainant based on race (potential housing discrimination), and a business-owner did not sell goods to a complainant based on sexual orientation (potential public accommodation discrimination). A detailed listing of specific classes protected by statute and the types of adverse actions prohibited in each of the three areas are listed in APPENDIX A.

EXHIBIT 1.1 shows the total number of discrimination complaints filed, by area of statute, over the last 5 years.

EXHIBIT 1.1. DISCRIMINATION COMPLAINTS FILED FISCAL YEARS 2015 THROUGH 2019					
Fiscal Year	Employment	Housing	Public Accommodation	Total	Annual percentage change for total complaints 2015 through 2019
2015	766	112	85	963	-
2016	737	154	98	989	3%
2017	903	159	76	1,138	15%
2018	1,163	346	184	1,693	49%
2019	1,399	320	210	1,929	14%
TOTAL	4,968	1,091	653	6,712	

SOURCE: Office of the State Auditor analysis of Division annual reports and data.

DIVISION COMPLAINT PROCESS

To formally file a civil rights discrimination complaint, which becomes a legal document once filed, a complainant must provide the Division with information about themselves, the respondent alleged to have committed the discriminatory practice, and the specifics of what happened. The Division has intake staff who initially screen each complaint to ensure that it falls within the Division's jurisdiction. Once screened in, the Division requires the complainant to sign and date the written complaint. The date the Division receives the signed complaint is considered the date the complaint is officially filed.

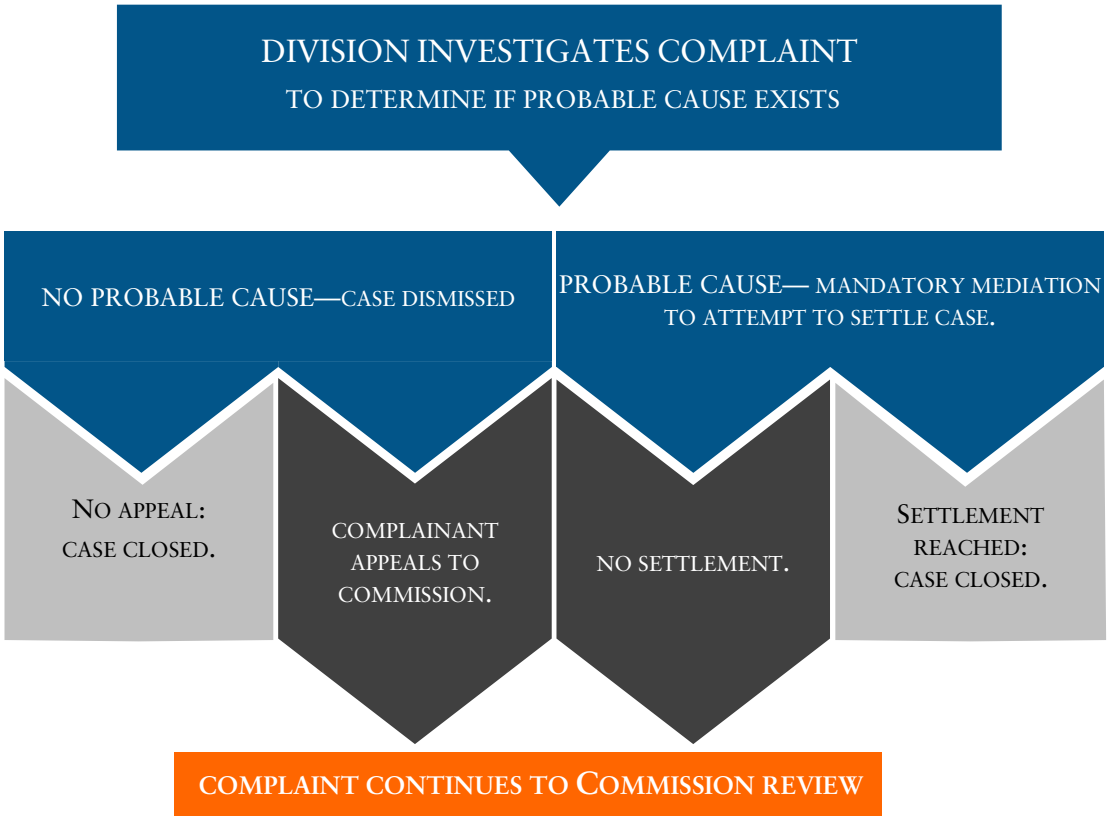
After a complaint is filed, the Division begins its investigative process, which includes notifying the respondent of the complaint; requesting information and documents relevant to the complaint from the respondent and the complainant; conducting interviews with the parties (i.e., the complainant and respondent) and other witnesses; and making on-site inspections to collect more evidence or observe the environment. The Division has authority to subpoena witnesses and compel testimony and records. The purpose of the Division's investigation is to make a determination of whether there is probable cause (or no probable cause) that the alleged discrimination occurred. The Division's determination of probable cause drives whether and how the complaint is further reviewed, as follows:

- **PROBABLE CAUSE.** When the Division determines that probable cause exists, statute requires the parties to participate in a mandatory mediation process [Section 24-34-306(2)(b)(II), C.R.S.]. Division staff facilitate the mediation with the goal of identifying settlement terms agreeable to both parties. For example, the respondent may agree to compensate the complainant for a specified amount of lost wages in an employment case. If the parties agree to settlement terms, the Division closes the complaint. If the parties do not reach settlement terms, the Division turns the complaint over to the Commission for review.

- **NO PROBABLE CAUSE.** When the Division determines that no probable cause exists, it dismisses the complaint. The complainant may appeal a "no probable cause" determination, to the Commission, within 10 days [Section 24-34-306(2)(b)(I)(A), C.R.S.].

EXHIBIT 1.2 illustrates this process.

EXHIBIT 1.2. COMPLAINT INVESTIGATION PROCESS



SOURCE: Office of the State Auditor analysis of the Division's process.

COMMISSION REVIEW OF COMPLAINTS

One of the Commission's primary duties under statute is to review complaints that have been investigated by the Division to determine their disposition. The Commission's review is initiated in one of the following circumstances.

- **PARTIES ARE NOT ABLE TO SETTLE.** If the Division exhausts its ability to assist the parties to a complaint in reaching settlement terms through mandatory mediation, the Commission is responsible for determining how the complaint should move forward. For employment and public accommodations complaints, the Commission considers a number of factors, including the strength of evidence provided, public interest in the issue, impact of the violation on the public at-large, availability of remedy, and cost of

holding a hearing compared to possible relief to determine if an Administrative Law Hearing should be set. For housing complaints, statute requires the Commission to always set an Administrative Law Hearing [Section 24-34-504(4.1), C.R.S.].

Under Section 24-34-305(1)(d), C.R.S., the Commission can conduct the hearing or request that an administrative law judge do so. In practice, the Commission has an administrative law judge conduct all of its hearings. If, as a result of the hearing, the respondent is found to have engaged in a discriminatory practice that violates the law, the Commission is required to issue a cease and desist order to the respondent [Section 24-34-306(9), C.R.S.]. The Commission may also order remedies for the complainant, including, for example, that the respondent must compensate for lost earnings, reimburse moving costs, pay actual damages, or provide other equitable relief [Sections 24-34-405(2)(a), and 24-34-508(1), C.R.S.].

- **APPEALS.** For complaints the Division dismisses as having "no probable cause," the complainant may make an appeal to the Commission. The Commission reviews to determine whether to:
  - Uphold the dismissal (complaint is closed).
  - Remand the complaint to the Division for further investigation.
  - Reverse the Division's determination (complaint is then treated as having probable cause and returns to the Division for mandatory mediation).

