

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>BERNIE BUESCHER, in his official capacity as COLORADO SECRETARY OF STATE, and the COLORADO OFFICE OF ADMINISTRATIVE COURTS, Petitioners, v. DOUGLAS EDWARD BRUCE, Respondent.</p>	
<p>JOHN W. SUTHERS, Attorney General KATIE ALLISON, Assistant Attorney General* 1525 Sherman Street, 7th Floor Denver, CO 80203 Telephone: 303-866-5333 FAX: 303-866-5671 E-Mail: katie.allison@state.co.us Registration Number: 39430 *Counsel of Record</p>	<p>Case: 10 CV 3548</p>
<p>MOTION FOR FINDING OF PROPER SERVICE</p>	

Petitioners Bernie Buescher, in his official capacity as the Colorado Secretary of State, and the Colorado Office of Administrative Courts (“OAC”) (collectively, “Petitioners” or “the State”), through the Office of the Attorney General, request that this Court find that Respondent, Douglas Edward Bruce, has been properly served as contemplated in this

Court's Order Compelling Compliance, entered May 10, 2010.¹

Background

Petitioners filed a petition in this case under §§ 24-4-105(5) and 24-30-1003(5)(a), C.R.S. (2009). That Petition sought an order from this Court compelling Mr. Bruce to comply with an administrative subpoena issued by an administrative law judge ("ALJ") from OAC in connection with a trio of campaign finance complaints, Case Nos. OS-2010-0001, OS 2010-0002 and OS 2010-0003.² The subpoena compelled Mr. Bruce to appear at a deposition and to produce documents. Mr. Bruce was personally served with the administrative subpoena. (The subpoena and affidavit of service are attached to the Petition as Exhibit 1.) Indeed, he appeared in the administrative proceeding by filing a motion to quash the subpoena. (The motion to quash is attached to the Petition as Exhibit 3.)

The ALJ modified the scope of the subpoena request but denied the motion to quash, finding that Mr. Bruce was required to produce documents and appear at a deposition. The ALJ's order was also served on Mr. Bruce. (The ALJ's order and certificate of service are attached to the Petition as part of Exhibit 3.) Nonetheless, Mr. Bruce failed to attend the deposition for which he was subpoenaed, and he ignored his obligation to produce documents. Therefore, Petitioners filed the Petition in district court for enforcement of the

¹ Petitioners intend to file a motion seeking sanctions for contempt during the week of June 14, 2010.

² OAC issued two subpoenas in the campaign finance case, one for Mr. Bruce to appear at a deposition and produce documents and the other for Mr. Bruce to appear at the administrative hearing. Petitioners only sought enforcement of the subpoena to appear at the deposition and produce documents.

subpoena, pursuant to § 24-4-105(5), C.R.S.

In an order dated May 10, 2010 (“Order”), this Court granted the Petition but stated that “authority to enforce the petition requires filing of proof of service upon respondent prior to 5/17/10.” Petitioners filed a proof of service on May 14, 2010, and filed a supplemental proof of service on May 20, 2010, which recounted the State’s numerous efforts to personally serve Mr. Bruce.

OAC is a governmental tribunal attempting to perform its duties, but it has been obstructed by Mr. Bruce’s apparent disrespect and disregard for the legal process. Petitioners submit this Motion to ask this Court to find that the State has adequately complied with the Court’s May 10 Order and that the State’s efforts constitute adequate service under the applicable rules of civil procedure. Petitioners’ request for this Court’s finding of proper service is necessary to prevent Mr. Bruce from further disregarding the ongoing legal process in the administrative court.

Argument

The Petition here is not a civil action requiring service of process under C.R.C.P. 4; rather, as discussed below, it is an ex parte proceeding under § 24-4-105(5), C.R.S., in which Petitioners have sought this Court’s assistance in enforcing an administrative subpoena. Service under C.R.C.P. 5 therefore governs this matter.

I. C.R.C.P. 4 does not govern service in this proceeding.

The underlying campaign finance complaint proceedings are being conducted by OAC pursuant to § 24-4-105, C.R.S. (2009). *See* Colo. Const. art. XXVIII, § 9(1)(f).