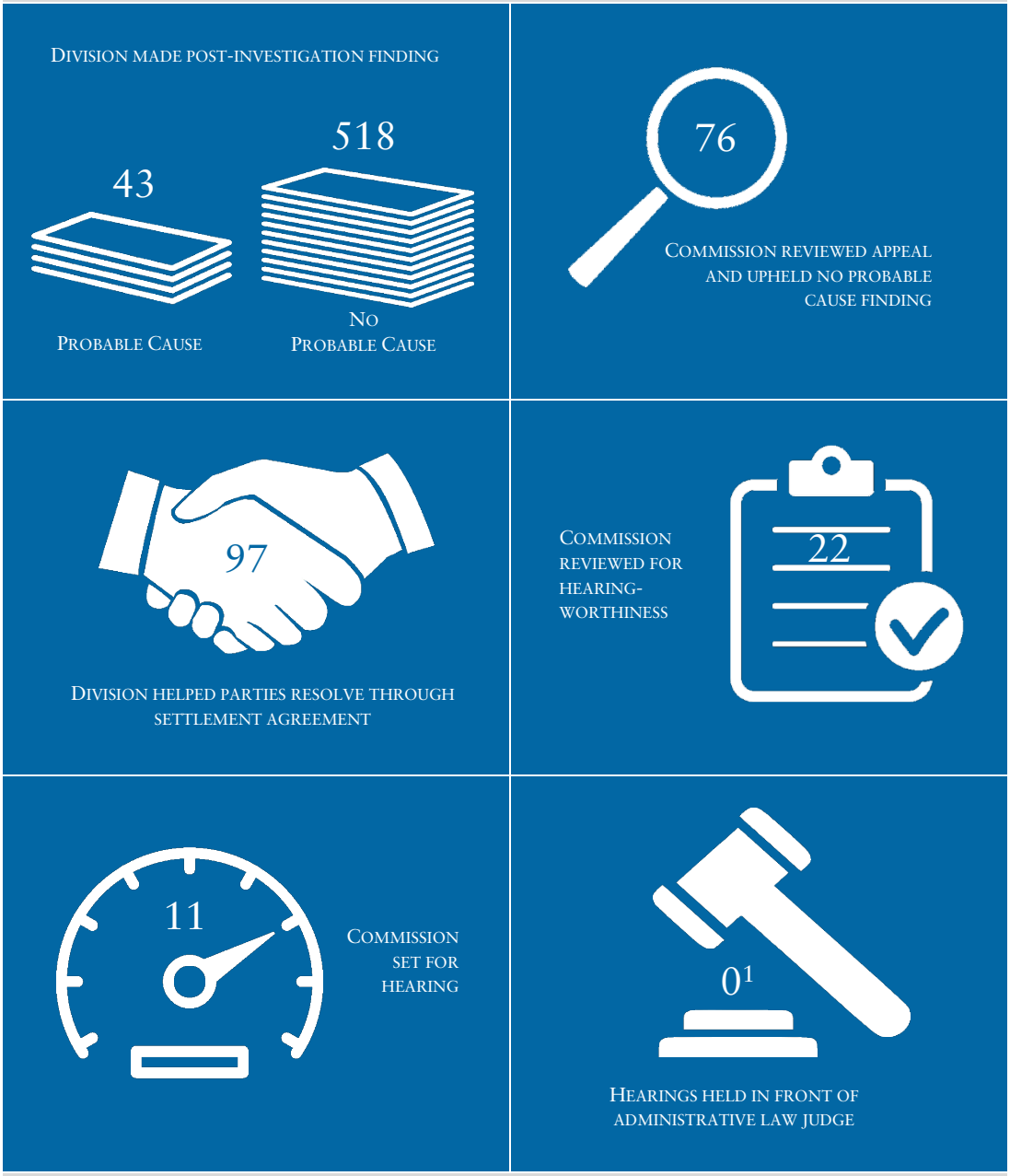
In Fiscal Year 2018, the Commission reviewed 76 appeals.

At any point throughout the process, from the time a complaint is filed through a hearing, the parties may (but are not required to) hire legal representation. Additionally, after a complaint is closed (e.g., due to settlement or dismissal) the complainant may file suit in district court.

EXHIBIT 1.3 shows the number of filed complaints that underwent

Division and Commission review and resulted in the outcomes described above, for Fiscal Year 2018.

EXHIBIT 1.3.
WORK THE DIVISION AND COMMISSION CONDUCTED IN FISCAL YEAR 2018



SOURCE: Office of the State Auditor analysis of Division annual report and data.
[1] All 11 of the cases that the Commission set for hearing in Fiscal Year 2018 settled before the hearing took place.

The Commission is also tasked, in general, with educating and advising the public, businesses, and lawmakers on Colorado's civil rights laws.

DIVISION AND COMMISSION ORGANIZATION AND FUNDING

The Division is overseen by a Division director and comprises about 27 full-time equivalent (FTE) staff whose main function is to receive, investigate, and conclude on discrimination complaints. The Commission is made up of seven members, appointed to 4-year terms by the Governor with the consent of the Senate. Commissioners must meet statutory requirements on representing business, community, employee associations, and protected class affiliations [Section 24-34-303(1), C.R.S.]. No more than three commissioners may be registered to the same political party. The Commission meets at least once per month to conduct its work.

Division and Commission activities are primarily funded with State General Funds. Specifically, for Fiscal Years 2016 through 2020, the Division was appropriated, on average, about $2.4 million in General Funds each year. The Division also receives federal funds, on average about $864,200 annually, through a workshare agreement with the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Housing and Urban Development (HUD). The Division receives these funds for cases that fall within the jurisdiction of the EEOC or HUD under the federal civil rights laws. The Division coordinates with the EEOC and HUD to determine which entity will investigate such complaints to avoid duplication of efforts. For example, HUD has dual jurisdiction with Colorado over all housing complaints and, under Title VII of the Civil Rights Act of 1964, the EEOC has dual jurisdiction over complaints involving employers with more than 15 employees.

The Division's total expenditures have averaged about $2.8 million each year, for Fiscal Years 2016 through 2019.

AUDIT PURPOSE, SCOPE, AND METHODOLOGY

We conducted this performance audit pursuant to Section 2-3-125, C.R.S., which was enacted through House Bill 18-1256 and requires the State Auditor to conduct two performance audits of the Commission and Division, by December 15, 2019, and December 15, 2024. In committee hearings on House Bill 18-1256, the General Assembly acknowledged that the audit requirements in the bill were important to help address transparency and accountability of the Commission's operations, particularly given the need for confidentiality in much of its work. The Commission received national attention in June 2018, when the United States Supreme Court (Court) held that the Commission had acted with bias inconsistent with the U.S. Constitution's guarantee of neutrality in a public accommodations case. In particular, the Court's decision stated that comments made by Commissioners in a 2014 meeting "violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint" and that "the Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality." [*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission.*]

This performance audit of the Commission and Division was also conducted in accordance with Section 2-7-204(5), C.R.S., the State Measurement for Accountable, Responsive, and Transparent (SMART) Government Act.

Audit work was performed from February through August 2019. We appreciate the assistance provided by management and staff of the Colorado Civil Rights Division and members of the Colorado Civil Rights Commission.

We conducted this audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to

provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

The key objectives of the audit were to evaluate (1) the Division's timeliness in completing investigations and concluding on complaints in line with statutory requirements and (2) the accountability and transparency of the Commission's decision-making processes.

To accomplish our objectives, we performed the following audit work:

- Reviewed Colorado anti-discrimination statutes and rules, and Division and Commission policies and procedures.
- Reviewed the State Measurement for Accountable, Responsive, and Transparent (SMART) Government Act [Section 2-7-201 through 205, C.R.S.], the Colorado Sunshine Law [Section 24-6-402, C.R.S.], statutes related to state boards and commissions [Section 24-3.7-102, C.R.S.], and *Standards for Internal Control in the Federal Government*.
- Reviewed the Department's performance plan from 2019, the Division's performance report for Fiscal Year 2018, and the Division's annual report for Fiscal Year 2018.
- Interviewed staff at the Division and Governor's Office of Information Technology. We also interviewed six commissioners, including two with terms that expired before August 2019 and four currently serving on the Commission.
- Reviewed the complaint information in the Division's online complaint filing system, CaseConnect, and the Division's spreadsheets for all 1,292 complaints the Division completed from November 2016 through December 2018.
- Attended one meeting of the Commission in Fiscal Year 2019, listened to audio of three full Commission meetings from Fiscal Year

2019, and reviewed Commission meeting minutes for every meeting held in Fiscal Years 2017 and 2018.

- Listened to audio recordings of General Assembly committee hearings chamber debates for House Bill 18-1256.

We relied on sampling techniques to support some of our audit work. Specifically, we selected the following samples:

- A non-statistical random sample of 66 time extension requests. We selected this sample to review whether the use of extensions complied with statutory requirements and legislative intent.
- A non-statistical random sample of five complaints in which mediation failed and the Commission decided not to set a hearing. We reviewed this sample for documentation of the process commissioners used and the factors they considered when making appeal and hearing worthiness decisions.
- A non-statistical random sample of 25 complaints to identify investigative activities and the timespan between activities.

The results of our samples cannot be projected to their respective populations. The samples were selected to provide sufficient coverage of the audit objectives and, along with the other audit work performed, provide sufficient, reliable evidence as the basis for our findings, conclusions, and recommendations.

We planned our audit work to assess the effectiveness of those internal controls that were significant to our audit objectives. Our conclusions on the effectiveness of those controls, as well as specific details about the audit work supporting our findings, conclusions, and recommendations, are described in the remainder of this report.

The Division and Commission reviewed a draft of this report. We have incorporated their comments into the report where relevant. The written responses to the recommendations and the related implementation dates provided by the Division are the sole

responsibility of the Division. The written responses to the recommendations and the related implementation dates provided by the Commission are the sole responsibility of the Commission. However, in accordance with auditing standards, we have included Auditor's Addenda to responses that are inconsistent with the findings or conclusions or that do not adequately address the recommendation.

CHAPTER 2

MANAGEMENT OF CIVIL RIGHTS DISCRIMINATION COMPLAINTS

The Colorado Civil Rights Division (Division) and the Colorado Civil Rights Commission (Commission) are charged in statute with providing the parties to a civil rights complaint with a neutral review and "prompt" resolution of the complaint [Sections 24-34-305(3) and 24-34-306(2)(a), C.R.S.]. This chapter discusses our findings and recommendations regarding deficiencies in the

Division's timeliness in conducting investigative activities and in maintaining aggregate data for filed complaints. The chapter also includes issues in how the Division initiates time extension requests to extend its review of complaints and how the Commission approves these extension requests. Finally, this chapter provides our findings and recommendations regarding the Commission's transparency with respect to decision-making.

TIMELINESS OF INVESTIGATIVE ACTIVITIES

Once a complaint is filed, the Division begins its investigation of the allegations made to determine whether there is probable cause to believe discrimination occurred and the complainant's civil rights were violated. In general, the Division conducts the following sequence of activities during its investigations:

- Division staff mail a written notice to the respondent with information about the complaint filed against them. Typically, staff also request that the respondent provide a written reply to the allegation (known as the respondent's position statement) and any supporting documentation or other information the respondent has related to the complaint. Division policy states that respondents will be asked to return their position statement and documents within 30 days.

- After the respondent replies, Division staff review the information, then forward it to the complainant and ask the complainant to provide a written rebuttal. Division policy states that complainants will be asked to submit their rebuttal within 30 days.

- Division staff continue to interact with both parties and investigate the complaint. For example, either party to the case may provide witnesses that staff need to interview. The Division indicated that for some cases either or both parties may provide hundreds of pages of

documents over the course of the investigation. The Division may subpoena witnesses and compel the production of records relevant to the case while the case is being investigated.

- Based on the investigation, the Division concludes on the likelihood the alleged discrimination occurred, meaning that probable cause exists, or conversely, that there is no probable cause to support that the discrimination occurred. Division staff write, and the Division Director or their designee reviews and approves, the conclusion, called a determination.

For all cases where the Division concludes that there is probable cause to believe the alleged discriminatory practice occurred, statute requires the complainant and respondent to participate in mandatory mediation [Section 24-34-306(2)(b)(II), C.R.S.]. If the parties cannot reach any settlement agreement through mediation, the Commission is notified. For employment and public accommodation cases, the Commission assesses whether the case should be set for a hearing (known as an assessment of hearing worthiness); for housing cases, statute requires the Commission to set a hearing for all that do not settle [Section 24-34-504(4.1), C.R.S.].

WHAT AUDIT WORK WAS PERFORMED, WHAT WAS THE PURPOSE, AND HOW WERE THE RESULTS MEASURED?

We requested all of the data the Division had for all complaints filed beginning in November 2016, which was when the Division began using its online complaint filing system, CaseConnect, and closed by the end of December 2018. CaseConnect contains detailed information about each case, from filing through completion, but does not have the functionality to aggregate any case data. As such, the Division maintained Excel spreadsheets to track complaint filing and closing dates for a total of 1,292 cases during the time period. The Division only maintained complete data on the dates the complaints were filed and closed for 933 of the 1,292 complaints. Therefore, we reviewed these 933 cases to identify how long the Division took to close them.

We also reviewed detailed case information in CaseConnect, including all investigator notes on activities and communication with the parties, to identify what investigation activities staff documented, and the time spans between activities. We conducted this detailed review for a random sample of 25 cases of the 1,390 that were filed in CaseConnect in Fiscal Year 2018 and had been closed or were still being investigated by staff as of March 2019. Finally, we interviewed Division management and staff.

The purpose of the audit work was to assess the Division's promptness in carrying out its work in line with statutory direction, as described below.

THE DIVISION'S HANDLING OF COMPLAINTS SHOULD BE TIMELY. The General Assembly intended that complaints alleging discrimination or unfair practices be dealt with expeditiously. First, statute establishes a 270-day deadline that serves as an outer limit on the time allowed for the Division to conclude its activities, and in some cases for the Commission to take certain actions, once an official complaint has been filed. During the 270-day period, the Division investigates each complaint and determines whether probable cause exists; dismisses cases without probable cause and attempts mediation for cases with probable cause; and refers cases that are not resolved through mediation to the Commission. Also during the 270-day period, the Commission determines whether to set unresolved cases for hearing and notifies the parties if a hearing is to be set. Statute states that if notice to the parties that a hearing will be held is not served within 270 days after the complaint is officially filed, the Commission loses its jurisdiction. At that point the complainant's only recourse to pursue the matter is in district court.

Second, statutes include a number of more general provisions that direct the Division to complete its work without delay:

- The Division is required to notify a respondent of a complaint filed against them "*prior to* any other action by the division" (emphasis added) [Section 24-34-306(1)(c), C.R.S.].

- The Division "shall make a *prompt* investigation" of each complaint (emphasis added) [Section 24-34-306(2)(a), C.R.S.].

- The Division shall "determine *as promptly as possible* whether probable cause exists" (emphasis added) that the alleged discrimination occurred [Section 24-34-306(2)(b), C.R.S.].

- If the Division determines that probable cause exists, it must notify the respondent and order the complainant and respondent to participate in mediation. Statute states "*immediately* after the [Division]…serves notice on the respondent, the [Division]…shall endeavor to eliminate the discriminatory or unfair practice by…means of the compulsory mediation" (emphasis added) [Section 24-34-306(2)(b)(II), C.R.S.].

WHAT PROBLEMS DID THE AUDIT WORK IDENTIFY?

THE DIVISION'S AND COMMISSION'S HANDLING OF COMPLAINTS IS NOT ALWAYS TIMELY. We found that the Division did not complete its work and conclude on some cases within the 270-day statutory timeframe and that there were long gaps in the process for some cases. For example:

- **EXCEEDED STATUTORY TIMEFRAME.** Of the 933 cases for which the Division had data on the dates the cases were filed and closed, we found that the Division did not complete its work for 367 (39 percent) within 270 days. The average number of days the Division took to complete its work across the 367 cases was 348 days, with a range of 271 to 450 days.

- **Lags in the Division's processes.** The Division was prompt with respect to two of the routine steps in their investigative process for all 25 cases in our sample: notifying respondents of a complaint filed against them (in line with Section 24-34-306(1)(c), C.R.S.) and scheduling mediation very shortly after notifying the parties of its determination of probable cause (in line with Section 24-34-306(2)(b)(II), C.R.S.). However, for nine of the 25 cases in our sample (36 percent), we found significant time spans (between 3 and 10 months) when there is no evidence that Division staff were actively investigating the complaints. Specifically:

  - For two of the nine cases, the Division waited between 4 and 5 months after receiving the initial information requested from the respondent to request a rebuttal from the complainant. During these months, there is no evidence that the Division was carrying out investigative activity on the complaints.

  - For one case, the Division waited 8 months to contact the complainant and proceed with the investigation after receiving the complainant's rebuttal.

  - For two cases, the Division waited between 3 and 6 months to contact the complainant for an initial interview after having received the complainant's rebuttal, then ultimately did not investigate any further. For one of these cases, about 6 months passed before the Division interviewed the complainant, and then determined that it did not have jurisdiction, contrary to what the intake staff had determined. For the other case, over 3 months passed before the Division contacted the complainant, at which time the complainant withdrew their complaint.

  - For four cases, there is no evidence the Division conducted any investigative activities after receiving the complainants' rebuttals. Specifically, the complainants in these cases requested "right to sue" authority under Section 24-34-306(15), C.R.S., which requires the Division to approve all such requests once 180 days (about 6 months) have passed, thus closing the case.

For three of these cases, the complainants submitted rebuttals and then between 4 and 10 months passed with no Division investigative activity. In the remaining case, the complainant first requested right to sue authority about 60 days after filing their complaint; the Division denied the request. The complainant submitted a second request about 150 days later. In spite of the repeated requests clearly indicating the complainant's wish to take the matter to court, the Division waited another 39 days before issuing a right to sue letter. There is no evidence the Division conducted any investigative activities on the case for the roughly 6 months between the time it requested the complainant's rebuttal and the time it approved the second right to sue request.

For three of the nine cases, the lags in investigation caused the Division's overall time to investigate to exceed 270 days. These three cases closed between 342 and 418 days after the complaints were filed.

WHY DID THESE PROBLEMS OCCUR?

Overall, the Division has not implemented policies, procedures, or guidance for staff to ensure that staff proceed with investigative activities in a timely manner, as described below.

LACK OF TIMELINESS GOALS AND EXPECTATIONS. The Division has not established specific goals or expectations for staff with respect to completing each phase of their work, such as how long staff should take to review information when the parties provide it, how quickly staff should contact the parties to share or request information about the case, or how quickly staff should make their probable cause determinations to allow sufficient time for other activities (e.g., mediation, appeal, and hearing setting) that must occur prior to the end of the full 270-day period that statute allows. Instead, the Division often asks the parties to a complaint to request an extension to the 270 days allotted in statute, for the Division's work; we discuss the Division's use of the parties' time extensions further in the next finding. The Division

stated that it implemented a guidance manual for staff in December 2018 and told us that one purpose of the manual was to address how long staff should take to conduct work and to better ensure that work is completed within 270 days. We reviewed the manual and determined that the only guidance the manual provides related to timelines is a statement that staff may give parties a week or two longer than 30 days to respond to information requests, and a recommendation that staff develop an investigative plan to "serve as a meaningful guide for conducting the investigation and to keep it on a timely track." Further, the Division reported to us that it does not require staff to follow the guidance related to timelines in the manual. Finally, although the Division prepares written performance plans for staff that address timeliness of case processing, the plans do not include specific timelines or deadlines that staff are required to meet, other than the overall 270-day statutory deadline.

No measurement of activity. While the Division reports that it regularly tracks workload statistics (including the number of complaints received, the number of probable cause and no probable cause determinations issued, and the number of mediations conducted) to include in its annual reports, it has not established a method for monitoring or reporting the time it takes for the various steps in the process of investigating and closing cases. For example, the Division has not established requirements that staff consistently record in CaseConnect when key steps in the process occur. If the Division required such recording, it could track how long staff take to complete various work activities, and establish processes to address instances when staff do not make timely progress.