An administrative court does not have powers of contempt; thus, § 24-4-105(5) allows the administrative court to petition the district court to enforce the subpoena. Specifically, section 24-4-105(5) provides that when a witness fails to comply with an administrative subpoena, the agency may petition the district court to enter an order compelling the witness to comply with the subpoena, under penalty of punishment for contempt. Such a petition is not itself a separate civil action; it does not require a summons and complaint or service of process under C.R.C.P. 4.

In *Feigin v. Colorado National Bank*, 897 P.2d 814 (Colo. 1995), the Colorado Supreme Court determined that such a petition in district court for the enforcement of an administrative subpoena is an ex parte proceeding for judicial enforcement. *Id.* at 820.

The *Feigin* court relied heavily on an earlier similar case, *Orcutt v. District Court*, 164 Colo. 385, 435 P.2d 374 (Colo. 1967), which likewise involved a petition for judicial enforcement of an administrative subpoena. In *Orcutt*, the Supreme Court addressed “the degree of formality requisite to the judicial enforcement of a subpoena issued by an administrative agency.” *Orcutt*, 164 Colo. at 386, 435 P.2d at 374. There, an administrative agency issued subpoenas duces tecum to the president of two corporations. The subpoenas were personally served and called for the individual to appear at an administrative hearing. When the president failed to appear, the agency filed a petition in district court (pursuant to agency statutory authority nearly identical to § 24-4-105(5)), seeking an order that the witness be compelled to comply with the administrative subpoenas. The district court issued an ex parte order directing the witness to comply with the subpoenas

and to appear before the agency. *Orcutt*, 164 Colo. at 387, 435 P.2d at 375.

In *Orcutt*, the target of the subpoena moved to quash the court's order, contending that the agency was required to comply with the Rules of Civil Procedure by filing a complaint and summons, issuing process, permitting the filing of an answer and generally treating the matter like a typical civil proceeding. A different district court judge granted the motion to quash, reasoning that the agency's statutory language permitting the agency to petition the court for an order to enforce the administrative subpoena required a "separate and distinct judicial proceeding" requiring the agency to commence a civil action and effect regular service of process. *Id.*, 164 Colo. at 389, 435 P.2d at 376.

The Supreme Court, in an original proceeding, rejected the trial court's reasoning and concluded that "the respondent court erred in granting a motion to quash the subpoenas based upon the failure of *Orcutt* to comply with the Rules of Civil Procedure by filing a complaint, issuing process, and generally treating the matter like a typical civil proceeding." *Orcutt*, 164 Colo. at 392-93, 435 P.2d at 377. The Court reasoned that the legislature intended to provide the agency with a simplified procedure for judicial enforcement of subpoenas. *Id.*, 164 Colo. at 392, 435 P.2d at 377.

In short, in both *Orcutt* and *Feigin*, the Supreme Court has held that an agency's petition to a district court to seek enforcement of an administrative subpoena is akin to an ex parte matter ancillary to the agency's statutory authority to issue administrative subpoenas; it is not a separate civil action. Importantly, such a petition requires neither a complaint nor service of process. Hence, C.R.C.P. 4, which governs service of process of a complaint, does

not govern this matter.

In the present matter, Mr. Bruce was properly served in the administrative proceeding. He was personally served with two administrative subpoenas. (The subpoenas are attached to the Petition as Exhibits 1 and 2.) In addition, he submitted a motion to quash the administrative subpoenas, and by law, his appearance operates as a waiver of objections to service. *Russell v. Craig*, 10 Colo. App. 428, 51 P. 1017 (1897); *Brown v. Amen*, 147 Colo. 468, 364 P.2d 735 (1961). (The motion to quash is attached to the Petition as Exhibit 3.) Therefore, Mr. Bruce was clearly under the jurisdiction of OAC, and that jurisdiction transferred to this Court for enforcement of the OAC subpoena pursuant to § 24-4-105(5).

Under *Feigin* and *Orcutt*, the Petition here, which seeks judicial enforcement of an administrative subpoena, is not a separate civil action requiring personal service of process under C.R.C.P. 4.