Lack of strategies for workload increases and turnover. The number of complaints the Division receives increased significantly when CaseConnect was implemented in November 2016. CaseConnect now allows online complaint submission for the first time, making it easier to file a complaint. The Division reports that it cannot meet its statutory jurisdictional timeline for investigating all cases because the number of complaints increased 15 percent between Fiscal Years 2016 and 2017

and another 49 percent in Fiscal Year 2018. Furthermore, in Fiscal Year 2018, the Division told us that it had turnover of 25 percent, which has contributed to delays in closing cases. According to the Division, investigative activities for cases often stop completely when staff leave, which can mean that months pass without investigative work until new staff are hired. In our file review of 25 complaints, we identified two that had timeliness issues because the cases were not reassigned for investigation after Division staff left until new staff were hired. The Division reports that it has taken some steps to increase efficiencies to help deal with the workload increase, such as requiring staff to write shorter determinations on whether probable cause exists, which takes less time to write and review. However, the Division has not comprehensively reviewed the time staff need to complete their work, employed other system-wide methods to increase productivity and timeliness, established processes to promptly reassign cases when staff leave, or identified and requested additional resources. The lack of information and processes to track work progress that we discuss in this finding have likely impeded the Division's ability to conduct such analyses.

WHY DO THESE PROBLEMS MATTER?

EFFECTIVENESS OF ADMINISTRATIVE HEARING PROCESS IS LIMITED. The process established in statute could serve as a lower cost, timely alternative to pursuing and undergoing a civil lawsuit. However, when the Division takes longer than 270 days (9 months) to investigate and make a determination for a complaint, or there are long lags during the process, the Division's ability to reduce the time and money the public expends to have its complaints heard successfully is diminished. For example:

- In our review of a sample of 25 cases, we saw instances in which complainants decided to forego the administrative hearing process. In two of the cases, at least 10 months elapsed without the Division doing investigative work or contacting the parties, and the complainants chose to opt out of the process by requesting right to

sue letters. This could indicate a loss of confidence in the Division. Statute [Section 24-34-306(15), C.R.S.] states that complainants may request the right to sue at any point during the Division's investigation and requires the Division to approve all such requests 180 days after the complaint filing date, or earlier if the Division determines it cannot complete its investigation within 180 days. The Division does not request or collect any information on the reasons why complainants request the right to sue, and as such, does not know if the lags in investigative work or untimely case completion we identified contributed to these requests.

- During our interviews with the Division, staff told us that the Division and Commission had lost jurisdiction for cases in Fiscal Year 2018 and specifically identified two cases. In one case, staff were still working on the case after more than 300 days had passed from the time the complaint was filed; no time extensions had been approved. In the second case, both parties received time extensions, but the Division did not complete its investigative work and close the case until the extended period had also passed.

In addition, for cases the Division dismisses due to lack of probable cause, statute allows complainants 10 days to file an appeal with the Commission after being notified of the dismissal [Section 24-34-306(2)(b)(I)(A), C.R.S.]. This deadline is important within the context of the 270-day outer limit because if the Commission remands an appealed case to the Division for further investigation, statute does not provide any additional time for such investigation. Therefore, when the Division does not complete its investigative process in a timely manner there is a risk jurisdictional time may run out before complainants can submit appeals and the Commission can consider them. We identified five cases in Fiscal Years 2017 and 2018 for which the Division issued a determination of no probable cause with less than 10 days of jurisdiction remaining.

Additionally, statute prohibits the parties from pursuing legal action in the courts until the Division's and Commission's processes have been exhausted, the Commission loses jurisdiction, or the Division issues a

right to sue notice. Thus, when complainants determine they need to request a right to sue, or when the Division loses jurisdiction, complainants experience even longer delays in having their concerns resolved and face the cost of taking their cases to civil court. There is also a risk that such delays could affect the case in court, if witnesses are no longer available, cannot be found, or have cloudy memories due to the passage of time. Further, when the Division uses not only the full 270 days allowed in statute, but also obtains extensions on many cases, a complainant may wait up to 450 days (15 months) only to learn that the Division determined there was no probable cause. Of the 933 cases for which the Division had maintained a record of both the complaint filing and closing dates, we identified 11 cases that remained open and under investigation with the Division for more than 425 days that ended in no probable cause determinations.

LAGS MAY INFLUENCE THE COMMISSION'S DECISIONS ON CASES. In Fiscal Years 2017 and 2018, the Division brought 42 cases for hearing worthiness review to the Commission. Of those, four (10 percent) had less than 30 days remaining in the Commission's jurisdiction, including two with less than 10 days left. In all four cases, the Commission declined to set the cases for hearing after being advised by the Division that there was not enough time to do so. Furthermore, during the Commission meeting we attended, the Commissioners expressed their disappointment that they could not set one case for hearing even if they wanted to, because there was insufficient time left in its jurisdiction to do so. When the Commission declines to set a case for hearing it no longer retains jurisdiction over the case and the complainant's only recourse is to sue in district court in accordance with Section 24-34-306(11), C.R.S.

RECOMMENDATION 1

The Colorado Civil Rights Division (Division) should improve the timeliness of its investigations of and determinations on complaints by:

A Implementing internal timeliness goals and expectations for each milestone in the process (e.g., notifying the respondent, requesting information from each party, completing the review of the parties' statements, contacting parties for interviews, completing the determination, and bringing the case to the Commission) that do not rely on the parties' time extensions for case completion, allow sufficient jurisdictional time for cases that may result in complainant appeals, and allow time for Commission review of appeals or case hearing worthiness.

B Implementing a process to track data on staff performance against the timeliness goals established in response to RECOMMENDATION 1 PART A.

C Using the information from the tracking implemented in response to RECOMMENDATION 1 PART B to comprehensively review the time needed to complete work and use the review to identify and pursue (1) system-wide methods to increase productivity and timeliness; (2) processes to promptly reassign cases when staff leave; and (3) additional resources, if needed.

RESPONSE

COLORADO CIVIL RIGHTS DIVISION

A AGREE. IMPLEMENTATION DATE: JANUARY 2020.

Yes, the Division agrees to implement timeliness goals and expectations for each step in its process (without relying on extensions). The Division defines the completion of a case by the closing action taken by the Division. The Commission decides the

outcome of appeals and determines which cases should be set for hearing. The timely completion of cases within 270 days has been impacted by an increased number of claims being filed with the Division (70% in the OSA report), limitations of the CaseConnect online filing and case management system, and staffing.

Historically, the Division has conducted several process improvement projects to address all aspects of the Division's processes. The Department of Regulatory Agencies and its Divisions are LEAN organizations and will continue to evaluate our processes over time through this lens. The Division agrees that a comprehensive review of time needed to complete the processing of cases be conducted, that a defined process to promptly re-assign cases when staff depart to be developed, and additional methods of increasing efficiency be identified and implemented given the resources available to the Division.

Additional strategies necessary to improve timeliness include the addition of eight additional staff. Current statistics reveal that the division closes 90-110 cases per month. However, the Division presently sees approximately 160 new case filings per month. As such, 40-50 additional cases per month will need to be closed to stay on track with timeliness.

B AGREE. IMPLEMENTATION DATE: JANUARY 2020.

Yes, the Division will be improving the timeliness of its investigations and determinations by implementing a process to track data on staff performance against the timeliness goals from PART 1A. Currently, there are requirements for staff to record case steps and activity in CaseConnect. Staff performance plans also require consistent, contemporaneous documentation of such. Additionally, all staff members (by unit) keep Excel spreadsheets with completion dates. Managers have one on one meetings with staff on a weekly basis to discuss case progress, and navigate any potential obstacles. Likewise, timeliness of case processing is also

specifically addressed in written performance plans. Staff's performance is evaluated on each duty and goal within these plans, and progressive discipline can, and has been issued, when there is a failure to fulfill these expectations.

Moreover, the planned updates to the Division's CaseConnect system include modifications to allow the Division to effectively query the system or run reports to provide information needed for management to achieve its objectives and evaluate performance, comply with statutes, and produce accurate external reports.

C AGREE. IMPLEMENTATION DATE: JANUARY 2020.

Yes, the Colorado Civil Rights Division agrees that it should improve the timeliness of its investigations and determinations on complaints by using the information from the tracking implemented in response to Recommendation 1B to comprehensively review the time needed to complete work and use the review to identify and pursue (1) system-wide methods to increase productivity and timeliness, (2) processes to promptly reassign cases when staff leave, and (3) additional resources, if needed. A new feature is being added to CaseConnect that will allow us to run reports so that we can evaluate our processes and make additional improvements, as needed.

For example, the new system will allow us to run reports that show when a case might be at a certain step for a prolonged period of time, so that Division staff can address efficiencies in that area.

TIME EXTENSION REQUESTS

From the time a complainant has filed a complaint against a respondent through the Commission's review and decision on setting a hearing, statute provides the Division and Commission up to 270 days to complete their review processes [Section 24-34-306(11), C.R.S.]. Statute also allows the complainant and respondent each to request time extensions from the Commission that can extend the 270-day period [Section 24-34-306(11), C.R.S.]. To request an extension, the complainant or respondent asks the Division via phone or email. The Division then sends the request to a Commissioner (typically the Commission chair) via email, with the name of the requesting party, the case number, and the reason for the request. The Commissioner reviews the extension request and sends approval back to the Division via email. Once a Commissioner approves the extension request, the Division sends notice to both parties.

WHAT AUDIT WORK WAS PERFORMED AND WHAT WAS THE PURPOSE?

We reviewed time extension request data for the 1,158 requests submitted on 981 complaints filed between November 2017 and December 2018. The Division's data indicated that all 1,158 requests were approved, and both the Division and Commission confirmed this. The Division does not record details of extension requests (such as which party submitted the request or the reason for the request) in an electronic system that is capable of aggregating data. Therefore, the only way we could evaluate compliance with the statutes discussed in the next section was to review a sample of hard copy documents. We selected a random sample of 66 time extension requests and reviewed hard copy files. For the 66 requests in our sample, the former Commission chair was responsible for approving 53 (80 percent).

The purpose of our audit work was to determine whether the Division and Commission complied with statutory requirements and intent governing the use and approval of time extensions for the sample of cases we reviewed.

HOW WERE THE RESULTS OF THE AUDIT WORK MEASURED?

Both statute and Commission rules provide standards related to requests for extensions of time:

- **INITIATED BY PARTIES TO THE COMPLAINT.** Statute [Section 24-34-306(11), C.R.S.] allows the complainant and the respondent to make a request for an extension of time beyond the Commission's 270 statutory days of jurisdiction. Statute allows each of the two parties to the case to request, and be approved for, a maximum 90-day extension. Statute does *not* have provisions that allow the Division to request extensions of time. The Division agrees that statute only provides for the complainant and respondent parties to request time extensions.

- **APPROVED FOR GOOD CAUSE BY THE COMMISSION.** Statute allows the parties' requests to be granted by the Commission, stating, "If any party requests the extension of any time period prescribed by [statute]…such extension may be granted for good cause" [Section 24-34-306(11), C.R.S.]. According to Commission rule [Section 10.7 (B), 3 CCR 708-1], the Commission "shall consider all relevant factors" in determining whether good cause has been shown for approving a request for extension of time, "including but not limited to" the following, as stated in Commission rule:

  - "whether the failure to grant an extension would jeopardize the rights of any party"

  - "whether there have been administrative delays that would adversely affect the rights of any party"

- "whether there are other factors outside the control of any party that caused delays in the administrative process"
- "whether the rights of any party would be unduly prejudiced by the granting of an extension."

WHAT PROBLEMS DID THE AUDIT WORK IDENTIFY?

We found that most of the extension requests we reviewed did not comply with one or more of the standards above. Specifically:

THE DIVISION, NOT THE PARTIES, INITIATES MOST EXTENSION REQUESTS. Division records clearly indicate that the Division initiated 58 of the 66 time extension requests (88 percent) in our random sample. The case documentation for each of these 58 cases included notes and correspondence written by Division staff that explicitly asked the complainant and/or respondent to submit a time extension request to the Commission on the Division's behalf, because the Division needed more time to complete its work. Examples of the language we saw include:

- An email from the Division to one a party stating, "As you may know, each party may request a 90-day extension of time. While these extensions must be requested by the parties, *they are typically for the benefit of the Division, to give us additional time*." (Emphasis added.)
- An email from the Division to a party stating, "Due to unusually high caseloads at the moment…*I require additional time to complete the investigation.*" (Emphasis added.)
- Division correspondence indicating that the Division allowed a respondent additional time for filing paperwork in exchange for an extension request on the Division's behalf. Specifically, the correspondence stated "the Division will authorize postponement of the 30-day deadline for submitting a response to the enclosed

Request for Information, *contingent upon your agreement to [request]…a 90-day Extension of Jurisdictional Time.*" (Emphasis added.)

- In Division correspondence, when a respondent asked the Division whether an extension request of less than 90 days was a possibility, staff replied, "I would ask that [you] consider requesting the full 90 days. This is *to ensure sufficient time to complete all steps that take place...including Director review, issuance of a determination, and any subsequent appeal or conciliation.*" (Emphasis added.)

For 38 of the 58 cases, the Division asked both parties for their time extensions while in the other 20, the Division asked just one of the parties to request an extension.

THE COMMISSION APPROVED ALL OF THE TIME EXTENSION REQUESTS WE REVIEWED BUT WITHOUT EVIDENCE IT CONSIDERED "GOOD CAUSE." For each of the 66 cases in our random sample, we reviewed all the documentation the Division and Commission had that might have demonstrated that the Commission applied its rules requiring consideration of good cause to grant a time extension [Section 10.7(B), 3 CCR, 708-1]. The documentation we reviewed included the extension request; the email sent to the Commissioner assigned to consider the request; the assigned Commissioner's email response; and the approvals sent to the requesting parties. In all 66 cases, we found no documentation showing the Commission's consideration of whether the reasons for the requests constituted "good cause" in accordance with its rules, including consideration of the effect of granting an extension on the rights of the parties. Instead, the documentation in each case was almost identical, containing no specific information, as follows:

- "Pursuant to C.R.S. 24-34-306 (11), the Charging (or Responding) Party in the above-referenced case hereby requests a 90-day extension of time to allow for completion of the administrative process." All the requests the Division sent to the assigned Commissioners used this email template. The template did not specify the reason for the request.

- All emails from the assigned Commissioners to the Division approved the requests without explanation.

- All notices sent to the requesting parties used a template that stated, "An extension of time in this charge has been granted for good cause, specifically to preserve the rights of all parties in this charge. At the request of the Division, the Charging [or Responding] Party authorized use of its extension of time."

WHY DID THESE PROBLEMS OCCUR?

The Division and Commission interpret statutes related to time extensions to allow for the practice of the Division using the extensions to provide more time for its work.

First, Commission policy III states, "Pursuant to Section 24-34-306(11), C.R.S., …either of the parties may each request up to a 90 day extension...*to complete the investigation, supervisory review, issuance of the Letter of Determination by the Director, possible [mediation], and/or period in which to appeal or set for hearing,*" (emphasis added). This policy cites work the Division is responsible for completing; it does not contemplate reasons a party may need more time, such as to collect and provide documentation. As a result of its interpretation, the Commission has not established controls to ensure that it only grants extensions in accordance with statute. Specifically:

- It has no rules or policies to prevent the Division from initiating extension requests available to parties to provide itself more time than statute allows.

- It has no rules or policies requiring requesting parties to articulate the reasons they need additional time to help the Commission evaluate whether there is "good cause" to grant the extension.

- It has no guidance for applying statute or rules to extension requests, such as outlining how to assess whether the granting or denial of a request is likely to affect the rights of both parties.

Second, the Division told us that if it needs more time than statute allows for it to complete its work, this need constitutes "good cause" for a time extension, because not having enough time to carry out its work inherently has an adverse effect on the rights of the parties. Furthermore, the Division told us that asking the parties to request time extensions so that Division staff can complete their work is compliant with statutes because staff educate the parties of their right to an extension and the parties themselves request the extension. However, a plain reading of statute indicates:

- An expectation that the Division complete its work and issue its determination promptly [Sections 24-34-306(2)(a) and (b), C.R.S.] and that the entire administrative law process be closed out within 270 days [Section 24-34-306(11), C.R.S.].

- No provision for the Division to request extensions of time for Division and Commission processes.

- That time extensions are intended to be available to the parties when they need them, not to the Division when it needs more time for its work. Statute states, "If *any party* requests the extension of any time period prescribed by this subsection (11), such extension may be granted for good cause by the commission…but the total period of all such extensions *to either the respondent or the complainant* shall not exceed ninety days each" (emphasis added).

Overall, the Commission's and Division's interpretation of statutes related to time extensions do not appear consistent with either the spirit or a plain reading of the law. The Commission and Division have not sought a formal legal opinion on these practices.

Although the Division told us that it believes it is in compliance with the statutes related to time extensions, it has also stated that statute should be changed to authorize the Division, instead of the parties, to request extensions. The Division told us that 270 days is insufficient to work through most cases, particularly since the number of complaints filed increased more than 70 percent between Fiscal Years 2016 and

2018. To date, the Division has not pursued or discussed such a change with the Commission.

WHY DO THESE PROBLEMS MATTER?

By asking parties to submit requests on the Division's behalf, the time allowed for the Division to complete its work is often extended from 270 days (9 months) to as long as 450 days (15 months). The extensions requested for the Division contributed to the lengthy delays we found. For example, as discussed in the TIMELINESS OF INVESTIGATIVE ACTIVITIES finding, the Division did not complete its work for 367 cases within 270 days. The average number of days the Division took to complete its work for the 367 cases was 348 days (29 percent longer than intended by statute).

The Commission is not fulfilling its statutory responsibility to consider whether there is "good cause," and the potential effect on the rights of the parties, before granting extensions, but, based on our audit work, has granted all requests as a matter of routine.

Further, when the Division initiates a time extension request for additional time its staff need to complete work, and the Commission approves the requests, the Division and Commission could deprive the parties of the ability to request time extensions for their own needs, as intended by statute. The Division told us that when parties ask for additional time to submit information during the investigation (e.g., for more than the 30 days established in Division policy for the respondent to provide a position statement or the complainant to provide a rebuttal), staff often allow the parties more time. However, the Division maintains no comprehensive records of this process so we could not verify how often this occurs, how much additional time staff allow the parties, or whether such allowances contribute to the Division's initiation of statutory time requests.

RECOMMENDATION 2

The Colorado Civil Rights Commission (Commission) should ensure that it is fulfilling its statutory obligations regarding time extension requests by modifying its rules and/or policies to:

A Prohibit the Colorado Civil Rights Division (Division) from initiating requests for time extensions through the practice of staff asking the complainant and respondent parties to make requests to the Commission on the Division's behalf.

B Require all extension requests to articulate the reason the party needs more time.

C Outline how it will assess each time extension request to ensure consideration of the factors cited in rule and how it will document the assessment's adherence with rules.

RESPONSE

COLORADO CIVIL RIGHTS COMMISSION

A PARTIALLY AGREE. IMPLEMENTATION DATE: SEPTEMBER 2019.

The Commission disagrees that the Division is initiating requests for time extensions through the practice of staff asking the complainant and respondent parties to make requests to the Commission on the Division's behalf. The Commission's rules provide that an extension may be granted when there have been "administrative delays that would adversely affect the right of any party" and when "there are other factors outside of the control of any party that caused delays in the administrative process" [3 CCR 708-1, Rule 10.7(B)].