II. Mr. Bruce has been properly served under C.R.C.P. 5.

A. Rule 5 governs service here.

Although the Petition itself was not required to be personally served on Mr. Bruce pursuant to C.R.C.P. 4, proper service of the Court's May 10 Order is governed by C.R.C.P. 5(a), which applies to, among other things, "every order required by its terms to be served." The Court's May 10 Order, is not effective absent "filing of proof of service upon respondent prior to 5/7/10."³ Hence, it is an "order required by its terms to be served."⁴

³ In light of the analysis above regarding the *Orcutt* and *Feigin* cases, Petitioners' understand the Court's order to require "proof of service" to pertain to service of its Order.

B. The Court's May 10 Order was properly served under Rule 5.

Rule 5 provides that service can be made, among other methods, by mailing a copy to the last known address of the person served, or it can be made by any other means, including e-service or other electronic means. C.R.C.P. 5(b)(2)(B) and (D).

The Order (and the Petition) were sent by overnight express mail to Mr. Bruce's residence on May 14, 2010. (The express mail receipt is attached to the proof of service as Exhibit 3.) The Order and Petition were also e-mailed to Mr. Bruce at his current e-mail address on May 12, 2010. (A copy of the e-mail is attached to the proof of service as Exhibit 4.) This is a functioning e-mail address for Mr. Bruce, as evidenced by communications Petitioners had with Mr. Bruce via this e-mail address on April 29, April 30, and May 3. (A copy of these e-mails are attached to the proof of service as Exhibit 5.) The Order and Petition were also mailed via regular U.S. mail to Mr. Bruce's residence and to his Post Office Box on May 10, 2010. (See Petitioners' certificate of service filed on May 10, 2010, and certificate of service by regular U.S. Mail filed on May 14, 2010.) Petitioners also e-served the proof of service and the supplemental proof of service on Mr. Bruce through

⁴ The Petition also arguably falls under the purview of C.R.C.P. 5(a) because it is a "pleading subsequent to the original complaint." The Petition here simply requests enforcement of the administrative subpoena following the filing of an administrative campaign finance complaint. The Petition does not assert any new or additional claims for relief. Rather, the administrative subpoena ordered Mr. Bruce to attend a deposition and to produce documents, and the Petition asks this Court to order the same. The Petition is merely a petition for enforcement of a subpoena in a case that was already at issue, and as such, it constitutes a "pleading subsequent to the original complaint."

Lexis-Nexis File and Serve. In sum, these efforts, as reflected in the proofs of service previously filed with the Court on May 14 and May 20, 2010, reflect that service of the Court's May 10 Order was proper and effective under the requirements of Rule 5.

III. Petitioners made substantial efforts to personally serve Mr. Bruce.

Although personal service under C.R.C.P. 4 was not necessary in this proceeding, Petitioners made every attempt possible to personally serve Mr. Bruce with both the May 10 Order and the Petition.

Prior to filing the Petition, counsel for Petitioners exchanged several e-mails with Mr. Bruce in an attempt to resolve this matter. Notably, on April 29 and April 30, 2010, counsel for the Petitioners informed Mr. Bruce via e-mail of the intent to file the Petition in district court. (Petitioners' e-mail correspondence with Mr. Bruce is attached to the proof of service as Exhibit 5.) It was after these communications that Mr. Bruce became unresponsive.

Between May 4, 2010, and May 18, 2010, the State made 30 attempts to serve Mr. Bruce at his primary residence, at several of his other properties, and at City Hall where he had previously been served with the administrative subpoenas. (Affidavits of service are attached to the proof of service as Exhibits 1 and 2 and to the supplemental proof of service as Exhibit 1.) In one attempt at service, Deputy Baker from the El Paso County Sheriff's Office left his business card at Mr. Bruce's residence. (The El Paso County Sheriff's Office's affidavit of service is attached to the proof of service as Exhibit 1.) Less than six hours later when El Paso County Sergeant Rafferty made an attempt, the business card was gone, so Sergeant Rafferty left his business card. In the Sheriff's Office's next attempt, the

first business card had returned to the door, and the second business card was on the ground. The Sheriff's Office found these suspicious business card placements significant enough to record them in its affidavit.