As such, when administrative delays arise, Division staff contact the parties to communicate both that there are delays and that either party may request an extension. The Division asks whether either

party would like an extension and instructs the party how to request one. This is a critical step because the parties, absent communication from the Division, have no way of knowing there are administrative delays and because unrepresented parties rely on the Division to help them understand the process.

The Commission agrees that it will work with the Division to implement a plan to clarify how information is presented from staff to the parties, how the parties' requests to the Commission are articulated, and how the Commission, or its delegate, analyzes and records whether good cause for an extension is or is not shown.

AUDITOR'S ADDENDUM

The Commission's response does not indicate that it will not prohibit the Division's practice of asking complainant and respondent parties to make time extension requests on the Division's behalf. As described on PAGE 31 of the report, our audit work found that a significant majority (88 percent) of the sample of requests we reviewed were initiated by the Division to allow its staff extra time. This practice does not appear compliant with statutory intent or a plain reading of the law.

B PARTIALLY AGREE. IMPLEMENTATION DATE: SEPTEMBER 2019.

The Commission agrees and will implement rules or policies to ensure and implement an appropriate process so that the Division receives from the requestor, and subsequently provides to the Commission or its delegate, an articulation of any reason for which a request for an extension of time has been requested.

AUDITOR'S ADDENDUM

The Commission's response is unclear regarding what aspect of the recommendation it does not agree to comply with.

C PARTIALLY AGREE. IMPLEMENTATION DATE: NOVEMBER 2019.

The Commission remains committed to fulfilling its statutory obligations regarding extension requests. The Commission also remains committed to ensuring that both parties to an appeal receive updates regarding administrative delays and the options available to a party when such delays, or other factors outside either party's control, would adversely affect the rights of either party. The Commission will develop clearer policies to document the need for any extension, the factors that support an extension, and the process of communicating that to the decision-maker for the Commission.

AUDITOR'S ADDENDUM

The Commission's response is silent on whether the Commission will modify its rules or policies to describe how it will assess each time extension request to ensure compliance with its own rules, and document its assessment. Our audit work found no evidence that the Commission applied its rules to consider whether there was "good cause" for approving any of the sample of time extension requests we reviewed. Statute specifies that time extensions may be granted by the Commission for "good cause."

RECOMMENDATION 3

The Colorado Civil Rights Division (Division) should discontinue initiating time extension requests that statute allows the complainant and respondent parties to make. If the Division determines that it cannot complete its work without reliance on time extensions, it should work with the Colorado Civil Rights Commission (Commission) to seek legislative change to authorize the Division to request extensions directly. Alternatively, if the Division does not agree that it should discontinue initiating time extension requests to complete its work, the Division should work with the Commission to obtain a written opinion from the Attorney General's Office affirming that its practice is within statutory requirements and intent.

RESPONSE

COLORADO CIVIL RIGHTS DIVISION

PARTIALLY AGREE. IMPLEMENTATION DATE: JANUARY 2020.

Yes, the Division agrees it should not be using requests for extensions solely for its benefit. The Division does not agree to discontinue initiating time extension requests. The Division believes that its current practice preserves the rights of the parties and allows for the completion of the administrative process. The Division will develop clearer policies to document the need for any extension, the factors that support an extension, and the process of communicating to the decision-maker on behalf of the Commission. The Division remains committed to fulfilling its statutory obligations regarding extension requests. The Division agrees to work with the Commission to obtain a written opinion from the Attorney General's Office affirming any and all practices going forward are within statutory requirements and intent.

The Division would like to note that it has been operating under the authority that the Commission's rules allow for extensions to be granted when there have been "administrative delays" (including but not limited

to: either party's request to submit evidence such as comparative data, affidavits, witness statements, personnel files, photos or other relevant items; the appeal process; statutorily required conciliation in the event of a probable cause finding; and complaint filing by the Attorney General's office when a case is set for hearing) that would adversely affect the rights of any party" and when "there are other factors outside the control of any party that caused delays in the administrative process." [3 CCR 708-1, Rule 10.7(B)].

AUDITOR'S ADDENDUM

The Division's response indicates that it will not discontinue its practice of initiating time extension requests to complete its own work. Statutes intend that parties to a complaint have the chance to request more time for their own needs; statutes do not contemplate extensions for the Division and Commission. Instead, Section 24-34-306(11), C.R.S., sets a time limit of 270 days to complete the administrative process, including all of the investigative work the Division conducts. Further, though the Division states that its current practice preserves the rights of the parties, the Division deprives parties of their statutory right to request extensions for their own needs, as intended by statute.

DATA MANAGEMENT

The Division uses two primary mechanisms to capture information on complaints. First, its online civil rights case filing and management system, CaseConnect, contains comprehensive information on each case, primarily documented in detailed written staff notes about the work the Division conducts on a case from filing through completion, as well as copies of Division correspondence with the parties and case documentation provided by the parties. Second, the Division uses Excel spreadsheets to track certain case information, such as when complaints are filed, when the Division issues a determination, when cases are mediated, and when the Commission reviews cases for appeal and hearing worthiness.

WHAT AUDIT WORK WAS PERFORMED, WHAT WAS THE PURPOSE, AND HOW WERE THE RESULTS MEASURED?

We reviewed the case information in CaseConnect and the Division's spreadsheets for all 1,292 complaints the Division completed from November 2016 through December 2018, and interviewed Division staff and staff from the Governor's Office of Information Technology (OIT) who assist the Division in managing the CaseConnect system. We also reviewed the Division's annual report for Fiscal Year 2018, the Division's performance report for Fiscal Year 2018, and the Division's performance plan for Fiscal Year 2019. Finally, we reviewed the Commission's use of data for its statutory duties.

The purpose of our audit work was to evaluate the Division's and Commission's use of case information as part of their internal control structure. The Colorado Office of the State Controller has directed all state agencies to follow the *Standards for Internal Control in the Federal Government* (Green Book). The Green Book defines internal control, in part, as a process implemented by an agency's management to provide reasonable assurance that the objectives of the agency will be achieved,

including the objectives of operating efficiency and effectively; reliably reporting information for internal and external use; and complying with applicable laws and regulations. The Green Book establishes some specific principles for internal controls related to information and communication [Green Book, Principles 13 through 15]:

- Management should maintain information that is complete, appropriate, relevant, and accessible.
- Management should use information to make informed decisions and evaluate the agency's performance in achieving key objectives.
- Management should communicate information externally so that external parties can help the agency achieve its objectives.

Furthermore, the Commission has an overarching duty to study the extent, character, and causes of the discriminatory practices defined in Colorado's civil rights laws and formulate plans for the elimination of those practices. Statute lists a number of specific expectations for the Commission in fulfilling this duty, including issuing educational information and making recommendations to the Governor and General Assembly for policies or legislation concerning discrimination [Section 24-34-305, C.R.S.].

WHAT PROBLEMS DID THE AUDIT WORK IDENTIFY AND WHY DID THEY OCCUR?

From November 2016, when the Division implemented CaseConnect, through to the end of our audit period (June 2019), the Division did not maintain case information that was accessible in any aggregated form to support its decision-making, achievement of objectives, or reliable external reporting.

First, although CaseConnect contains comprehensive information about each complaint, and we found no indications of any significant problems with the accuracy or completeness of the data in

CaseConnect, the Division cannot extract *any* type of aggregated data from the system for management purposes, in part because the information that staff enter into CaseConnect is narrative, rather than in data fields that can be aggregated. For example, the Division cannot query CaseConnect or program it to produce reports that:

- Show how many cases were opened or closed in a specific time period.
- Show how many closed cases were completed within statutory deadlines (as discussed in the TIMELINESS OF INVESTIGATIVE ACTIVITIES finding).
- Show trends, in aggregate, of types of cases filed over a specified timeframe by location and outcome.

The Commission told us that it does not study the extent, character, and causes of discriminatory practices, as required by statute, to help identify policies or legislation that could address them. However, if the Commission began carrying out this statutory duty, the limitations we describe above would hinder its ability to use actual information on discrimination complaints to draw conclusions or make policy or legislative recommendations.

Second, the Division reported that it did not design the spreadsheets, and that they have not been used to provide management with aggregate case data. For example, the spreadsheets do not contain some information that is important for management's use, such as the date the Division completed its work for every case, and many of the cells capture narrative information (e.g., notations such as "placed on hold per request"), rather than quantitative data that can be used for sorting or analyzing. We also found that some of the information in the spreadsheets is not reliable. For example, some cases were documented as having no probable cause but also had notes indicating that they were settled; cases the Division determines as having no probable cause are dismissed and do not move forward to attempt settlement. Other cases were incorrectly recorded with duplicated numbers for cases that were already in process.

CaseConnect was implemented primarily to allow for online complaint filing. However, in accomplishing that intent, the Division lost its ability to electronically track and aggregate complaint information in a single automated system. According to the Division, it requested support from the Department of Regulatory Agencies (Department) and OIT as far back as June 2017 to modify CaseConnect to address its deficiencies in providing information for management purposes. The Division indicated that it is now working with OIT to update CaseConnect to collect and report aggregate data for management purposes and that the update should be in place by October 2019.

WHY DO THESE PROBLEMS MATTER?

The lack of readily accessible aggregated case data impedes the Division's ability to evaluate its performance in complying with applicable laws and regulations or achieving key objectives, as follows:

NOT HAVING READILY ACCESSIBLE AGGREGATE DATA ON COMPLAINTS HINDERS THE COMMISSION'S ABILITY TO STUDY THE EXTENT, CHARACTER AND CAUSES OF DISCRIMINATORY PRACTICES. For example, without being able to generate reports that show changes in the aggregate number of employment discrimination cases filed over a specified period, along with details such as where the alleged discrimination occurred (e.g., which city or county), the type of employer (e.g., professional, service sector), and the outcome, the Commission lacks information to determine if the rate of employment discrimination is changing, particularly in certain geographic locations or industry sectors, and thereby make recommendations to help address them.

THE DIVISION IS UNABLE TO DETERMINE IF IT IS MAKING PROGRESS ON THE OBJECTIVE OF INCREASING THE NUMBER OF CASES COMPLETED ON TIME. In its performance plans for Fiscal Years 2018 and 2019, the Department established a State Measurement for Accountable, Responsive, and Transparent (SMART) Government goal that the Division would increase the number of cases it completed within the 270-day statutory deadline. Specifically, the Department set a goal to

increase the number of cases closed from 77 percent to 86 percent in Fiscal Year 2018. The Division reported in its Fiscal Year 2018 performance evaluation that it had not met its 2018 goal; therefore, the Department lowered the Division's goal to 80 percent for Fiscal Year 2019. By not being able to query CaseConnect on start and end dates for all cases, the Division cannot readily determine its progress against these SMART goals. As discussed in the TIMELINESS OF INVESTIGATIVE ACTIVITIES finding, for the 933 cases for which we could determine the time elapsed from the filing of a complaint until it was closed by the Division, the Division did not meet the statutory deadline for 367 cases (39 percent). We used the Division's spreadsheets to analyze the Division's timeliness because the data could not be extracted in aggregate from CaseConnect.

THE COMMISSION AND DIVISION CANNOT ENSURE THAT THEY PROVIDE RELIABLE REPORTS TO THE GOVERNOR AND GENERAL ASSEMBLY. Statute requires the Commission to provide annual reports accounting to the Governor for the discharge of its duties. The Division prepares and submits the required report on behalf of the Commission. The annual reports contain information on both the Division's and Commission's activities, including the total numbers of complaints filed, mediations conducted, cases completed, and appeals filed. We reviewed the Fiscal Year 2018 annual report but could not verify the data it contained. The Division told us that a former OIT staff member worked in CaseConnect to extract the numbers for the report, but the Division had no supporting documentation and could not replicate the process to demonstrate the accuracy of the report.

RECOMMENDATION 4

The Colorado Civil Rights Division (Division) should ensure that the planned updates to CaseConnect include modifications to allow the Division to efficiently query the system or run reports to provide information needed for management to achieve its objectives, comply with statutes, and produce accurate external reports.

RESPONSE

COLORADO CIVIL RIGHTS DIVISION

AGREE. IMPLEMENTATION DATE: JANUARY 2020.

Yes, the Division agrees that planned updates to CaseConnect should include modifications to allow the Division to efficiently query the system or run reports to provide information needed for management to achieve its objectives, comply with statutes, and produce accurate external reports.

The Division's staff continues to work collaboratively with OIT by developing process maps, testing system capabilities, and spotting system defects as they occur. This allows the Division to provide in depth feedback to OIT in order to ensure that the aforementioned improvements are made.

The Division will propose a plan to OIT in which OIT and the Director will provide status updates from staff using the system and will raise obstacles early and frequently to OIT. The Division would like to continue these discussions with OIT for 3-6 months after the system's release to ensure that the Division is confident in its use of the system to serve the public.

RECOMMENDATION 5

After the Colorado Civil Rights Division has modified CaseConnect to allow queries, in response to RECOMMENDATION 4, the Colorado Civil Rights Commission should use the data available from CaseConnect to study and make recommendations to address discrimination, as required by statute.

RESPONSE

COLORADO CIVIL RIGHTS COMMISSION

AGREE. IMPLEMENTATION DATE: JANUARY 2020.

Assuming the State's Office of Information Technology is capable of modifying CaseConnect to make it useful for the queries proposed during this audit, the Commission will use the data made available from CaseConnect to study and make recommendations to address discrimination.

CIVIL RIGHTS COMMISSION TRANSPARENCY AND ACCOUNTABILITY

The Commission is responsible for making decisions on complaints in the following two situations:

- **On appeal.** When the Division determines that there is no probable cause on a complaint, the complainant has the right to appeal the determination to the Commission. The complainant must complete an appeal form that states their reason for appealing and submit it to the Division. The Division typically assigns a single commissioner to review the appeal and makes the case documentation compiled during the Division's investigation available to the assigned commissioner. After the review, the assigned commissioner makes a recommendation to the full Commission on how to decide the appeal. The Commission then decides, by vote, to uphold the Division's determination, remand the case back to the Division for further investigation, or overturn the Division's determination.

- **When parties are unable to settle** a case during mandatory mediation pursuant to Section 24-34-306(2)(b)(II), C.R.S., for which the Division determined there was probable cause. The Commission reviews employment and public accommodation cases that were not settled by the parties to determine whether they should undergo an administrative law hearing. Division staff coordinate with the Attorney General's office to present a recommendation to the Commission for whether to set the case for hearing. The Division and Commission refer to these as "hearing worthiness" determinations. The Commission can decide to set such cases for hearing or dismiss them. According to Section 24-34-504(4.1), C.R.S., all housing cases that are not settled must be set for hearing.

In Fiscal Years 2017 and 2018, the Commission decided on 176 cases that were appealed and 42 cases for hearing worthiness (for a total of 218 cases).

WHAT AUDIT WORK WAS PERFORMED AND WHAT WAS THE PURPOSE?

We reviewed executive session minutes for all 28 meetings the Commission held in Fiscal Years 2017 and 2018, attended one commission meeting in-person, and listened to audio recordings of three Commission meetings held in Fiscal Year 2019. We also reviewed a random sample of five case files, out of the 11 employment and public accommodation discrimination cases from Fiscal Year 2018 that the Commission reviewed for hearing worthiness. We reviewed the sample for documentation of the process commissioners used and the factors they considered when making appeal and hearing worthiness decisions. Finally, we interviewed commissioners and Division staff, and reviewed statute, rules, and Commission policies related to Commission decision-making.

The purpose of the audit work was to determine if the Commission is transparent and accountable in applying its own rules and policies to decide appeals and hearing worthiness cases.

HOW WERE THE RESULTS OF THE AUDIT WORK MEASURED?

The Colorado General Assembly and citizens expect state entities to operate in a transparent and accountable manner. This expectation is expressed clearly in the State Measurement for Accountable, Responsive, and Transparent (SMART) Government Act, which states, "It is important that state government be accountable and transparent in such a way that the general public can understand the value received for the tax dollars spent by the state" [Section 2-7-201(1)(a), C.R.S.].

The importance of transparency and accountability are reflected in other statutes as well, including the following:

- **THE COLORADO SUNSHINE LAW.** Section 24-6-402, C.R.S., establishes a variety of requirements for state public bodies, such as the Commission, to carry out their work in an open manner. For example, the law requires that such bodies hold public meetings; only take official action, such as voting, in open meetings; and maintain meeting minutes that are made available to the public and that record any official action, including votes.

- **STATUTES RELATED TO MEETINGS OF STATE BOARDS AND COMMISSIONS.** Section 24-3.5-101, C.R.S., expresses the General Assembly's intent that boards and commissions operate in a transparent manner that makes their work open to public scrutiny and involvement, stating, "The general assembly declares that public participation in government produces better government" and recommends actions boards and commissions should take to promote such participation.

In some cases, a government entity's need to preserve the confidentiality of individual citizens creates an impediment to full public transparency. For example, statute states "the members of the commission…shall not disclose the filing of a [complaint], the information gathered during the investigation, or the efforts to eliminate such discriminatory or unfair practice" except under limited circumstances [Section 24-34-306(3), C.R.S.]. The Commission interprets this statute as prohibiting discussion of complaints in open meetings and therefore conducts most of its business in executive session. When protecting privacy prevents a government entity from conducting business in the open, audits can provide a measure of transparency and accountability by gathering and analyzing evidence about the entity's operations. *Generally Accepted Government Auditing Standards* (known as the Yellow Book) note that government auditing is essential to provide accountability and help "legislators, oversight bodies, those charged with governance, and the public…know whether (1) management and officials manage government resources and use their authority properly and in

compliance with laws and regulations; (2) government programs are achieving their objectives and desired outcomes; and (3) government services are provided effectively, efficiently, economically, ethically, and equitably." [Yellow Book, Sections 1.02 and 1.03].

The General Assembly recognized the need for audits of the Division and Commission when it passed House Bill 18-1256, which requires two performance audits between 2019 and 2024. In committee hearings on the bill, one General Assembly member noted that the audit requirements in the bill were important to help address concerns regarding the transparency and accountability of the Commission's operations, particularly given the need for confidentiality in much of its work.

For audits to be effective in providing transparency and accountability, the audited entity must maintain records the audit can review. The Green Book establishes standards that all Colorado state entities, including the Commission, are expected to follow and requires that they clearly document all significant events so that the documentation can be examined [Green Book, Principal 10.03].

WHAT PROBLEMS DID THE AUDIT WORK IDENTIFY AND WHY DID THEY OCCUR?

The Commission does not operate in a manner that allows for transparency or accountability. We attempted to evaluate the Commission's adherence to their rules and policies in making decisions on appeals and hearing worthiness cases but could not draw conclusions, as explained below.