During several attempts to serve Mr. Bruce at his residence, the lights were on but no one answered the door; and in other instances, newspapers had been picked up, trash had been removed, and documents were removed from the door. Mr. Bruce was also sent mailings and e-filings containing the Petition and Order, documents were left at the door of his residence; phone messages were left on his answering machine; and the service attempts were documented in several news articles.⁵ (Several news articles are attached to the proof of service as Exhibit 6.) Further, the documents were sent via e-mail to the very e-mail address from which Mr. Bruce had emailed Petitioners less than 24 hours prior to the first attempt at service on May 4, 2010.⁶

In a recent news article, Mr. Bruce told the press that he was on vacation in Pennsylvania. (This news article is attached hereto as Exhibit 1.) It appears that Mr. Bruce was apparently *not* out of town during the entire period of May 4-18, 2010, when Petitioners were making their 30 attempts to personally serve him. On May 19, 2010, the Office of the Attorney General received a pleading from Mr. Bruce related to a separate lawsuit he has

⁵ Petitioners request the Court to take judicial notice of the news articles that have been published through reputable news agencies.

⁶ The Office of the Attorney General had received an e-mail from Mr. Bruce from this e-mail address on May 3, 2010, at 10:15 a.m. The first attempt at service was 23 hours later, on May 4, 2010, at 9:15 a.m.

filed against the State. The certificate of service on the pleading, signed by Mr. Bruce, states, “I hereby certify that on May 17, 2010, I mailed this ANSWER....” (The cover sheet, signature page, and certificate of service of this pleading are attached hereto as Exhibit 2.) Notably, the envelope containing these documents contains a postmark dated May 17, 2010, originating from Colorado Springs, Colorado. (The envelope is attached hereto as part of Exhibit 2.)

The rules governing service of process are not “designed to create an obstacle course for [serving parties] to navigate, or a cat-and-mouse game for defendants who are otherwise subject to the court’s jurisdiction.” *TWR, Inc. v. Derbyshire*, 157 F.R.D. 29, 60 (D. Colo. 1994). By all appearances, Mr. Bruce has been eluding personal service by ignoring e-mails, phone calls, mailings, and documents posted on his door (except to remove and replace them).

In addition, Mr. Bruce is not ignorant of the law. He is a former prosecutor – and a former legislator – who is presumably familiar with the rules of the Court. Thus, Mr. Bruce likely knew the administrative subpoena was not enforceable without a district court order, and he knew the district court order was imminent.

Mr. Bruce should not be allowed to ignore his obligations as a citizen of Colorado to appear, give testimony, and produce documents in a lawful proceeding. As noted above, Mr. Bruce was personally served with the administrative subpoena; he even made the effort to contest the subpoena by filing a motion to quash it. After losing that argument, he deliberately failed to comply with the administrative subpoena. His actions are an affront to

the ALJ and to this Court, and his apparent efforts to avoid service of this Court's May 10 Order should not be allowed to continue.

Petitioners have provided this Court with assurances that all reasonable efforts have been made to serve Mr. Bruce personally, and that further attempts would be neither fruitful nor a judicious use of limited State resources. Petitioners contend that their efforts, as described in this Motion and in the proof of service and supplemental proof of service, reveal that Mr. Bruce has been properly served.

WHEREFORE, for the reasons stated above, Petitioners ask this Court to find that Mr. Bruce has been properly served with the Court's May 10 Order under the applicable law and rules of procedure.

JOHN W. SUTHERS
Attorney General



/s/ Katie Allison

Original signature on file at the Colorado Attorney
General's Office
KATIE ALLISON, 39430*
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CERTIFICATE OF SERVICE

This is to certify that I have duly served copies of the **MOTION FOR FINDING OF PROPER SERVICE** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 11th day of June, 2010, addressed as follows:

Douglas Edward Bruce
4545 Iron Horse Trail
Colorado Springs, CO 80917-1322

Douglas Edward Bruce
P.O. Box 26018
Colorado Springs, CO 80936

/s/ Susan Gowan



Original signature on file at the Colorado Attorney
General's Office