For cases and meetings we reviewed, The Commission has no documentary evidence of its processes to decide appeals or hearing worthiness cases. Specifically, for the 218 cases the Commission reviewed in Fiscal Years 2017 and 2018 (176 appeals and 42 hearing worthiness), the Commission had no documents indicating

how it considered and decided the outcome of each case. Furthermore, for the one commission meeting we attended in-person and the three meetings we listened to audio recordings of, the Commission had no audio evidence of how it considered and decided the outcome of each case. The Commission has outlined the following elements that it states it will consider when reviewing cases, but because the Commission maintained no documentary evidence of its review, we could not evaluate its application of these rules or policies:

- The only grounds for successful appeals are that the Division disregarded or misapplied applicable law or available evidence or that new evidence is available that was not available during the investigation [Commission Rules, Section 10.6(A)(1), 3 CCR 708-1].
- The Commission will consider various factors to determine hearing worthiness, including the strength of the evidence, the likelihood of success of the case, the impact of a decision beyond the specific complaint, and the cost of a hearing [Commission Policy V(B)].

The Commission had no documents from their assessment of any of the appeals or hearing worthiness cases they reviewed, such as notes reflecting (1) an assigned commissioner considered the elements in rule or policy, or (2) the Commission discussed the cases, including how they aligned with rule or policy, during meetings. Furthermore, for the four executive sessions we listened to (three audio recordings and one meeting we attended in person), where the Commission decided 13 appeals and six hearing worthiness cases, it did not discuss the factors in rule or policy, and in fact conducted virtually no discussion of the cases at all.

According to the Commission, it collectively bases its decisions on appeals on the recommendation of the assigned commissioner, and its decisions on hearing worthiness on recommendations provided by the Commission's Attorney General representative and Division staff. As a result, the Commission has not seen a need to document its decision making on appeals or hearing worthiness cases and how the factors outlined in rule or policy are applied. With respect to discussion of

appeals or hearing worthiness cases, the commissioners reported that they did not discuss the cases during meetings, including during executive session meetings, because they feel that anything they say might be construed as biased.

VOTING IN EXECUTIVE SESSION. Based on our review of minutes and the four meetings we listened to, the Commission votes on appeals and hearing worthiness cases in executive session, rather than in open meetings, in violation of the Sunshine Law, which states, "All meetings…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(2)(a), C.R.S.]. Commissioners told us that they did not know that statute requires voting on appeals and hearing worthiness cases be done in open meetings, rather than in the executive session meetings. Further, the Commission's policies do not specify that the commissioners' votes need to be held in public session.

All six of the commissioners we interviewed told us that the commissioners apply their rules and policies and function in an equitable and consistent manner when making decisions on cases.

WHY DO THESE PROBLEMS MATTER?

Because the Commission makes decisions in closed meetings, there is no opportunity for independent observation of the fairness and consistency of its operations. The lack of documentary evidence of its decision-making compounds the problem, resulting in a process that is opaque to Colorado citizens and policy makers. Even our audit is unable to provide assurance that the Commission is operating in a fair and accountable manner.

Further, the lack of discussion among commissioners about appeals and hearing worthiness cases prior to voting prevents the commissioners from considering the thoughts and experiences of other members as part of the decision-making process. The Commission is statutorily-designed to represent a wide variety of experiences and perspectives, including those of business, government, and individuals who have been or may

be discriminated against due to disability, color, sex, sexual orientation, national origin, ancestry, marital status, religion, or age. When the commissioners do not share their knowledge and experience with one another, they do not use that breadth of perspectives to help in their collective decision-making.

Finally, the Commission's practice of basing their decisions almost entirely on recommendations from individuals (i.e., a single commissioner for appeals or their Attorney General representative or Division staff on hearing worthiness cases), then taking a vote without Commission deliberation, could be misleading. The public and policy makers could easily interpret the Commission's vote as meaning that the cases underwent thorough consideration and discussion by the entire Commission.

RECOMMENDATION 6

The Colorado Civil Rights Commission should operate in a transparent and accountable manner and implement rules or policies while maintaining necessary confidentiality, with respect to appeals and cases it considers for hearing worthiness, by:

A Documenting the consideration of each appeal and hearing worthiness case that demonstrates the application of the factors in rules and policies.

B Discussing the factors in rules and policies, and commissioners' perspectives on how these factors should be applied to each appeal and hearing worthiness case, and use the discussion as a basis for decision-making.

C Voting on appeals and hearing worthiness cases during open meetings, in accordance with statute.

RESPONSE

COLORADO CIVIL RIGHTS COMMISSION

A PARTIALLY AGREE. IMPLEMENTATION DATE: OCTOBER 2019.

Because the Commission functions in both a quasi-judicial and quasi-prosecutorial roles, the Commission's confidential discussions are not subject to documentation. The Commission will not engage in creating a record of its deliberations.

The Commission will engage in training to review and discuss the factors applicable in determining hearing worthiness and in reviewing decisions on appeal so as to engage in appropriate discussion during its confidential meetings.

The Commission will vote on hearing worthiness and decisions on appeals in public session and will have whatever level of discussion is appropriate or necessary to inform its vote on any motion put forth by any Commissioner. The Commission will continue to record its formal actions in its minutes.

AUDITOR'S ADDENDUM

The Commission's response indicates that it will not document its consideration of appeals and hearing worthiness cases. Our audit work found that the Commission has no documentation of its processes to decide cases for appeal or hearing worthiness, and as such, is not operating in a manner that allows for transparency or accountability. The Commission's plan to engage in training is not relevant to the recommendation to document that it considers and applies the factors in policies and rules when it makes determinations about civil rights cases.

B PARTIALLY AGREE. IMPLEMENTATION DATE: OCTOBER 2019.

As noted above, the Commission functions in quasi-judicial and quasi-prosecutorial roles. The Commission's deliberations in these roles are not subject to review.

The Commission, however, agrees to focus on expanded training with regard to the factors that apply to appeals and hearing worthiness and use the training to propose modifications to any existing rules or policies that need modification to permit more robust conversation and consideration of different perspectives during its deliberations in executive session.

AUDITOR'S ADDENDUM

The Commission's response indicates it will not discuss the factors in its own rules and policies for considering cases as a basis for decision-making, as recommended. Our audit work found that there

is no evidence that the Commission follows its own rules and policies to decide cases for appeal or hearing worthiness. The Commission's response indicates it will continue to decide cases based on the recommendations of a single commissioner or of its Attorney General representative and Division staff, rather than on the Commission members engaging in discussion.

C PARTIALLY AGREE. IMPLEMENTATION DATE: OCTOBER 2019.

Subject to the qualifications set forth in the previous two parts, the Commission will make determinative votes on appeals before it and whether to set matters for hearing in open session.

AUDITOR'S ADDENDUM

The Commission's response is unclear regarding what aspect of the statutory requirement (i.e., that it take formal action, such as a vote, in public meeting) it does not agree to comply with.

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APPENDIX A

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PROTECTED CLASSES AND PROHIBITED ADVERSE ACTIONS IN COLORADO, BY SETTING			
	EMPLOYMENT	HOUSING	PUBLIC ACCOMMODATION [1]
PROTECTED CLASS			
Age [2]	●		
Color	●	●	●
Disability [3]	●	●	●
Familial Status [4]		●	
Marital Status		●	●
National Origin/Ancestry	●	●	●
Race	●	●	●
Religion or creed	●	●	●
Sex	●	●	●
Sexual Orientation	●	●	●
PROHIBITED ADVERSE ACTION			
	▪ Refusal to reasonably accommodate a disability or pregnancy, childbirth, or related condition ▪ Refusal to hire or promote ▪ Discharge or Demotion ▪ Harassment ▪ Unequal application of employment terms and conditions ▪ Unequal compensation ▪ Printing or circulating any statement, advertisement, or publication that expresses, either directly or indirectly, any limitation, specification, or discrimination as to the protected class ▪ Retaliation	▪ Refusal to reasonably accommodate a disability ▪ Refusal to show, rent, or sell ▪ Unequal application of terms and conditions or discriminatory financing ▪ Making inquiry or record, either verbally or in writing, of the protected class ▪ Steering [5] or misrepresenting availability ▪ Advertising discriminatory preference ▪ Retaliation	▪ Restricting access or applying differential pricing ▪ Refusal of service or sale of goods ▪ Publishing or displaying any kind of notice or advertisement that indicates that services will be denied, or that an individual's presence is unwelcome, due to the protected class ▪ Retaliation

SOURCE: Office of the State Auditor analysis of Sections 24-34-301 through 803, C.R.S.

[1] A place of "public accommodation" means any place of business engaged in sales to and offering services, facilities, or accommodations to the public, including but not limited to businesses such as restaurants, swimming pools, hospitals, schools, and parks. A place of public accommodation does not include a church, synagogue, mosque, or other place that is principally used for religious purposes [Section 24-34-601(1), C.R.S.].

[2] Specifically, age as a protected class includes individuals who are 40 and over [Section 24-34-301(1), C.R.S.].

[3] "Disability" includes both physical and mental impairment [Section 24-34-501(1.3), C.R.S.]. Further, an individual with a disability has the right to be accompanied by a service animal without being required to pay an extra charge in any place of employment, housing, or public accommodation [Section 24-34-803, C.R.S.].

[4] "Familial status" means one or more individuals who are younger than 18 years of age and living with a parent or legal custodian. This also applies to a pregnant person or someone who is in the process of securing legal custody of an individual younger than 18 [Section 24-34-501(1.6), C.R.S.].

[5] "Steering" refers to the practice of guiding renters or buyers to specific housing areas [Section 24-34-502(1)(h)(i), C.R.S.].


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